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## Official Report Citation of California Supreme and Appellate Court Cases in the PACIFIC REPORTER, VOL. 140.

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Shannon v. Tooker* is in Pac. Rep., vol. 140, p. 10. It can be cited as from the State Report by giving citation opposite "10" (Reporter page column) in this table, i. e., "167 Cal. 484."

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The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Lane v. Lyon*, is in Pac. Rep., vol. 140, p. 197. It can be cited as from the State Report by giving the citation opposite "197" (Reporter page column) in this table i. e., "57 Colo. 166."

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WITH KEY-NUMBER ANNOTATIONS

## VOLUME 140

PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

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OF THE

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### CALIFORNIA—Supreme Court.

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### District Courts of Appeal.

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THOS. J. LENNON, PRESIDING JUSTICE.

F. H. KERRIGAN.<sup>1</sup>

JOHN E. RICHARDS.

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### Court of Appeals.

LOUIS W. CUNNINGHAM, PRESIDING JUDGE.

ASSOCIATE JUDGES.

ALFRED R. KING.

WILLIAM B. MORGAN.

EDWIN W. HURLBUT.

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<sup>1</sup> J. D. Murphy served as judge pro tem.

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J.



THE  
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**KLINE v. GUARANTY OIL CO.**  
(L. A. 3245.)

(Supreme Court of California. March 25, 1914.  
Rehearing Denied April 24, 1914.)

**1. PARTIES (§ 6\*)—PLAINTIFFS — REAL PARTY IN INTEREST.**

In an action for damages growing out of a lease of oil lands, evidence *held* to sustain a finding that plaintiff was the real party in interest, and hence entitled to maintain the action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6, 7; Dec. Dig. § 6.\*]

**2. APPEAL AND ERROR (§ 187\*)—DEFECTS AS TO PARTIES—TIME FOR OBJECTION.**

Defects of parties plaintiff cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.\*]

**3. MINES AND MINERALS (§ 73\*)—OIL LEASE —CONSTRUCTION.**

A lease of 40 acres of oil-bearing property provided that the lessor did "lease and let the 40 acres, and the lessee agreed to pay all taxes on the improvements, and upon the oil wells," and "upon the land itself." *Held*, that the lease was not merely an oil lease, but a lease of the land itself, and hence the discovery of oil was not a prerequisite to an action for the breach.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.\*]

**4. MINES AND MINERALS (§ 73\*)—PREMISES AND ENJOYMENT OF USE THEREOF—ACTIONS FOR FAILURE TO DELIVER POSSESSION—EVIDENCE.**

In an action for damages growing out of an oil lease, evidence *held* to sustain a finding that the lessee was never placed in possession of the property.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.\*]

**5. LANDLORD AND TENANT (§ 129\*)—ACTIONS FOR FAILURE TO DELIVER POSSESSION—DAMAGES.**

Where a party, acting in bad faith, knowing that he had no title to property, contracted to lease it to another upon conditions which would require such other party to expend money in organizing a corporation, the measure of damages were those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances which were known to both parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 450-457; Dec. Dig. § 129.\*]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by M. Franklin Kline against the Guaranty Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter V. Dysert, of Los Angeles, for appellant. Collier & Clark and Arthur Abbott, all of Los Angeles, for respondent.

MELVIN, J. The defendant appeals from a judgment in favor of plaintiff for \$2,769.85, and also from an order denying a motion for a new trial. The business relations between the parties grew out of certain transactions culminating in a lease to plaintiff by defendant of certain supposedly oil-bearing property, and the damages demanded were for an alleged violation of said contract. The agreement, dated February 4, 1911, recited that, for and in consideration of a nominal sum paid and the further consideration of mutual covenants and agreements contained in the instrument, the Guaranty Oil Company, a corporation, did thereby let to Kline "the north half (N. ½) of the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) of section 31, all in township (32) thirty-two south, range (24) twenty-four east, Mt. Diablo base and meridian, lying and being in the county of Kern, state of California, and containing forty (40) acres of land, more or less." There was also a grant to plaintiff of the exclusive right to sink shafts, to drill wells, and to extract any and all kinds of minerals, especially petroleum, from the land. The term of the lease was 20 years, except as limited therein. The lessee agreed to incorporate a company for the operation and development of the leased property, with capital stock of 1,000,000 shares of the par value of \$1.00 each, and promised to deliver to the Guaranty Oil Company 250,000 shares of such stock before the commencement of active operations on the property. Kline further agreed by the terms of the contract to commence active work of boring for oil not later than April 1, 1911, and to prosecute his labors diligently; the agreement specifying the number of wells to be bored within a certain period,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

if oil should be found in paying quantities. There was also a covenant on the part of the lessee to defend against liens and suits against the property, and to pay all taxes or assessments levied or assessed on the improvements thereon. There was a covenant for the payment of rental or royalty from the minerals produced on the land and elaborate provisions for the disposal of the casings, tools, and other property which might be on the land at any time when plaintiff might choose to abandon the lease. The court found that the contract was made and ratified by defendant as pleaded; that, as a part of the consideration for the execution and delivery to plaintiff of the said lease, and at the same time, plaintiff paid to defendant the sum of \$1,000; that, in examining title to the land described in the contract and in preparing to enter upon it, plaintiff incurred an additional expense of \$1,269.65, including the time necessarily consumed by him in such preparations, which was found to be reasonably worth \$500. The language of the court on this subject was in part as follows: "Defendant at all times knew that plaintiff's time was reasonably worth the sum of \$500, as aforesaid, and that plaintiff would necessarily and reasonably incur an expense in examination of said title, and in preparing the papers necessary to the performance of said contract, and in preparing to enter upon said premises, in the sum of \$1,269.65, as aforesaid." There was a finding that on the 4th day of February, 1911, defendant was not, and never had been, the owner of the lands described in the contract, nor entitled to the possession thereof, and at all times was unable to perform, and had not performed, the covenants of said agreement; that the Lucky Boy Oil Company, a corporation, was the sole owner of the property; that the only interest defendant ever had in the premises was under a contract of purchase between said Lucky Boy Oil Company and R. L. Cox, defendant's assignor; that defendant had defaulted in the payment of the purchase price of the property; that the Lucky Boy Oil Company never consented that defendant or any assignee should enter into possession of said premises, "and had no knowledge of said defendant, or any of its assignees, lessees, or agents entering into possession thereof, and had no knowledge of any lease to any part of said premises, having been made by said defendant, until after the 18th day of April, 1911, and that said Lucky Boy Oil Company never ratified or acquiesced in, or consented to, any lease or contract made by said defendant, and purporting to convey or transfer any interest in said premises or any part thereof." The court also found that the defendant acted in bad faith, and knew at all times that it had no title or right of possession of any sort to the land in question; that the plaintiff did not learn these facts until after the expenditure of the moneys paid and the incurring of the damages pleaded; and that the said plaintiff was

at all times ready and willing to perform the obligations of the contract. There were findings also that plaintiff organized a corporation as provided by the terms of the contract, assigned his lease to it, and did all that he agreed to do, including the delivery to the defendant of 250,000 shares of the capital stock of the corporation which he had so organized, but that defendant failed, when the time came for delivery of the property, to place either plaintiff or his assignee in possession thereof, which default on defendant's part prevented the corporation, to which plaintiff had assigned his contract, from beginning active drilling operations. There was a finding that, prior to the commencement of the action, there had been an abandonment of the lease and the plaintiff's assignment thereof to it on the part of the corporation which had been plaintiff's assignee.

[1, 2] The first objection urged by appellant to the judgment is that plaintiff was not the proper party to institute the suit, because he had assigned the lease before the commencement of the suit. Undoubtedly a defendant is entitled to have an action commenced in the name of the real party in interest. Section 367, Code Civ. Proc. While it is true that plaintiff assigned his lease to one William B. Randall on March 20, 1911, it is also the fact that it was immediately reassigned to the New York & California Petroleum Company. There was a default clause in the assignment to Randall, providing that, if he or his assigns failed to commence active operations upon the land ten days before April 1, 1911, Kline would be at liberty to enter thereon, record the statement of that fact, and that thereby the assignment would terminate. There was evidence that the officers of the New York & California Petroleum Company, learning of the infirmity of the defendant's pretended title, did not commence work ten days prior to April 1, 1911. On March 28, 1911, Kline filed a notice of intention to hold the property, stating therein that he had entered into actual possession. It is evident that he still entertained the hope of inducing the New York & California Petroleum Company to go on with the work, for on March 30th he obtained a written guaranty from the defendant and R. L. Cox that they would protect "M. Franklin Kline and his associates, the New York & California Petroleum Company, in the peaceable possession of the 40 acres of land leased to them." This shows that the Guaranty Oil Company recognized Kline as at least one of the real parties in interest. He failed in his efforts to get the officers of the company which he had formed to take the property on the strength of the guaranty. The case was evidently tried upon the theory that the plaintiff was entitled to sue, if any one was. Defendant was a stockholder in the company organized by Kline, and knew of the assignment to said company, yet the right of plaintiff to appear was not raised by demurrer or otherwise. It is

therefore not material whether or not the declaration of intention to hold the property under the lease operated to terminate the interest of the New York & California Petroleum Company. It is contended that the expenses incurred in examining the title to the property and for incorporating the company which plaintiff organized were obligations of that corporation, and not of the respondent, and that judgment in favor of Kline is no bar to a future action by the New York & California Petroleum Company. The record, however, shows that the respondent was the legal obligor for all debts incurred, including the fee of the attorneys who arranged for the incorporation of the new company. The trial court properly held, therefore, that the plaintiff was the real party in interest.

[3] Appellant insists that the contract between the parties to this action was not a lease of the land, but merely an "oil lease," which did not purport to confer any title, but merely was intended as a permission to enter upon the premises for the purpose of prosecuting a search for oil and other minerals (citing *Payne v. Neuval*, 155 Cal. 47, 99 Pac. 476; *Brookshire Oil Co. v. Casmalia Oil Co.*, 156 Cal. 213, 103 Pac. 927). In both of those cases the court was considering leases granting a mere right to extract petroleum and other minerals. The lease by defendant to plaintiff purported to be a conveyance of a present leasehold estate, as well as of a right to extract oil and other minerals from the land itself. It was not one of those ordinary oil and gas leases whereby the lessor remains in possession and control of the land itself, giving the mere right of entry to the lessee when he shall begin the prosecution of the search for oil. By the terms of the agreement, the defendant did "*lease and let*" to Kline the 40 acres described. The lease contained this language: "And the said lessee agrees to pay all taxes or assessments levied or assessed on the improvements on said land, and upon the said oil wells, or any of them, and *upon said land itself.*" The lessor reserved the easements of free entry for inspection and certain rights of way over the land, thus evidencing the intention to grant a leasehold interest in the land itself. It is therefore evident that the discovery of oil was not a prerequisite to the existence of a cause of action.

[4] Appellant contends that this is, in its essence, an action for breach of covenant for quiet enjoyment, and that such an action may not be maintained without a showing of an eviction. The respondent admits that, generally speaking, the rule is that announced by appellant, but it does not apply to those cases in which there was not delivery of possession. The complaint alleges that the appellant never was entitled to possession of the property and never delivered possession thereof to respondent. The evidence shows that the contract between the Lucky Boy Oil Company

and R. L. Cox, which was assigned to the Guaranty Oil Company, and was the only possible basis of a claim of a right of possession existing in the latter, contained this provision: "That, when said Cox shall have paid hereunder one hundred thousand (100,000) dollars of the entire purchase price of said land with interest thereon, he may enter into possession of said premises, but not otherwise."

It was further shown that only about \$20,000 principal and interest had been paid on that contract, and therefore, according to respondent's contention, the court was justified in finding that the Guaranty Oil Company never was entitled to possession, and could not and did not deliver possession to the respondent. But appellant argues that, by his recordation of intention to hold the land in question, the respondent admitted his possession of the property, and that therefore he cannot now be heard to deny it. Attention is also called to the fact that respondent testified as follows:

"Q. What do you call entering into possession? A. It is a matter of record in Bakersfield that I had entered on the premises and taken possession of them in accordance with the lease that I had with the Guaranty Oil Company. That was recorded in Bakersfield. \* \* \* Q. Then the New York & California Petroleum Company did assume possession of it before April 1, 1911? Mr. Clark: We object to that as being argumentative. The Court: Answer the question. Mr. Clark: It also calls for a conclusion of law. The Court: Objection overruled. That is, took physical possession? Mr. Pruitt: Yes. Is that true or false, that statement made by you in the minutes there? A. It is true I entered into possession of the property."

Earlier in the examination of the witness, the following question had been propounded and the appended answer had been given: "I will read you, Mr. Kline, from page 41 of the minute book of the New York & Consolidated Petroleum Company at a meeting on the 5th day of April, 1911: 'Mr. Kline further reported that on behalf of the company he had entered into possession of the property of the lessee, and commenced the actual work of drilling for oil before April 1st, in accordance with the terms of the lease, and had filed statement of his entry in the office of the county clerk of Kern county at Bakersfield.' That is correct, is it, Mr. Kline? A. Perfectly correct."

In view of these solemn declarations, the court should have viewed, and doubtless did scrutinize, the statements of the witness with great care. The testimony given at the trial, however, was to the effect that, while Mr. Kline went upon the property with an oil driller to get an estimate of the probable cost of the work, he never exercised any dominion over it, or did anything in the way of asserting a right to possess it physically. In view

of this conflict, we cannot say that the court was in error in finding that he had never been placed in possession by defendant. One who has never been in possession of demised premises cannot be evicted. *Tiffany on Landlord and Tenant*, p. 1268.

[5] Finally it is contended that the court below erroneously adopted the measure of damages contemplated by section 3306 of the Civil Code, instead of that prescribed in section 3304 of the same Code. It really makes little difference whether we regard this action as founded in part on breach of the covenant of peaceable possession or upon a violation of an agreement to convey an estate in real property. The element of bad faith would clothe a court, upon plain principles, with the power to fix damages according to the detriment shown by the existing special circumstances of the case. The court found that the defendant, being in default in its contract with the owner of the legal title, agreed to lease the property in question to plaintiff upon conditions which required of him the expenditure of money in the organization of a corporation, and that defendant acted in bad faith, knowing the impossibility of performance on its part. The damages, therefore, would be those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances, which were known to both parties. *Hawthorne v. Siegel*, 88 Cal. 162, 25 Pac. 1114, 22 Am. St. Rep. 291.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

ISLAND RECLAMATION DIST. NO. 776 v.  
FLORIBEL ALFALFA SYNDICATE  
et al. (Sac. 2015.)

(Supreme Court of California. March 24, 1914.)

1. INJUNCTION (§ 118\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF COMPLAINT.

While the complaint, where injunctive relief is prayed, must allege, not merely a possibility, but a reasonable probability, or injury from defendant's contemplated acts, a complaint alleging that defendants threatened to dam one branch of a stream, and that this would force all the waters into the other channel and cause an overflow of flood waters and the destruction of a levee, crops, and orchards, was sufficient.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

2. WATERS AND WATER COURSES (§ 174\*)—DAMMING FLOW OF STREAM—MANDATORY INJUNCTION.

A prohibitory injunction will issue against the threatened damming of the natural flow of a stream, to the detriment of another, by causing overflows and a mandatory injunction to remove the cause when some injury has been done.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 205, 206, 232; Dec. Dig. § 174.\*]

3. WATERS AND WATER COURSES (§ 171\*)—OBSTRUCTIONS—DAMS.

While a riparian owner may protect his land by levees, even though this necessitates similar embankments on adjacent lands, he may not obstruct the natural flow of one channel of a stream, thereby causing the other channel to overflow, to the detriment of those who, in the usual way, have guarded against floods.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. § 171.\*]

4. WATERS AND WATER COURSES (§ 171\*)—OBSTRUCTIONS—DAMS.

Where some water passed through a slough or channel of a stream and eventually joined the other part of the stream, it could not be dammed, thus causing the other channel to overflow in times of flood.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. § 171.\*]

5. WATERS AND WATER COURSES (§ 177\*)—GROUNDS FOR DENIAL—PROHIBITED ACT ALREADY COMMITTED.

That a dam had already been constructed across a stream was not ground for denial of a preliminary injunction, where, prior to the hearing, it had been removed by plaintiff's agents; their right to remove it being a matter for determination on the trial.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 260-262; Dec. Dig. § 177.\*]

Department 2. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by the Island Reclamation District No. 776 against the Floribel Alfalfa Syndicate and others. From an order granting a preliminary injunction, defendants appeal. Affirmed.

H. Scott Jacobs, of Hanford, for appellants. J. L. C. Irwin, of Hanford, for respondent.

MELVIN, J. Defendants have appealed from an order of the superior court of Kings county granting a preliminary injunction whereby they are restrained from constructing a dam across a branch of Kings river.

The plaintiff is a reclamation district organized under the laws of this state, and all of the lands embraced within said district are within Kings county and are protected from inundation by a levee. It is alleged in the verified complaint that the easterly boundary of the district begins at a point "near the section line between sections 10 and 11 in township 18 south, range 20 east, M. D. B. & M., where what is generally known and called the South fork of Kings river crosses said section line between said sections 10 and 11, and that said levee runs thence on the north side of said South fork of said Kings river in a westerly and south-westerly direction across said section 10, the northwest corner of section 15, across sections 16 and 17 in said township and range, and follows the meander line of said south fork of said Kings river at a distance of about from 30 to 100 feet from said river"; that Kings river carries annually large quan-

titles of water; that, to protect the district from inundation and consequent injury, the plaintiff has maintained and kept, and is maintaining and keeping, a levee running through sections 10, 11, 15, and 16; that the lands within said Island reclamation district No. 776 have been reduced to and are under a high state of cultivation; that the said levee along the north side of the South fork of Kings river is sufficient to protect the lands of plaintiff from the overflow from Kings river if the waters of that stream be permitted to take their course down the channels which have existed from time immemorial; that "said South fork of said Kings river divides near the center of the northeast quarter of said section 11 in township 18 south, range 20 east, M. D. B. & M., aforesaid, and that one branch of said river runs in a westerly direction from said point of division about one mile to the center of said section 10 and thence in a southerly and southwesterly direction passing a point near the center of section 16 in said township and range, and that the other branch of said Kings river runs in a southwesterly direction from said point of division and intersects with said westerly branch at said point near the center of section 16 in said township 18 south, range 20 east, M. D. B. & B."; that Kings river is subject to freshets in the spring and winter of each year; that the branch running southwesterly from the point of division of the South fork of said river carries water largely in excess of the portion of the river running westerly from said point of division; that the westerly portion cannot and will not carry all of said freshet waters; that the defendants have threatened to construct a dam across the said southwesterly portion of the river just below the point of division of the stream into two parts; that defendants threaten to make such dam of material, size, and strength sufficient to stop the flow of any waters down that channel; that such structure, if erected, will force all of the waters into the other channel in such a way as to cause the overflow of the flood waters across the levee and the destruction, not only of said levee, but also of the crops and orchards upon the lands embraced with the reclamation district. Plaintiff asked that the erection of such dam be enjoined. The court issued an order to show cause and, after a hearing, granted the preliminary restraining order, from which this appeal is prosecuted.

In their answer defendants allege that the stream flowing southwesterly from the point of division, as alleged in the complaint, is merely a small slough, commonly known as "Crooked Slough." They deny that it is a branch of Kings river or a channel thereof, and deny that the building of the proposed dam would injure plaintiff. It is also asserted in the answer that plaintiff does not own any lands riparian to the South fork of Kings river, and that any interest in the

levee mentioned in its complaint is a mere easement; and there is an allegation that, prior to the filing of the complaint, defendants, as the owners of the land south and east of the South fork of Kings river, built, as a part of their levee for the protection of said lands, a dam across Crooked Slough, and that said dam was completed more than three weeks before the temporary restraining order was granted.

[1,2] The complaint is attacked as not stating facts sufficient to constitute a cause of action for an injunction because, as appellants contend, threatened damage is a mere matter of opinion, and there is no showing why an action at law would not be sufficient. We think the demurrer was properly overruled. It is true that the courts have upheld the rights of owners of land to protect it from inundation by levees along the line of water courses, even to the extent of closing small sloughs, and when such protection may cause the overflow of other lands not sufficiently protected by levees (*Lamb v. Rec. Dist. No. 108*, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775), and it is also true that the complaint, in a case where such injunctive relief is prayed as that which was here given, must allege not mere possibility of injury to plaintiff from the contemplated acts of the defendants, but a reasonable probability of such injury must appear from the facts pleaded (*Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54; *Hoke v. Perdue*, 62 Cal. 546). But we know of no cases where a court has refused to consider the complaint for want of facts, where it is alleged, as it is here, that the defendants have dammed the channel of a stream, thereby forcing the flood waters to seek another outlet, which, in the nature of things, will most probably injure the persons seeking relief. Both pleading and proof of the plaintiff in this case come within the principles announced in *Rudel v. Los Angeles County*, 118 Cal. 283, 50 Pac. 400. One may not dam the natural flow of a stream, to the detriment of his neighbor, by causing the water to empty upon the latter's land. Prohibitory injunction will issue where the damage is threatened, and mandatory injunction to remove the cause when some injury has been done. *Allen v. Stowell*, 145 Cal. 666, 79 Pac. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80.

[3,4] The contention that the owners of land may take any means to improve their property, without regard to the effect of such action upon neighboring land, finds no support in reason or authority. One may protect his land by levees, even in some instances where such a protection may increase the necessity for the building of similar embankments on adjacent lands, but this does not give him the right to obstruct the natural flow of a stream, regardless of consequences. The courts uphold the right to raise the banks of streams by artificial means in order to shut out the water from riparian land.

but they do not permit the closing of natural channels of important rivers to the detriment of those who, in the usual way, have guarded against the destructive power of flood waters. In the opinion in *Gray v. McWilliams*, 98 Cal: 163, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163, after a statement that the different conclusions reached in the cases upon the subject of injunction to restrain diversion of flood waters arise by reason of the diversity of facts considered, the learned commissioner who wrote the opinion said: "In the case of flood waters escaping from natural streams, we view them, it is true, as a common enemy, against which we may protect ourselves without the commission of a wrong; but, after all, this declaration is used in view of the means of defense resorted to rather than in the abstract. We build the banks of the river higher for our protection, it is true; but, in so doing, we aid nature in her effort to carry the water to its ultimate destination, and he who, to protect himself from a flood, should erect a barrier across the channel of one of our important rivers would probably be met with the declaration that it was not the proper mode of warfare, even against a 'common enemy.'" In *De Baker v. Railway Co.*, 106 Cal. 274, 39 Pac. 610, 46 Am. St. Rep. 237, the chief justice points out the difference between *Lamb v. Reclamation Dist.*, supra, and those cases involving the diversion of a stream by building obstructions in its bed. Appellants endeavor to bring the present case under the rule announced in the earlier one, but the facts will not justify us in applying such rule. It is true that there was a diversity of testimony with reference to "Crooked Slough" and the proportion of the waters of the South fork emptying into and conveyed by it. The estimates varied greatly, but all witnesses agreed that some of the water passed through Crooked Slough and eventually rejoined the other part of the stream. It was clearly, therefore, not a mere high water channel, and *Lamb v. Reclamation District*, supra, is not in point.

[5] Appellants next assert that the injunction was improperly issued because the threatened erection of the dam had already taken place, and there was nothing to restrain. In this behalf they cite *Hatch v. Raney*, 9 Cal. App. 716, 100 Pac. 886, and cases therein approved. It is, of course, not denied by respondent that an injunction will not lie to restrain the destruction of a ditch already destroyed (*Hatch v. Raney*), or to prevent the opening of a street that has been opened (*Delger v. Johnson*, 44 Cal. 182), or to prohibit the erection of a building previously built, but it was here shown, by some evidence at least, that the dam had been removed by plaintiff's agents before the restraining order was issued. Whether or not they acted beyond their rights is a matter for determination upon the trial of the is-

ssues joined. For the purposes of the preliminary hearing, it was sufficient for the court to know that the defendants contemplated the construction and maintenance of a dam across "Crooked Slough" at the point indicated in the complaint. That such was the intention of defendants was clearly shown, and no one pretended that a dam was in existence at that point when the hearing on the order to show cause took place.

No other matters discussed in the briefs require comment. The order from which defendants appeal is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

McNUTT et al. v. NUEVO LAND CO.  
(L. A. 3170.)

(Supreme Court of California. March 23, 1914.)

1. MORTGAGES (§ 590\*)—EFFECT OF FORECLOSURE—RIGHTS OF COTENANT—REDEMPTION OF PROPERTY.

A land company, which was indebted to three separate persons, executed a deed to a representative of one of them, who executed a declaration of trust to sell the land conveyed and apply the proceeds, first, to the payment of an existing mortgage due a bank from the debtor, and then to pay the debts of the beneficiaries of the trust according to their priorities. The bank foreclosed the mortgage, and the property was sold, and defendant purchased the certificate of sale, and also purchased the interests of two of the beneficiaries under the declaration of trust. *Held*, that the third beneficiary, not having redeemed within the statutory time, was not entitled to reimburse the purchaser on foreclosure and restore the rights of the several beneficiaries under the trust, on the theory that the title conveyed upon the foreclosure sale was for the benefit of all of the beneficiaries under the trust as joint owners or tenants in common; the trust having terminated upon the foreclosure sale, in view of Civ. Code, §§ 871, 2279, providing that, when the purpose for which an express trust was created ceases, the trustee's estate ceases, and Code Civ. Proc. § 700, providing that the purchaser of realty on foreclosure acquires all of the interest of the judgment debtor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1691, 1692; Dec. Dig. § 590.\*]

2. MORTGAGES (§ 586\*)—FORECLOSURE—EFFECT.

A mortgage foreclosure sale extinguished all rights of defendants in the foreclosure action acquired after the date of the mortgage, and vested in the purchaser the mortgagor's title at the date of the mortgage, discharged of all such rights; the effect of the sale being terminated only when the judgment debtor redeems, by the direct provisions of Code Civ. Proc. § 703.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1684; Dec. Dig. § 586.\*]

3. MORTGAGES (§ 624\*)—FORECLOSURE—REDEMPTION.

The exercise of the right of redemption from a mortgage foreclosure sale by one who is under no legal obligation to do so, as a junior lien claimant or judgment creditor, is not strictly a redemption, but a purchase of the rights acquired under the foreclosure sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1878-1888; Dec. Dig. § 624.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**4. MORTGAGES (§ 590\*)—FORECLOSURE.**

The interests of the beneficiaries under a declaration of trust were determined and foreclosed by a foreclosure sale of the trust property, so that the beneficiaries could not afterwards claim any interest in the property, where the declaration of trust was not recorded until after the lis pendens was filed in the foreclosure action, in view of Civ. Code, §§ 1214, 1215, making every conveyance, including mortgages, void as against subsequent purchasers in good faith whose conveyance is first duly recorded, and as against a judgment affecting the title, unless the conveyance is recorded before the record of notice of action.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1691, 1692; Dec. Dig. § 590.\*]

**5. MORTGAGES (§ 590\*)—FORECLOSURE SALE—CONCLUSIVENESS.**

The interests of beneficiaries under a declaration of trust affecting land covered by an existing mortgage were determined and foreclosed by a judgment of foreclosure and sale under the mortgage, where the trustee was a defendant in the foreclosure action.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1691, 1692; Dec. Dig. § 590.\*]

**6. MORTGAGES (§ 599\*)—FORECLOSURE—RIGHT OF REDEMPTION.**

The right of redemption of the beneficiaries under a declaration of trust, covering realty subject to an existing mortgage, upon the subsequent sale of the property upon foreclosure of the mortgage, was not an equitable right which could be exercised within an indefinite period, but was merely the statutory right of redemption given by Code Civ. Proc. § 702, which must be exercised within 12 months after sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1733-1741; Dec. Dig. § 599.\*]

**7. TENANCY IN COMMON (§ 19\*)—RIGHTS OF COTENANT—PURCHASE OF COMMON PROPERTY.**

One tenant in common could acquire for his sole benefit the rights of the other cotenants at a judicial sale involving such rights.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 55-59; Dec. Dig. § 19.\*]

**8. TENANCY IN COMMON (§ 36\*)—TENANTS IN COMMON.**

An offer by a tenant in common to reimburse a cotenant for his proportionate part of the amount required to purchase an outstanding title to the common property must be made promptly, and is not made in time where it is made years after the acquisition of title by the purchasing cotenant, and after the land has greatly increased in value.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 105; Dec. Dig. § 36.\*]

Department 2. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Cyrus F. McNutt, as trustee, and others, against the Nuevo Land Company. From a judgment for defendant and an order denying a new trial, plaintiffs appeal. Affirmed.

Smith, Miller & Phelps, Joseph E. Hannon, K. A. Miller, W. W. Phelps, and J. E. Hannon, all of Los Angeles, for appellants. Leonard & Surr, of San Bernardino, for respondent.

HENSHAW, J. Another action involving much of the law and many of the facts here

presented was brought by these plaintiffs against the same defendants. To the complaint in that action a general demurrer was sustained. An appeal was taken to this court, which will be found reported in *Smith v. McNutt et al.*, 156 Cal. 769, 106 Pac. 70. For convenience, however, the facts may be briefly recapitulated. The Lake View Land Company, owing a certain indebtedness to John Wolfskill, another independent indebtedness to L. P. Hansen, a third to the law firm of Smith, McNutt & Hannon for legal services, made to Mr. McNutt of that firm a deed absolute in form for 1,000 acres of land. The deed, however, was upon certain trusts subsequently declared by McNutt in a declaration of trust which years thereafter was recorded. At the time of the conveyance of this land it was incumbered by a mortgage to the San Gabriel Valley Bank, to secure the payment of the sum of \$5,000. The declaration of trust declared that McNutt held title to the land to sell it, and upon sale, first, to pay the mortgage debt of the San Gabriel Valley Bank and the expenses of sale, next to pay to John Wolfskill \$10 per acre, next to pay to L. P. Hansen \$10 per acre, and the residue, if any, and in whatever amount, to be paid to Smith, McNutt & Hannon for their legal services. Default was made on the interest of the mortgage to the bank, and the bank foreclosed. An appeal was taken, the judgment in foreclosure affirmed, and on April 3, 1907, the commissioner duly sold the mortgaged property, the bank becoming the purchaser for the sum of \$7,306.31, the amount then due under the judgment. Prior to July 18, 1907, A. B. Miller (who, for the purposes of this consideration it may be conceded was acting as the agent of the defendant, the Nuevo Land Company) purchased the certificate of sale to the bank, and all its rights therein and thereunder, for the sum of \$9,050. He also purchased the interests of Wolfskill and Hansen under the trust and other properties of theirs, all his purchases in these matters amounting to or exceeding \$90,000. All of these properties Miller in turn conveyed to the Nuevo Land Company, of which he was a director. On the 31st of October, 1907, McNutt wrote to the land company, offering to contribute "our [Smith, McNutt & Hannon's] just share of the money necessary to reimburse your company of its necessary outlay to relieve and release the said lands and the said water stock of said trust, from the lien and burden of said mortgage and the sale made under the decree foreclosing the same." The Nuevo Land Company answered, repudiating the idea that it had taken the certificate of sale burdened with any trust or duty to Smith, McNutt & Hannon, or the other beneficiaries of the trust, and declaring that it had purchased the land to hold and own as its sole property, and it asserted an unqualified and unincumbered ownership upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the expiration of the time allowed by law for redemption should the redemption not be effected by the parties entitled to redeem. This letter was received by Smith, McNutt & Hannon when the statutory period for redemption had yet some months to run. They answered it, not by redemption, but by an action by which they sought a restoration of the trust in the land in their favor, after having the court determine the just share which they should pay to reimburse the Nuevo Land Company for its outlay. This was the action to which the general demurrer was sustained, and which is reported in the 156th volume of our reports. It may here be said that the whole theory of that case, as well as that of the case at bar, is this: That such relations of privity existed between the beneficiaries of this trust as to make the acquisition of the title conveyed under the foreclosure sale a title for the benefit of all the beneficiaries if it was acquired by any one of them, or by any one acting under them; that Miller when he purchased the beneficial interests of Wolfskill and Hansen became substituted under the trust for them; that his acquisition of the title was, therefore an acquisition for the trustee McNutt for the benefit of all the beneficiaries, and that all that the beneficiaries, or any of them, were required to do was to tender their just share of the amount so expended by Miller; that the Nuevo Land Company succeeded Miller to the title and interests subject to the same duties and liabilities; that the effect of the judgment in *Smith v. McNutt* in 156th Cal. was but to declare that a beneficiary seeking to maintain his rights in this respect must pay the full redemption price and not a part of it; that upon the announcement of this decision they brought the present action, in which they offered to pay to the Nuevo Land Company the full redemption price. Their first efforts in this regard were made in January, 1910, long after the statutory right of redemption had expired, and it was a written offer to pay \$9,050 with legal interest, coupled with a demand that the land be conveyed to McNutt as trustee. This was followed by a second demand, in which the offer to pay \$9,050 was accompanied by an additional offer to pay the indebtedness due under the trust to Wolfskill and Hansen, and still by a third offer to pay the \$9,050 and \$20,000 with interest, being the amount due Wolfskill and Hansen, each of these offers being joined with a demand that the Nuevo Land Company make its deed of the property to McNutt as trustee. It is perhaps unnecessary, but still it is not improper, to add that between the time when the statutory equity of redemption had expired without action upon the part of these plaintiffs and the time when these offers were made in 1910 the land had greatly increased in value. The court heard the evidence, made its findings adverse to plaintiffs, entered judgment accordingly, and plaintiffs have appealed from that judg-

ment and from the order denying their motion for a new trial.

[1] It is apparent from what has been said that the whole foundation of appellants' case rests upon its asserted identity with the case of a redemption by one of several joint owners or the acquisition of an outstanding title by one cotenant or tenant in common. *Randall v. Duff*, 107 Cal. 35, 40 Pac. 20; *Warner Bros. v. Freud*, 138 Cal. 651, 72 Pac. 845. Not only is the law of this case against the assertion of such a right and against the existence of such equities under the relationship of these parties, but the general law has no application to conditions such as are presented here. Under the trust in the McNutt deed there was no community or privity of interest between the beneficiaries. All the parties, including the bank, occupied simply the relation of separate independent lienholders upon the property with an ordained priority to their lien claims, and with interests which were not only held in common, but which might well be exercised in hostility to each other. Of course, it cannot be contended, and is not contended, that there was any privity or community interest between the mortgage claim of the bank and the claim of the beneficiaries under the trust. So, eliminating the bank, the ultimate facts are that Wolfskill had a first lien upon the property for \$10 an acre, or \$10,000. It mattered not to him for what the property was sold, so long as it was sold for sufficient to pay his debt. The same is true of the next lien claimant, Hansen. His interest was solely that the land should be sold for sufficient to pay his succeeding \$10,000. Neither Wolfskill nor Hansen was in the least interested in seeing, nor charged with any duty to see, that the land was sold for enough to pay the demands of subsequent lien claimants. True, equity, if not the law, would give each one of these lien claimants a right of redemption as contemplated by section 2903 of the Civil Code, and as declared in *Smith v. McNutt*, supra, where it is said that for the purposes of the decision it might be conceded that "plaintiffs had such an interest in this land as would have given them the right to obtain such relief as would practically constitute a redemption thereof, even though they may not have been entitled to redeem under the statutory provisions relating to redemption." But in this connection it is to be remembered that in their original action they did not attempt to redeem, and the present action has been brought long after the statutory right has expired. Whether by virtue of the facts established any equitable right exists extending the statutory period is matter for later consideration.

But to return to the principal point in the case—the charge that grave equities were imposed upon the Nuevo Land Company by virtue of the manner of its acquisition of the title. It is declared in *Smith v.*



McNutt that the trust necessarily terminated upon the foreclosure sale. This is not only the law of the case but it is true in fact. "When the purpose for which an express trust was created ceases the estate of the trustee also ceases." Civ. Code, §§ 871, 2279. "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto." Code Civ. Proc., 700. "It is by the foreclosure sale that the title passes." *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 120; *Duff v. Randall*, 116 Cal. 229, 48 Pac. 66, 58 Am. St. Rep. 158; *Breedlove v. Norwich, etc., Ins. Society*, 124 Cal. 166, 56 Pac. 770.

[2] The effect of the foreclosure sale "is of itself to extinguish the right and claim of all the defendants in the action acquired subsequent to the date of the mortgage, and to vest in the purchaser the title of the mortgagor at the date of the mortgage, discharged of all such right and claim." *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Sichler v. Look*, 93 Cal. 610, 29 Pac. 220; *Marquam v. Ross*, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1. It is only when the judgment debtor redeems that the effect of the sale is terminated and he is restored to his estate. Code Civ. Proc., 703; *Eldridge v. Wright*, 55 Cal. 535.

[3] In other cases where one exercises the right of redemption when he is under no legal obligation so to do, as a junior lien claimant, or a judgment creditor, his action is not in strictness a redemption, but a purchase of the right and title acquired under the sale. 27 Cyc. 1866; *Eldridge v. Wright*, supra.

[4-6] Coming thus to the rights and duties of the beneficiaries after this judicial sale, it is to be noted that the purchase was made by the bank, which in no way was charged with any duty toward any of the beneficiaries. Moreover, the interests of the beneficiaries were included, determined, and foreclosed by the judgment and sale, not only by reason of the fact that in the foreclosure proceedings they were represented by their trustee McNutt, who was a defendant, but also by virtue of the fact that McNutt's declaration of trust was not placed of record until after the lis pendens in the foreclosure action had been filed. Civ. Code, §§ 1214, 1215. Therefore we have, by virtue of this foreclosure and sale, the extinguishment of the trust and the beneficiaries' right under the trust, with title to the land going into the hands of a stranger in interest to the beneficiaries, freed from every claim, legal or equitable, upon their part, saving their right of redemption. For the reasons already given, these beneficiaries, one and all, being before the court in the foreclosure proceedings, are bound by its decree. What right of redemption was then open to them or any of them? Was it an equitable right which they might exercise at

their pleasure years after, as here they seek to do, or was it the statutory right merely? Unquestionably it was the statutory right declared in section 702 of the Code of Civil Procedure. They and their rights were before the court in the foreclosure action. They were not in the position of subsequent lien claimants, mortgagees, or grantees not impleaded. They had no equities other than those which were passed upon in the action, and they were limited therefore to their statutory right of redemption. *Whitney v. Higgins*, 10 Cal. 554, 70 Am. Dec. 748. This right admittedly they did not exercise.

[7] It might be sufficient to rest this decision here, but the contention is so earnestly pressed that, because Miller acquired the Wolfskill and Hansen interests in the trust, his purchase of the certificate of sale from the bank in equity so redounded to the benefit of all the beneficiaries—that in effect it restored the trust, that it was a redemption as complete as though made by McNutt himself as trustee—that it is proper perhaps, briefly, to consider this position and show its untenableness. And this may be done by this simple declaration that, if Wolfskill himself had purchased the certificate of sale from the bank, he would have received complete title to the property, freed from any subsequent liens of Hansen and of plaintiffs, and subject singly to their right of redemption, which could be exercised only within the statutory period, and only upon paying to him the amount, not only of the judgment and costs of redemption, but the amount of his prior lien upon the property, and this, for the simple fact that, even were the parties bound by the privity which exists in the case of tenants in common (though, as is plain, they were not), still there was nothing in the law to prevent any one of them from acquiring for his sole ownership the rights of all the others at a judicial sale which covered those rights. Such are the cases of *Gunter v. Laffan*, 7 Cal. 593; *Felten v. Le Breton*, 92 Cal. 466, 28 Pac. 490; *Eldridge v. Wright*, 55 Cal. 536; *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. 50, 29 L. Ed. 396; *Baston v. German-American Bank*, 127 U. S. 532, 8 Sup. Ct. 1297, 32 L. Ed. 210; *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 882, 54 L. Ed. 602, 17 Ann. Cas. 1167; *Coleman v. Coleman*, 3 Dana (Ky.) 398, 28 Am. Dec. 86—while Mr. Freeman (Cotenancy, § 165) says: "The reasons which prevent a cotenant from purchasing and asserting an outstanding title do not apply with equal, and generally not with any, force against his purchasing the title of his cotenants, whether the same be voluntary or involuntary. Unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, there is no doubt that a cotenant may purchase at an execution or a judicial sale the moiety of any of his companions in interest, and that he may retain and assert the title there-

by acquired as fully as though he were a stranger to the judgment defendant." The reason of this is that it is only while a privy amounting to a community interest exists between the parties, with a corresponding duty on each to protect the others, that equity will not countenance the acquisition by one of a title adverse to the other. The rule ceases with the reason, and the reason ceases at once when all those interests and all the privy and community interests have been terminated under their judicial sale.

[8] And, finally, upon this branch of the case it may be added that, even where the doctrine of equitable contribution is applicable and is sought to be applied, the rule is that the offer of contribution and the demand of the right to contribute shall be promptly made. *Stevenson v. Boyd*, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. (N. S.) 525. Here, even if the right existed, the proper offer is made years after the acquisition of the title, and after the land has doubled or trebled in value. Clearly, such an offer does not appeal to equity.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

SHANNON v. TOOKER et al. (S. F. 6229.)  
(Supreme Court of California. March 25, 1914.)

1. CORPORATIONS (§ 93\*)—ASSESSMENTS ON STOCK—SALE FOR NONPAYMENT.

Where a sale of stock by a corporation to satisfy a delinquent assessment was postponed because of a defect in the original notice of sale, and, though the notice of the delinquent sale was published anew, the notice of the assessment was not republished, the sale was irregular, under Civ. Code, § 346, providing that, in case of any substantial error or omission, all previous proceedings, except the levying of the assessment, are void, and that publication must be begun anew.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 380, 390-402; Dec. Dig. § 93.\*]

2. APPEAL AND ERROR (§ 1011\*)—REVIEW—QUESTIONS OF FACT.

In an action to recover stock sold by the corporation to satisfy a delinquent assessment, where there was evidence that plaintiff did not tender the sum paid by defendant, with subsequent assessments and interest, the finding that there was no tender was conclusive on appeal, though there was also evidence which would have supported a contrary finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

3. CORPORATIONS (§ 93\*)—SALE OF STOCK FOR DELINQUENT ASSESSMENT—RECOVERY—"TENDER."

An offer to repurchase stock, which had been sold by the corporation to satisfy a delinquent assessment, was not a "tender," within Civ. Code, § 347, providing that no action may be sustained to recover stock for irregularities in the sale or proceedings therefor, unless plaintiff

first pays or tenders the sum for which it was sold, with subsequent assessments and interest.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 380, 390-402; Dec. Dig. § 93.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6910, 6911.]

Department 1. Appeal from Superior Court, City and County of San Francisco: J. M. Seawell, Judge.

Action by H. L. Shannon against George M. Tooker and another. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Samuel M. Shortridge, of San Francisco (Thomas B. Dozier, of San Francisco, of counsel), for appellant. F. J. Solinsky and Frank R. Wehe, both of San Francisco, for respondents.

SHAW, J. This is an action by the plaintiff to recover from the defendant Tooker certain shares of stock in the defendant company, which were sold to Tooker upon a sale for the collection of a delinquent assessment, alleged by the plaintiff to have been voidable because of a defect in the proceedings leading up to the sale. The judgment below was for the defendants. The plaintiff appeals from said judgment, and from an order denying his motion for a new trial.

[1] The assessment was made on September 12, 1907, and the resolution stated that it would become delinquent if not paid on or before October 16, 1907, and that if it became delinquent a sale thereof would be made on November 11, 1907, unless previously paid. The publication of the notice of sale of the stock after it became delinquent on October 16th was defective, and for that reason the directors, by resolution, postponed the sale until December 9, 1907. The directors did not, after said postponement, republish the notice of the assessment provided for in sections 335 and 336 of the Civil Code. They did, however, publish anew the notice of the delinquent sale as provided in section 339. On December 9th the stock was sold to the defendant Tooker. Under the decision of this court in *Smith v. Gate City Oil Co.*, 160 Cal. 446, 117 Pac. 525, and under the provisions of section 346 of the Civil Code, it appears that the proceedings for the postponement and sale were irregular, because the notice of the assessment was not published anew. If this were the only question in the case, it would necessarily follow that the judgment should be reversed.

[2, 3] But a condition precedent to the recovery of stock under such circumstances is imposed by section 347 of the Civil Code. It provides that no action for such recovery can be sustained upon the ground of irregularity or defect in the sale, or the proceedings therefor, unless the party seeking recovery first pays or tenders to the party holding the stock sold the sum for which it was sold, together with all subsequent assessments paid

and interest. The tender of these amounts was alleged in the complaint and denied in the answer. The court below found that the plaintiff never tendered defendants, nor either of them, the sums required to be tendered under the aforesaid section, nor any part thereof. The plaintiff recognizes the importance of this finding, and argues with great earnestness that it is entirely contrary to the evidence. With this contention we cannot agree. It is not the province of this court, as is well understood, to weigh conflicting evidence, and in such cases the decision of the trial court is absolutely conclusive, where there is substantial evidence in its favor. The testimony of the plaintiff and of the witness who went with him on the occasion in question is to the effect that he met Tooker on the street and demanded of him the stock he had bought at the sale, and declared that he was ready to pay to him every dollar that he was out on the stock, including the assessments, costs, and interest to date, and that Tooker declared that he would not let him have it. This evidence would sustain a finding in favor of such tender. But, on the other hand, the defendant Tooker testified that no such conversation occurred between them at the time they met on the street, as related by the plaintiff and his witness; that they did meet in the office of Tooker, and that the plaintiff there said that he wanted to buy the stock of Tooker, to which Tooker replied that he could not give him the price until morning, because he had to consult other persons; and that they then separated, and that no other offer or demand for the stock was made. His testimony to this effect was corroborated by that of another witness, who was present in the office. It is clear that, if the testimony on behalf of the defendants is true, the plaintiff did not make the tender required by the statute. In view of this condition of the evidence, we must sustain the finding of the lower court, which sustains the judgment, since the statute provides that without such tender no action of this kind can be maintained. The plaintiff should have made his tender in such unequivocal terms that no bona fide dispute nor misunderstanding regarding it could arise. It was easily within his power to have done so.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

IN RE HORMAN'S ESTATE. (Sac. 2131.)  
(Supreme Court of California. March 24,  
1914.)

# 1. EVIDENCE (§ 82\*)—PRESUMPTIONS—VALIDITY OF JUDGMENT.

Where one of the parties to proceedings under Code Civ. Proc. § 1664, for the determination of heirship, died during the pendency of those proceedings, it will be presumed in

support of the decree that the administrator of such person was properly substituted as a party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.\*]

## 2. DESCENT AND DISTRIBUTION (§ 71\*)—CONCLUSIVENESS OF DECREE — PERSONS CONCLUDED—PUBLIC ADMINISTRATOR.

Where the public administrator was a party to a proceeding for the determination of heirship, under Code Civ. Proc. § 1664, as the representative of one of the claimants, the decree in that proceeding is conclusive against him in a subsequent proceeding for his appointment as administrator of the estate of another claimant, who died during those proceedings, but who was adjudged therein not to be entitled to take anything, and who had no other property to be administered.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229-236; Dec. Dig. § 71.\*]

Department 2. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Petition by the public administrator of San Joaquin County for letters of administration on the estate of Catherine Roach Horman, deceased. Petition denied, and the administrator appeals. Affirmed.

C. W. Miller, of Stockton, for appellant.  
W. R. Jacobs and A. H. Carpenter, both of Stockton, for respondent.

MELVIN, J. The public administrator of San Joaquin county appeals from an order denying his petition for letters of administration in the estate of Catherine Roach Horman, deceased. George Roach died testate in the county of San Joaquin in 1872. By his will he gave to his wife, Margaret Roach, a life estate in all of his property. One of the provisions of his will was in the following language: "It is my desire that on the death of my said wife, after deducting the portion to which she is legally entitled under the laws of the state of California, the remainder be equally divided among my brothers and sisters, or their descendants, according to the laws of distribution." George Roach had a brother Thomas who died prior to George's death. Thomas Roach left two daughters, one of whom, Johanna Roach Roughan, is still living. The other was Catherine Roach Horman, who died August 2, 1905, leaving issue. George Roach also had a sister named Ellen Roach Whalen, who died June 1, 1903, leaving children. The widow of George Roach, deceased, died December 9, 1907. Meanwhile, in 1904, the children of Ellen Roach Whalen, deceased, together with the children of Thomas Roach, deceased, commenced proceedings, under section 1664, Code of Civil Procedure, to determine and declare the rights of all persons to the said estate of George Roach, which was still in process of settlement. Among the parties to that proceeding was George F. Thompson, the public administrator of San Joaquin county, who

was the administrator of the estate of Fred Copsey, one of the claimants who had died during the litigation. Catherine Roach Horman also died intestate while said proceeding was pending. Both Catherine Roach Horman and her aunt, Ellen Roach Whalen, were residents of the state of Massachusetts and died there. Their respective estates were administered there. In November, 1908, the superior court of San Joaquin county entered its findings and decree, by the terms of which it was adjudged that the children of Ellen Roach Whalen, together with Johanna Roach Roughton and the heirs of Catherine Roach Horman, deceased (the said Johanna Roughton and Catherine Horman being children of the brother of George Roach), were the devisees and heirs at law of George Roach, deceased, entitled under his will to take his estate and to have distributed to them an undivided one-half of the property remaining in the estate. The court in the present proceeding found that the public administrator, the petitioner, was barred by the proceedings under section 1664, Code of Civil Procedure, because his predecessor in office had actual notice of the proceedings to establish heirship. There was also a finding that the decree in the proceeding under section 1664, Code of Civil Procedure, was "conclusive against the whole world, including the public administrator." The court therefore denied the petition of the public administrator for letters in the estate of Catherine Roach Horman.

Appellant insists: First, that the remainders under the will were vested remainders, and therefore that Catherine Horman's part thereof became a portion of her estate on her death; second, that there is no estoppel because no one was legally authorized to represent her estate in the proceeding under section 1664, Code of Civil Procedure; and, third, that administration in her estate cannot legally be dispensed with.

[1] It is unnecessary to follow learned counsel in their discussion of the meaning of the will. Whether the interest of Mrs. Horman was vested or contingent is of no moment whatever. She chose to apply for an adjudication of her rights, and the court entered a decree establishing her interest. It is true that she died during the period in which the proceeding was pending, and it is not shown by the transcript before us whether her administrator was substituted for her upon the record or not, although it does appear that her husband had been appointed administrator of her estate by proper authority in the commonwealth of Massachusetts. Respondents' counsel assert in their brief that such substitution was made, while the representative of appellant makes a contrary declaration. We must assume that the proceeding was regular in all respects, and against an attack of this sort must hold that the court was clothed with

jurisdiction to enter the decree establishing heirship.

[2] Therefore the decree and not the will must be the controlling factor in determining the manner of distribution of the estate. Under the terms of section 1664, Code of Civil Procedure, the determination of heirship as therein provided shall be conclusive in the distribution of the estate. It therefore makes no difference what the intent of George Roach may have been, or whether the language of his will, which we have quoted, operated to create a vested or a contingent remainder. The court's decree must control in the distribution of his estate. *Jewell v. Pierce*, 120 Cal. 83, 52 Pac. 132; *Luscomb v. Fintzelberg*, 162 Cal. 439, 123 Pac. 247, and cases cited. The public administrator was a party to the proceeding in *Whalen v. Webster* 159 Cal. 260, 113 Pac. 373 (which was considered in *Whalen v. Smith*), and the judgment in that case long ago became final. As pointed out in the opinion of Mr. Justice Shaw, "no appeal was taken from the part declaring that the plaintiffs were persons entitled as descendants of the brother and sister to take as devisees under the will." *Whalen v. Smith*, 163 Cal. 365, 125 Pac. 904, Ann. Cas. 1913D, 1319. See, also, *Estate of Roach*, 159 Cal. 261, 113 Pac. 373. This collateral proceeding must accordingly fail. The only estate sought by petitioner to be subjected to administration was Mrs. Horman's alleged interest in her uncle's estate. But the final and solemn adjudication of the court in *Whalen v. Smith* is that she had no interest and that the part which she would have received had she survived the widow of George Roach must be distributed to her heirs. It is not alleged or contended that the administration by the public administrator would or could result in anything but the obtaining for the heirs of Mrs. Horman exactly the interest in the estate of Roach which would be theirs under the decree in *Whalen v. Webster* (considered in *Whalen v. Smith*)—minus the costs of administration in the Estate of Horman. We think that section 1664, Code of Civil Procedure, was passed for the very purpose of obviating such useless proceedings as that contemplated by the public administrator.

The order denying the prayer of the petition is therefore affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

In re WHALEN'S ESTATE. (Sac. 2130.)  
(Supreme Court of California. March 24, 1914.)

Department 2. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge. Petition by the public administrator of San Joaquin County for letters of administration on the estate of Ellen Roach Whalen, deceased. Petition denied, and the administrator appeals. Affirmed.

C. W. Miller, of Stockton, for appellant. W. R. Jacobs and A. H. Carpenter, both of Stockton, for respondent.

**PER CURIAM.** This is an appeal by the public administrator of San Joaquin county from an order of the superior court of San Joaquin county denying his petition for letters of administration in the estate of Ellen Roach Whalen. It differs from the matter of Estate of Horman (Sac. 2131) 140 Pac. 11, this day decided, only in the fact that Mrs. Whalen was the sister of George Roach, deceased, while Mrs. Horman was his niece, and in the circumstance that Mrs. Whalen died before her heirs began the proceeding to establish their interest in their uncle's estate. There is no difference in principle between the two cases.

Therefore upon the authority of Estate of Horman, *supra*, we affirm the order from which the appeal was prosecuted.

**KRZEPICKI v. KRZEPICKI.** (L. A. 3208.)  
(Supreme Court of California. March 23, 1914.)

**1. JUDGMENT (§ 584\*)—CONCLUSIVENESS.**

A final judgment on the merits is a bar to a subsequent action between the same parties on the same cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063-1065, 1067, 1079, 1081, 1083, 1086, 1087, 1096, 1097, 1123, 1125, 1137; Dec. Dig. § 584.\*]

**2. DIVORCE (§ 93\*)—ALLEGATIONS OF GROUND—NEGLECT.**

An allegation of the petition in a divorce action that since defendant's alleged desertion he has left plaintiff abandoned and destitute, without any means of support, and during such time has failed to contribute anything toward plaintiff's support, sufficiently alleged willful neglect as a ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292-307; Dec. Dig. § 93.\*]

**3. DIVORCE (§ 171\*)—RES JUDICATA—JUDGMENT OF OTHER STATE.**

An adverse judgment in a former action by plaintiff in New York for a limited divorce for willful neglect was res judicata of a subsequent action by plaintiff in this state for an absolute divorce on the same ground.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. § 171.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Ludivicka H. Krzepicki against Morris Krzepicki. From a judgment for defendant, plaintiff appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, for appellant. Morris Krzepicki, in pro. per.

**LORIGAN, J.** This is an action for divorce brought in the superior court of Los Angeles county. Plaintiff is a resident of California, defendant a resident of New York. The complaint, after alleging the marriage of the parties in the city of Lututow, Poland, Russia, in 1895, alleged "that in the year 1908, in the city of Lututow, defendant deserted plaintiff, and since that date has neglected and refused to provide plaintiff with the necessaries of life and had neglected to live with plaintiff and support and maintain

her, though able to do so," and prayed for a divorce. It is conceded that the year 1908 mentioned in the complaint and printed in the record is inaccurate and should be 1898. The complaint was filed April 13, 1911. Defendant answered the complaint denying the above allegations and further pleaded in bar to the maintenance of the present action a judgment made and entered on April 19, 1910, at a special term of the Supreme Court of the state of New York in an action for limited divorce brought therein by plaintiff against defendant. When the present case was called for trial, an exemplified copy of the record in the action in the Supreme Court of New York was introduced in evidence, whereupon the superior court, holding that the judgment in that action was a bar to the maintenance of the present suit, declined to hear any other evidence upon the issues in the case and denied plaintiff a divorce. Plaintiff appeals from this judgment.

The only question presented on this appeal is whether the superior court was correct in holding that the judgment of the New York court constituted a bar to the present action. The exemplified copy of the record in the action in New York shows that in December, 1908, plaintiff and defendant then residing in the city of New York in that state, plaintiff brought an action against defendant for divorce, alleging their marriage in the town of Lututow, Russian Poland; that they lived together in the town of Wielum, Russian Poland, for a few months; and "that the defendant left and abandoned the plaintiff a few months after the aforesaid marriage and has since left the plaintiff abandoned and destitute without any means of support in the aforesaid town of Wielum, Russian Poland." It is then alleged that "since the above-named defendant abandoned and deserted the plaintiff, went to the city of New York, state of New York, and since said abandonment and desertion resided therein, and that during the said time has failed to contribute anything towards the support of the above-named plaintiff." The prayer was for a separation for life from bed and board and requiring the defendant to contribute towards the support of the plaintiff. Defendant answered denying all the allegations of the complaint save their marriage and set up affirmatively that in December, 1905, at Wielum, Russian Poland, the plaintiff deserted him and had refused to live with him. The action in New York was tried on its merits, and the court made findings of fact and conclusions of law. The court found: "That the defendant did not leave or abandon the plaintiff without any means of support in the town of Lututow, Russian Poland." That the plaintiff left the defendant in said town and country. "That the plaintiff refused and still refuses to live with the defendant. That the plaintiff abandoned the defendant in the city of New York." The conclusion of

law was that the plaintiff was not entitled to a decree of limited divorce, and a judgment dismissing her complaint on the merits was entered.

Section 1762 of the New York Code of Civil Procedure provides that an action may be maintained by either party to a marriage to procure a judgment separating the parties from bed and board forever, or for a limited time for, among other causes: "(3) The abandonment of plaintiff by the defendant; (4) when the wife is plaintiff, the neglect or refusal of the defendant to provide for her." Our Code, like the New York Code, provides as causes for divorce willful desertion or willful neglect to support. Civ. Code, § 92. Under the New York Code the only ground for an absolute divorce in that state is adultery. For any other cause a limited divorce may be granted. Under our Code limited divorces are not known; all divorces are absolute divorces.

[1] It is, of course, well settled that a judgment rendered on the merits in a former action and which has become final is a bar to a subsequent suit between the same parties for the same cause of action. Appellant insists, however, that the cause of action for a divorce set up in the suit in the New York court in which the judgment relied on was rendered is not the same cause of action set up in the present complaint; that the only cause of action set up in the New York court was the desertion of plaintiff by defendant, and, while willful neglect was also a ground for divorce in New York, the complaint there does not charge it, and it is only charged in the present complaint for the first time and as the sole ground for a divorce here. Hence, he claims, that the New York judgment is not a bar to the maintenance of the present action brought on the ground of willful neglect.

[2, 3] But we are of the opinion, from an inspection of the record in the New York case, considered in the light of the causes for divorce available to a plaintiff under the quoted section of the New York Code and the same causes for a divorce provided for in our Code, that this claim of appellant is untenable. It appears from the complaint in the New York action that plaintiff alleged both desertion and neglect to provide on the part of the defendant as grounds for a divorce. Appellant admits that it alleged desertion. But it is apparent also that plaintiff alleged neglect to provide when plaintiff charged that subsequent to the date of his alleged desertion defendant "has since left the above-named plaintiff abandoned and destitute without any means of support, \* \* \* and that during the said time has failed to contribute anything towards the support of the above-named plaintiff." It is a general allegation charging willful neglect and could have no rele-

vancy except as stating a cause of action upon that ground. As evidently from the record in the New York case desertion and willful neglect were both charged in the complaint, issues made as to both, findings of the court against plaintiff on both issues and judgment on the merits entered against her denying a divorce, the judgment in that action was a bar to the maintenance of the present suit unless there is merit in the further contention of appellant. This contention is that the New York judgment is not available as a bar because the relief demanded there is different from the relief demanded in the present action; that in the action in New York for divorce on the ground of willful neglect a limited divorce only could be obtained, while here an absolute divorce on that ground may be granted. While making this point, the attorney for appellant concedes that he can find no authority to support it. We think it presents no real difficulty. The appellant is seeking the same kind of relief here that she sought in the New York court—a divorce. The difference is not in kind, but in degree arising from the difference in the statutory law of New York and this state. But this difference cannot affect the prior judgment as a bar. It is a fundamental rule of judicial procedure that a cause of action between parties can be litigated to judgment but once, and, when a subsequent suit is brought for identically or substantially the same cause of action that was set up and litigated in the former suit, such former judgment is a bar. Whether such prior judgment constitutes a bar to a subsequent suit or not does not depend on the difference in relief sought in the two actions, but upon the question whether the same matter put in issue in the second suit between the same parties was actually in issue in the first and adjudicated. If the issue is the same, the former judgment is conclusive upon it in any subsequent action between the parties and bars the right to seek a different remedy based on the same facts or cause of action. Applying this rule to the instant case: The plaintiff here in her action in the New York court for a limited divorce charged defendant with willful neglect which was made an issue in that action, and the judgment of the court was against her upon it. In this state she charges the same identical ground of willful neglect as made there as a ground for divorce here. As, however, this very same matter of willful neglect was the subject of judicial controversy in the former action and judicially determined against plaintiff, she will not be permitted to relitigate it, and within the rule announced such former judgment constitutes a bar, and the trial court properly so held. The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

**KAUFFMAN v. MACHIN SHIRT CO. et al.**  
(L. A. 3193.)

(Supreme Court of California. March 26, 1914.)

**1. CARRIERS (§ 305\*)—ELEVATORS—INJURIES—PROXIMATE CAUSE.**

Where a person using an elevator, on reaching the fourth floor, found the door partly open, and upon his return, after delivering a package, fell down the elevator shaft, the elevator having been moved in the meantime, the violation of an ordinance requiring doors to open only from the inside of the shaft was not the proximate cause of the accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136-1139, 1245-1246; Dec. Dig. § 305.\*]

**2. CARRIERS (§ 328\*)—ELEVATORS—CONTRIBUTORY NEGLIGENCE.**

Where a person using an elevator to deliver a package on the fourth floor of a building found the door at that floor open, and upon his return, after delivering the package, fell down the shaft, the elevator, having been moved, his negligence defeated a recovery, assuming that an ordinance was in force and applicable requiring an automatic device which would close the door when the elevator was moved, since he knew that there was no such device or that it was not in working order.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1367-1369; Dec. Dig. § 328.\*]

**3. CARRIERS (§ 314\*)—ACTIONS—COMPLAINT—NEGATING CONTRIBUTORY NEGLIGENCE.**

An allegation that when a person who left an elevator to deliver a package returned the elevator and shaft were "to all appearances" in the same condition in which he left them, with no allegation that he looked or that there was any physical reason why he could not have seen that the elevator had been moved, did not negative his negligence in walking into the shaft.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. § 314.\*]

**4. NEGLIGENCE (§ 136\*)—QUESTIONS OF LAW OR FACT.**

While ordinarily contributory negligence is largely a question of fact for the jury, where the standard of conduct required under given circumstances has been plainly neglected, it is a question of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**5. CARRIERS (§ 328\*)—CONTRIBUTORY NEGLIGENCE—CHILDREN.**

A boy 15 years old, living and working in a large city where hundreds of elevators were in daily use, and who was sufficiently experienced to run an elevator in safety to the fourth story of a building, was charged with the duty of exercising ordinary caution in entering an elevator.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1367-1369; Dec. Dig. § 328.\*]

**6. CARRIERS (§ 286\*)—ELEVATOR DOORS—ORDINANCES—CONSTRUCTION AND OPERATION.**

Sections 80 and 31, Ordinance No. 19,121, New Series, City of Los Angeles, requiring elevators to be provided with hatchways, opening with a trapdoor, which shall open and close as the elevator passes, by their express terms apply only to elevators constructed or installed subsequent to its passage and not inclosed in shafts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Carrie F. Kauffman against the Machin Shirt Company and others. From a judgment dismissing the complaint on demurrer, plaintiff appeals. Affirmed.

Chas. F. Blackstock, of Oxnard, and N. Blackstock, of Los Angeles, for appellant. F. W. Morrison, Jones & Weller, and R. P. Jennings, all of Los Angeles, for respondents.

MELVIN, J. The general demurrers of the defendants to plaintiff's second amended complaint having been sustained without leave to amend unless special application should be made within five days, and such application not having been made, judgment of dismissal was entered. From this judgment plaintiff appeals.

The plaintiff sued for damages for the death of her son caused by a fall down an elevator shaft. The building in which the unfortunate accident occurred was the property of the defendants Winstel, and defendant Staub was the lessee of the premises, while the Machin Shirt Company, a corporation, was sublessee of the fourth floor. The complaint charges that the elevator had been constructed and was maintained in violation of two certain ordinances of the city of Los Angeles; one requiring all doors to elevator shafts to be so constructed that they could be opened from the inside only, except the door on the ground floor, which should be so arranged that it might be opened from the outside but should be provided with a lock and kept locked when the elevator was not in use; the other prescribing an automatic device by which each door to any elevator shaft should close whenever the elevator should move away from the floor where said door was located. There is some question about the applicability of such ordinances to the elevator which was used by the plaintiff's decedent on the day of the accident.

It is alleged that on April 14, 1911, George Kauffman, an inexperienced boy 15 years of age and unaccustomed to handle such elevators, was sent by his employers to deliver a package to the Machin Shirt Company on the fourth floor of the Winstel building. According to the averments of the complaint, the boy entered the elevator and used it for the purpose of transporting himself and the package to the fourth floor. This was in accordance with the practice of the defendants, who permitted and expected messengers and employees of customers having business in the building to use said elevator. The boy had seen other messengers from the establishment of his employers use this same elevator, and there was no apparent reason why he could not do so with safety. On reaching the fourth floor, the lad found the door

to the elevator shaft open and unfastened. He pushed it open about a foot, stepped from the elevator platform into the hall, walked about 20 or 30 feet to the establishment of the Machin Shirt Company, and returned to the door of the elevator shaft, not more than one minute after he had emerged from the elevator. "To all appearances" (to quote directly from the complaint) "the said door and the said platform were in the same condition that he had left them less than one minute before." Some one had moved the elevator to another floor. Kauffman, believing that it was where he had left it, stepped into the shaft, fell to the basement, and sustained injuries from which he subsequently died.

It is the contention of the respondents that, conceding their negligence in failing to maintain doors to the elevator shaft constructed in conformity with local ordinances, the accident was not proximately connected with such unlawful arrangement. There was no pleading of willful or wanton conduct on the part of defendants, and in the absence of such pleading no such conduct may be assumed. *Esrey v. Southern Pacific Co.*, 88 Cal. 406, 26 Pac. 211. Admitting for the sake of argument, they say, that the ordinances mentioned in the complaint were violated by them, and that they were consequently guilty of that sort of negligence not aggravated by willful or wanton conduct on their part, they may not be held responsible, because the boy's own negligence was the proximate cause of the injury. A part of one of these ordinances which, according to the allegations of the complaint, was in effect when the elevator was installed, was set forth as follows: "Sec. 231. All elevator shafts and all elevator enclosures of every kind, shall have iron doors, which shall be made to open from the inside of said elevator shaft only excepting the door upon the ground floor of the building, which shall also have a lock to permit opening same from the outside. (Ord. 6108, N. S. § 92, which ordinance is set forth as section 231 of the Penal Ordinances of the City of Los Angeles, at page 96.)" The other ordinance is not pleaded in terms, but the allegations in relation to it are as follows: "That the door of said elevator shaft at said fourth floor was not at any of the times herein mentioned so constructed that the same would close automatically if the said elevator was moved away from said fourth floor, as the same should have been constructed to safeguard the lives of persons who were entitled to use the same as prescribed by sections 30 and 31, known as Ordinance No. 19,121 New Series of the City of Los Angeles, and which said ordinance was adopted and approved by the city council and the mayor of said city on the 5th day of November, 1909, and which ordinance prescribed that such elevators should be constructed with automatic doors, so that when the said platform was removed from any given floor

the doors at said floor would close automatically."

[1] The violation of the ordinance first quoted was clearly not the proximate cause of the accident. When he reached the fourth floor the boy found the door partly open. It might have been left in that condition even if it had been constructed in such manner that, when closed, it could be opened again only from within. The violation of the other ordinance, say respondents, was not the proximate cause of the accident because the boy had notice that there was no automatic device for opening and closing the door. He found the door somewhat open and unfastened, and he thereupon pushed it open about a foot. The allegation in the complaint is that the ordinance prescribed a device by which the doors of the elevator would close automatically when the elevator should be removed from the floor at which it had stopped. But inspection of the ordinance itself, or those parts of it pleaded by number in the second amended complaint, shows that the automatic device contemplated by the ordinance was for opening and closing the doors of elevators. These sections are as follows:

"Sec. 30. Every elevator for the carriage of freight or passengers, constructed or installed in any building in the city of Los Angeles, subsequent to the passage of this ordinance shall have all safety appliances required and prescribed by this ordinance.

"Sec. 31. Every freight elevator constructed or installed subsequent to the passage of this ordinance shall be constructed throughout all parts with sufficient strength to sustain six times what such elevator is designed to carry. \* \* \* In any case, where a freight elevator is not inclosed in a shaft, hatchways shall be provided at each floor, opening with a trapdoor which shall open and close as the elevator passes."

[2-6] Assuming therefore that the ordinance was in force and applicable to the elevator of respondents, the very condition in which the boy found the door when he reached the fourth floor was notice to him that there was no automatic device attached to that particular door, or that if one had been provided it was not in working order. He knew it was possible to leave the door partly open while the elevator was at the level of the fourth floor because he had left it in that condition. He must have known that it was possible to move the car because he himself had come up to the fourth floor in it a minute before he fell. There is no allegation that any one was guilty of negligence in moving the elevator from that floor. Nor is the situation helped by the allegation that when he returned the elevator and shaft were to all appearances in the same condition in which he left them. There is no statement that he looked or that if he had looked there was any physical reason why he could not have seen that the elevator had been moved.



In the absence of any such showing, the court must assume that "to look was to see," and that if he had looked he must have noticed the danger. One may not thus heedlessly disregard the commonest precautions for his own safety. *Green v. Southern Pacific Co.*, 132 Cal. 254, 64 Pac. 255; *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 777, 89 Pac. 1109; *Brown v. Pacific Electric Ry. Co.* (L. A. 3054) 138 Pac. 1055, filed February 4, 1914. It is true that ordinarily the question of contributory negligence is one largely of fact for the consideration of the jury; but, where the standard of conduct required of persons under given circumstances has been plainly neglected by the person seeking relief, it then becomes a question of law. *Hamlin v. Pacific Electric Ry. Co.*, and *Brown v. Pacific Electric Ry. Co.*, supra. George Kauffman was an inexperienced boy 15 years of age, but that did not exempt him from the necessity of taking ordinary simple precautions. He was old enough and sufficiently experienced to run the elevator in safety to the fourth story of the building. He lived and worked in a great city where hundreds of elevators are in daily use. It would be absurd to say that a lad of that age was ignorant of the necessity of exercising ordinary caution in entering an elevator. The case of *Ballou v. Collamore*, 180 Mass. 246, 35 N. E. 463, is very similar to this. The facts were as follows: A boy 15 years of age having goods to deliver at various suites in a building entered the "freight box" of a combined passenger and freight elevator, telling the operator the numbers of the suites to which he wished to take goods. The first stop was made at the fourth floor, and the boy opened the door of the elevator shaft, left it open, and took his parcels to the customer on that floor. Returning he entered the open door without looking and was killed; the operator of the elevator having gone with a passenger to an upper floor. The Supreme Court of Massachusetts said: "Under the circumstances, even for a boy of 15 to step through the open door into the elevator well without looking to see if the elevator was there was careless. \* \* \* In this case the plaintiff himself left the door open, and knew or ought to have known that it was at least as probable that the elevator would not be there as that it would. *Taylor v. Carew Mfg. Co.*, 140 Mass. 150 [3 N. E. 21]; *Id.*, 143 Mass. 470 [10 N. E. 308]; *Patterson v. Hemenway*, 148 Mass. 94 [19 N. E. 15, 12 Am. St. Rep. 523]; *Gaffney v. Brown*, 150 Mass. 479 [23 N. E. 233]; *Keenan v. Edison Electric Illuminating Co.*, 159 Mass. 379 [34 N. E. 366]."

[8] But there is another reason why the demurrer to plaintiff's second amended complaint was properly sustained. The ordinance providing for automatic doors to elevator shafts was approved in the month of November, 1900, as specifically set forth in

the complaint, while in the same pleading it is averred that the elevator was installed in 1906, and the ordinance by its terms applies so far as safety devices are concerned only to elevators constructed or installed subsequent to its passage. Furthermore, the complaint under consideration described the elevator as one having a shaft through which it was operated, while section 31 quoted above commands the maintenance of automatic doors only on freight elevators not inclosed in shafts. Whether we regard the elevator as one designed for the carriage of freight or of passengers, the ordinance pleaded was not violated, and the negligence of the respondents sought to be predicated upon the alleged violation did not exist.

A licensee using a freight elevator is contributorily negligent in stepping from the platform into an unguarded space between the elevator and the wall of the shaft. *Gray v. Siegel, Cooper Co.*, 78 App. Div. 118, 79 N. Y. Supp. 813. But whether we regard the decedent under the facts pleaded as a mere licensee or as a person using the elevator by invitation of the defendants, we cannot say that he was excused for his failure to observe the absence of the elevator when he returned to the open door of the shaft.

The judgment is therefore affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

#### HUGHES MFG. & LUMBER CO. v. ELLIOTT. (L. A. 3191.)

(Supreme Court of California. March 26, 1914.)

#### 1. EXCEPTIONS, BILL OF (§ 39\*)—TIME FOR PROCEEDINGS—NOTICE OF ENTRY OF JUDGMENT—NECESSITY.

The fact that appellant's counsel was in court during argument of a motion to set aside a default does not imply actual knowledge by appellant of the entry of the order denying the motion, so as to relieve respondent from giving appellant notice of the order, pursuant to Code Civ. Proc. § 650, requiring appellant to prepare and serve his bill of exceptions within 10 days after notice of entry of judgment.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54-56, 60; Dec. Dig. § 39.\*]

#### 2. APPEAL AND ERROR (§ 511\*)—RECORD—MATTERS TO BE SHOWN—NOTICE OF ENTRY OF JUDGMENT.

To deprive appellant of his right to the written notice of an entry of judgment, pursuant to Code Civ. Proc. § 650, the record must show facts clearly indicating a waiver of such notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.\*]

#### 3. APPEAL AND ERROR (§ 937\*)—PRESUMPTIONS.

If the appellate record does not show when the bill of exceptions was presented and settled, it is presumed that it was presented within due time; all presumptions favoring the regularity of the proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3788-3794; Dec. Dig. § 937.\*]

#### 4. JUDGMENT (§ 143\*)—DEFAULT—VACATING—EXCUSABLE NEGLIGENCE.

Defendant's affidavits, supporting his motion to set aside a default judgment under Code Civ. Proc. § 473, on the ground of excusable neglect, showed that defendant was president of a bank, and that plaintiff, on February 11, 1911, filed two unverified complaints, one naming the bank defendant, and the other naming its president, and that defendant, knowing of the filing of the complaints, though summons was not served until September 15, 1911, discussed the question with his attorney; that immediately after he was served he delivered the summonses to the cashier, with the request that they be delivered to his attorney, who was also attorney for the bank, and at the same time gave some other relevant documents to the cashier to file, so that they would be available for the attorney's use in case of defendant's absence from the city; that on October 12, 1911, defendant left the city, and did not return until the 31st, when he first learned of the default judgment. The affidavits further showed that the suits were for certain goods sold to the bank by plaintiff in June, 1907, and that plaintiff had been fully paid therefor. The cashier made affidavit that the bank went into the hands of a trustee upon September 6, 1911, and for several weeks thereafter its affairs were in confusion, and affiant assumed new duties and did not recollect receiving the summonses from defendant, but did remember receiving some documents concerning plaintiff's claims, which he gave to another employé to be filed in the bank, and in so doing he inadvertently delivered the copies of the complaints and summonses in the actions to such employé, and such employé filed corroborating affidavits, which showed that the true nature of the writings filed was not discovered until the latter part of October, 1911. *Held*, that it was an abuse of discretion not to grant the motion to vacate the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.\*]

#### 5. JUDGMENT (§ 160\*)—DEFAULT JUDGMENT—VACATING—SUFFICIENCY OF AFFIDAVIT.

An affidavit of merits, filed on a motion to vacate a default judgment, that defendant has fairly, fully, and truly "stated all of the facts and grounds of defense," was not objectionable on the ground that it should have averred that it stated "the facts of the case," especially where the affidavit contained a verified declaration of facts which completely answered the unverified complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314-316; Dec. Dig. § 160.\*]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Hughes Manufacturing & Lumber Company against L. L. Elliott. From an order denying defendant's motion for relief against a default money judgment, defendant appeals. Reversed.

Frank J. Thomas and Irving M. Walker, both of Los Angeles, for appellant. Sheldon Borden and George H. Moore, both of Los Angeles, for respondent.

MELVIN, J. The defendant appeals from an order denying his motion to be relieved under section 473, Code of Civil Procedure, from a money judgment taken against him by default.

[1] Respondent objects to the consideration

by this court of the bill of exceptions, on the ground that it was presented and settled after the time allowed by law. Appellant's motion was made on November 14, 1911. On that date it was denied, and the order was entered upon the minutes of the court. The notice of appeal was served on January 4, 1912, and on January 10th service of the proposed bill of exceptions was accomplished. Counsel insist that, since a motion must be made *viva voce*, it must be presumed that the parties were in court, that the order was made in their presence, and that appellant, therefore, had actual notice of the decision of the court which was equivalent to served notice or a waiver thereof. Measured by this interpretation of the law, they assert that defendant's time to serve and present his bill of exceptions began to run immediately upon the decision of the court—citing *Estate of Keating*, 158 Cal. 111, 110 Pac. 109. That authority does not sustain their contention. It was there held that the filing of a notice of appeal was a waiver of the notice of the entry of the order appealed from. In the present case there is no record of the service upon appellant of any notice of the entry of judgment. The fact that his counsel must have been in court during the *argument* of the motion to set aside the default does not imply actual knowledge either of the making or the entry of the order. Under the terms of the statute (section 650, Code Civ. Proc.) appellant was entitled to notice of such entry and he did not bring himself under the rule announced in *Estate of Keating*, *supra*, until he filed his notice of appeal. That was on January 4, 1912.

[2] The rule is that, in order to deprive an appellant of his right to written notice of the entry of an order or judgment, there must be facts of record clearly indicating a waiver of such notice. In *Mallory v. See*, 129 Cal. 359, 61 Pac. 1124, after reviewing the cases in which the conduct of appellants had been held to constitute waiver, this court said: "The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived." Part of this language was quoted with approval in the opinion in the case of *Gardner v. Stare*, 135 Cal. 119, 67 Pac. 5. It was held in that case that by the act, evidenced upon the record, of obtaining an order for the stay of execution, appellant had waived written notice of decision. In *Estate of Richards*, 154 Cal. 482, 98 Pac. 528, *Mallory v. See* is again approved, as it is also in *Estate of Keating*, *supra*, cited by respondent. The record before us discloses no act on the part of appellant or his counsel

amounting to a waiver of his rights to a formal notice of the entry of the order in accordance with section 650, Code of Civil Procedure.

[3] But respondent makes the further contention that the bill of exceptions was not presented in time, as required by section 649, Code of Civil Procedure, which requires such presentation to occur within 10 days after written notice of the making of the decision. In any event, say respondent's counsel, appellant had full knowledge of the order as early as the 4th day of January, 1912, when his notice of appeal was served and filed; but the bill was not presented to the court for settlement until February 19, 1912, more than 40 days after his waiver of written notice. In reply appellant's counsel say that, while it appears that the bill was settled and allowed over respondent's objections on the date last referred to, there is nothing to indicate when the objections were made. It is not shown by the record, they say, when the bill was presented, and the presumptions are all in favor of the regularity of the proceedings. Appellant's position is correct. *Henry v. Merguire*, 106 Cal. 144, 39 Pac. 599, cited in opposition to this theory, does not sustain respondent's argument. In that case it was held that the failure to present a bill within 10 days after service of the proposed amendments is fatal, unless an excuse for the delay be set forth in the bill of exceptions itself; but in that case it affirmatively appeared upon the face of the record that appellant served notice upon his adversary that the statement and amendments would be "presented" on a certain date, which was after the time allowed by statute for such presentation. That case is authority against respondent, for the court there said (quoting from *Hayne on New Trial and Appeal*): "If the judge overrules the objection and proceeds to settle the statement, the party must have his objection and the matter in its support incorporated in the statement. When so incorporated, it may be urged as a reason why the motion should be denied, both in the lower court upon the hearing of the motion and in the Supreme Court upon appeal from the order granting or refusing the motion." In other words, it was the duty of respondent to have matter incorporated in the bill which would affirmatively show that the bill of exceptions was not presented in time. Otherwise it must be held that the court acted within its proper authority when it proceeded to settle the bill. The foregoing discussion disposes of respondent's preliminary objections whether we regard the proceedings with reference to the bill to have been taken under section 649 or section 650 of the Code of Civil Procedure.

We will now proceed to discuss the appeal upon the merits. The motion, as above indicated, was made in accordance with the provision of section 473, Code of Civil Procedure.

Appellant freely admits, as indeed he must, that such a motion is addressed to the sound legal discretion of the court; but he contends that the order from which he appeals was an abuse of the court's discretion.

From the affidavit of the defendant it appears that he was president of the Oil & Metals Bank & Trust Company. On February 11, 1911, plaintiff filed two unverified complaints, each for the sum of \$13,077.15; one naming the bank as a defendant and the other naming the president. The cause of action set forth in each complaint was for goods, wares, and merchandise sold and delivered and for labor and services performed. Summons was not served in either case until September 15, 1911; but Mr. Elliott, knowing of the filing of the complaints, had discussed the matter with his attorney, Frank J. Thomas, Esq. On that day he was served with summons in each case, and immediately he delivered both documents to Mr. H. H. Scott, the cashier of the bank, with the request that the latter deliver them to Mr. Thomas who was his personal attorney, and also attorney for the banking corporation. He also collected some papers which were in his opinion relevant to the two suits and gave them to Mr. Scott, with orders that they should be filed with the secretary of the bank, so that they would be easily available for the use of the attorney in the absence of Mr. Elliott from the city. On October 12, 1911, defendant left the city of Los Angeles, and did not return until the 31st day of that month, when he learned for the first time that a judgment by default had been entered against him. He further alleged in his affidavit that the bases of the suits were certain goods, wares, and merchandise sold and delivered and labor furnished to the bank by plaintiff in June, 1907; that for all of these things plaintiff had been fully paid and overpaid; that he personally had never been indebted to plaintiff; that he has "fairly, fully, and truly stated all of the facts and the grounds of defense to the complaint and cause of action in this suit to said Thomas, attorney at law and counsel for affiant, and he has been informed and advised by said Thomas, and therefore believes and states, that he has a good defense to said cause of action, and to the whole thereof, upon the merits."

Mr. Scott declared in his affidavit that the bank went into the hands of a trustee upon September 6, 1911, and that for several weeks thereafter the affairs of the institution were thrown into great confusion; that, owing to the discharge of many of the old employes, new and unforeseen duties were placed upon affiant; that he had no recollection of receiving the summons from Mr. Elliott, but that he did remember the receipt of some documents relating to plaintiff's claims, which he gave to Mr. E. G. Derby, an employe of the bank, with instructions that the papers be placed on the files of the bank; that in doing so he inadvertently delivered the copies

of the complaints and summonses in the two cases to Mr. Derby. That gentleman by affidavit corroborated Mr. Scott in the matter of the receipt of the papers and the filing of them was ordered, and it was shown by his affidavit and that of Mr. Lyon, another employé, that the true nature and importance of the writings were not discovered until the latter part of October, 1911. No answering affidavits were filed on behalf of the plaintiff.

[4] That the affidavits present a strong showing of excusable neglect is apparent, and they should have prevailed over the unverified complaints to move the court to grant the relief requested. True it is that applications under section 473, Code of Civil Procedure, are addressed to the discretion of the court, and it has been said that, "unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed." *Ingrim v. Epperson*, 137 Cal. 371, 70 Pac. 166. That there was an abuse of discretion we are satisfied. It was proper and natural that Mr. Elliott should intrust to the cashier, not only the summons in the case against the bank, but also that in the action against him personally. It appears that the two suits were practically identical, and the same attorney was acting for both defendants. Under his solemn oath the defendant has declared that he never was personally indebted to plaintiff. He has with like solemnity averred that whatever supposed claim plaintiff had against him had arisen in June, 1907, but that no suit was filed until February, 1911, after which summons was not served until more than half a year had elapsed. Respondent has not shown such haste as would lead us to believe that hardship would result in opening the default, to the end that a trial may be had upon the merits. Affiants have alleged under oath a substantial defense, as opposed to the unverified averments of the complaint. Defendant should be given an opportunity to present such defense. Otherwise he might be deprived of very important rights, "whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action." *Nicoll v. Weldon*, 130 Cal. 667, 63 Pac. 63. Such has long been the policy of this court. *Malone v. Big Flat Gravel M. Co.*, 93 Cal. 384, 28 Pac. 1063; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Mitchell v. California & Oregon Coast S. S. Co.*, 156 Cal. 576, 105 Pac. 590; *Downing v. Klondike M. & M. Co.*, 165 Cal. 786, 134 Pac. 970.

[5] Criticism is made of the affidavit of merits, because Mr. Elliott states therein "that he has fairly, fully, and truly stated all of the facts and grounds of defense to the complaint and cause of action" in the suit to his attorney. Respondent's counsel declare the affidavit insufficient because it fails to allege that defendant stated "the facts of the case."

This we think is hypercriticism, especially so in view of the circumstance that the affidavit also contains a verified declaration of facts which amounts to a complete answer to the unverified complaint.

The order is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

**FOUTZ v. CITY OF LOS ANGELES.**  
(L. A. 3027.)

(Supreme Court of California. March 25, 1914.)

**1. MASTER AND SERVANT (§ 182\*)—INJURY TO SERVANT—FELLOW SERVANTS—WHO ARE.**

Civ. Code, § 1970, as amended by St. 1907, p. 119, making an employer liable for injury to a servant caused by the neglect of a coemployé having the right to control the injured servant, makes an employer liable for the neglect of a foreman or other person in charge and control of employés for damages caused by his negligence in the performance of his superior duties, though they are not duties which the employer, by law, owes to the inferior servant; and where a servant was injured, while standing on a ladder which could be raised or lowered, because of the negligence of a coemployé, in control of the injured servant and operating the machinery, by lowering the ladder while the servant using it thought it would be raised, the employer was liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.\*]

**2. MUNICIPAL CORPORATIONS (§ 747\*)—CONTRACTS FOR PUBLIC IMPROVEMENTS—INJURIES TO EMPLOYEES—LIABILITY.**

Where a city was engaged in building an aqueduct to bring water for its inhabitants, and as a part thereof did the work through its officers duly authorized, the city was liable for injury to an employé while at work, caused by the negligence of a coemployé having authority to control the men, though there was no ordinance or resolution of the council or other express authority giving the coemployé power of control.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1570-1577; Dec. Dig. § 747.\*]

**3. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—REFUSAL TO GIVE INSTRUCTIONS.**

Where, in an action for injuries to a servant, the undisputed evidence showed that a coemployé negligently inflicting the injury was in control of the work, and that a negligent act committed in exercising that control caused the injury, the refusal to charge that the employer was not liable unless the negligence of the coemployé occurred while he had the right to control the men and in the exercise of such control was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**4. MASTER AND SERVANT (§ 297\*)—INJURY TO SERVANT—GENERAL VERDICT—SPECIAL VERDICT—INCONSISTENCIES.**

In an action for injury to a servant while standing on a ladder which could be raised and lowered by cables, and holding on the cable used for lowering, there was evidence that the coemployé in charge of the work negligently lowered the ladder instead of raising it, and thereby caused the employé's hand to be carried into a pulley. The jury gave negative answers to the questions, did the coemployé, by words or

acts immediately prior to the accident, give the employé reasonable grounds for believing that the ladder would not be lowered? and did the coemployé, prior to the accident, inform the employé that the ladder was about to be lowered? and rendered a general verdict for the plaintiff. *Held* that, since the jury might believe that the first interrogatory referred only to the time immediately preceding the injury, the special verdict was not inconsistent with the general verdict, within Code Civ. Proc. § 625, and judgment was properly rendered for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.\*]

In Bank. Appeal from Superior Court, Los Angeles County; M. D. Dooling, Judge.

Action by Horace S. Foutz against the City of Los Angeles. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Shenk, City Atty., Leslie R. Hewitt, and W. B. Mathews, all of Los Angeles, for appellant. Carlton R. Bainbridge and Frank F. Pratt, both of Los Angeles, and Munson T. Case, of Chicago, Ill., for respondent.

SHAW, J. The plaintiff recovered a judgment against the defendant, in an action for damages from personal injuries. The defendant appeals therefrom, and also from an order denying a new trial.

The defendant was constructing an aqueduct to bring water from Inyo county to Los Angeles for the use of its inhabitants. It was excavating the canal by means of a suction dredger driven by electric power, operated by four men, all of whom worked under the general direction of a camp foreman named Carter. The mechanical operations of the dredger were under the control of one Berry. While operating the machinery in the regular fashion, he stood on a small platform in the front part of the dredger and worked the various parts of the machinery, as required, by means of several movable levers placed at hand for that purpose. He was known as lever man. Two other men, known as bank men, worked on the canal bank, adjusting its slope as the dredger proceeded, and also helping to move the dredger as the work progressed. Foutz, the plaintiff, was employed as an oiler. His primary duty was to keep oil supplied to the machinery on the dredger. Berry was in the immediate control of the movements of the men as they worked. Ordinarily, however, each knew the work he was to do and proceeded to do it; no orders being necessary. If anything unusual occurred in Carter's absence, Berry had authority to take control and direct the other men as to what they should do. At the time of the accident which caused the injury complained of, a part of the dredger, called the "digger head," had broken off and fallen into the water in the canal. It was made of metal and was some 4 feet long, weighing 300 pounds. These digger heads

were revolved under the water to loosen the earth so that it could be taken up into the suction pipes. There were two of them, one on each side of an apparatus, called a "ladder," extending almost horizontally in front of the dredger into the water and hinged to the dredger so that the forward end could be raised or lowered to keep the digger heads working in the earth to be excavated. When the digger head broke, Carter was absent, and Berry took charge of the operations to raise it from the water and put it upon the bank at one side. He undertook to do this by attaching it to the ladder and then by lifting the ladder and turning it to one side, carrying the digger head to the bank, using the machinery on the dredger for that purpose. He directed the other men to assist him in this work, which they immediately proceeded to do. There were two cables attached to the ladder, one of which was used to raise and the other to lower it. At the time of the accident, Foutz was standing on the ladder with a scantling in one hand which he intended to press against the rope fastened to the digger head in order to hold the rope away from the sharp corner of the ladder frame to prevent the cutting of the rope when the digger head was lifted. He had been given to understand that the ladder was to be raised. To steady himself in the position he took, he placed the other hand upon the cable used to lower the ladder, which, as he supposed, would not be operated. While he was getting himself in this position, Berry had gone back to the lever platform, saying that he would "try it," which Foutz understood to mean that he would proceed to raise the ladder and thereby lift the digger head. When Berry reached the platform, Foutz was immediately in front of him in plain sight. In this situation Berry pulled the lever which lowered the ladder, instead of that which raised it, and thereby caused Foutz's hand, which was resting on the cable, to be carried with it into a pulley, thereby causing the injury.

It is unnecessary to state further details. There was sufficient evidence to sustain a finding that the injury was caused by the negligence of Berry in moving the cable to which plaintiff was holding to steady himself, without warning the plaintiff of his intention, and to sustain a finding that plaintiff was not guilty of contributory negligence in placing his hand upon that cable. The main contention of the defendant is that the negligence of Berry, which caused the injury, was that of a fellow servant of plaintiff, for which the defendant is not liable.

[1] Under the rule declared by section 1970, Civil Code, prior to its amendment in 1907 (St. 1907, p. 119), Berry and the plaintiff would have been classed as fellow servants. That section then declared that an employer was not bound to indemnify an employé for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

injuries from the negligence of "another person employed by the same employer in the same general business," if he had used ordinary care in selecting the culpable employé. Under this definition, it was settled law that a foreman or engineer is a fellow servant with the workmen engaged with him and under his immediate direction, control, and supervision in carrying on a part of the master's work. *Trewatha v. Mining Co.*, 96 Cal. 498, 28 Pac. 571, 31 Pac. 561; *Donovan v. Ferris*, 128 Cal. 53, 60 Pac. 519, 79 Am. St. Rep. 25; *Stevens v. San Francisco, etc., Co.*, 100 Cal. 566, 35 Pac. 165; *Daves v. S. P. Co.*, 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133; *Fagundes v. Central P. R.*, 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824. In 1907 this section was amended by adding thereto, among other things, the following: "Provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employé injured, or of a person employed by such employer having the right to control or direct the services of such employé injured." We have italicized the portion of the section as amended which applies particularly to this case. This provision was intended to change the former definition of fellow servants and to limit that definition to a much smaller class. There can be no doubt that it has that effect. A foreman in charge of others engaged in the same work with him, or an engineer in charge of the operation of the machinery with assistants immediately under him, usually has authority from the master, either expressed or implied, to order and direct the movements of the men engaged with him. Yet, under the statute as it previously stood, he was only a fellow servant with them, and for his neglect in the performance of his superior duties, to which they were required to conform, the master was not liable, unless the neglect was in some duty which the master himself, by law, owed to the inferior servant. *Wall v. Marshutz*, 138 Cal. 522, 71 Pac. 692. The proviso quoted makes the master liable for the neglect of a foreman or other person in charge and control of other men that work with him, for damages caused by his negligence in the performance of his superior duties, even if they are not duties which the master, by law, owes to the inferior servant.

The lever man, at the time of the accident, was in control of the movements of the men who were assisting him in recovering the digger head. This was not a part of the regular work of operating the dredger in which they would be presumed to know their duty and would be expected to perform the same without order or direction from any one. It was an unusual operation, arising upon an emergency, and was conducted wholly under the direction and at the instance of the lever man who was in control. He was

operating the machinery of the dredger for that purpose, and they had taken positions which gave them no reasonable opportunity to avoid the danger from his negligent act. It matters not that he did not expressly, or by words, command the plaintiff to stand as he did and endeavor to hold the rope away from the sharp edge of the ladder frame with his hand on the other cable. Plaintiff in the performance of his duty, and without express orders, did that which he saw was appropriate to be done to facilitate the work in which he was ordered to assist. He was under Berry's immediate control and subject to his orders, whether he gave directions for each act or not. Berry was in a position to see and either did see, or by ordinary care would have seen, the position which plaintiff had taken, and his silence after such observation was equivalent to an approval of that position and to an order that the plaintiff should do that which he was then doing, so far as the operation then in hand was concerned, and Berry was in actual control of the position of the plaintiff and of the machinery to be operated. His choice of levers was not a part of the work of the same character as that of the other men, but was a part of the work pertaining to his superior power and functions. The case therefore falls directly within the proviso above quoted, which makes the defendant liable for his negligence.

[2] It was not necessary for the plaintiff to show an ordinance or resolution of the council or other express authority giving Berry or Carter directions to carry on this work and control the men. It was admitted that the city was engaged in building the aqueduct, and it appeared that this was a part thereof, and that it was being constructed by the city, through its officers and agents duly authorized, by means of this dredger operated in this manner by these men. The authority was sufficiently proven.

[3] Complaint is made of a ruling upon instructions to the jury. The defendant asked an instruction to the effect that it was not liable for the negligence of Berry, unless it was shown that the negligence complained of occurred, not only while Berry had the right to control or direct the services of plaintiff, but also that it "occurred in the exercise of such control or direction." The court struck out the clause quoted and instructed the jury merely that the defendant was not liable unless it was shown that the negligence complained of occurred while Berry had the right to control and direct the services of plaintiff. The court did not elsewhere instruct the jury that the defendant would not be liable unless Berry's negligence occurred in the exercise of his right to control or direct the services of the plaintiff. We can conceive of cases where such an instruction should be given. For example, if a foreman, in charge of men shoveling dirt

out of a trench, should himself take a shovel and work in the trench with the men, and in so doing should carelessly strike one of the men with his shovel, it may be that, while thus using the shovel, he would be a mere fellow servant with them, and that the master would not be liable for the injury caused by the blow. If the evidence left it doubtful whether the negligent act was done by the foreman while working in common with the men or while performing some superior duty pertaining to his foremanship, the question whether or not such an instruction was proper would arise. But here there is no conflict in the evidence with respect to the character of the work Berry was doing, as compared to that of the plaintiff, or concerning their respective functions and relations at the very time of the accident. Berry was in control, both physically and legally, and it was his act in exercising that control that caused the injury. The jury could not have found otherwise. The failure to give the instruction as asked, therefore, did not prejudice the defendant, even if we assume it to be correct in point of law in a case to which it would apply.

[4] This cause was decided by the District Court of Appeal, and the decision of that court was vacated upon a petition for rehearing, because of its statements in regard to the point last mentioned. The following part of the opinion of that court upon another point was not objected to upon the rehearing, and we think it correctly states the law on the subject to which it relates: "There was submitted to the jury certain special interrogatories, first: 'Did the employé Berry, by his words or acts, or both, immediately prior to the accident in which plaintiff was injured, give the plaintiff reasonable grounds for believing that he (the said Berry) would not lower the ladder frame of the dredge mentioned in the complaint?' This question was answered by the jury in the negative. It is claimed by appellant that such answer is inconsistent with the general verdict, and under section 625, Code of Civil Procedure, said judgment should have been given for defendant. The interrogatory is peculiarly and adroitly worded, but it in terms restricts the time of notice to that immediately preceding the accident. The whole of the conversation with reference to the movement to be made of the cable to be employed, from which the inference might be drawn that the ladder lowering cable would not be disturbed, occurred a considerable time before the accident, and not immediately preceding it. The answer to the question as framed is not therefore inconsistent with the general verdict. The second special interrogatory was: 'Did the employé Berry, prior to the accident in which plaintiff was injured, inform the plaintiff that he was about to lower the ladder frame of the dredger mentioned in the

complaint? Answer: No.' It is apparent that the jury believed their attention was called by the first interrogatory to the specific time immediately preceding the injury, and not to what occurred at a more period in the progress of the work."

The other points urged in the briefs are covered by what we have already said, and it is unnecessary to further discuss them.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

# CALAVERAS COUNTY v. POE et al. (Sec. 2090.)

(Supreme Court of California. March 27, 1914.)

## 1. OFFICERS (§ 100\*)—COMPENSATION—INCREASE OF COMPENSATION—VALIDITY.

Under Const. art. 11, § 9, prohibiting the increase of the compensation of county officers during their term of office, and County Government Act (St. 1905, p. 582), providing that the salaries and fees provided for shall be in full compensation for all services, the compensation of one elected for the term beginning January 7, 1907, to the consolidated offices of county clerk, auditor, and recorder, while St. 1903, p. 377, fixing the salary for the recorder at \$1,500 per annum, was in force, may not be indirectly increased by the appointment of a copyist for the office of recorder, notwithstanding Pol. Code, § 4267, as amended by St. 1907, p. 507, fixing the salary of the recorder at \$1,500 per annum, and authorizing the recorder to appoint a copyist at an annual salary of \$900 to be paid out of the county treasury, though, where a statute provides a fixed salary for an officer and fixed salaries for deputies payable out of the county treasury, a subsequent law increasing the compensation of deputies or their number will take effect at once.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

## 2. LIMITATION OF ACTIONS (§ 34\*)—COUNTY AUDITOR—ISSUANCE OF WARRANTS—LIABILITY.

Where the incumbent of the consolidated offices of county clerk, auditor, and recorder could under Pol. Code, § 4091 et seq., only issue as auditor warrants for legal demands against the county, a cause of action for the issuance of warrants for illegal demands was within Code Civ. Proc. § 335, subd. 1, limiting actions on a liability created by statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151-157; Dec. Dig. § 34.\*]

Department 2. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by the County of Calaveras against Adam W. Poe and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Snyder & Snyder, of San Andreas, for appellants. John Hancock, Dist. Atty., of San Andreas, for respondent.

MELVIN, J. Defendants appeal from the judgment. This case was decided upon an agreed statement of facts. Adam W. Poe

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was duly elected to the consolidated offices of county clerk, county auditor, and county recorder of Calaveras county, a county of the thirty-third class, for the term beginning January 7, 1907. At that time his salary as recorder was fixed by statute at \$1,500 per annum (Stats. 1903, p. 241), and the "County Government Act" also contained the following provision: "The salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." Stats. 1905, p. 582. Subsequently section 4262 of the Political Code was amended with reference to counties of the thirty-third class to read as follows: "The county officers shall receive as compensation for the services required of them by law or by virtue of their office, the following salaries, to wit: \* \* \* The recorder, one thousand five hundred dollars per annum. In counties of this class the recorder may appoint a copyist for service in his office, which office of copyist for the county recorder is hereby created, and said copyist shall receive as compensation for his services the sum of nine hundred dollars per annum, to be paid out of the county treasury in equal monthly installments in the same manner and at the same time as other county officers are paid." Stats. 1907, p. 507. Thereafter, on April 1, 1907, Adam W. Poe appointed J. A. Smith copyist under the provisions of said section 4262 of the Political Code as amended in 1907, and the said Poe continued, as auditor from May 6, 1907, to March 7, 1910, to draw warrants for the monthly salary of said Smith as copyist. These warrants were duly paid by the county treasurer. This action was one by the county for the repayment of the moneys thus expended upon the theory that the auditor was without authority to order the payment of Smith's salary. The amount demanded was \$2,625, but the court found that the payments made in May and June, 1907, were barred by the provisions of subdivision 1 of section 338, Code of Civil Procedure. Judgment was given against Poe for \$2,475 and against the other defendants, who were the sureties on his official bond, but as they had become such sureties on April 24, 1909, their joint and several liability upon such judgment was found by the court to be \$825.

[1] The trial court held that the creation of the office of copyist and the provision for the payment of such official violated the provision of the state Constitution prohibiting the increase of the compensation of a county officer during his term of office. Const. art. 11, § 9. This was in accord with the decisions. It is fixed and settled law in this state that, where at the beginning of an of-

ficer's term the statute allows him a gross sum to cover his compensation and all the expenses of his office, such emolument may not be directly increased by a statute allowing a larger sum nor indirectly by the creation of the office of a deputy to be paid by the county. *Dougherty v. Austin*, 94 Cal. 603, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; *Humiston v. Shaffer*, 145 Cal. 195, 78 Pac. 651; *Elder v. Garey*, 19 Cal. App. 776, 127 Pac. 826; *Hanson v. Underhill*, 12 Cal. App. 548, 107 Pac. 1016; *Applestill v. Gary*, 18 Cal. App. 387, 123 Pac. 228.

Where the statute provides a fixed salary for an officer and fixed salaries for deputies, all payable out of the county treasury, a subsequent law increasing the compensation of the deputies or their number will take effect at once. *Tulare County v. May*, 118 Cal. 304, 50 Pac. 427; *Newman v. Lester*, 11 Cal. App. 577, 105 Pac. 785. The facts of this case, however, do not bring it within the exception announced by the cases last cited. Indeed, the attempted creation of the office of copyist was exactly similar to the effort to provide additional deputies which the court considered in *Hanson v. Underhill*, *supra*. Calling the assistant "copyist" did not in any way change the rule. We are therefore forced to the conclusion, under the authorities, that the allowance of the claims of Smith as copyist was without authority.

[2] Appellant contends that there is no statutory provision for the recovery of money paid upon the warrants approved in good faith by an auditor. He denies that any such authority arose under section 4005b of the Political Code because that section authorizes the district attorney to institute suit against the person or persons in whose favor the warrant or warrants not authorized by law shall have been drawn, when such persons shall have received the money. It may be forcibly argued that section 4005b of the Political Code does apply to defendant Poe because in contemplation of law the money paid to his copyist was an increase of his compensation and therefore might be regarded as a payment to him. The section cited is not, however, the only statute which the plaintiff might invoke to sustain this action. The office of auditor is created by statute. The duty of the defendant as auditor was to refuse to sanction any illegal claim against the county. His official obligations were fixed by statute (section 4091 et seq. of the Pol. Code), and he might only issue warrants for debts or demands against the county which were authorized by law to be allowed to some person. Consequently a cause of action for a violation of his statutory duty was upon a liability created by statute within the meaning of section 338, subdivision 1, Code of Civil Procedure. *County of Sonoma v. Hall*, 132 Cal. 593, 62 Pac. 257, 312, 65 Pac. 12, 459; *Higby v. Calaveras County*, 18 Cal. 179; *People v. Van Ness*, 76 Cal. 124, 18 Pac. 139.



We have not overlooked the fact that this case presents features of great hardship. In nearly every case involving the same principles, a person appointed under a statute of doubtful constitutionality as applied to the deputies of incumbents was seeking to compel the county to pay his salary. It is to be regretted that the legality of the appointment by the defendant Poe of a copyist to assist him in his official capacity as recorder was not tested by appropriate proceeding immediately after said appointment was made. Unfortunately such course was not pursued, but the failure to test the question then and the consequent loss to Mr. Poe, who doubtless acted in good faith, does not alter the principles and precedents which were binding upon the learned trial judge and are equally binding upon us.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

# CHAMBERLAIN v. SOUTHERN CALIFORNIA EDISON CO. (L. A. 3189.)

(Supreme Court of California. March 28, 1914.)

## 1. MASTER AND SERVANT (§ 302\*)—SCOPE OF EMPLOYMENT.

L., an employé of defendant electric light and power company, owned an automobile which needed repairing, and defendant's general storekeeper directed the driver of one of its automobile trucks used in distributing supplies to go to L.'s residence with the truck and bring his automobile to defendant's shop for repairs and the driver, while doing so, negligently injured plaintiff. The driver was under the storekeeper's direction, but was also subject to the orders of the president, manager, or assistant general manager. After L.'s automobile was repaired at defendant's shop, a bill was rendered to him by defendant for the actual cost of the labor and material used, and was paid. *Held*, that the driver of defendant's truck was acting within the scope of his employment at the time, so as to make defendant liable for his negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.\*]

## 2. CORPORATIONS (§ 491\*)—LIABILITY FOR TORTS—ULTRA VIRES ACT.

Defendant cannot escape liability for plaintiff's injuries on the ground that it was acting beyond its powers and ordinary corporate purposes in having the automobile of its employé brought to its shop for repairs; the defense of ultra vires not being available in such a case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1902; Dec. Dig. § 491.\*]

## 3. CORPORATIONS (§ 492\*)—LIABILITY FOR TORTS—ULTRA VIRES ACTS.

A corporation is civilly liable for torts committed by its servant acting within the scope of his employment, though it did not authorize the particular act or ratify it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1908; Dec. Dig. § 492.\*]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Caleb Chamberlain against the Southern California Edison Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

H. H. Trowbridge, of Los Angeles, for appellant. Newman Jones, of Riverside, and Mark A. Somers, of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment in favor of plaintiff for \$2,000, awarded as damages for personal injuries.

The Southern California Edison Company is a corporation engaged in the business of manufacturing and distributing electricity for light, heat, and power. One of its employes, J. A. Lighthipe, owned an automobile which was in need of repairs. The general storekeeper of the corporation was W. T. Sterling, and J. G. Rosso was the driver of one of the company's automobile trucks used in distributing supplies. Rosso was under Sterling's direction, but was subject to orders also from the president, the general manager, or the assistant general manager. Sterling, the storekeeper, ordered Rosso, the chauffeur, to go to the residence of Lighthipe with the company's truck of which Rosso was the driver and to bring Lighthipe's motor car to the shop which the corporation maintained for the repair of its own motor vehicles. This order was obeyed and while Rosso was towing Lighthipe's automobile, Caleb Chamberlain was injured through the carelessness and negligence of Rosso. It was shown that Lighthipe's automobile was repaired at the company's shop, that a bill was rendered by the corporation and paid by Lighthipe, and that the charges so made and paid amounted to the actual cost to the company of the material and labor. Both the corporation and Lighthipe were made defendants in this suit, but upon motion of the plaintiff the action against the latter was dismissed, and judgment was entered against the Southern California Edison Company.

The sole attack of the appellant is upon that part of the findings which declare that the motor truck was in charge of a servant of the Southern California Edison Company at the time of the infliction of the injuries upon Chamberlain. In this behalf the assistant general manager of the corporation testified that he had not instructed Sterling to send for Lighthipe's automobile. It was not denied, however, that Sterling did give the order to Rosso, and there was no proof that some one higher in authority than the assistant general manager did not order the work to be done. The defendant's articles of incorporation were introduced in evidence, and attention is called to the fact that the repairing of automobiles is not one of the purposes for which it was organized.

[1] The contention of appellant is that Rosso was not engaged in his master's busi-

ness at the time of the infliction of the injuries upon plaintiff but was acting for Lighthipe. It is true that Rosso in the course of his examination said: "I was in charge of that machine but I was not exactly doing work for them, I was towing a machine for Lighthipe." But in almost the next breath he said: "I got my orders from W. T. Sterling, the general storekeeper of the Southern California Edison Company, the one I was employed under." Later in his examination Rosso admitted that Lighthipe had never spoken to him about the motor car. Consequently the court was justified in rejecting Rosso's conclusion that he was working for the owner of the vehicle which was being towed at a time when Rosso was acting under the orders of his superior in the defendant's employ, driving the defendant's motor truck and drawing pay from the defendant as its servant. According to the undisputed facts in the case the defendant was clearly liable. It makes no difference that Rosso's usual employment was the distribution of supplies. His business was to operate his motor truck under the orders of his superior, and that was exactly what he was doing at the moment when his carelessness caused the injury to plaintiff. The defense of *ultra vires* is untenable. If the defendant were a natural person and should order his servant to bring an automobile to his place of business, there would be no doubt of his liability for such a tort as this occurring during the time when his command was in process of execution. He could not justly defend upon the theory that he was a banker and not a blacksmith. It would make no difference if he intended to use the automobile, after repairing it, in transporting firearms across the Mexican border.

[2] Upon a like principle the defendant corporation may not escape liability for the torts of its servants, acting under its orders, upon the theory that it is not authorized to make repairs upon the instrumentality which caused the damage. To hold otherwise would be to give to an artificial person immunity not enjoyed by a natural one. A corporation acts through its officers and servants. When the plaintiff established the fact that the driver of the motor truck was a servant of the defendant acting under orders of one of its officers who had authority to direct him in his work, a *prima facie* case was established in favor of plaintiff. This condition was not changed by reason of the fact that the assistant general manager did not order the work to be done on Lighthipe's automobile. The fact remains that one having apparent authority gave the order, and no showing was made that this authority was not real—indeed, all of the circumstances, including the collection of the cost of repairs, point to the existence of an agreement between the corporation and its employé by which the latter's automobile was to be taken to the former's shop and

there to be put in proper condition. Whether such a contract was or was not beyond the granted powers of the corporation is immaterial. In either view the corporation would be responsible for torts committed by its servant. The rule is that actions like the one at bar, being founded not upon contract, but upon tort, the defense of *ultra vires* is not available. In an action arising *ex delicto* like this one, it makes no difference what sort of a contract the party causing the injury may have been performing when the injury was inflicted. *Central R. R. Co. & Banking Co. v. Smith*, 76 Ala. 582, 52 Am. Rep. 353; 10 Cyc. 1207, 1208.

[3] "Under the rule of respondeat superior a corporation is civilly liable for torts committed by its servant or agent while acting within the scope of his employment, although the corporation neither authorized the doing of the particular act nor ratified it after it was done." See 10 Cyc. 1205, and cases cited. In the case at bar the servant acted by authority, and the principal ratified his act by repairing, for a consideration, the motor car which he had taken to its shop.

Appellant's counsel cite certain cases in which owners of automobiles and other agencies have been held not to be liable for injuries inflicted by servants acting without authority. Eight of the cited decisions involve the principle that a chauffeur using his master's car on his own private business is not acting within the scope of his employment and that his tort is not imputable to the owner of the automobile. These cases are: *Lotz v. Hanlon*, 217 Pa. 340, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 593; *Steffen, Adm'r, v. McNaughton*, 142 Wis. 51, 124 N. W. 1016, 28 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227; *Jones v. Hoge*, 47 Wash. 664, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Daily v. Maxwell*, 152 Mo. App. 424, 133 S. W. 351; *Doran v. Thomsen*, 74 N. J. Law, 445, 66 Atl. 897; *Reynolds v. Buck*, 127 Iowa, 602, 103 N. W. 946. They have no application to the facts of this case, because in each of those cases there was an absence of authorization on the part of the owner for the use of the motor vehicle, while in the case before us the driver was not engaged upon his own private business. *Hartley v. Miller*, 165 Mich. 116, 130 N. W. 336, 33 L. R. A. (N. S.) 81, was a "borrowing" case, the injuries for which damages were sought having resulted from the negligent driving of one who had borrowed another man's automobile. The owner was properly held blameless. In *Clark v. Buckmobile Co.*, 107 App. Div. 121, 94 N. Y. Supp. 772, the evidence showed that an employé of the defendant corporation who had been absent from the city on his own private business telephoned from the

station on his return, asking another employé to call for him in a motor car belonging to their employer. The request was complied with, and on the return trip from the station plaintiff was injured because of the careless driving of the vehicle. It was held that a verdict in favor of the plaintiff was against the weight of the evidence because the men were not acting within the scope of their employment. The case of *Brown v. Jarvis Engineering Company*, 166 Mass. 76, 43 N. E. 1118, 82 L. R. A. 605, 55 Am. St. Rep. 382, was also very different from the one at bar. Several workmen under the supervision of a foreman and employed by the defendant, were engaged in laying certain brickwork in the basement of a building. A van containing heavy rolls of paper was backed up to the rear entrance of the building, and it became necessary for the defendant's foreman and bricklayers to cease the work upon which they had been engaged until the paper had been unloaded and rolled into the basement. Plaintiff was the driver of the van. Without his knowledge or request one of defendant's men went upon the drey for the purpose of assisting in the unloading of the paper and there set in motion one of the rolls, which fell upon plaintiff, injuring him severely. There was some testimony that the foreman had ordered his men to assist in unloading the wagon so that the bricklaying work would not be delayed too long. It was held that, even if he did give such order, the acts of the servants of defendant were not the necessary or natural or proper result of anything that they were employed to do. In the case at bar the towing of the automobile was the natural result of the order which Rosso had received from his superior. *Higgins v. Western Union Tel. Co.*, 156 N. Y. 76, 50 N. E. 500, 66 Am. St. Rep. 537, was a case in which the owner of a building was held not to be liable for injuries inflicted upon a mason by the carelessness of an operator of one of defendant's elevators. But in that case the conductor of the elevator, having suspended the work of carrying passengers, operated the elevator for the accommodation of the mason *under the latter's direction*, and while he was so doing the mason was injured through the conductor's negligence. The mere statement of the facts of that case shows that the discussion contained in the opinion there can have little value in this case, because of the totally different facts here involved.

The true rule is stated in the opinion in the case of *Moon v. Matthews*, 227 Pa. 493, 76 Atl. 219, 29 L. R. A. (N. S.) 865, 136 Am. St. Rep. 902. In that case it was contended that the chauffeur who had been driving the defendant's automobile was acting outside the scope of his employment at the time the plaintiff was struck by the car. Defendant testified that the accident occurred during his absence, and that he had forbidden the

chauffeur to take the car out of the garage while he (the owner) was away. It was shown, however, that the man was acting in obedience to the command of the defendant's sister, a member of his household. The court said in part: "It was shown that the automobile belonged to defendant, and at the time of the accident was being operated by his regular chauffeur, not upon any errand of his own, or to serve his own purposes, but in obedience to the order of a member of defendant's family. That the occupants of the car were friends of defendant, and guests of his sister, and the errand upon which the car was taken was entirely proper and fitting in itself. Under such circumstances, the burden was upon the defendant to show that the chauffeur was not acting within the scope of his employment, and upon the business for which he was employed by his master. The test is whether the act was done in the prosecution of the business in which the servant was employed to assist. If it was, the master is responsible. The fact that, while acting for the master, he may have disobeyed his commands, does not take the act out of the scope of his employment. *McClung v. Dearborne*, 134 Pa. 396 [19 Atl. 698, 8 L. R. A. 204, 19 Am. St. Rep. 706]." The reasoning in the opinion in the case of *Jessen v. Peterson, Nelson & Co.*, 18 Cal. App. 350, 123 Pac. 219, also supports the conclusions which we have reached.

The evidence abundantly sustains the finding which is attacked. The judgment is accordingly affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

# NATIONAL BANK OF CALIFORNIA v. MINER et al. (L. A. 3211.)

(Supreme Court of California. March 28, 1914.)

## 1. BANKS AND BANKING (§ 189\*)—CASHIER'S CHECK—MISTAKE—MUTUALITY.

A bank can rely on mistake as the defense to an action upon a cashier's check, even though the mistake was not a mutual one.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 729-732, 736; Dec. Dig. § 189.\*]

## 2. BANKS AND BANKING (§ 189\*)—CASHIER'S CHECK — FINDINGS — CONSTRUCTION — "SUPPOSITION."

A finding that the cashier of a bank gave a check pursuant to his supposition that the drawer of the check, in exchange for which the cashier's check was given, had a deposit with the bank is a finding that the cashier believed the drawer had sufficient money on deposit to meet the check; the word "supposition" being used as an equivalent of belief.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 729-732, 736; Dec. Dig. § 189.\*]

## 3. BANKS AND BANKING (§ 189\*)—CASHIER'S CHECK—ACTION.

Findings and evidence which show that a bank cashier issued a cashier's check in exchange for another check under the mistaken

belief that a stamp on such check was the approval stamp of a teller of the bank, and that, on discovering the mistake, immediate notice was given to the payee of the cashier's check that it was issued without consideration and by mistake, sufficiently show that the cashier's check would not have been issued if the bank had known that the drawer of the other check was not a depositor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 729-732, 736; Dec. Dig. § 189.\*]

#### 4. ESTOPPEL (§ 72\*) — PERSONS EQUALLY BLAMELESS.

Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by the act of a third person, he by whose negligence it happened must be the sufferer, does not prevent recovery of money paid or a check given by mistake, even though negligent, where the other party has not changed his position to his detriment.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 188; Dec. Dig. § 72.\*]

#### 5. BANKS AND BANKING (§ 189\*)—CASHIER'S CHECK—MISTAKE—WANT OF CONSIDERATION.

Plaintiff bank accepted from a debtor a check drawn by J. upon defendant bank, and gave the debtor a tentative credit upon its books. When J.'s check was presented to defendant bank, the cashier, mistakenly supposing that J. had sufficient funds to meet the check, issued a cashier's check, payable to the plaintiff bank, which thereupon gave the debtor absolute credit for the amount on its books but made no statement to him. The defendant bank discovered the mistake and notified the plaintiff bank thereof within an hour. *Held*, that the plaintiff bank had not parted with value or changed its position in reliance upon the cashier's check, and the defendant bank could therefore set up mistake and want of consideration as defenses.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 729-732, 736; Dec. Dig. § 189.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the National Bank of California against C. B. Miner, the First National Bank of Los Angeles, and others. Judgment for plaintiff, and defendant First National Bank of Los Angeles appeals. Reversed.

Flint, Gray & Barker, of Los Angeles, for appellant. Oscar A. Trippet, of Los Angeles, for respondent.

**HENSHAW, J.** This action was brought by the plaintiff to foreclose its pledge of certain securities, collateral obligations of the defendant Miner, who was a depositor, client, and debtor of the plaintiff bank. As affecting the First National Bank of Los Angeles, defendant, cross-complainant, and appellant herein, the plaintiff sought to recover \$2,970 upon a cashier's check drawn by defendant bank in favor of the plaintiff. The defense of the defendant bank was of nonliability growing out of lack of consideration and of a mistake noninjurious to the plaintiff, and which therefore appellant was entitled to rectify. The facts, in brief, are these: Miner had a commercial deposit in plaintiff's

bank and likewise owed it money upon an overdue promissory note. Upon a certain day he presented to the plaintiff bank for deposit to the credit of his account the check of one A. R. Johnson drawn in favor of himself upon appellant bank. A conditional credit was given by respondent bank, and the check was presented by the messenger of respondent bank to appellant bank for payment. The appellant bank's paying department is divided amongst a number of tellers and corresponding bookkeepers. The depositors are numbered alphabetically, and a certain number of them so arranged are assigned to teller 1, another alphabetical arrangement to teller 2, and so on; there being eight such divisions. In practice, when such a check is presented for payment, it is referred to the teller of the proper department, who "O. K.'s" it by a teller's stamp, which O. K. imports the declaration that the check is good, that the drawer is a depositor and has in the bank funds sufficient to meet it. With this teller's O. K. it is passed on to the draft teller, who in turn prepares the bank's check or draft and presents it to the cashier or assistant cashier for execution. In this case it appears that the check bore a stamp very similar to the O. K. stamp of paying teller No. 3. Coming into the hands of the draft teller, he was misled into believing that the stamp which it bore was the stamp of his bank's own proper teller, and so prepared the check executed by the assistant cashier to the respondent bank in payment of Johnson's check, and it was delivered to the respondent bank. Within an hour the error and mistake were discovered. Johnson was not a depositor in the bank and had no funds therein. The respondent bank was immediately notified, and the Johnson check was tendered to it with a demand for the return of appellant's check. The tender and demand were refused. The appellant bank, in turn, refused to pay the check issued under these circumstances, and this litigation followed.

These are the uncontroverted evidentiary facts, though the findings of fact are in some respects puzzling and confusing. Those findings are as follows: "That the cashier's check issued by the defendant First National Bank to the plaintiff was issued in payment of the check of said A. R. Johnson. That the said cashier's check issued by the First National Bank was not executed by mistake of said First National Bank, nor upon the erroneous supposition that said A. R. Johnson then and there was a depositor in said bank and had to his credit the sum of \$2,970. That said A. R. Johnson was not then and there a depositor of said defendant First National Bank and did not then and there have any account whatever with said defendant, and had no money whatever to his credit with said defendant. That said cashier's check of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

First National Bank was given to plaintiff pursuant to a supposition of the officers of said bank that said A. R. Johnson had a deposit with said bank. That after said cashier's check was so given by said First National Bank to plaintiff, on the same day, said First National Bank discovered its said error and notified plaintiff that said A. R. Johnson had no account with the said First National Bank, either at the time of the presentation of said check or thereafter, and had no moneys whatever to his credit in the bank of said defendant, and notified plaintiff that said cashier's check had been issued by and through an error and without any consideration whatever. That the said cashier's check was still in the possession of the plaintiff, when defendant so notified plaintiff. That the plaintiff did part with value and gave a consideration for said check of said A. R. Johnson and for said cashier's check so issued to the plaintiff by said defendant. That, after the receipt of said cashier's check, plaintiff gave to one Miner, the defendant herein, credit for the amount of said cashier's check in the account of said defendant Miner and credited the amount of said cashier's check of \$2,970 upon the promissory note of the said defendant Miner."

[1] It is not easy to reconcile a finding that the appellant's check was not executed by a mistake on its part, nor upon the erroneous supposition that Johnson was a depositor in the bank with a credit to his account sufficient to pay the check, with the next declaration that Johnson was not a depositor, had no money whatever to his credit in the bank, and that the bank's check "was given to plaintiff pursuant to a supposition of the officers of such bank that said A. R. Johnson had a deposit with said bank." It would appear that the court finds that the check was not issued upon an erroneous supposition of the existence of certain facts, while immediately thereafter it finds the check was issued "pursuant to a supposition" of the existence of material facts which did not in truth exist. If reconcilable at all, these findings can only be reconciled upon the theory that the contention here stoutly urged by respondent was that adopted by the court, namely, that there was no mistake because there was a lack of mutuality of mistake; or, in other words, that the appellant could not avail itself of its mistake because the mistake was not known to and shared by the respondent bank. But this, of course, is not the law applicable to a consideration such as this. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Palace Hardware Co. v. Smith*, 134 Cal. 381, 66 Pac. 474; *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149.

[2] We need not be at pains to follow respondent's counsel through the dictionaries to arrive at the meaning of the word "supposition," as used in the finding, nor after that to follow his argument that the appellant bank had no right to "suppose" any-

thing, and that the finding implies that it might have "supposed" he was a depositor, though of a trifling sum, and that there is no finding that any officer "supposed" he had money enough to pay the check. The manifest fact is that "supposition" is used as the equivalent of belief. We take it that no man, reasoning sanely, can, under the evidence and under these findings, say that the court meant other than to declare that the check was in fact issued under the belief of the officers of the bank that Johnson had a deposit with it sufficient to justify and demand the issuance of the check.

[3] Nor do we think there is any need of following respondent's argument to the effect that there is no evidence that the bank would not have paid this check regardless of whether Johnson was a depositor or not, and that there is no evidence to show what the belief of the officers dealing with this check was. The findings, as well as the evidence, show so plainly the nature of the mistake under which the check was issued, the notification to the respondent bank that it had been issued "through an error and without any consideration whatever," that it would be but a useless burdening of this opinion to discuss such propositions.

[4] Since the judgment cannot be supported for lack of mutuality of mistake, but one proposition remains, and the conflicting views of counsel upon it may be thus stated: Respondent asserts in effect that, by virtue of the execution and delivery of this check, the liability of the appellant bank became absolute; that by this act it foreclosed itself from any right to repudiate its obligation; and that, following the issuance of the check, respondent bank changed its condition and parted with value upon the faith of the assurance of the check of the appellant bank. To the first proposition little need be said. Extracts are taken from cases which, within their facts, are perfectly sound to the effect that, generally speaking, the certification of a check, or a cashier's check, imports absolute verity. But these cases are, one and all, in connection with facts where the certificate or check has been issued without mistake, and certain underlying equities are sought to be advanced in opposition to its payment, or they are cases where, by virtue of a change in the condition of the holder of the check, it would be inequitable to allow the bank either to repudiate it or to advance defenses against it. Generally speaking, one and all rest upon the application of the familiar maxim of equity that, where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. Civ. Code, § 3543.

The rule governing such transactions received extended consideration in *Crocker-Woolworth Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169. There, amongst other quota-

tions and citations of authority, the following language from the *National Bank of Commerce v. National Mechanics' Association*, 55 N. Y. 213, 14 Am. Rep. 232, is repeated: "It is now settled, both in England and in this state, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." And the matter is summed up by this court in the following language: "An examination of the cases will show that, in all well-considered adjudications, recognition, tacit or express, is given to these principles. Their ultimate analysis amounts to this: That plaintiff, even if negligent, may recover if his act has not changed the position of an innocent defendant to his detriment." In consideration, then, of the one important question in the case, namely, whether, as found by the court, the respondent did give a consideration and part with value after its reception of appellant's check, it may be said before reaching it that the finding that "it is not true that the check of said A. R. Johnson at the time of the presentation thereof to the First National Bank for payment was wholly valueless" is in direct opposition to the other findings made by the court, unless it be construed to be a finding that it was not wholly valueless because it was of value to the respondent in maintaining its unwarranted claim. If not absolutely a fictitious check, it was a check drawn without warrant of law or fact upon a bank where the drawer had no account whatsoever and no arrangement for its payment. The drawer's act under these circumstances was criminal (Pen. Code, § 476a), and it is indeed hard to conceive that the court could have meant that the check had any value to the unfortunate payee misled into honoring it.

[5] Coming thus to the principal point in the case, namely, that the respondent bank gave value and consideration after its receipt of appellant's check such as would make it inequitable to permit appellant bank to refuse payment, what the respondent bank actually did in this connection, and all that it did, after the receipt of the check and within the hour before its notification of the mistake, was to credit the amount of the check upon the overdue note of Miner which it held. It was but the exercise by the respondent bank of its right of application of the funds of a depositor who was at the same time its debtor. But even this was not an absolute and complete transaction in the sense that there was any statement and account settled between respondent bank and Miner. It was the mere bookkeeper's stroke of pen whereby Miner's commercial account was lessened by the transfer of a credit upon

his promissory note. It was not even regarded by the respondent bank as a perfected and completed transaction, for, in pleading this very transfer, respondent alleged that the "credit was only apparent, and not real, in that the said credit contained at said time the said check drawn on the First National Bank aforesaid for the sum of \$2,970." As an analysis of the pleading, this can only mean that, if respondent could hold the appellant bank to the payment of its check, it was a real credit, but, if it could not, it was but an apparent credit. But aside from this, and assuming that the changes upon the books of the respondent bank in the matter of Miner's account were made in perfect good faith and in the due course of business, the fact still remains that the respondent bank had not, upon the reception of the appellant bank's check and its bookkeeping transfers thereafter, changed its condition to its detriment in any legal sense which would justify its enforced collection of the check of the appellant bank. The entries which it thus made were all subject to its control and could be changed without injury or detriment to it to comport and comply with the truth. Its reception of the Miner check justified it in giving, as doubtless it did give, but a tentative credit on its books to Miner (*Nat. Gold Bank v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697; *Steinhart v. Nat. Bank*, 94 Cal. 362, 29 Pac. 717, 28 Am. St. Rep. 132); but because of its reception of appellant's check it parted with no value and changed its condition only by a stroke of its bookkeeper's pen which another stroke could restore. The defense of lack of consideration, therefore, was fully open to the appellant bank. *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; *Mann v. Nat. Bank*, 30 Kan. 412, 1 Pac. 579; *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96, 43 Am. Dec. 300; *Central Nat. Bank v. Valentine*, 18 Hun (N. Y.) 417. That defense is abundantly established.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

BRIMMER v. SALISBURY et al.  
(L. A. 3347.)

(Supreme Court of California. March 27, 1914.)

1. VENDOR AND PURCHASER (§ 6\*)—VALIDITY OF CONTRACT—TITLE OF VENDOR.

The fact that one who contracts to sell a piece of land is without title thereto at the time of making the contract does not make the contract void, in the absence of deceit, concealment, or false representations upon which a purchaser was entitled to rely.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 4, 5; Dec. Dig. § 6.\*]

## 2. VENDOR AND PURCHASER (§ 349\*)—REMEDIES OF PURCHASER—ACTION FOR RESCUE—COMPLAINT.

In an action by the purchaser for the breach of an executory contract for the sale of land, an averment merely that the vendor had, since the contract was entered into, sold the land to another, is not sufficient, since it does not negative the possibility that the rights of the purchaser were reserved in such sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1033, 1039-1042; Dec. Dig. § 349.\*]

## 3. VENDOR AND PURCHASER (§ 343\*)—BREACH OF CONTRACT—SALE BY VENDOR TO ANOTHER.

A vendor does not breach a contract for the sale of land by a sale thereof to another, subject to the rights of the purchaser under the contract; but, where the purchaser's rights are not protected, the sale amounts to a breach of the contract and a fraud upon the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1023-1029; Dec. Dig. § 343.\*]

## 4. BILLS AND NOTES (§ 539\*)—FINDINGS—WANT OF CONSIDERATION—FRAUD.

Where the defense to an action upon a promissory note was want of consideration and fraud, findings that the note was given by the purchasers of land under an executory contract of sale, in settlement of a claim against them for damages for failure to pay an installment due under the contract, that prior to the execution of the note the vendor had sold the property to another, and that he concealed that fact from the purchaser, do not support a judgment for the defendants, since they do not show whether the rights of the defendants were preserved in the sale, and, if they were preserved, the concealment of the sale did not amount to fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913, 1934; Dec. Dig. § 539.\*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by H. W. Brimmer against F. M. Salisbury and another. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

Samuel H. Pardue, of Los Angeles, for appellant. Conkling & Brown, of El Centro, for respondents.

**HENSHAW, J.** This appeal is from the judgment upon the judgment roll alone. Plaintiff brought his action to enforce the collection of a promissory note in the sum of \$500 executed by defendants. Defendants answered, alleging lack of consideration and fraud in the procurement of the instrument. The facts in this regard alleged and found by the court are the following: In 1908 defendants entered into an agreement with the plaintiff to purchase a piece of land owned by plaintiff in Imperial county for the sum of \$6,250, \$2,500 of which amount was payable May 1, 1909, the remainder at a later date in the same year. On the 27th day of April, 1909, "the plaintiff rescinded the said contract in toto and sold the said property to one A. A. Cox, without the knowledge or consent of the defendants

or either of them." Thereafter, on the 29th day of April, 1909, plaintiff came to defendants, who were unable to make the forthcoming payment of \$2,500 upon May 1st, and, concealing from them the fact that he had sold the property, threatened them that he would commence an action against them for specific enforcement of their contract to purchase if they did not make the payment when due. The defendants did not know and had no means of knowing that plaintiff had theretofore sold the property to Cox, and being unable to meet the payment of \$2,500 due on the 1st of May, and believing that their contract to this effect was in full force and effect and that plaintiff had a right to insist upon its due performance and would bring action against them to enforce such due performance, without any other consideration and so without any consideration at all, they executed to plaintiff in settlement of the controversy and for relinquishment of plaintiff's demands the note for \$500 which is the subject of this litigation. Under these findings the court concluded that plaintiff was not entitled to recover and gave judgment for defendants accordingly. Plaintiff has appealed, asserting that under the authorities and rule of decision in this state he was neither in default nor had he violated his contract by the conveyance of the property to Cox; that he was under no duty to advise defendants of this conveyance, and that therefore his failure to do so was not a concealment amounting to fraud; that the single condition imposed upon him by his contract was to make a good and sufficient deed to the defendants when the last payment was due and tendered; that this duty did not run concurrently and interdependently with defendants' obligation to pay the installment of \$2,500; that consequently defendants were in default, and he (plaintiff) was not (*Hill v. Grigsby*, 85 Cal. 650; Civ. Code, § 1439); that notwithstanding the conveyance of the property he had a legal right of action to enforce the installment payment of \$2,500; and that his forbearance so to do and his agreement with defendants to abandon the contract was a good and legal consideration for their promissory note.

Thus are presented the contentions upon this appeal, and for their proper consideration a review of our decisions becomes imperative. The first of these which may be mentioned is *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123. This case arising in a controversy over an executory contract for the sale of land where it was asserted that the vendor's title was radically defective, this court declared that it was not necessary that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. "An equitable estate in land, or a right to become the owner of the land, is as much

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the subject of sale as is the land itself. \* \* \* If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld. We cannot lose sight of the proposition that in this country, where values of land fluctuate rapidly, and where transfers are so frequent, it is very common for the purchaser of land to make a transfer before he has acquired the title. It would work great injustice to hold that no one could make a valid contract for the sale of land until he has himself become clothed with the absolute title." The opinion proceeds to say that it has been held that where the vendor enters into such a contract without any title or equity, and is a mere speculator, courts will refuse to enforce the contract at his instance and will rescind the agreement at the instance of the vendee, upon the ground that the contract was not made in good faith. But it points out that this rule has been questioned where no element of bad faith enters, and has in some courts been distinctly repudiated, as in *Dresel v. Jordan*, 104 Mass. 407. Continues the opinion: "It is held, also, that the vendee may maintain an action to rescind the agreement upon the ground that the vendor, at the time of entering into the agreement, knew that he could not make the conveyance, or fraudulently represented himself as the owner of the premises (*Innes v. Willis*, 48 N. Y. Super. Ct. 192); and that, if, subsequent to entering into the agreement, the vendor voluntarily puts it out of his power to complete the contract—as if he should sell the land to another pending the existence of the agreement—the vendee may treat the contract as rescinded, and bring his action for the deposit. *Burwell v. Jackson*, 9 N. Y. 535. In either of these cases the ground for the rescission is the fraud of the vendor, either at the time of entering into the contract or by his subsequent acts." A portion of this quotation has here been italicized for the important bearing which it has upon the consideration of our cases.

The next of these is *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320. That case was this: Miss Popplewell had entered into a written agreement with defendants for the purchase of certain land. The purchase price was \$1,250, which she was to pay in three equal installments, the first at the time of the making of the contract, the second one year thereafter, the third two years thereafter. She paid the first installment and no more. About five months after the last payment fell due, defendants, without offering Miss Popplewell a deed and demanding payment from her, conveyed the land for a valuable consideration to one Bryant. A year and a half thereafter Miss Popplewell assigned

her contract to plaintiff. Plaintiff then made no tender of the amount due on the contract, but commenced his action, contending that defendants by conveying the land had put it out of their power to comply with their agreement, and that consequently an offer of performance on the part of the plaintiff would be unavailing; that plaintiff was therefore at liberty to construe the contract as abandoned and to recover the first payment so made years before. A general demurrer to this complaint was sustained, and the appeal came before this court from the judgment which followed. There was necessarily, therefore, involved in the decision nothing more than the question of the sufficiency of the complaint—the question whether or not it stated a cause of action. It is declared that it was never intended in any of our cases to hold that a purchaser may upon his own default recover money paid by him when the vendor has not refused to complete the sale and the vendee still declines to do so, and, proceeds the opinion: "The conveyance by the vendor was not a breach of the contract. One may sell land which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." Here it is immediately to be noted that a vendor under an executory contract of sale who has title may part with it under two essentially different conditions. He may part with it to a third person, who, if he be not charged with knowledge of the previous executory contract, takes it freed from the obligations of that contract. Such would be the case were the executory contract of sale unrecorded. He may, however, part with his title, subject to the rights of the vendees under the executory contract of sale, and thus not put it beyond his reasonable power to make title to his vendees under the executory contract of sale when in due time title may be demanded of him. In the one case the conduct of the vendor may with propriety be termed a fraud upon the vendee, since he has parted with the title, and consequently with the security upon which his vendee was entitled to rely in the making of his installment payments, and after having done so he insists that these installment payments should be continued without any legal assurance to him that, at the time when the vendee is entitled to demand a deed, the vendor will be in a position to convey title. *Joyce v. Shafer* therefore must be read in connection with *Easton v. Montgomery*, and bearing in mind that *Joyce v. Shafer* was before the court upon demurrer the decision amounts to this, that a pleading



merely that during the life of such an executory contract of sale the vendor has parted with the title, is not sufficient to put the vendor in default or to show an abandonment by him of the contract. It must be further pleaded that the vendor did this without reserving and protecting his vendee's rights under the executory contract—allegations which did not appear in Joyce's complaint.

The next case is *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 259, 33 Pac. 848. The vendee under an executory contract of sale had failed to pay the installments, including the final settlement. Thereafter the vendor notified him to make the payments. He did not do so, and the vendor then sold the land to a third person. Shively sued to recover the money which he had paid, under the theory and allegation that the contract had been mutually rescinded. The opinion holds that the mere conveyance by the defendant did not amount to such rescission, but that the answer of defendant itself admits and declares such a rescission, and therefore Shively was entitled to his recovery.

*Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857, also came before this court upon the judgment after the sustaining of a general demurrer to the complaint. This also was the case of annual payments to be made under an executory contract for the sale of land, and a conveyance by the vendor during the life of it. The action was brought to recover the first installment paid and for damages. This court held that the mere allegation of a conveyance to a third party of the premises contracted to be sold, pending the contract and before the time of its completed performance, did not of itself allege a breach authorizing the purchaser to rescind. The complaint, containing only this allegation of a conveyance and failing to allege a repudiation of the contract or a refusal to carry it out or a parting with title under such conditions as that it could not be carried out, did not show a violation of the contract, and an allegation that the act of the defendant in conveying the land "put it absolutely without his power to perform the contract" was a mere legal conclusion improperly drawn from the fact of the conveyance itself. Herein the court said (quoting with approval from *Shively v. Semi-Tropic Land & Water Co.*, supra): "It does not necessarily follow from such transfer that defendant has placed it out of his power to comply with the terms of the contract. Such transfer creates no breach of the contract. Non constat, but plaintiff's rights were expressly reserved by its terms. \* \* \* Plaintiff is not entitled to recover the money paid until he shows the default of the defendant. This question was directly presented in *Joyce v. Shafer*, supra, and it was there held that a conveyance by the vendor was not a breach of the contract, and a demurrer was sustained to the complaint for

that reason. We are entirely satisfied with the principle laid down in that case."

*Hanson v. Fox*, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 182 Am. St. Rep. 72, was a demand made by the vendee under such an executory contract for an annulment of the contract upon the ground that at the time of entering into it the vendor (defendant) had no title, and it was held upon the authority of the cases above cited that, in the absence of fraud, a mere lack of title or incompleteness of title was not sufficient to justify the vendee in repudiating the contract, for the vendor was not under its terms obligated to convey a title until many months thereafter, and could not be put in default by a premature demand to that effect.

The case of *Backman v. Park*, 157 Cal. 608, 108 Pac. 686, 137 Am. St. Rep. 153, was the case of an executory contract of sale made by one not having title but agreeing to convey title within a stipulated time. She secured such title within the time and tendered the deed demanding payment. The defense was that the contract itself was fraudulent and void because at the time of its execution the plaintiff did not have the title. In support of this position *Easton v. Montgomery*, supra, was relied on. It was held that *Easton v. Montgomery* was not authority for the rule, that, while it was stated that such had been the ruling, the ruling was not affirmed by this court, and *Easton v. Montgomery* itself declares, as above stated, that the correctness of the rule has been both doubted and repudiated. It was held that under our decisions, in the absence of fraud or an equivalent mistake, an executory contract for the sale of land made by a vendor without title may be enforced by him upon the procurement and tender of title within the time limited by his contract.

The last of our cases is *Crane v. Ferrier-Brock Development Co.*, 164 Cal. 676, 180 Pac. 429. This was an action by the vendee under an executory contract for sale of land for a judgment of rescission. This case also came before the court upon general demurrer sustained to the complaint. The charge was that the vendor had induced the vendee to enter into the contract of sale by fraudulently misrepresenting that it had good title to the land, when in fact it had none, nor any interest whatsoever in the land. The judgment following the sustaining of the general demurrer was here reversed; this court saying that the allegations showed ground for rescission within the rule declared by all of our decisions. It is further declared that respondent's reliance upon *Joyce v. Shafer* is not well founded; that *Joyce v. Shafer* and other like cases involve a consideration of contracts made in good faith; and that the principle of law declared by them was that a vendee in default could not recover payments made under an executory contract until, by due offer of performance, he has relieved himself from default and placed his

vendor in default. The opinion in *Crane v. Ferrier-Brock Development Co.*, quotes the language of *Joyce v. Shafer* with a declaration that "this is a true statement of the law as applicable to a suit to rescind the contract, or to recover the money paid thereon after a rescission upon the ground that the vendor has himself broken the contract." This decision therefore holds, in accordance with all authorities, our own as well as those of other jurisdictions, that the vendee may rescind an executory contract for fraudulent misrepresentations of the vendor as to the matter of title upon which the vendee was justified in relying, and it further declares in accordance with our unbroken rule of decision that the mere allegation of a sale by the vendor of his title does not show such a breach as to justify the vendee in treating the contract as rescinded.

[1, 2] This completes the review of our decisions, and, to summarize, they hold, first, that a contract to sell a piece of land by one without title will not be held fraudulent and void by virtue of the mere fact that the vendor had not such title. Deceit, concealment, or false representations upon which a vendee was entitled to rely will of course avoid such a contract; but where the dealings between the parties are openhanded, and where, as is the general rule, the vendee is charged with the duty of acquiring his own knowledge of the condition of the vendor's title, such contracts will be enforced upon the theory that the vendee contracted with his eyes open and contracted not in the belief that the vendor did have title, but in the expectation that he would be able to make title. Second, our adjudications hold that, in an action for breach of contract based upon a conveyance by the vendor to a third person during the existence of such an executory contract of sale, the averment merely that the vendor has sold does not state a complete cause of action; the reason being given in *Easton v. Montgomery*, supra, and repeated and reaffirmed in the *Shively Case*, supra, and again in the *Garberino Case*, supra. The gist of the matter then is this, that a vendee is entitled to rely upon the security of the vendor's title, whatever it may be, in the making of his installment payments.

[3] A vendor will not have breached his contract if he shall have conveyed the property subject to or under circumstances such as do protect the rights of his vendee. But where his conveyance has been in disregard of those rights, under such circumstances that those rights are not protected, then this is a breach of contract and a fraud on the vendee. Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the

vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. Of the essence of the contract is the security to the vendee, in his payments, of the title which the vendor has, and, if the vendor parts with that title to the impairment or destruction of that security, the vendee may be heard justly to complain, and it is, of course, no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility and that such a vendor has not the slightest intention of so doing.

[4] Coming once more directly to the case at bar, the question of consideration or no consideration for the promissory note in suit will be answered as is answered the question: Were the vendees' rights under their executory contract protected under the sale which the plaintiff made? Herein it makes no difference whether the sale was made before or after the default of the vendees, and therefore the motion in this case to amend the record by striking from it a certified answer filed in the court of appeals need not be considered. The record here is not in such condition as to enable us to answer the question which we have propounded. The answer, as has been said, charged fraud and lack of consideration. The finding of the court is that the fraud was in the concealment from the defendants of the fact that plaintiff "had previously rescinded the contract and had sold the said property to the said Cox." As we have been at pains to show, the mere sale was not a rescission. The mere concealment could not therefore be a fraud. The vital question is whether the sale to Cox was made in disregard and in sacrifice of defendants' security growing out of plaintiff's ownership of the land. If the sale was so made, then unquestionably there was no consideration for the promissory note and plaintiff would not be entitled to recover. If, however, the sale was made with due regard to those rights, then, as plaintiff would have committed no breach of his contract and no fraud, it could not be said that there was no consideration under plaintiff's forbearance to sue and agreement to rescind the contract.

It appearing therefore that the judgment is not supported by the findings, it is reversed, with direction to the trial court to permit such amendments to the pleadings as will directly present the vital issue in the case, and to retry and determine the action under the law as here set forth.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.

**SUNSET LUMBER CO. v. BACHELDER**

et al. (S. F. 6851.)

(Supreme Court of California. March 27, 1914.)

**1. MECHANICS' LIENS (§ 182\*)—NOTICE—TIME TO FILE—STATUTORY PROVISIONS.**

Where, in a suit to foreclose a mechanic's lien, the undisputed evidence showed that the owner, directing the work himself without letting it out by contract, took possession of the building January 1, 1909, and continuously lived therein, and that no work was done on the building from January 1, 1909, until some time in April following, a finding that there was no cessation of labor on the building for 30 consecutive days between January 1, 1909, and December 11 following, when the building was fully completed, was contrary to the evidence, and under Code Civ. Proc. § 1187, as existing in 1909, the occupation of the building by the owner and the cessation of work thereon for 30 consecutive days set the time running for the constructive completion of the building, and controlled the time within which a materialman must file his claim for lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 182.\*]

**2. MORTGAGES (§ 151\*)—PRIORITIES—MECHANIC'S LIEN.**

Where a materialman's lien was not filed within the time prescribed by Code Civ. Proc. § 1187, as existing in 1909, a mortgage, executed by the owner after the materialman had begun to furnish material, was paramount to any lien in favor of the materialman.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 307, 309-311, 314-329, 332-336; Dec. Dig. § 151.\*]

**3. APPEAL AND ERROR (§ 164\*)—RIGHT OF REVIEW—ESTOPPEL.**

Where a mortgagee, asserting priority for his mortgage over a mechanic's lien, appealed from so much of the decree foreclosing the lien and the mortgage as gave the lien priority, the mortgagee, compelled to purchase at the foreclosure sale after his appeal to protect his interests, was not thereby estopped from prosecuting the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 992-994; Dec. Dig. § 164.\*]

Department 1. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action to foreclose a materialman's lien, by the Sunset Lumber Company against T. F. Bachelder and others. There was a judgment for the foreclosure of the lien and of the mortgage to defendant James Rankin, and declaring the lien superior to the mortgage, and defendant Rankin appeals. Reversed with directions.

Walter E. Rode, of Oakland, for appellant. C. L. Colvin, of Oakland, for respondent.

SHAW, J. Plaintiff began an action to foreclose a lien on a house and lot belonging to the defendant T. F. Bachelder, for the price of materials furnished by it to Bachelder for use in the construction of said house, amounting to \$776.67. James Rankin filed a cross-complaint to foreclose a mortgage for \$3,000 on the premises. The court gave judg-

ment for the foreclosure of the lien, and the mortgage for the full amount of each, but declared that the lien of plaintiff was prior and superior to that of Rankin's mortgage. Rankin appeals from that part of the judgment which declares that the plaintiff's lien is paramount to his own, and directing its payment in preference to his own out of the proceeds of the foreclosure sale.

Bachelder began the erection of the house in August, 1908. He directed the work himself, and did not let it out by contract. On December 31, 1908, there was a cessation of the work on the building, and on the next day, January 1, 1909, Bachelder and his family moved into it, and have ever since resided in it. The plaintiff furnished material prior to December 31, 1908, amounting to \$876.67, of which \$100 was paid. Afterwards, in April, 1909, plaintiff delivered other lumber for use in the house at \$93.70, which was paid in cash, and in July, 1909, additional lumber to the amount of \$124.90, which also was paid in cash at the time.

The complaint alleged that the building was fully completed on December 11, 1909, that its claim of lien was filed for record on March 11, 1910, exactly 90 days thereafter, and that no notice of completion was ever filed for record. The mortgage to Rankin was executed by Bachelder on March 9, 1909, and was duly recorded on March 12, 1909. The answer of Rankin denies that the building was not completed until December 11, 1909, and alleges that it was fully completed on December 31, 1908, and that it was then and ever since has been occupied and used by Bachelder and his wife; that there was at that time a cessation of labor on the building, which continued for more than 80 days thereafter, and for more than 120 days prior to the time of the filing of plaintiff's claim of lien on March 11, 1910.

[1] The findings declare that "there was no cessation of labor upon said building for the period of 30 consecutive days between the 1st day of January, 1909, and the 11th day of December, 1909." This finding is contrary to the undisputed evidence in the case. Bachelder and his son testified that they lived in the house from and after January 1, 1909, and that there was no work done upon the building from that date until some time in April, 1909. Bachelder fixes the date as April 21, 1909. During this time a little work was done in fixing up the yard and putting up some fences, but none at all upon the building. It is the cessation of work upon the building for which the material was furnished, together with its occupation or use by the owner, that sets the time running for the constructive completion of such building, under section 1187 of the Code of Civil Procedure, as that section read in 1909. *Robison v. Mitchell*, 159 Cal. 588, 114 Pac. 984. We must therefore consider the rights of the

parties as controlled by the fact that the owner's occupation and use of the house began on January 1, 1909, and that there was a cessation of labor thereon from December 31, 1908, until after April 1, 1909.

[2] Under the provision of said section 1187, and the decisions of this court construing it, it is clear that the lien of the plaintiff was filed too late, and that it is not superior to that of Rankin's mortgage, if indeed it exists at all. The section provides that "in all cases the occupation or use of a building, \* \* \* by the owner, \* \* \* and cessation from labor for thirty days upon any contract, or upon any building, \* \* \* shall be deemed equivalent to a completion thereof for all purposes of this chapter"; that "within forty days after cessation from labor upon any unfinished contract, or upon any unfinished building" the owner must file for record a verified notice, stating therein the date on which such cessation actually occurred; that in case he neglects to do so he and all persons claiming an interest in the property shall be estopped, in any proceeding to foreclose a lien under that chapter, from maintaining that such claim of lien was not filed in time, "provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building." With regard to the time within which claims of lien may be filed by other than the original contractor, the section provides that such claim of lien must be filed after completion of the building and within 80 days after the notice of completion or cessation of labor is filed. In making the foregoing quotations we have transposed the phrases of the section so as to place those relating to the same subject in their proper connection, and thereby make the meaning clearer.

In *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167, we had this part of the section under consideration upon a statement of facts similar to that existing here. In that case the cessation of labor occurred in November, 1897, and the claim of lien was not filed until the following April, more than 120 days thereafter. No notice of completion or cessation of labor was ever filed. Alluding to the fact that no notice of cessation of labor was ever filed, the court said that the building was deemed completed for the purpose of filing liens by all claimants at the expiration of 30 days after the actual cessation of labor, and proceeded to say: "Ninety days was thereafter allowed in which to file and record the claim of lien, and the claim, not having been filed within the 90 days, was too late. It is claimed that the effect of the failure of the owner to file and record the notice of cessation of labor was to indefinitely postpone the time within which the claim of lien could be filed. We do not so construe the section. After stating that the owner failing to give the notice shall be estopped from maintain-

ing a defense on the ground that the lien was not filed in the time provided for in the chapter, it is expressly provided 'that in any event all claims of lien must be filed within ninety days after the completion of said building.' The statute then provides what is equivalent to and shall be deemed completion. The proviso should be read in connection with, and as a part of, the sentence in regard to the owner being estopped to claim that the lien was not filed in time. This construction gives effect to and makes all parts of the section consistent. It enlarges the time of 30 days, formerly given the materialman in which to file his claim of lien, and gives him 30 days after the filing of notice of cessation of labor by the owner, or, in case the owner does not file such notice, then 120 days after such cessation from labor. The construction contended for by the plaintiff would prolong the time in which a claim of lien could be filed for years, in case the owner failed to file and record the notice. Such could not have been the intention of the Legislature." This reasoning meets with our approval, and it is decisive of the case now before the court. It is not necessary here to determine whether or not any lien existed in favor of the plaintiff as against the defendant Bacheider. Judgment was given declaring and foreclosing such lien, and Bacheider has not appealed. The only part of the judgment appealed from by the appellant is that declaring the priority of the liens, and directing the order of payment. A reversal of that part of the judgment will not affect the other portion of the judgment declaring the lien of the plaintiff, but it will give the appellant the relief for which he asks, namely, that of declaring that his mortgage is paramount to any lien which may exist in favor of the plaintiff on the premises.

[3] The notice of appeal herein was filed on May 25, 1912. The bill of exceptions recites that on May 27, 1912, at the sole direction of plaintiff, and not at the request or direction of Rankin, said property was sold by a commissioner under the decree, and that at said sale plaintiff bid \$3,700, and that Rankin thereupon bid \$3,750 and became the purchaser thereof for said sum; that at the demand of the commissioner Rankin paid the amount necessary to satisfy the plaintiff's lien and the costs, and was given credit for the balance of the purchase money on his own mortgage debt. The plaintiff claims that by this proceeding Rankin has accepted the benefits of the judgment foreclosing his mortgage, and that thereby he is estopped from prosecuting this appeal. The claim is not a tenable one. The foreclosure sale was not at the instance of Rankin. It took place two days after his appeal, and was made upon the demand of the plaintiff. In order to protect his own interests, in the absence of a stay of proceedings, Rankin was compelled to appear at the foreclosure sale and

make such bid as might be necessary to make the property bring its reasonable value. The case is governed by the same principles as where a defendant against whom a judgment is rendered has appealed after execution has been taken out and enforced against him. In such cases the rule is said to be that "a forced payment by execution sale against a nonconsenting judgment debtor cannot be held to abridge any of his rights upon or under appeal." *Vermont Marble Co. v. Black*, 123 Cal. 28, 55 Pac. 590; *Kenney v. Parke*, 120 Cal. 24, 52 Pac. 40; *Warner Bros. Co. v. Freud*, 131 Cal. 639, 63 Pac. 1017, 82 Am. St. Rep. 400. The same principle applies here. The defendant Rankin was compelled to submit to the sale and protect his interest by bidding thereat, and he is not thereby estopped from availing himself of an appeal from the part of the judgment which is to his prejudice, and upon the reversal of which the remaining parts of the judgment will stand unaffected. If, as appears from the recital in the bill of exceptions, Rankin has been compelled to pay a portion of the claim of plaintiff, by reason of the enforcement of the part of the judgment from which he has appealed, and which is now reversed, he will have his remedy, as provided in section 957, Code of Civil Procedure, by action against the plaintiff.

The part of the judgment appealed from is reversed. The court below is directed to retry the issue between the plaintiff and the defendant Rankin as to cessation of labor on the building for 30 days between the 1st day of January, 1909, and the 11th day of December, 1909, and to make a new finding thereon. If it finds that there was such 30-day cessation of labor, it will enter a supplementary judgment that the lien of the defendant, Rankin, upon the premises as hereinbefore adjudged, is prior and superior to the claim and lien of the plaintiff hereinbefore adjudged, and that Rankin is entitled to have his said mortgage debt and costs paid out of the proceeds of any sale under the judgment before any part of such proceeds is paid or applied upon the claim of said plaintiff. If it shall find that there was no cessation of labor on said building for 30 days during that period, it shall enter judgment for the plaintiff against Rankin for his costs upon said trial.

We concur: SLOSS, J.; ANGELLOTTI, J.

#### WEBBER v. SMITH. (Civ. 1463.)

(District Court of Appeal, Second District, California. Feb. 18, 1914.)

#### 1. EVIDENCE (§ 441\*)—PAROL EVIDENCE AFFECTING WRITINGS — CONTEMPORANEOUS ORAL AGREEMENT.

Where plaintiff executed to defendant a bill of sale conveying the tangible property used by him on a milk route, evidence that there was a contemporaneous oral agreement, whereby the

defendant was to purchase the good will of the business for an additional sum, is not inadmissible, in a suit therefor, as varying the contract contained in the bill of sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

#### 2. CONTRACTS (§ 32\*) — REQUISITES — AGREEMENTS TO BE REDUCED TO WRITING.

The fact that it was the intention of the parties to reduce an agreement for the sale of the good will of a business to writing, which intention was never carried out, does not affect the validity of that agreement, nor show that it was not a completed transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 159; Dec. Dig. § 32.\*]

#### 3. SALES (§ 409\*)—REMEDIES OF SELLER—ACTION—AGREEMENT TO GIVE NOTE.

Where a buyer agrees to execute a note for the purchase price of the good will of a business, but later repudiates his agreement, and refuses to execute the note, the seller is entitled to recover the amount immediately, even though there was no evidence as to the date when the note was to mature.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1160; Dec. Dig. § 409.\*]

#### 4. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

A verdict based upon conflicting evidence will not be disturbed on appeal, although a verdict for the opposite party would have been amply supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Superior Court, Los Angeles County; John L. Childs, Judge.

Action by R. W. Webber against Albert Hatcher Smith. Judgment for the plaintiff, and defendant appeals. Affirmed.

G. A. Gibbs, of Pasadena, for appellant.  
A. Lincoln Rowland, of Pasadena, for respondent.

JAMES, J. Appeal from a judgment entered against defendant. The action was brought to recover, first, an amount of money alleged to be owing to plaintiff from defendant as the purchase price of the good will represented by a milk route. There was a second cause of action, which it is not material to take notice of, as there is no controversy over the correctness of the adjustment of the matters concerned therein. Plaintiff testified that he sold to the defendant the equipment and business connected with his milk route in the city of Pasadena for the sum of \$4,000. A bill of sale was proved to have been made which covered all of the tangible property, made up of automobile delivery wagons and a truck, milk bottles, etc.; the price fixed as the consideration therefor being the total amount of \$2,625. Plaintiff testified that the difference between the amount represented in the bill of sale and the \$4,000 was to be covered by a promissory note of defendant for the sum of \$1,000, and the balance to be paid in cash. He testified that at the time the bill of sale was made there was some talk about

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

drawing a contract covering the sale of the milk route, and that defendant said that he did not think he could word such a contract right that evening, "but, if I could do so, we would fix it up at that time; I told him that I didn't think that I could word it right, and that we would carry it over until another time." This promissory note was not given. It was agreed as a part of the same transaction that the plaintiff should be employed by the defendant as foreman at a salary of \$125 per month, and pursuant to this employment he continued to deliver milk over the same route that he had theretofore managed. The defendant, when settlement was demanded of him at a later date, denied that he had ever purchased the milk route from plaintiff. The plaintiff, prior to the making of the bill of sale, had been indebted to the defendant for a large amount of milk furnished by the latter from month to month, and which charges he was unable to meet. It was because of his inability to pay his debts that the defendant took over the delivery equipment. The amount mentioned in the bill of sale was about the amount of indebtedness that was canceled by the transferring of the property therein described. The jury sitting at the trial returned a verdict in favor of plaintiff for the sum of \$1,000, which was based upon the claim of the plaintiff as to the agreement of defendant to pay him for his milk route.

[1, 2] It is contended on behalf of appellant that, as there was a writing (meaning the bill of sale) which expressed the agreement of the parties as to the sale and purchase of the delivery equipment property, the writing is presumed to include all of the matters agreed upon between the parties. It may be noted here that there was no objection made to the introduction of evidence tending to show an oral agreement in addition to and outside of that expressed by the writing, covering the matter of the sale of the milk route as separate from the delivery equipment. And even though such objection had been made, and the point thus preserved, the rule adverted to would not be applicable, because the subjects dealt with in the bill of sale were distinct and separate from that about which it was claimed an oral agreement had been made. The bill of sale specified and covered the tangible property. The intangible property was, according to plaintiff's testimony, the subject of a separate agreement which it was the intention of the parties to express in writing, but which was not reduced to that form. The mere fact that it had been the intention to make a writing covering the conditions of the sale of the milk route, and that such writing had never been made, would not affect the validity of the contract as it was represented to have been made by the plaintiff, nor entitle it to be viewed in any other light

than that of a completed transaction, except as to the execution of it.

[3] Plaintiff's testimony was further to the effect that a promissory note was to be given representing \$1,000 of the balance which was to be paid to him by defendant. It does not appear that anything was said as to when this note was to mature. The defendant, at a date more than a month subsequent to the time of the alleged purchase, sold and disposed of all of the equipment purchased by him from the plaintiff, and the purchaser thereof appropriated the milk route which had formerly been the property of the plaintiff. To be sure, it was testified that this route was not pretended to be sold by the defendant to the purchaser of the equipment; but the fact was that they did appropriate it, and there was some testimony tending to show that it was considered as accompanying the sale of the other property. Whether the promissory note which plaintiff testified defendant agreed to execute was to have been made payable on demand, or within a reasonable time after the date of the main transaction, becomes immaterial because, in either event, the condition was satisfied before this action was brought; and it may be added that under such circumstances, where the defendant failed and refused to execute the note by repudiating the alleged obligation which it was to cover, plaintiff would have been entitled to enforce his demand immediately upon such repudiation.

[4] The case presented is one where the jury was called upon to formulate a verdict based upon conflicting testimony. While it does appear by way of direct testimony and evidence of circumstances that, had the verdict been in favor of defendant, it would have been supported by abundant proof, still it is not for this court to review the questions of fact. The jury's verdict as to such matters is final and conclusive.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

# WESTERN IMPLEMENT CO. v. BLODGETT. (Civ. 1400.)

(District Court of Appeal, Second District, California. Feb. 14, 1914.)

## 1. PLEADING (§ 36\*)—ADMISSIONS.

Where plaintiff, suing for a sum due on account of a sale by defendant of merchandise, established a prima facie case, defendant, who admitted in his answer that a certain sum was due, could not complain of a finding that the amount admitted was due.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

## 2. SALES (§ 442\*)—BREACH OF WARRANTY—DAMAGES.

Where a buyer of merchandise for resale, sold the merchandise to his successor in business, and received full market price, he could

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not recover any damage, though there was a warranty and a breach thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.\*]

Appeal from Superior Court, Orange County; Charles Wellborn, Judge.

Action by the Western Implement Company against V. B. Blodgett. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Scarborough & Forgy, of Santa Ana, for appellant. Kemper B. Campbell and Frank B. Doherty, both of Los Angeles, for respondent.

**JAMES, J.** This was an action brought to recover the sum of \$952.33, alleged as due from defendant to plaintiff on account of the sale of a certain lot of merchandise. The court rendered judgment in favor of the plaintiff for the sum of \$978.30, with interest. This appeal was taken from that judgment, and from an order denying defendant's motion for a new trial.

Defendant in the year 1909 was engaged in the business of a seller of farming implements at the city of Santa Ana. Through the representative of plaintiff company, he ordered a lot of implements, which lot contained 27 plows of a certain kind, his agreement being to pay 5 per cent. over and above the price at which the implements were invoiced to plaintiff by the eastern manufacturers. The defendant, in his answer, after denying the general allegations of plaintiff's complaint, alleged that the purchase was made upon the terms just stated, and further alleged that the plaintiff "agreed to give to said defendant a copy of the invoice, showing the cost price of said goods to said plaintiff, but that said plaintiff has never delivered to said defendant said invoice." This allegation then followed: "But that said defendant denies that said invoice price to plaintiff, plus the sum of 5 per cent., amounts to the sum of \$1,797.03, or any other sum in excess of the sum of \$1,400." By way of alleged cross-complaint, it was set up that the plows agreed to be furnished were furnished under a representation and guaranty of plaintiff that they would be adapted to the particular needs of the farmers of Orange county, where the soil was very heavy, and that the plows would turn such soil satisfactorily and make a furrow of the depth desired. It was alleged that the plows would not so operate, and that the defendant was unable to sell all of them, and that he was damaged in the sum of \$400. The trial judge in the findings of fact determined that the amount of the invoice price, plus 5 per cent., was the sum of \$1,400, as admitted in the answer of the defendant, and found against the claim of warranty as alleged. The evidence showed that a demand had been made, prior to the suit being brought, for payment of the sum of \$1,737.49, that being the amount claimed by

plaintiff to be due, and also showed that after much negotiation had occurred between the plaintiff and defendant and his counsel, defendant made payments in the sum of \$844.70, which sum, deducted from the invoice price admitted by defendant, left remaining the amount for which judgment was entered.

[1] It is claimed that the evidence was insufficient to warrant the court in fixing the amount of the invoice price as the findings determined it to be; but the answer to that contention is that, while plaintiff offered some evidence showing the invoice price to be of a greater amount than that allowed it by the court, the trial judge based his judgment upon the sum which defendant by his answer admitted to be true. Of course, it was first necessary that the plaintiff should, under the general denial contained in the answer, make out a prima facie case, but this it did do quite clearly, and, under the condition of the pleading as referred to herein, defendant was not in a position to complain of the finding as to the amount fixed as owing by him.

[2] And it may also be said that no damage was shown to have been caused to defendant by reason of any alleged breach of warranty. Defendant testified that he first sold several of the plows, and that they failed to give satisfactory service, and that he was unable to make sale of the remainder at retail. He testified further, however, that he did sell all of the plows later, along with his stock of merchandise, to a man who became his successor in the implement business. The burden was upon defendant to show, both the making of the warranty, its breach and resulting damage. For aught that appeared in evidence, he may have received the full market price for all of the plows. Therefore, even though it be conceded that the evidence tended to show the making of the warranty as alleged, in opposition to the finding to the contrary, no prejudice could have resulted, for a different finding as to that fact would not have changed the judgment.

A very careful examination of the entire record compels the conclusion that none of the alleged errors urged by appellant possesses substantial merit.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

HUNT v. MANNING et al., Board of Sup'rs of Los Angeles County, et al.  
(Civ. 1317.)

(District Court of Appeal, Second District, California. Feb. 17, 1914.)

1. STATUTES (§ 123\*)—TITLE—SUFFICIENCY.

The title of St. 1907, p. 806, entitled "An act to provide for work upon the public roads \* \* \* not within the territory of incorporated cities or towns; for the incidental establishment of grades thereof; \* \* \* for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

construction therein or thereon of sidewalks; \* \* \* for the issue of bonds representing the cost and expenses thereof; for a special fund derived in part from the county road fund and in part from a special assessment on a district, and for the establishment of such districts"—is sufficient, within Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be expressed in the title, to justify provisions conferring authority to grade, or regrade to official grade, plank or replank, pave or repave, macadamize or remacadamize, gravel or regravell, pile or repile, cap or recap, oil or reoil any portion of streets not within any incorporated city or town, because, though not mentioned in the title, they are all germane to the general subject expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.\*]

**2. CONSTITUTIONAL LAW (§ 48\*)—VALIDITY OF STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.**

No part of a statute will be declared void where, by applying a reasonable construction, it may be upheld.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**3. STATUTES (§ 211\*)—TITLE—CONSTRUCTION.**

The rule of ejusdem generis that, where general and special terms are employed, all relating to the same things, the special terms limit the general ones is inapplicable in construing the title of an act, and the general words of a title are not limited by the enumeration of specific things following, but the specific enumeration merely amplifies the meaning of the general clause.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 211.\*]

**4. MUNICIPAL CORPORATIONS (§ 408\*)—VALIDITY—DEFINITENESS—STREET IMPROVEMENTS—ASSESSMENT DISTRICTS.**

A statute which authorizes street improvements at the cost of property benefited within assessment districts need not, to be valid, specifically provide that in determining the boundaries of an assessment district only property which will be benefited can be included, but the power to specifically tax can only be exercised on the theory that benefits will accrue to the property assessed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1005, 1006, 1183; Dec. Dig. § 408.\*]

**5. EVIDENCE (§ 83\*)—OFFICIAL ACTS—ASSESSMENT DISTRICTS—ASSESSMENT OF BENEFITS—VALIDITY.**

Where the power to specially tax property benefited for the cost of a street improvement is conferred on public officers, the presumption of good faith on their part in levying the tax will be indulged in, and the court will assume that the officers properly considered and determined that all property within an established assessment district will receive benefits from the improvement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

**6. EMINENT DOMAIN (§ 271\*)—REMEDY OF PROPERTY OWNER—IMPROVEMENTS—DAMAGES—RECOVERY.**

An owner of land abutting on a street which is improved may recover, in an action therefor, damages sustained by him by reason of the improvement.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.\*]

**7. MUNICIPAL CORPORATIONS (§ 339\*)—STREET IMPROVEMENTS—CONTRACTS—STIPULATIONS—VALIDITY.**

A provision in a street improvement contract that when, in the opinion of the engineer

it is necessary to waste excavated material outside of the lines of the streets, the contractor shall move the waste to places outside the street, and spread the same in a workmanlike manner, merely requires that waste material shall be deposited in a convenient place, and left in a reasonably level condition, and does not render the contract invalid on the ground that it will materially increase the cost of the work, and thereby influence bidders to fix the cost at a higher amount than they otherwise would.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 868, 870-873; Dec. Dig. § 339.\*]

**8. MUNICIPAL CORPORATIONS (§ 339\*)—STREET IMPROVEMENTS—CONTRACTS—STIPULATIONS—VALIDITY.**

The provision in a street improvement contract that employes of a contractor, who shall fail to perform their work in accordance with the specifications, shall be discharged does not invalidate the contract on the ground that it injects an element of uncertainty into the performance of the work, and thereby prevents bidders from bidding intelligently, or increases the cost of the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 868, 870-873; Dec. Dig. § 339.\*]

Appeal from Superior Court, Los Angeles County; Fred V. Wood, Judge.

Action by W. J. Hunt against C. D. Manning and others, constituting the Board of Supervisors of Los Angeles County, and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

A. J. Sherer and Arthur G. Baker, both of Los Angeles, for appellant. J. D. Fredericks, A. J. Hill, B. C. Hanna, and Robert Young, all of Los Angeles, for respondents.

**JAMES, J.** Proceedings were taken by the board of supervisors of Los Angeles county for the improvement of certain streets lying outside of incorporated cities and towns. A contract was made with respondent Gentry for the doing of the work, which work was to include the construction of cement sidewalks, curbs, and gutters and the grading and graveling of the streets mentioned in the contract. Appellant, as a resident of and an owner of real property within the improvement or assessment district created, brought this action to prevent the contractor from proceeding with the work and to restrain the county treasurer from issuing bonds to cover the cost thereof. Judgment, after trial had, was in favor of defendants. The appeal is taken from that judgment, and from an order made denying plaintiff's motion for a new trial. The facts were stipulated, and certain questions of law are presented for consideration.

The proceedings, the validity of which is called into question, were taken under an act of the Legislature entitled: "An act to provide for work upon the public roads, streets, avenues, boulevards, lanes and alleys not within the territory of incorporated cities or towns; for the incidental estab-



ishment of grades thereof; for the construction therein or thereon of sidewalks, sewers, manholes, bridges, cesspools, gutters, tunnels, curbing and crosswalks; for the issue of bonds representing the cost and expenses thereof; for a special fund derived in part from the county road fund and in part by special assessment upon a district, and for the establishment of such districts." Stats. 1907, p. 806. In the body of the act it is provided that authority is given to the board of supervisors of every county in the state "to grade or regrade to the official grade, plank or replank, pave or repave, macadamize or remacadamize, gravel or regravell, pile or repile, cap or recap, oil or reoil the whole or any portion of roads, streets, avenues, boulevards, lanes or alleys so far as not within the territory of any incorporated city or town, \* \* \* and to construct therein or thereon sidewalks, sewers, manholes, culverts, bridges, cesspools, gutters, tunnels, curbing and crosswalks. \* \* \*

[1] The first contention made is that the title of the act does not fulfill the requirements of section 24, art. 4, of the Constitution, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title. \* \* \*" Our Supreme Court has considered the reason underlying the insertion of this provision in the Constitution, and has said that the purpose was to prevent legislative abuses, or the passage of acts bearing misleading and deceitful titles, which give no indication of the matters contained therein. *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014. In the opinion filed in that case a quotation is made with approval from a federal court decision, where it is declared that such a provision in a constitution was never intended to prevent a legislature from treating all the various branches of the same general subject in one law, or from inserting in a single act all the legislation germane to the general subject. In *Hellman v. Shoulters*, 114 Cal. 138, 44 Pac. 915, 45 Pac. 1057, it was determined that an amendment to the Vrooman street act (St. 1885, p. 160), which added provisions respecting the issuance of bonds, treated of purposes germane to the general subject of street improvement therein provided for, and that the title to the principal act, which was expressed in general terms, sufficiently defined the objects to be accomplished, including those covered by the amendment. The matters of oiling and paving the surface of streets, etc., while not specifically mentioned in the title of the act here in question, are strictly germane to the general subject of the act as first expressed in the title.

[2, 3] The further question is argued as to whether, because the title of the act, after first declaring the general subject to be treated of, enumerates certain specific things as being included within the purpose of the

law, the words giving general scope to the act are limited by the purposes which are more particularly stated. Keeping in mind the rule that the legislative intent is to be given full effect, and no part of an act declared void where, by applying a reasonable construction, it may be upheld, it would seem a fair interpretation to apply here to say that the terms of particular description contained in the title are used in amplification of the meaning of the general clause, and not in restriction or limitation of it. The rule formulated under the doctrine of "ejusdem generis" is not violated by this construction. That rule merely requires that where general and special terms of definition are employed, all relating to the same things, the special terms limit and make certain the general ones. This rule has not been held to be properly applicable in a strict sense where a public statute is being construed, and for stronger reason it should not be held applicable in construing the mere title to an act. The title is intended only to indicate the purpose of the legislation which the act following it embraces, and, as has been just expressed, the effort of the courts must be to give such a construction to legislative enactments as will make them effective and not nullify them. The Missouri appellate court, in *State v. Broderick*, 7 Mo. App. 19, has said: "The rule ejusdem generis," in statutory construction, "is by no means a rule of universal application, and its use is to carry out, not to defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, and when, to carry out the purpose of the statute, the general word ought to govern, it is a mistake to allow the ejusdem generis rule to pervert the construction." The title of the act here considered sufficiently expresses the objects to be accomplished by the legislation, and answers the requirements of the section of the Constitution referred to:

[4, 5] That the contract made with respondent Gentry, if carried out and the cost thereof assessed against the property of the road improvement district, as formed pursuant to the provisions of the act, will result in some of the property being assessed without benefit accruing thereto, is another contention advanced by appellant. It was not alleged nor made to appear that all of the property included within the assessment district would not be benefited, whether more or less, by the proposed improvement. The act, it is true, does not provide that in determining the boundaries of the assessment district the board of supervisors shall include only property which it is considered will be benefited by the public work, but attention is called to no authority holding that such a provision is essential to the validity

of such a statute. As the power to specially tax in the manner proposed by this act can only be exercised upon the theory that benefits will accrue to the property affected thereby, the presumption of good faith and fair action that accompanies the acts of public officers is entitled to be indulged, and it then must be assumed that the board of supervisors properly considered and determined that all of the property included within the established district would receive benefits from the doing of the work. As is said by respondents, the benefit need not be direct, citing *Lent v. Tillson*, 72 Cal. 429, 14 Pac. 71. The district described in the proceedings had herein embraced contiguous property, all of which might well receive some benefit from the improvement of the streets described in the contract. The case is very different from that considered in *Southwick v. Santa Barbara*, 158 Cal. 14, 109 Pac. 610, where the court said: "It appears from the complaint that the engineer reported, as 'the district to be benefited by said improvement,' \* \* \* two separate and distinct sections of the city that are not contiguous, and that are alleged to be separated at their nearest points to one another by nearly one-half of a mile."

[6] It is also complained that the act seems to authorize the taking of private property without awarding compensation therefor. The provisions of the act contemplate the improvement work to be done upon streets and public ways already laid out and established. Ordinarily it must be assumed an abutting property owner will not suffer damage different from that common to all of such owners by reason of the improvement of the street. If he can show such damage, which is classed as indirect or consequential, he will be entitled to his action therefor. *Eachus v. Los Angeles, etc., Ry. Co.*, 108 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

[7, 8] The specifications for the work contained the following clauses which it is insisted invalidate the contract: "Whenever, in the opinion of the engineer, it is necessary to waste excavated material outside of the lines of the streets, the contractor shall move such waste material to places outside the street, and spread the same in a workmanlike manner"—and: "Any overseer, superintendent, laborer or other person employed on the work by the contractor, who shall perform his work in a manner contrary to these specifications, shall be discharged immediately and such person shall not again be employed on the work." It is claimed that by the first provision mentioned there is placed within the power of the engineer the right to materially increase the cost of the work, and that because of such possibility the bidders for the contract will be influenced in fixing the cost at a higher amount than they otherwise would, and so increase

the burden of the property owner. No doubt but that, were the provision respecting waste material wholly absent from the contract, the contractor would be required in the performance of his work to clear the street of such waste material, and the mere additional requirement that he shall "spread the same in a workmanlike manner" could not, in giving the provision practical effect, cause an uncertainty as to the cost which would void the contract. It seems very plain that the engineer cannot require the contractor to carry waste material to any distance away from the line of the work that he may choose to direct, but only that, when a convenient place is found where it may be deposited, the contractor shall leave the material so deposited in a reasonably level condition. As to the provision which requires that employes of the contractor who shall fail to perform their work in accordance with the specifications shall be discharged, that provision does not inject an element of uncertainty into the matter of the performance of the contract which might prevent bidders from bidding intelligently, or result to increase the cost of the work. A similar condition in a street contract has been held to be a reasonable one. *McQuiddy v. Worswick Street Paving Co.*, 160 Cal. 9, 116 Pac. 67. In that decision the court uses language which is directly applicable here when it declares: "We can see nothing improper in this provision. It does not give the city authorities absolute power to arbitrarily dismiss an employé whether he was competent or faithful or not. It only allows such action by the city authorities when the employé is in fact incompetent or unfaithful. There is nothing improper in the clause giving the city the right to demand the dismissal of such employes."

All of the objections urged as affecting the validity of the statute and the proceedings had thereunder have been considered, and no reason appears why the judgment and order should not be affirmed.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

#### MEYER v. McALLISTER. (Civ. 1408.)

(District Court of Appeal, Second District, California. Feb. 14, 1914.)

#### 1. SALES (§ 418\*)—CONTRACT—BREACH—DAMAGES—RESALE—NOTICE.

A resale of chattels by the seller after the buyer's refusal to accept the same, without actual notice to the buyer, is not conclusive evidence of the value of the chattels, by which to measure the damages for which the buyer is liable.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

**2. SALES (§ 418\*)—CONTRACT—BUYER'S BREACH—DAMAGES—RESALE—PASSING OF TITLE—STATUTES.**

Civ. Code, § 3311, provides that the detriment caused by a buyer's breach of contract to accept and pay for personal property, the title to which is not vested in him, is: (1) If the property has been resold pursuant to section 3049, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the sale; or (2) if the property has not been resold as provided by section 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market over those that would have been incurred if the buyer had accepted it. *Held* that, where title had not passed from the seller when the buyer refused the goods, and they were resold, but without actual notice to the buyer, the seller's measure of damages was determined by subdivision 2 only, and was the excess, if any, of the amount due from the buyer, under the contract, over the value of the goods to the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

**3. SALES (§ 416\*)—CONTRACT—BREACH—EVIDENCE—VALUE TO SELLER.**

Where, in an action for a buyer's breach of a contract to buy machinery, the seller, in order to prove the value of the property to him after the buyer's refusal to receive the same, proved a public sale of the property without notice to the buyer, at which it was sold at \$800, evidence of a witness familiar with machinery of the same general kind and with the sale or market value thereof that such machinery uninstalled at the place of the sale was worth from \$1,700 to \$1,800 was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.\*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Charles A. Meyer against James W. McAllister. Judgment for plaintiff for less than the amount demanded, and he appeals. *Affirmed*.

Stutsman & Stutsman, of Los Angeles, for appellant. Randall & Bartlett, of Los Angeles, for respondent.

CONREY, P. J. In this action plaintiff seeks to recover damages in the sum of \$1,345 incurred by defendant's breach of a contract made with plaintiff's assignor, wherein the defendant agreed to purchase from the vendor certain machinery at the agreed price of \$2,145. Judgment was awarded in the sum of \$429, and the plaintiff appeals from the judgment, as well as from an order denying his motion for a new trial.

As both parties assume, in accordance with the record, that there was a contract, and that there was a breach thereof by the defendant, the only questions presented on appeal relate to the plaintiff's claim that the evidence is insufficient to sustain the finding limiting plaintiff's damages to the amount named in said judgment; and incidentally to the claim that the court erred in receiving certain evidence offered by the defendant

concerning the value of the property described in the contract.

After the vendor had, as required by the terms of the contract, shipped the machinery to Chino, Cal., and the defendant had further confirmed his refusal to accept the same, the vendor made some efforts to sell the property at and in the vicinity of Chino, and finally, at a time within two months after the shipment had been made, sold said property publicly for \$800, which was the highest and best bid made at that time. The representative of the vendor who made the sale testified to his efforts with respect to making a sale, and that he could not get any higher bid.

[1] The sale was made without actual notice thereof to the defendant. Therefore the amount received at the sale is not conclusive evidence of value by which to measure the damages for which the defendant is liable.

[2] For the same reason (and also because title had not passed from the vendor), the first subdivision of section 3311 of the Civil Code is not applicable to the case. The detriment caused to the vendor by the defendant's breach of his agreement is to be measured by subdivision 2 of said section 3311, and in the present case consists in the excess, if any, of the amount due from the buyer under the contract over the value to the seller. See, also, section 3353, Civ. Code.

[3] In offering the above-mentioned evidence, the plaintiff was seeking to prove "the value to the seller," and was proceeding upon the theory that the value to the seller was the price obtained at a sale fairly made in the market at Chino. This would be evidence of the market value taken as equivalent to the value of the property to the seller. In response to the evidence thus produced, the defendant offered the testimony of a witness familiar with machinery of the kind in question and with the sale or market value thereof, who testified that the value of the machinery uninstalled at Chino, as described to him and set forth in the contract, was between \$1,700 and \$1,800. The testimony of this witness, especially on cross-examination, shows that he was speaking of market value, or the price at which such property was being sold and reasonably could be sold. "The value in the market up there of the engine would be somewhere in the neighborhood of \$1,400. The pump was worth somewhere in the neighborhood of \$300 or \$400." Objection was made to this testimony on the general grounds, and particularly that the witness should have been asked to fix, "not the market value, but the value to the seller at that time." But, as we have pointed out, the plaintiff himself had assumed that the value to the seller was to be ascertained by proving the market value, and this he had undertaken to do by showing the amount that he had been able to obtain at a sale which he

contended was a fair sale. Therefore the testimony objected to was clearly admissible. This being so, there was thereby created a conflict in the evidence as to what was the value of the property to plaintiff's assignor at the time in question. The finding of the court as to value is substantially supported by the testimony, and this is sufficient to determine the case.

The judgment and order denying a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

#### SESSIONS v. MILLER. (Civ. 1442.)

(District Court of Appeal, Second District, California. Feb. 14, 1914.)

##### 1. VENDOR AND PURCHASER (§ 181\*) — CONTRACTS—CONSTRUCTION.

A promise by a vendor to subscribe a specified sum to a fund for street widening, to be paid with a check from the amount deposited to the vendor's account by the purchaser, made in connection with the sale of real estate to the purchaser, who agreed to pay the price on delivery of the deed and certificate of title, is only a promise to pay the specified sum after payment of the price by the purchaser, and the purchaser may not pay the sum to the fund prior to or independently of the closing of the transaction of the sale of the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 367, 368; Dec. Dig. § 181.\*]

##### 2. MONEY PAID (§ 1\*)—VOLUNTARY PAYMENT—RECOVERY.

Where a vendor was required to pay a specified sum to a specified fund on the purchaser paying the price on the delivery of the deed and certificate of title, a payment thereof by the purchaser, without request of the vendor prior to and independently of the closing of the transaction of sale, was a voluntary payment which he could not recover from the vendor on the vendor's failing to show clear title.

[Ed. Note.—For other cases, see Money Paid, Cent. Dig. §§ 1-16; Dec. Dig. § 1.\*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Kate O. Sessions against Sarah Johnston Cox and H. L. Miller, her executor, substituted as defendant. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Stearns & Sweet, of San Diego, for appellant. Luce & Luce, of San Diego, for respondent.

CONREY, P. J. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was commenced against Sarah Johnston Cox to recover the sum of \$305, alleged to have been paid by the plaintiff at the request and for the use of Mrs. Cox; the payment having been made to a fund for the widening of certain streets in the vicinity of land owned by her in the city of San Diego. Mrs. Cox died while the action was pending,

and the defendant executor has been substituted in her place.

It appears that on October 11, 1907, Mrs. Cox executed and delivered to plaintiff an agreement to sell to plaintiff two lots in the above-mentioned tract of land for the sum of \$1,500, "to be paid at the Bank of Commerce upon the delivery of a deed and certificate of title made by the Abstract Title & Insurance Company." Appended to the same contract and dated on the same day is an additional agreement by Mrs. Cox as follows: "I agree to subscribe \$300 to the fund for widening of Washington and Lewis streets and to pay the same with a check of the Bank of Commerce from the amount deposited to my account by K. O. Sessions." At that time there was being collected a fund paid in by various subscribers to a custodian, which moneys were to be used for the widening of said streets. It does not appear that the plaintiff was one of those subscribers, and it does not appear that Mrs. Cox made any subscription to that fund, or any agreement with reference to a subscription, other than the above-quoted written promise made to the plaintiff.

On October 18, 1907, without having deposited any moneys to the account of Mrs. Cox and without any request from Mrs. Cox, the plaintiff paid to the custodian of said fund the sum of \$300 and took a receipt showing that she had made that payment, and that it was made for Mrs. Cox "a/c widening of Washington and Lewis streets." The plaintiff claims that her failure to pay or tender the \$1,500 was caused by some defect in title of Mrs. Cox's property which prevented the issuance of a certificate showing clear title in the vendor, and we here assume that this claim is shown to be well founded. It is not alleged in the complaint or found by the court that Mrs. Cox at any time ratified the \$300 payment so made by the plaintiff in her behalf, or made any promise other than in the written terms above stated, with respect to repayment thereof. It is claimed in argument here on behalf of the plaintiff that the evidence shows such ratification. The only evidence pertaining to this matter is found in the statement of one witness who heard Mrs. Cox say to plaintiff, "I will pay you that money, but I won't pay you until I get good and ready," and another witness, who testifies that Mrs. Cox told him that she was going to pay, and had agreed to pay, Miss Sessions \$300 for a purpose connected with the widening of said streets. On the other hand, there is testimony of a witness who heard the plaintiff ask Mrs. Cox to pay the \$300, at which time Mrs. Cox replied that she would not pay, and did not know why she should do so.

[1] Manifestly the plaintiff's rights herein must be determined by the language of the written contract as made. That contract did not make Mrs. Cox a subscriber to the fund, and did not create any legal liability against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

her in favor of the subscribers to the fund. The promise was made in connection with the sale of two lots to plaintiff, and it was a promise to the plaintiff to make such subscription and to pay the same after receipt by the vendor of the \$1,500, which amount was to be paid by the plaintiff for said lots. Mrs. Cox promised to pay the amount herself out of that sum to be so received. This was not a formal, but a substantial, condition of the promise. It may well be that Mrs. Cox did not feel able to pay such a subscription until the sale transaction was completed, and until she had received that entire sum. There is nothing in the language used which can be construed as an authorization or request to plaintiff to make the payment into the subscription fund prior to or independently of the closing of the transaction of the sale of the lots.

[2] We have then a voluntary payment made by the plaintiff in the name of the defendant, for a purpose which may have been beneficial to the defendant, but which did not go to satisfy any legal liability of the defendant. Even if a payment so made had satisfied a legal liability of the party for whom the payment was made, recovery thereof could not be enforced. "There can be no recovery for the voluntary payment of the debt of a third party without request, and with no promise of repayment by the party whose debt is paid." *McGlew v. McDade*, 146 Cal. 553, 80 Pac. 695.

The judgment and order denying a new trial in this action are reversed.

We concur: JAMES, J.; SHAW, J.

GREENE v. CARMICHAEL. (Civ. 1155.)  
(District Court of Appeal, Third District, California. Feb. 16, 1914.)

1. PROPERTY (§ 9\*)—OWNERSHIP—EVIDENCE.

Evidence held to warrant a finding that defendant was the owner of an automobile, and that R., who had mortgaged the same to plaintiff, had possession under an executory contract of sale.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9;\* Evidence, Cent. Dig. § 2457.]

2. CHATTEL MORTGAGES (§ 17\*)—VALIDITY—OWNERSHIP.

Where R. had possession of an automobile belonging to defendant under an executory contract of sale, R.'s act in mortgaging the machine did not affect defendant's ownership.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 55-58; Dec. Dig. § 17.\*]

3. CHATTEL MORTGAGES (§ 17\*)—CONDITIONAL SALES—RIGHTS OF OWNER—IMPAIRMENT.

One in possession of a chattel under a contract of conditional sale, by attempting to sell or create a lien thereon, cannot impair the rights of the owner.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 55-58; Dec. Dig. § 17.\*]

4. PROPERTY (§ 9\*)—PERSONAL PROPERTY—POSSESSION.

Possession of personal property is only prima facie evidence of ownership and, except

as to negotiable instruments and whatever comes under the general denomination of currency, will not prevail against the rights of the true owner, under the rule that no one can be divested of his property without his consent, and that no person can transfer a better title than he himself has.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9;\* Evidence, Cent. Dig. § 87.]

5. ESTOPPEL (§ 75\*)—OWNERSHIP OF PROPERTY.

Defendant purchased an automobile for R.'s use under an agreement that R., who was employed by defendant, should pay for the same out of his earnings, and that the title should vest in him when paid for. R., without defendant's knowledge, took title to the machine in his own name, and later mortgaged the machine to plaintiff. Held, that defendant was not estopped to assert his ownership as against the mortgagee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 192-195; Dec. Dig. § 75.\*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by John T. Greene against D. W. Carmichael. From a judgment for defendant, plaintiff appeals. Affirmed.

Grove L. Johnson and Albert D. Smith, both of Sacramento, for appellant. R. L. Shinn, of Sacramento, for respondent.

BURNETT, J. The appeal is from a judgment in favor of defendant in an action brought to recover the value of a certain automobile alleged to have been converted by defendant to his own use, and on which appellant had a chattel mortgage to secure the payment of a promissory note for \$250, with interest at the rate of 5 per cent. per month. This note and mortgage were executed by one Sidney A. Root while he had possession of said machine. Issue was joined on the question of Root's ownership and respondent's right to convert the machine to his own use. The court found that Root was not the owner of the automobile at the time of the execution of the mortgage nor at any other time, but that he was in possession thereof under an executory contract of sale, conditioned on the payment to D. W. Carmichael, the respondent herein, of the sum of \$1,400, on which payment Root was to become the owner, and not otherwise, and that "no part of said \$1,400 has ever been paid to said defendant." The conclusion was that defendant had the full right to take and dispose of the property, and this presents the real question involved on the appeal.

There is no doubt that the finding of the court as to the conditional sale is fully sustained by the evidence. Mr. Carmichael testified: "He wanted me to get him an automobile, and I secured an automobile with the understanding he was to go to work on Carmichael Colony and to work hard, and he made those promises, which prompted me in securing an automobile for him to use in his work. First, I was to put up so much

cash for the automobile, which I objected to doing. He came back to me with another proposition that he had a party that would let him have an automobile—as I understood it, had an automobile to trade—if I would give him a certain lot that I had on the corner of Twenty-Fourth and T street, to trade for the automobile. That was the transaction that was agreed upon. Then when he went to get the automobile he came in, he asked me how I wanted that automobile, where I wanted it; he said he could keep it at his home. \* \* \* All these things I agreed to do. \* \* \* It was to be paid for by the commissions that he would make; he would pay for it from month to month along; everything he could make he would turn right in, paying for the automobile until it was finally paid for. \* \* \* I was buying the machine. The machine was to be mine. That was the general understanding and was agreed to at that time. Mr. Root asked me how the bill of sale was to be made, 'Carmichael Company' or 'D. W. Carmichael.' I told him, 'Make the bill of sale in my name.' It is not denied that through the transfer of said lot the purchase price of the machine was paid by defendant. It also appears that respondent paid Charles M. King, a garage owner, \$369 on account of material and repairs for said machine. This was after King had advertised a sale, to satisfy his claim, of the automobile, which had been left at his garage. It is not claimed that Carmichael has been paid any portion of the \$1,400.

[1] The statement of the foregoing without comment is sufficient to disclose the legal justification for the finding of the lower court that respondent was at all times the owner of the machine and that Root had possession of it under an executory contract of sale.

[2] It is just as irrefutable that there is warranted the conclusion that the action of Root in mortgaging the machine did not affect nor derogate in any manner from defendant's ownership.

[3] Conditional sales are fully recognized in this state, and it is well established that one in possession under such contract, by attempting to sell or create a lien upon the property, cannot impair the rights or interest of the owner. The same principle applies as in the case of stolen property. No one familiar with our law would contend that a thief, by selling, mortgaging, or pawning stolen goods, could prevent or hinder the owner from reclaiming his property wherever he might find it. Of course, on principles of good conscience, if the owner misled an innocent party to his prejudice, the former might be precluded from asserting ownership, but, as we shall see, that is not the case here.

[4] In *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196, the question is reviewed at length by the court through Chief Justice Field, and it is said: "Possession of personal property is only prima facie evidence of

ownership, and never prevails against the true owner, except with reference to negotiable instruments, and whatever comes under the general denomination of currency. \* \* \* The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property of which a transfer is attempted, with the exceptions stated." The earlier decisions of the Supreme Court to the contrary were referred to and overruled. In the *Wright Case*, supra, the goods had been consigned to the factor for sale, and he pledged them as security for a loan of \$2,000, and it was held that this would not prevail against the owner, and that it made no difference "whether the party taking the pledge was ignorant as to the extent of the factor's authority, or that the factor was not the real owner of the property."

In *Putnam v. Lamphier*, 86 Cal. 158, it is said: "It is a general rule, applicable to conditional as well as absolute sales, that a second vendee is not entitled to stand in any better situation than his vendor in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general denomination of currency."

In *Vermont Marble Co. v. Brow*, 109 Cal. 241, 41 Pac. 1031, 50 Am. St. Rep. 37, it is declared: "The common-law right of the seller by appropriate contract to retain the title until performance of some valid condition on the part of the buyer has been long recognized in this state, as almost universally elsewhere."

In *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448, it is held, as stated in the syllabus: "The owner of property may include, in any executory agreement for its sale, any conditions which he may desire to insert, and make their performance essential before he is to be deprived of his ownership; and he may sell his property upon the condition that the title shall not be divested until the price has been fully paid." It is further held that, in the absence of fraud, this is as valid against a third person as the parties to the transaction, and that the bailee of personal property cannot convey the title or subject it to execution for his own debts until the condition on which the agreement to sell was made has been performed. The familiar principle is also therein announced that the question whether the sale is conditional is one of intention, and that it is the duty of the court to carry out the intention of the parties when ascertained.

The question is again fully discussed in *Van Allen v. Francis*, 123 Cal. 474, 56 Pac. 339, and it is therein declared: "Conditional sales are recognized in this state to the fullest extent [citing cases]; and it is well settled that even bona fide purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property (*Palmer v.*

Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60)."

In the Palmer Case, *supra*, Kohler v. Hayes, 41 Cal. 455, and Hegler v. Eddy, 58 Cal. 598, are cited as authority, and they declare the same doctrine.

[6] Of course, it can make no kind of difference in the application of the principle that the original purchase of the automobile was made by Root and possession taken by him immediately. This was in pursuance of the agreement with Carmichael, and the title to the property under this agreement was just the same as though Carmichael had first taken actual possession and then delivered the machine to Root. The form of the transfer cannot change the legal effect of the agreement and understanding between Root and Carmichael.

Neither is it important, as far as the rights of respondent are concerned, that the bill of sale from King was made to Root instead of Carmichael, as directed by the latter. Of course, King and Root could not defeat the rights of respondent by treating the property as though it belonged to Root. The bill of sale, it may be remarked, was not essential to the transfer, but constituted evidence of the sale which probably could not be questioned by King or Root, but it did not affect the agreement between Root and respondent. If the latter had known of it, the question of ratification or estoppel might possibly arise, but no such situation is presented. Nor are we concerned with the consideration of a constructive trust and its repudiation by Root. The vital question is, who was the owner of the automobile at the time the chattel mortgage was executed? and this is to be determined by the terms of said agreement between Root and Carmichael.

The contention of an estoppel is equally untenable. It cannot be said that appellant was misled by any act or declaration of respondent. The latter had no conversation with the former about the ownership of the automobile, nor did he have any knowledge, until long after, of the execution of the chattel mortgage. He did not know that Root had taken the bill of sale in his own name. In fact, there is no circumstance disclosed by the record that would make it inequitable for respondent to assert his title to the machine. Neither can it be said that he is chargeable with negligence. He had the right to assume that Root was an honest man and that he would not violate his agreement. He could not be expected to anticipate that Root would execute a chattel mortgage upon property that the latter did not own. Neither is it strange that he made no inquiry about the bill of sale. Root was working for him, and it was confidently expected that the former would soon earn enough money out of his commissions to pay for the automobile, which he was using in the business.

Considering the testimony as we are required by the familiar rule, we can see no substantial reason for interfering with the conclusion of the trial judge.

We do not consider the cases upon which appellant relies as applicable to the facts here and deem unnecessary specific notice of them.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

## BARR v. SOUTHERN CALIFORNIA EDISON CO. (Civ. 1469.)

(District Court of Appeal, Second District.  
California. Feb. 18, 1914.)

### 1. DEATH (§ 49\*)—ACTIONS FOR CAUSING DEATH—PLEADING—COMPLAINT—EXISTENCE OF BENEFICIARIES.

A complaint, in an action for wrongful death, was not bad for failure to allege the existence of an heir, where the action was brought by the widow as administratrix, as the widow is not only an heir, but Civ. Code, § 1970, authorizes the personal representative to sue for the benefit of the widow, and, under the express terms of Code Civ. Proc. § 377, such damages are recoverable as may be just.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 64-66, 69; Dec. Dig. § 49.\*]

### 2. DEATH (§ 49\*)—ACTIONS FOR DEATH—PLEADING—COMPLAINT.

A complaint, in an action for wrongful death, was not bad for failure to allege that suit was brought for the benefit of the widow, as heir, where the widow brought the suit as administratrix, as she could not maintain the suit other than for the benefit of the heirs, for whom she acts as statutory trustee.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 64-66, 69; Dec. Dig. § 49.\*]

### 3. PLEADING (§ 35\*)—SURPLUSAGE—ACTIONS FOR DEATH—COMPLAINT.

An allegation, in a complaint in an action for wrongful death, that the plaintiff, who was the widow, suffered damages as administratrix must be regarded as surplusage, as she could not sustain any damages in that capacity upon the facts alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 78-80; Dec. Dig. § 35.\*]

### 4. DEATH (§ 52\*)—ACTIONS FOR DEATH—PLEADING—COMPLAINT.

The failure of the complaint, in an action for wrongful death, to allege that the widow suffered pecuniary damages did not render it subject to general demurrer, as Civ. Code, § 1970, authorizes the personal representative to sue for the widow, Code Civ. Proc. § 377, authorizes the recovery of just damages, and the widow was deprived of that share of deceased's earnings to which she was entitled for support.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.\*]

### 5. PLEADING (§ 9\*)—CONCLUSION FROM FACTS ALLEGED—DAMAGE.

A complaint, in an action for wrongful death, was not subject to general demurrer because it did not allege the heir's damages, where it alleged facts from which damage to the widow, as heir, must necessarily follow, particularly where the prayer asked for a specific sum.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.\*]

**6. LIMITATION OF ACTIONS (§ 127\*)—COMPUTATION OF PERIOD OF LIMITATION—AMENDMENT OF PLEADINGS.**

Where the original complaint, in an action for wrongful death, was filed before the expiration of the period of limitation, the sustaining of a demurrer thereto and the filing of an amended complaint, showing the existence of an heir, after the expiration of the period of limitation, did not defeat the action; no new cause of action being set up.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

**7. LIMITATION OF ACTIONS (§ 127\*)—COMPUTATION OF PERIOD OF LIMITATION—AMENDMENT OF PLEADINGS.**

Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Mary Jane Barr, administratrix with the will annexed of David W. Barr, deceased, against the Southern California Edison Company. From a judgment dismissing the action, plaintiff appeals. Reversed, with directions to the trial court.

Frank C. Prescott and Jones & Weller, all of Los Angeles, for appellant. H. H. Trowbridge, of Los Angeles, and Hamilton A. Bauer, of San Francisco (Bernard Silverstein, of Oakland, of counsel), for respondent.

**SHAW, J.** This is an appeal by plaintiff from a judgment dismissing her action upon sustaining a demurrer to an amended complaint after failure to further amend.

The action was instituted on September 23, 1911, by plaintiff, as administratrix of the estate of David W. Barr, deceased, to recover damages for his death, alleged to have been caused by the negligence of defendant on September 25, 1910. There was nothing in the original complaint, containing one count, showing that deceased left any heirs, and a general demurrer interposed thereto was, upon this ground, sustained, with leave to amend. *Webster v. Norwegian Mining Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181. Within the time granted therefor, plaintiff filed an amended complaint which, although it contained three counts, was substantially in the form of the original complaint, save and except in each count it was alleged "that the deceased left at the time of his death surviving him his widow, Mary Jane Barr, who, as the administratrix of his estate and as his personal representative and as plaintiff, brings this action; that by reason of the premises the plaintiff, as such administratrix, has sustained damages in the sum of \$100,000." At the time of filing the amended complaint, the time within which,

under subdivision 3 of section 340, Code of Civil Procedure, an action of this character may be instituted had expired. Defendant interposed a general demurrer to each count of the amended complaint, and also alleged that each cause of action set forth therein was barred by the provisions of said subdivision 3 of section 340, Code of Civil Procedure. This demurrer, by an order in general terms, was sustained, and, upon plaintiff's failure to amend, judgment of dismissal followed.

[1] Two points are presented on the appeal. It is claimed: First, that the amended complaint was obnoxious to the general demurrer interposed, for the reason that it was not alleged the suit was brought for the benefit of any heir of deceased, nor made to appear that he left an heir, nor alleged in terms that such or any heir sustained damage in any sum by reason of the death of deceased; and, second, that, if the same stated a cause of action, it was barred by reason of the amended complaint being filed after the statute of limitations had run against it.

1. The complaint alleged "that the deceased left at the time of his death his widow, Mary Jane Barr." Not only is the widow of deceased an heir, but section 1970, Civil Code, expressly provides that "when death \* \* \* results from an injury to an employé \* \* \* the personal representative of such employé shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, \* \* \*" which amount so recoverable, as provided in section 377, Code of Civil Procedure, shall be "such damages \* \* \* as under all the circumstances of the case may be just." The point made in this behalf possesses no merit.

[2] Nor was it necessary to allege that the suit was brought for the benefit of such widow. Since plaintiff, who is shown to be the personal representative of deceased, could not maintain the action other than for the benefit of the heirs (*Webster v. Norwegian Mining Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Kerrigan v. Market-Street Ry. Co.*, 138 Cal. 506, 71 Pac. 621), for whom she acts as statutory trustee, it follows as a matter of law, from the facts alleged, that the suit is brought for her benefit. It could not be otherwise brought; hence it was unnecessary to allege the conclusion that it was so brought.

[3-5] Since plaintiff, as administratrix, could not sustain damage by reason of the facts alleged, the allegation that she in such capacity suffered damage must be disregarded as surplusage. *Newman v. Smith*, 77 Cal. 27, 18 Pac. 791. It is not alleged in terms that the widow sustained pecuniary damage by reason of the death of deceased. Such omission, however, did not render the complaint obnoxious to the general demurrer. Upon the death of deceased, caused by the wrongful act of defendant, the statute gave



the widow the right to such damages as under the circumstances were just, and authorized the personal representative to sue for the recovery of the same. By his death the widow was deprived of that share in the earnings of deceased to which, as his wife, she was entitled for support. *Kelley v. C., M. & St. Paul Ry. Co.*, 50 Wis. 381, 7 N. W. 291; *Serensen v. Northern Pac. R. Co. (C. C.)* 45 Fed. 407; section 155, Civ. Code. Since the complaint alleged facts from which damages to the surviving wife must necessarily follow, it was sufficient to overcome the objection on the score that it failed to allege the amount in which the heir was damaged. *Blasingame v. Home Ins. Co.*, 75 Cal. 638, 17 Pac. 925. Moreover, the prayer of the complaint was for a specific sum which plaintiff sought to recover upon the facts alleged, and it has been held that this is equivalent to a formal allegation of the amount of damages sustained. *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Bank v. Port Townsend*, 16 Wash. 450, 47 Pac. 896. While the complaint cannot be regarded as a model pleading, it is nevertheless, in our opinion, sufficient when tested by a general demurrer.

[8, 7] 2. As stated, the original complaint failed to state a cause of action, and, conceding the amended pleading was sufficient in this regard, respondent insists that, by reason of the fact that it was filed after the statute of limitations had run against the cause of action, it was barred. The amended complaint did not purport to set up a new or different cause of action from that attempted to be set up in the original complaint. "Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action." *Ruiz v. Santa Barbara Gas, etc., Co.*, 164 Cal. 188, 128 Pac. 330. The case at bar is not unlike that of *Rauer's Law, etc., Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427, where the original complaint filed to recover upon a promissory note failed to allege nonpayment, by reason of which omission the complaint failed to state a cause of action. After the expiration of the time when the action would have been barred had it not been for the filing of the original complaint, an amended complaint was filed wherein nonpayment was alleged, and it was held that such amendment did not change the cause of action, and that, as stated in the amended complaint, the cause of action was not barred by the statute of limitations. To the same effect is the case of *Ruiz v. Santa Barbara Gas, etc., Co.*, supra, wherein the above case is cited with approval. Respondent has cited a number of authorities from other jurisdictions which support its conten-

tion, in reply to which it is sufficient to say the courts of this state have adopted, the rule laid down in *Tiffany's Death by Wrongful Act*, § 187, where it is stated: "The complaint or declaration may be amended as in other actions where the amended pleading does not state a new cause of action; and such amendment, although made after the expiration of the period of limitation, will relate back to the commencement of the suit. Thus an amendment may be made \* \* \* which adds an allegation that the deceased left a wife and children." *South Carolina R. R. Co. v. Nix*, 68 Ga. 572; *Haynle v. Chicago, etc., R. R. Co.*, 9 Ill. App. 105; *Frost v. Witter*, 132 Cal. 422, 64 Pac. 705, 84 Am. St. Rep. 53. The amended complaint did not purport to contain a new cause of action, but merely an amendment showing that the deceased left surviving him a widow as his heir.

In our opinion the learned judge erred in sustaining the demurrer. The judgment is therefore reversed, and the trial court directed to overrule the demurrer interposed to the complaint.

We concur: CONREY, P. J.; JAMES, J.

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GOLDEN & CO. v. JUSTICE'S COURT OF  
WOODLAND TP., YOLO COUNTY,  
et al. (Civ. 1194.)

(District Court of Appeal, Third District, California. Feb. 12, 1914. Rehearing Denied by Supreme Court April 13, 1914.)

1. INTOXICATING LIQUORS (§ 146\*)—OFFENSES—SOLICITATION OF ORDERS.

The *Wyllie Local Option Law* (St. 1911, p. 602) § 15, makes it unlawful to solicit or take orders or make agreements for the sale or delivery of alcoholic liquors in no-license territory, but provides that this shall not apply to the taking of such orders from a registered pharmacist at his place of business, or to the taking of orders for such liquors on the premises where stored or manufactured, under the conditions stated in section 16. Section 16 provides that the keeping of alcoholic liquors at cellars, vaults, or warehouses, the receiving of orders thereat, and the shipment of such liquors therefrom, are not unlawful, provided they are not to be distributed or delivered to any person or place in no-license territory within the county, except when delivered to a carrier for shipment, and that the keeping of such liquors on the premises where manufactured, the receiving of orders thereat, and the shipping of such liquor therefrom are not unlawful, provided they are not to be distributed or delivered, in no-license territory within the county, in quantities of less than two gallons, and are not delivered to any person or place in such territory, except to a common carrier for shipment, to other manufacturers, to cellars, vaults, or warehouses, to any person at his or her permanent residence, or to registered pharmacists at their place of business. *Held*, that as the provision authorizing the taking of orders on the premises where stored or manufactured refers to sales by manufacturers, and does not therefore authorize the soliciting or taking of orders from manufacturers, except possibly as to registered pharmacists, no one has a legal right to solicit

or take orders for intoxicants from persons within no-license territory.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

## 2. INTOXICATING LIQUORS (§ 10\*)—OFFENSES—SOLICITATION OF ORDERS.

A municipal corporation by ordinance or a municipality or other subdivision of the state by invoking the provisions of the local option law cannot prohibit the soliciting of orders or the making of agreements within its limits for the sale or delivery of intoxicating liquors, where the liquors are to be delivered outside its limits.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.\*]

## 3. INDICTMENT AND INFORMATION (§ 110\*)—FOLLOWING LANGUAGE OF STATUTE.

A complaint, charging accused with soliciting orders for intoxicating liquors within no-license territory, but not showing whether the liquors were to be delivered within or without the limits of such territory, stated an offense, and a magistrate's court therefore had jurisdiction to preliminarily examine and pass upon the charge; it being sufficient to charge the offense in the language of the statute.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

## 4. INTOXICATING LIQUORS (§ 146\*)—OFFENSES—SOLICITATION OF ORDERS.

The Wyllie Local Option Law (St. 1911, p. 602) § 15, making it unlawful for any person, company, association, or club, within no-license territory, to solicit or take orders or make agreements for the sale or delivery of alcoholic liquors, was violated by the sending of a circular letter from a point outside no-license territory to a person in no-license territory soliciting an order, the phrase "within any no-license territory" not as claimed qualifying "person, company, association or club," in view of the ultimate object of all legislation on the subject, which is not merely to prevent the public traffic in liquors, but to reduce to the lowest minimum the individual use and consumption of such liquors as beverages.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

## 5. STATUTES (§ 184\*)—CONSTRUCTION—EXTRINSIC AIDS.

Every statute must be construed with reference to the object intended to be accomplished thereby, and to ascertain this object, it is proper to consider the occasion and necessity of its enactment, and it should be so construed as is best calculated to advance its object by suppressing the mischief and securing the benefits intended.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 262; Dec. Dig. § 184.\*]

## 6. STATUTES (§ 181\*)—CONSTRUCTION—DOUBLE MEANING.

Where a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with sound sense and wise policy, the former should be rejected and the latter adopted.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

## 7. STATUTES (§ 189\*)—CONSTRUCTION—REJECTION OF GRAMMATICAL CONSTRUCTION.

Where a statute may be given a grammatical construction leading to a result in manifest opposition to its purpose and intent, or in circumvention of its paramount object, such construction will be rejected, and one adopted

which will effectuate or carry out the object designed to be accomplished.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 268; Dec. Dig. § 189.\*]

## 8. INTOXICATING LIQUORS (§ 6\*)—OFFENSES—SOLICITATION OF ORDERS.

While the right to use or consume intoxicating liquors is one of the citizen's personal liberties, of which he can be deprived by governmental interference only where such use leads to intoxication or alcoholism, thus infringing the rights and liberties of others, the Legislature in the exercise of its police power may establish any regulation tending to remove temptation to use such liquors as beverages under any circumstances which, if permitted to exist, might create a sentiment in no-license territory favorable to the revival of traffic in such liquors, and may therefore prohibit every form of soliciting orders within no-license territory for such liquors to be delivered in such territory, though intended for individual use.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 4; Dec. Dig. § 6.\*]

## 9. INTOXICATING LIQUORS (§ 146\*)—OFFENSES—SOLICITATION OF ORDERS.

Under Wyllie Local Option Law (St. 1911, p. 602) § 15, the soliciting of orders or the making of agreements within no-license territory for the sale of intoxicating liquors to be delivered within no-license territory is prohibited, though it is contemplated that the sale shall be consummated outside no-license territory.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

## 10. INTOXICATING LIQUORS (§ 146\*)—OFFENSES—SOLICITATION OF ORDERS—"SOLICIT."

Wyllie Local Option Law (St. 1911, p. 602) § 15, relative to soliciting orders for intoxicating liquors in local option territory, does not apply to advertisements in newspapers circulating in such territory, and addressed to the general public and not to a particular individual, since "solicit" within the statute means to apply to for obtaining something; to awake or excite to action; to arouse a desire in, and implies personal petition and importunity addressed to a particular individual to do some particular thing.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6548; vol. 8, p. 7802.]

## 11. CRIMINAL LAW (§ 108\*)—VENUE—INTOXICATING LIQUORS.

Under Wyllie Local Option Law (St. 1911, p. 602) § 15, prohibiting the soliciting of orders for intoxicating liquors in no-license territory, where a circular letter soliciting an order was addressed to a party in no-license territory, the crime was committed upon the receipt of the letter by such party, and the venue of the offense was in that county.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 220-226, 230, 231, 234; Dec. Dig. § 108.\*]

Original application by Golden & Co. for a writ of prohibition against the Justice's Court of Woodland Township, County of Yolo, and another. Order to show cause discharged, and writ dismissed.

Hoefler & Morris, of San Francisco, for petitioner. A. G. Bailey, Dist. Atty., of Woodland, for respondents. I. M. Golden, of San Francisco, amicus curiae.

HART, J. This is a petition for a writ of prohibition to restrain the above-named respondents from "taking any further proceedings pending in the case of the People of the State of California, Plaintiff, v. Golden & Co., a Corporation, in said justice's court, and from hearing, determining, passing upon, trying, or deciding any proceeding in said case," etc.

This proceeding arises by reason of the filing of a complaint, on the 21st day of June, 1913, in the respondent court, by the district attorney of Yolo county, charging the petitioner with the violation of section 15 of the local option law, popularly known as the "Wyllie law," and passed by the Legislature of 1911. Stats. 1911, p. 599 et seq. The specific charge against the petitioner is that it solicited the sale of certain alcoholic liquors within the limits of the city of Woodland, a municipal corporation, it being admitted by the petitioner, for the purposes of this case, that, prior to the time at which the petitioner is alleged to have committed the offense with which it is charged in the complaint objected to here, at an election, held in said city, in pursuance of the provisions of said local option law, the electors voted in favor of the application of the provisions of said law to the territory embraced within the corporate limits of said city, and thus declared that said municipality should thereafter be no-license territory.

From the petition in this proceeding it appears that the petitioner "is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the state of California; that its principal place of business is in the city and county of San Francisco, in said state of California, and is, and at all times herein mentioned was, lawfully engaged in the business of selling, furnishing, and distributing alcoholic liquors." It is further alleged that said petitioner was not, at any of the times mentioned in the complaint filed against it, "a person, company, association, or club being or existing within the limits of the county of Yolo"; that it has no place of business within the limits of the said county of Yolo, but, "as said complaint shows upon its face, has its principal place of business in the city and county of San Francisco," etc.; that, "as appears upon the face of the said complaint, the said alleged violation of the said act consisted solely of the mailing of certain letters, price lists, and an order sheet at the city of San Francisco, \* \* \* addressed to a resident of the city of Woodland, in said county of Yolo, the said circular letter, price lists, and order sheet constituting an advertisement of certain alcoholic liquors offered for sale by your petitioner; that it appears upon the face of the said complaint that all and singular the acts constituting the alleged offense as aforesaid were committed wholly in the city and county of San Francisco, \* \* \* and wholly without the said city of Wood-

land and the said county of Yolo." The petition then alleges that it does not appear upon or from the face of the complaint that the offense, purporting to be therein and thereby charged against the petitioner, or that any offense whatever, was committed within the limits of the county of Yolo, or within the jurisdiction of the said court of Woodland township; "that the said court of Woodland township has no jurisdiction of your petitioner, or of the attempted criminal proceeding."

The complaint filed in the respondent court against the petitioner and to restrain proceedings under which this proceeding is instituted is made a part of the petition and attached thereto. It is charged in said complaint that, on or about the 28th day of May, 1913, the defendant corporation mailed a letter at the city of San Francisco, addressed to a Mr. James Monroe, at Woodland, Cal.; that said letter, which characterized itself as a "circular," contained an offer, designated therein as "our final offer," to consign to the said Monroe, at any time within 30 days from the date of the letter, "one full quart of this fine 'Old Reserve' whisky, by return express, for only 50c. [no doubt meaning fifty cents]." Said circular letter then proceeds:

"This is a special introductory offer we are making to NEW customers only—and if YOU have never tried 'Old Reserve' Whiskey—we want you to try it NOW. We want to Show you. We want to place some of our fine 'Old Reserve' Whiskey before you so you may know how rich, pure and delicious it really is—and here's the greatest offer you ever heard of.—Send us 50 cents—that's All and we will send you a full quart bottle of our fine 'Old Reserve' Whiskey—in a strong, plain case, by return express.—Remember—It's Pure Kentucky Whiskey and every bottle has our absolute guarantee that it is fully aged and full measure—as good and pure as it is possible to produce.—You take no chances. Our guarantee is fair and square—it means what it says—we must send you a quality that will please you in every way—and we will do it.—We lose Money shipping one quart means a loss to us—but we want your trade—and we know when you have tried this whiskey, you will be so pleased with it, that you will send us your future orders for at least a gallon at \$3.60 or four full quarts for \$4.00 and then we pay all the express charges.—A Wonderful offer. No one else offers a single quart of whiskey at our price of 50 cents a quart—no one else would be willing to lose money on a one quart shipment as we are doing simply to prove our claims for 'Old Reserve.'—Take us up on this offer—order this whiskey—try it—use all you want—and if you don't find it all we claim—the finest you ever tasted and the greatest value you ever saw—we will return your money together with all express cost without a word.—Now, Rush Your Order. Cut out this coupon—fill it in—and mail it to us with 50 cents in stamps, coin or money

order—and the full quart of fine 'Old Reserve' Whiskey will go by first express. You must pay express charges on this single quart shipment. The cost is small—only 25c to 50c, according to distance from San Francisco, but no matter how much expressage you paid, you will get a wonderful bargain. Golden & Co. 130 Pine St. San Francisco, Calif.

"Golden & Company. Not good after 30 days."

Accompanying said letter were the price lists of the various brands of whiskeys and wines and "miscellaneous liquors" handled and sold by the petitioner and an order sheet, in blank, to be used by the party to whom the letter was addressed if he elected to purchase any of the liquors referred to in the letter and the price lists.

Manifestly the ultimate question presented here, as is stated in the petition as well as is necessarily implied from the nature of this proceeding, is one of jurisdiction. That the respondents, as a magistrate's court and the presiding magistrate thereof, are wholly without legal authority or jurisdiction to examine the charge set forth in the complaint assailed by this proceeding is sought to be sustained upon the following grounds: (1) That, within the meaning of the language of the local option law, there can be no solicitation of orders for the sale of alcoholic liquors within no-license territory, unless the sale and delivery of such liquors are made or intended to be made within such no-license territory; (2) that section 15 of said act contemplates and intends that the solicitation interdicted thereby must be prosecuted in person within such territory by the persons or corporations, etc., mentioned in said section; or, in other words, that the solicitation contemplated by the section cannot be effectuated except it be done in person by such persons or corporations themselves or their agents, which proposition implies, of course, that they or their agents must be physically present within such territory when such solicitation takes place.

In addition to the points above specified, it is urged by Messrs. Golden and Pritchard, in a brief filed by them as amici curiæ, that section 15 of said act contravenes certain constitutional guaranties.

[1] Section 15 of the local option law reads as follows: "It shall be unlawful for any person, \* \* \* company, association or club, within any no-license territory, to solicit orders, take orders, or make agreements for the sale or delivery of alcoholic liquors; provided, that this shall not apply to the taking of such orders from a registered pharmacist at his place of business, or to the taking of orders for alcoholic liquors on the premises where stored or manufactured, under the conditions stated in section 16 hereof."

Section 16 provides: Nothing in this act shall be interpreted as rendering it unlawful to keep alcoholic liquors for distribution, or to sell or distribute such liquors, in no-li-

cense territory in the manner following: "1. The serving of such liquors by any person at his own home to members of his family or to his guests, as an act of hospitality, when no money or thing of value is received in return therefor, and when said home is not a place of public resort;" 2. the serving or dispensing of such liquors by a registered pharmacist for bona fide medical purposes, upon certain specified conditions, among which is that such liquors so dispensed shall not be drunk upon the premises where dispensed; 3. the selling of alcohol by a registered pharmacist for other than beverage purposes, upon certain designated conditions; 4 and 5. the selling of wine by a regularly licensed pharmacist for sacramental purposes only, on certain conditions, and the distributing of wine, at the sacramental service of any religious organization; 6. "the keeping of alcoholic liquors at cellars, vaults or warehouses, receiving orders at such cellars, \* \* \* for said liquors, and the shipping of the same therefrom; provided, said liquors are not distributed or delivered to any person or place in no-license territory within the county in which such cellars, \* \* \* are located, except when delivered to a common carrier for shipment to a place outside of no-license territory; 7. the keeping of alcoholic liquors on the premises where manufactured, receiving orders at said premises for such liquors, and the shipping of the same from such premises; provided, said liquors are not distributed or delivered in no-license territory within the county in which such premises are located in quantities of less than two gallons, and are not delivered to any person, or place in such territory within said county except as follows: (a) to a common carrier for shipment to a place outside of said no-license territory; (b) to other manufacturers of alcoholic liquors at the premises where they manufacture such liquors; (c) to cellars, vaults or warehouses where such liquors are stored or distributed as provided in the sixth paragraph of this section; (d) to any person at his or her permanent residence; (e) to registered pharmacists at their place of business."

It will be observed that section 15 exempts from its operation, to the extent of *taking orders* for alcoholic liquors, registered pharmacists and those places where such liquors are stored or manufactured, as provided by paragraphs 6 and 7 of section 16. There is no exception made as to the soliciting of orders, unless it may be said (and perhaps it may reasonably be so held) that such authority is necessarily implied from the provision that such orders may be taken from registered pharmacists. The provision authorizing the taking of orders on the premises where alcoholic liquors are stored or manufactured undoubtedly has reference to sales by the manufacturers of intoxicants, and does not therefore authorize the soliciting or taking of orders for such liquors *from them*, to be

delivered to them. It is quite clear, then that, except possibly as to registered pharmacists, regularly licensed to engage in the prosecution of their business in no-license territory, no one has a legal right to solicit or take orders for intoxicants from persons within such territory.

Now, as above indicated, the first point urged by the petitioner is that the provisions of the local option law do not and were not intended by the Legislature to prohibit the solicitation within no-license territory of orders for the sale or delivery of alcoholic liquors, unless the liquors to which such solicitation relates are to be delivered within such territory. Indeed, the contention goes so far as to involve the maintenance of the proposition that, while the legislative department of the government may, in the exercise of the police power, prohibit the solicitation or the making of agreements for the sale of intoxicating liquors within no-license territory where such liquors are to be delivered therein, legislation inhibitory of such solicitation or the making of such contracts within no-license territory, where the liquors are to be delivered outside the limits of such territory, would be invalid as in restraint of trade or in contravention of the right of contract.

In the case of *Ex parte Anixter*, 134 Pac. 193, the petitioner sought to be relieved, through the writ of habeas corpus, of the effect of a judgment of imprisonment, imposed upon him by the recorder's court of the town of Winters upon a conviction of the crime of soliciting orders within the limits of said town for intoxicating liquors, contrary to the provisions of an ordinance adopted by the governing board of Winters. It was there argued, as here, that the ordinance could not validly be so construed as to prevent persons from soliciting orders within the incorporated limits of Winters where the liquors to which such orders related were to be delivered outside of said limits, since such construction would operate in restraint of trade. In remanding the prisoner, and reviewing the point thus suggested, this court in effect held that the right of contract, or the principles supporting inhibitions against legislation in restraint of trade, could have no application in cases of prohibitory or regulatory legislation with respect to the traffic in alcoholic liquors. The writer of this opinion is the author of the opinion in the *Anixter* Case referred to. It was then his impression that, since it is settled beyond all peradventure that the traffic in such liquors is, in a legal aspect, a nuisance per se, which is merely to say that the traffic may exist, if at all, only by and through the sufferance of the government and not as of right, the state, or any of its subdivisions to which such powers are committed, may, in the exercise of the powers of police, not only suppress the traffic entirely, but, in addition thereto, may adopt

any regulation or character of legislation which will tend to remove every manner or form of temptation which might be introduced, and which might have the effect of encouraging the use of such liquors or of generating in the people living within the territory in which the traffic is prohibited a sentiment favorable to the resumption therein of such traffic. In other words, I had always been of the opinion that all legislation, whose purpose was to minimize the use of intoxicants as beverages, whether such legislation was of a prohibitory or merely of regulatory character, solely applied to and operated upon the personal conduct of the inhabitants constituting the community or territory affected thereby, and, as stated, could have no relation to or in any manner affect or impair, in legal contemplation, the right of contract; that therefore the state, or any of its political subdivisions to which it had confided the right to execute within their respective limits the police power, could legitimately declare, if it so elected, that no transactions of any kind or character whatsoever respecting intoxicating liquors, either as to the use thereof or the traffic therein, shall be inaugurated, conducted, or carried on within its boundaries. This power in the state with respect to the subject of intoxicating liquors I assumed had become absolutely complete, and, indeed, supreme, since by the act of Congress known as the "Wilson Act" (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]) intoxicating liquors had been expressly exempted from the operation of the commerce clause of the federal Constitution. *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733. I hence concluded that it was within the rightful power of this state and its municipalities, to which has been delegated by our Constitution full power in matters of the public police (article 11, § 11, Const.), to declare that the mere act itself of soliciting orders for intoxicating liquors or the making of agreements within its limits for the sale thereof, irrespective of the place where it was proposed or intended to deliver the liquors to which such solicitation or agreements related, whether within or without the boundaries of the state or political subdivisions within which such transactions were prohibited, and regardless of whether the result of such solicitation was a sale or an agreement to purchase any such liquors, shall constitute a public offense, punishable as the legislative power might deem necessary or wise to direct. I believed that such legislation could not be held to have extraterritorial operation, nor therefore operate in restraint of trade, since its effect was directly upon those within the territory affected thereby, and could in no manner or degree interfere with the right of persons living or being in a license territory to solicit or contract for or-

ders for such liquors in such territory. I conceived that, in the views thus entertained and expressed, I was supported by many, if not all, of the cases in which the power of the state with respect to the use and business of trafficking in alcoholic liquors has been fully and exhaustively reviewed and expounded and held to be (particularly since the Wilson act, supra, removed such liquors from among the subjects affected by interstate commerce) plenary, and, indeed, unhampered by any of the constitutional guaranties whereby certain other occupations, in themselves useful and necessary, yet subject to police regulation, are justly shielded against the effect of discriminatory legislation.

Of those cases, I need mention only two, of which the one which may first be mentioned is that of *Ex parte Christensen*, 85 Cal. 208, 213, 24 Pac. 747, 748, where it is said that the governing power may impose such conditions upon the existence of the traffic in alcoholic liquors as it pleases, and that, "even if it be conceded that *the conditions were arbitrary, they were within the power of the board.*" The other is the case of *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 10 Ann. Cas. 733, wherein the court was called upon to consider and pass upon certain objections, based upon constitutional grounds, urged against the validity of a statute of the state of South Dakota, imposing an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within said state, "by any traveling salesman, who solicits orders by the jug or bottle in lots less than five gallons." Upholding the statute and replying to a branch of the argument set up in support of the claim that the legislation involved therein was invalid, the court, among other things, said: " \* \* \* The proposition here relied on is widely different, since it is that, despite the Wilson act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another state. *But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted, or whence the liquor which they embraced was to be shipped.*" Again, in that case, the court, after referring to certain cases, notably *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, in which it was held that a state has the authority to prohibit and penalize the act of procuring, or agreeing to procure, any insurance from any foreign insurance company, unauthorized to do business within the borders of such state under the laws thereof (section 439, Pen. Code), uses the following language: "It follows that the

authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not have thought of making' must be as complete \* \* \* as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

From the foregoing authorities and many others which might be mentioned, I concluded that, if it be within the power of the states to prohibit the soliciting of orders for the sale of intoxicating liquors within their territorial limits, regardless of where such liquors were to be consigned or delivered, it was equally within their right, in the exercise of the supreme control which it must be conceded that they possess over the subject of intoxicating liquors, to delegate like power to the municipalities within their borders (article 11, § 11, Const., supra), or to other of their political subdivisions, whose electors may themselves, by virtue of legally exercisable authority, invoke the application, within their respective jurisdictions, of the provisions of a general law, which determines the extent and conditions to and upon which such liquors may be used (Stats. 1911, p. 599, supra).

[2] The foregoing observations, let it be understood, are not here made for the purpose of overthrowing the position of the petitioner in this proceeding upon the question to which they relate or of confuting the argument advanced in support of said position; but they are merely ventured as explanatory of the reasons which led to what now appears, from a recent decision of our Supreme Court, to have been an erroneous conclusion reached by this court in the *Anixter Case*, supra, as to the point referred to. The former court, in the case of *Ex parte Anixter*, 138 Pac. 353, the self-same case which was before this court and above referred to (the petitioner, after being remanded by this court, having petitioned the Supreme Court for and there claimed the right to his release, through the writ of habeas corpus, for the identical reasons urged in this court), has held that the petitioner here is right in his contention that the legislative authority of a political subdivision of the state cannot enforce penalties against those soliciting orders within its jurisdiction for intoxicating liquors, in cases where such liquors are to be delivered outside the limits of such subdivision. The court, in an opinion in that case, prepared by a justice of acknowledged learning and acumen,

and noted for the marked clearness with which he invariably expounds and applies to concrete cases the principles of jurisprudence, says: "The incorporated town of Winters in law cannot exercise control over the welfare of those beyond its corporate limits, and, touching the liquor traffic, its utmost right of control is to prevent soliciting and contracts of sale made within its limits for delivery of intoxicants therein. As a court, between two permissible constructions of a statute, will always give to it that which sustains its validity, so here it will be held that the ordinance applies, and applies only, to the soliciting and contracting for the sale of intoxicants to be delivered within the town limits. But the town of Winters has no legal right to say that a contract may not be made within its limits for the sale of intoxicants to be delivered without those limits. Such an ordinance would not be a reasonable exercise of the police power, and would plainly be in restraint of contract and of trade."

I take it that the principle thus enunciated is no less applicable to the local option law where the provisions thereof are invoked by the electors of a municipality, or of any other territory in the state to which the provisions of said law may be made to apply than to a municipal ordinance, and that, therefore, although the local option law has been adopted by the electors of the city of Woodland, and its provisions made applicable to the territory embraced within the incorporated limits of said city, the act of soliciting orders or making agreements within said city for the sale or delivery of intoxicating liquors cannot be prevented or penalized, where the intoxicants as to which such solicitation is prosecuted or agreements are made are to be delivered without or beyond such incorporated limits.

[3] The proposition thus decided, however, is of no importance here, so far as is concerned the decision of the question presented for determination in this proceeding. As before stated, and as is obvious, the sole question submitted here is whether the respondents have jurisdiction of the subject-matter of the complaint and of the person of the petitioner. It is true that, while the complaint charges that the solicitation was carried on within the incorporated limits of Woodland, it does not directly appear from or upon the face of that document where the liquors to which such solicitation related were to be delivered—whether within or without the limits of said city. But the complaint nevertheless states an offense of which the respondents have jurisdiction, not as a justice's court and the justice thereof, but as a magistrate's court and a magistrate, since the penalties prescribed for a violation of the provisions of the act are in excess of those within the power of a justice's court to impose under the law. Pen. Code, § 1425. The language of the complaint is,

in other words, so far as the element of the offense of which I am now speaking is concerned, in the language of the statute, and, abstractly viewing it, the complaint alleges facts constituting a charge which the respondents, as a magistrate's court and a magistrate, have the legal authority to preliminarily examine and to pass upon for the purposes of such hearing (assuming, of course, that the solicitation of orders by mail is an act which comes within the inhibitions of the statute), and it is sufficient to charge the offense in the language of the statute; for it would be a perfect defense to the charge of soliciting, and "the defendant would be completely exonerated," if, either at the examination or the trial, he should make "a showing that in fact the delivery was not to be made within the territorial limits of the town." *Ex parte Anixter*, 138 Pac. 353, *supra*.

[4] The next point urged against the validity of the proceedings pending before the respondents is, as seen, that the crime of soliciting orders, taking orders or making agreements within no-license territory for the sale or delivery of intoxicants therein cannot be committed, within the contemplation of section 15 of the statute, unless such solicitation or making of agreements be carried on within such territory in person by a party or his agent. In other words, the contention is that, to constitute either or any of the offenses denounced by said section, the party charged or his agent must be shown to have been physically present within the no-license territory, and there in person have solicited or taken such orders or made such agreements. This construction of said section is arrived at by a grammatical analysis of the phraseology thereof, whereby, considering the construction concretely, it is sought to be established that the Legislature intended the language of the section to be understood as it may be paraphrased as follows: "It shall be unlawful for any person, corporation, firm, company, etc., being at the time within no-license territory, to solicit orders, take orders or make agreements within such territory for the sale or delivery of alcoholic liquors," etc.

In support of the construction thus arrived at, it is asserted that grammatically the phrase, "within any no-license territory," as used in the section, "necessarily qualifies the series of nouns commencing with the word, 'person' (as used therein), rather than the verb, 'solicit,' or the still more remote phrase, 'for the sale or delivery.'" As sustaining that theory of the legislative intent, so far as said section is concerned, attention is directed to the rule laid down in section 73 of Black's Interpretation of Laws as follows: "As a general rule, relative, qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, *unless the context or the evident meaning of the enactment requires a dif-*



*ferent construction.*" (The italics are mine.) Or, as the rule is stated in *Piper v. Boston*, etc., R. R., 75 N. H. 435, 75 Atl. 1041, "the general rule of grammar and law is that relative terms refer to the next preceding antecedent, *unless it is clear from the context that a different one was intended.*" (Italics mine.)

Not only by implication, from the fact of their reliance upon the rule of interpretation above quoted, do counsel for the petitioner concede that the construction of laws or contracts according to strict grammatical rules will not prevail where such construction is *clearly* opposed to the context or evident spirit or purpose of such laws or contracts, but they expressly admit the soundness of the proposition in their brief. They vigorously contend, however, that their construction of section 15 is in perfect harmony with the spirit and purpose of the local option law. The argument is that the sole and paramount object of said law is, as is claimed to be true of all laws licensing, regulating, or prohibiting the sale of liquor, to control, regulate or prohibit the *public traffic* in intoxicants; that it is directed against the saloons and places where intoxicating liquor is sold and drunk upon the premises; that the act does not, even if it were competent for the Legislature so to ordain, attempt to "control or direct individual use of liquor, since it expressly exempts from the operation of its penalties the act of keeping intoxicants at one's home in no-license territory for family use or the purposes of hospitality; that therefore the solicitation for orders for intoxicants to be used for such purposes is an essential incident of said right."

But, so the argument runs, even assuming that the soliciting of orders from individuals within no-license territory was intended to be and is proscribed, since the law cannot punish for sales of liquor committed outside of such territory, "it cannot be presumed that the usual and ordinary incidents of sales are prohibited. Accordingly," so it is then declared, "it is the personal soliciting by those within the territory rather than advertising or the mailing of circulars by those outside the territory that is sought to be prevented."

I cannot agree with the petitioner in its construction of section 15 of the local option act, nor am I impressed with the various arguments offered in support of such construction, some of which are briefly given in the foregoing statement of its conception of the intent and scope of said section. It may well be conceded that the language of said section, when tested solely by the strict rules of grammar, appears, upon its face, to be involved in some obscurity. At any rate, it can be said that the legislative intent as to the scope of the section could well have been expressed with a greater degree of perspicuity, or, in other words, its phraseology so ar-

ranged as that there would be left no ground upon which there could exist any difference of opinion as to what I conceive must be its true import. But, when examined under the test of familiar rules of statutory construction, aided by the light afforded by the vital object which is obviously sought to be accomplished by the legislation of which it forms a part, no doubt can reasonably arise that said section was intended by the Legislature to prevent, if possible, or to penalize, if committed, the solicitation of orders, the taking of orders or the making of agreements within no-license territory for the sale or delivery of intoxicating liquors in such territory, irrespective of the manner in which such acts may be accomplished. By this I mean to say that one who solicits orders or makes agreements through the instrumentality of letters, sent to the addresses in no-license territory of persons residing or being therein, thus brings himself as clearly under the ban of the statute as if he were to prosecute such solicitation or make such agreements in person within the boundaries of such territory.

[5-7] A fundamental canon of construction is that every statute must be construed with reference to the object intended to be accomplished by it. *People v. Dana*, 22 Cal. 11. "In order to ascertain this object, it is proper to consider the occasion and necessity of its enactment, \* \* \* and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended." 36 Cyc. p. 1110, and cases cited in the footnotes. And, where a statute "is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected and the latter adopted." *In re Mitchell*, 120 Cal. 384, 386, 52 Pac. 799, 800. The rule last stated is merely a repetition in another form of the rule relied upon by the petitioner and above quoted, and has peculiar force in its application to the proposition that where a statute may be given a grammatical construction leading to a result in manifest opposition to its purpose and intent, or in circumvention of its paramount object, such construction will be rejected, and one adopted which will effectuate or carry out the object designed by the Legislature to be accomplished by the act.

Aided by the foregoing rules, no difficulty seems to be in the way of reaching an accurate conclusion as to the meaning and scope which it was the legislative intention that section 15 of the act in question, particularly the words, "solicit orders," should bear and possess.

[8] As to the general object and the legality of the legislation involved in the local option law, and incidentally noticing some of the arguments set up in support of the petitioner's position, it may first be conceded



that the real root of the mischiefs and evils which too frequently directly result from the use of intoxicants is in the public retail traffic therein, and that it is true, as counsel for the petitioner maintain, that legislation bearing upon the question of intoxicating liquors is primarily directed against such traffic. It is also true that the individual act of using or consuming intoxicants appertains to or comes within the category of a citizen's personal liberties, and with which act governmental interference can legally be interposed only where the individual use of such liquors becomes intoxication or alcoholism, and thus an infringement of the personal rights and liberties of others. But while, as stated, this is all true, it cannot for a moment be doubted that the great ultimate object of all legislation upon the subject of intoxicating liquors is, as is obviously true of the statute in question, to reduce to the lowest minimum the individual use and consumption of such liquors as beverages and thus diminish intemperance. And, while the state may not interfere with the individual act of consumption, where such act does not develop a condition of which it may legally take cognizance, it may nevertheless adopt such reasonable regulations relative to such private or individual use and consumption as will prevent it from becoming a public evil, or responsible for conditions or mischiefs equal in enormity or degree to those proceeding directly from the traffic itself. Indeed, it is, as before intimated, within the constitutional rights of the Legislature, in the exercise of the police power of the state, to establish any regulation which may tend to remove every temptation to use intoxicants as beverages under any circumstances, and which, if permitted to exist, might have the effect of creating a general sentiment in no-license territory favorable to the revival of the traffic therein. It is therefore within the constitutional competence of the Legislature to prohibit, and to authorize punishment for a violation of the prohibition, every act and form of soliciting for orders within no-license territory for the sale of intoxicants, to be delivered in such territory, regardless of the use to which they may be intended to be put—that is to say, irrespective of whether the orders so solicited related to individual or other uses. In the case here, the statute has made it unlawful to solicit such orders from all persons within no-license territory, except, perhaps, as before suggested, registered pharmacists, and, although, as shown, individual use of liquors at one's home for the purposes specified in section 16 is permitted, it is very clear, not alone from the manifest general purposes of the law, but also from the fact that the taking of orders from individuals for liquors to be used at their homes is not, as is true in the case of pharmacists, authorized by section 15 either expressly or by implication, that the act of soliciting orders from individ-

uals for household purposes was intended to be and is enjoined by the statute. It is in other words, contrary to said act to solicit orders from or make agreements with any person within the limits of no-license territory for intoxicants, to be delivered therein, except registered and licensed pharmacists. If this be not true, then manifestly the law has little, if any, practical meaning for the purposes for which it was passed.

[9] Nor is it important so far as is concerned either the act of soliciting orders or that of making agreements for the sale or delivery of intoxicants, whether the sale contemplated by such solicitation or agreements is consummated outside of the territory, for the gist or gravamen of the offense of soliciting orders, or that of making agreements for intoxicants within such territory, is in the solicitation or the making of the agreements *with the purpose and intent of delivering such liquors therein*. It is, in other words, not unlike the crime of burglary, which consists of the mere entering of a building with the intent to steal or commit some other crime, irrespective of whether or not any property be actually stolen, or any other act, which in itself would constitute a different crime, was actually committed.

The foregoing views are, I think, in perfect accord with those of the Supreme Court as expressed in the *Anixter Case*, above referred to, concerning an ordinance whose language is very much like that contained in section 15 of the act under consideration.

It has already been declared that by section 15 it was intended to enjoin every form of solicitation of orders for intoxicants. By this it was intended to be said that, viewing section 15 by the light of the obvious paramount purpose sought to be achieved by the legislation represented by the act, no other reasonable meaning can be deduced from it than that thus it was intended to prevent every kind and character of solicitation, whatever may be its form, whether in person or by letter or other like communications sent either from without or from within no-license territory through the United States mail or by messengers and addressed to persons within such territory, except pharmacists, at their residences or places of business.

The construction for which the petitioner contends would render the act woefully impotent for the accomplishment of its purpose as a prohibitory measure. It would, indeed, open up an avenue whereby the central object of the statute could be frustrated, almost, if not quite, to the extent of rendering it nugatory. It would, in brief, countenance a gross evasion of the evident spirit and intent of the statute for liquor dealers engaged in business outside the borders of no-license territory could, with impunity, and immunity from punishment, carry on a mail order liquor traffic within such territory (*Rose v. State*, 4 Ga. App. 588, 62 S. E. 117), and thus

impart to the act an effect which would make it practically prohibitory of prohibition rather than prohibitory of the liquor business. Besides, such a construction would have the effect of granting to persons licensed to conduct the liquor trade outside the limits of no-license territory privileges exercisable within such territory which cannot be enjoyed by persons residing or doing business therein, that is to say that, while persons engaged in the liquor business outside the boundaries of no-license territory could solicit orders and make agreements touching intoxicants, manufacturers of such liquors maintaining and carrying on their business as such within the limits thereof cannot legally do so, a discrimination which the Legislature doubtless has the right to make as to the liquor traffic, but which, from the manifestly absurd consequences which would follow therefrom, it cannot reasonably be supposed to have intended; for thereby the city embracing such territory or the county in which it is situated, would not only be deprived of its revenues, but of the power of exercising that proper control of the traffic which results from the imposition of the license. *People v. Swenson*, 162 Mich. 397, 127 N. W. 302.

[10] Counsel, however, perceive no difference between the act of soliciting orders by means of letters or circulars sent through the mail to particular individuals in no-license territory and the circulation in such territory of newspapers, containing among others relating to other matters, advertisements extolling the quality and giving the prices of certain brands of liquor. But there is an obvious distinction between the two propositions, and it lies in the fact that, in the one case, the minds of particular persons are directly addressed upon a single subject, and their attention thus specially called to the subject-matter of the letter or circular, while in the other no particular person is appealed to upon any one of the various matters which are usually referred to in or given publicity through the medium of the advertising columns of a newspaper of general circulation. "Solicit," according to Webster's Dictionary, is "to apply to for obtaining something; to awake or excite to action; to arouse a desire in," etc., and it may apply to cases where one asks another for a bribe, or asks another to commit bribery or larceny and other offenses. *Black's Law Dict.*, p. 1105. It implies *personal* petition and importunity addressed to a particular individual to do some particular thing, and it is unquestionably in this sense that the term is used in the statute. If our statute against bribery in terms, as in effect it does, had been made to say that a public officer who *solicited* a bribe for the performance of some act within his official duties, and the officer should, by letter, solicit the payment to him of a bribe, it would not for a moment be questioned that such act of the officer would constitute a solicitation of a bribe within the

meaning of the law. So it is and must be true here. A letter or circular, such as the one involved in this case, addressed to a particular person, and emphasizing in alluring terms the superior quality of certain commodities, giving the prices at which they may be purchased, and vigorously importuning the addressee to buy and use the same, can be no less a *personal* solicitation for orders for such commodities than would be the solicitation of a bribe through the medium of a letter, or, indeed, than would be the case of like solicitation prosecuted *in person* by the party by whom such letter or circular is sent out. An advertisement can in no sense be held to be a *personal* petition or request addressed to any particular person. The ordinary advertisement so published has the effect only of directing attention, in a general way, to the matter advertised, and is, as before stated, addressed to the general public wherever such newspaper is circulated.

But there is ample judicial authority for holding that a solicitation of orders by mail for the sale of liquors to be delivered in no-license units within which solicitation of such orders is in general terms forbidden by law is a violation of the legislative mandate.

In *Rose v. State*, *supra*, the question is elaborately and ably examined in a case calling for the construction of a section of the Penal Code of the state of Georgia which provided: "If any person shall sell, contract to sell, take orders for or solicit personally or by agent, the sale of spirituous, malt or intoxicating liquors in any county or town or municipal corporation or militia district or other place where the sale of such liquors is prohibited by law, high license or otherwise, he shall be guilty of a misdemeanor." The counties of the state of Georgia are given the authority, by a general act of the state Legislature, to prohibit the traffic in intoxicating liquors within their respective jurisdictions. The defendants were accused of personally soliciting the sale of intoxicating liquors within Bartow county in said state, "said soliciting being made by and through the United States mail, by mailing letters to the citizens of Bartow county from the city of Chattanooga, Tenn., containing self-addressed envelopes, order blanks, and other printed and written matter soliciting the sale of said liquor, said letters having been mailed and delivered" to certain named citizens of said county. It was claimed in that case, as here, that the solicitation of orders for liquor by mail did not constitute the solicitation contemplated or intended by the Code section, but that the section applied only to solicitations made by one in person, "and that for that reason the solicitation of sales, referred to, whether it be by the seller himself or by his agent, must be by personal visit to the locality where such sales are prohibited." In support of that contention, special emphasis was placed upon the language of the section, "solicit *personally*." The court rejected the

construction thus given the section and the argument advanced in support of it, saying, *inter alia*: "When we consider that the intention of the act, to which we have already referred, was to make criminal the introduction of intoxicants from a county where the sale of such intoxicants was legal into a county where the sale was prohibited, it is readily to be seen that, while the solicitation which was made penal could be a personal solicitation, it was none the less made a crime for any person, either himself or by an agent, *in any way*, to solicit the sale of intoxicating liquors where it was prohibited." Again the court said: "We have no difficulty, therefore, in holding that it was the intention of the Legislature (in order to make the prohibition laws of those counties that might adopt them effective) to absolutely prohibit the encouragement of purchases of intoxicating liquors in counties which had prohibited the sale, *by any kind or form of solicitation* (*italics mine*), except that licensed sellers might solicit orders from licensed druggists and licensed physicians."

In *Hayner v. State*, 83 Ohio St. 178, 93 N. E. 900, the Ohio Supreme Court sustained a verdict whereby the defendant was convicted of the crime of soliciting orders within "dry" territory for intoxicating liquors, said soliciting having been done by mail, under circumstances precisely the same as those disclosed by the complaint in this case, the court, among other things, saying: "We assume that the act of soliciting may be done by letter, as well as in person."

In *State v. Holmes*, 68 Wash. 7, 122 Pac. 345, the defendant had been convicted of the charge of soliciting orders for intoxicating liquors within a dry unit, under a statute of the state of Washington making such solicitation a misdemeanor. The soliciting was done, precisely as here, by means of a circular letter sent through the United States mail by the defendant from the city of Seattle, where the sale of intoxicating liquors was then permitted by law, to a citizen of the city of Everett, in said state, which was a unit in which the sale of such liquors was then unlawful. The Supreme Court of that state upheld the judgment following the verdict of conviction upon the authority, principally, of the case of *Rose v. State*, *supra*, of which it had this to say in its opinion in the *Holmes* Case: "Upon every point discussed, we regard that opinion as logical, unanswerable, and well sustained by authority. Its reasoning and conclusions, which we approve and adopt, when applied to the facts in this case, not only support the proposition that appellant's act was an unlawful solicitation of orders for intoxicating liquors in a dry unit, but are also convincing to the effect that such unlawful act was committed in the city of Everett, where appellant's letter was received by Swallowell." See, also, *U. S. v. Thayer*, 209 U.

S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; In re *Palliser*, 136 U. S. 266, 10 Sup. Ct. 1034, 34 L. Ed. 514; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126; *Burton v. U. S.*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Danciger v. Stone* (C. C.) 187 Fed. 861.

[11] As is shown by the above-cited cases, and, indeed, as necessarily follows from the conclusion arrived at here with respect to the scope of the language, "solicit orders," as employed in the statute in question, the crime charged against the petitioner was committed upon the receipt of the circular letter in the city of Woodland by the party to whom it was addressed, and the venue of the offense is consequently in Yolo county, in which the city of Woodland is situated. See cases above cited, particularly *Thayer v. U. S.*

I have carefully examined the brief filed here by counsel *amici curiæ*. It is unnecessary to review in detail the arguments and authorities presented therein. It is enough to say that most of the points made in said brief are in effect answered in the foregoing views of the vital questions submitted by this proceeding. It may be remarked, however, that many of the cases cited by counsel in the brief referred to have no application to the case at bar. The cases referred to have to do with legislation purporting to control, as a police regulation, businesses which are in themselves legitimate, and which, though subject to the police power are essential to the well-being of society, and which can neither be suppressed nor so regulated as that unjust, burdensome, or discriminatory conditions may be imposed upon them or the right to conduct them. For instance, the slaughterhouse, the cemetery, and other like cases, cited by counsel as *amici curiæ*, obviously deal with occupations in which people have the inherent right to engage, because they are, unlike the liquor traffic, necessary and useful; yet they are of a character that, unless managed in a proper way, they may become a source of great injury to the comfort and health of communities. Therefore, as stated, the state, in the exercise of its powers of police, may regulate the manner of their management so as to prevent, as far as possible, the injurious results to others which are known to come from the prosecution of such occupations; but, as declared, such regulations can neither be prohibitory nor discriminatory in their effect, as is true, in my opinion, as to legislation affecting the liquor traffic.

I think, for the reasons herein stated, that the respondents have jurisdiction of the proceeding of which complaint is here made, and the order to show cause is therefore discharged and the writ dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

**GOLDEN & CO. v. JUSTICE'S COURT OF  
GUINDA TP., YOLO COUNTY,  
et al. (Civ. 1195.)**

(District Court of Appeal, Third District, California. Feb. 12, 1914. Rehearing Denied by Supreme Court April 13, 1914.)

**INTOXICATING LIQUORS (§ 146\*)—CRIMINAL  
OFFENSES—SOLICITING ORDERS.**

An ordinance of the board of supervisors of a county, making it unlawful for any person, etc., as principal, agent, employé, or otherwise within such county to solicit orders for the sale of alcoholic liquors, was violated by the sending of a circular letter through the mail to a resident of the county soliciting an order.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

Original application by Golden & Co. for a writ of prohibition against the Justice's Court of Guinda Township, Yolo County, and another. Alternative writ discharged.

Hoesfer & Morris, of San Francisco, for petitioner. A. G. Bailey, Dist. Atty., of Woodland, for respondents. I. M. Golden, of San Francisco, amicus curiæ.

**HART, J.** This is an application for a writ of prohibition to restrain the respondents from taking further steps in a certain proceeding, now pending before them, and which is based upon a complaint whereby the petitioner is charged with the violation of the provisions of section 4 of ordinance No. 72 of the county of Yolo, passed by the board of supervisors of said county on the 5th day of September, 1911.

The purpose of said ordinance is the regulation of the business of selling intoxicating liquors in the said county of Yolo. Section 2a provides that 10 licenses and no more shall be issued in Yolo county to carry on and conduct the liquor traffic, and then follows a designation of the towns and places wherein the right to carry on said business under the licenses mentioned, when the same are duly issued, may be exercised. No part of the territory in said county known as Guinda township, of which the respondents are the justice's court and the justice of the peace, is included among those in which licenses to conduct the liquor traffic may be issued under said ordinance.

Section 4 of said ordinance provides: " \* \* \* It shall be unlawful for any person, company, association or club, as principal, agent, employé, or otherwise, within the limits of the county of Yolo, to solicit orders, take orders or make agreements for the sale or delivery of alcoholic liquors."

The complaint filed against the petitioner with the respondents is made a part of the petition for the writ applied for here, and from said complaint it appears that the petitioner is charged with soliciting an order in said Guinda township for alcoholic liquors by means of a circular letter, sent through

the United States mail to a resident of said township at his post office address therein. The circular letter, which is set out in said complaint, is substantially in the language of the letter involved in the case of *Golden & Co. (the petitioner here) v. Justice's Court of Woodland Township et al.* (Civil No. 1194), 140 Pac. 49, this day decided.

Both cases were submitted to this court at the same time and upon the same oral arguments and briefs, both involving precisely the same legal questions. Therefore, upon the authority of the case of *Golden & Co. v. Justice's Court of Woodland Township et al.*, the relief applied for here must be denied and the alternative writ of prohibition accordingly discharged.

Such is the order.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

**ARIZONA LIFE INS. CO. v. LINDELL†**  
(Supreme Court of Arizona. April 16, 1914.)

**1. PRINCIPAL AND AGENT (§ 20\*)—EVIDENCE  
OF AGENCY—PAROL EVIDENCE.**

In an action against an insurance company to recover a cash payment made by plaintiff on a stock subscription agreement, oral evidence was admissible to show that the person with whom plaintiff contracted for the return of the payment was acting as defendant's agent, so that defendant was bound by the contract, though not an ostensible party thereto.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 37, 38; Dec. Dig. § 20.\*]

**2. PLEADING (§ 291\*)—DENIAL—VERIFIED  
DENIAL—AUTHORITY OF AGENT.**

In an action on a written contract by the agents of defendant insurance company to return a cash payment made on a stock subscription any time within 90 days, an allegation that such contract was made by defendant's agent was admitted if not denied by a verified answer under Civ. Code 1901, par. 1358, requiring an answer denying the execution by defendant's authority of a writing upon which a pleading is founded to be verified by affidavit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864, 865, 866½-879; Dec. Dig. § 291.\*]

**3. CORPORATIONS (§ 515\*)—ULTRA VIRES ACTS  
—NECESSITY OF PLEADING.**

A corporation must specifically plead 'its want of power to do an act upon which liability by it is predicated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2082-2084; Dec. Dig. § 515.\*]

**4. INTEREST (§ 46\*)—RIGHT TO RECOVER.**

In an action against an insurance company to recover an amount paid on a contract to subscribe for its corporate stock under its agreement to return the payment within 90 days, if demanded, plaintiff, upon recovering, should be allowed interest from the date of his demand for the return of the payment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 95-105; Dec. Dig. § 46.\*]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Action by John Lindell against the Arizona Life Insurance Company. From a judgment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 6, 1914.

for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed as modified.

Hayes & Laney, of Phoenix, for appellant. Richard P. Talbot and Daniel E. Parks, both of Prescott, for appellee.

ROSS, J. The appellant insurance company, acting by its agent, George Moselle, on July 31, 1911, and the appellee, acting in his own behalf, had dealings and transactions as follows: The appellee subscribed to 50 shares of the capital stock of the appellant insurance company, agreeing to pay therefor \$25 per share, \$312.50 in cash, and balance of \$937.50 in notes bearing 6 per cent. interest. Simultaneously, and as a part of the same transaction, another paper was executed and delivered to appellee, to wit: "Temporary Receipt. July 31, 1911. Received of John Lindell of Prescott subscription for fifty shares of the capital stock of the Arizona Life Insurance Company, at \$25.00 a share, upon which following settlement has been made; \$312.50 cash and note for \$937.50 for nine months, bearing six (6) per cent. interest, from September 1st. Of the settlement made under this subscription, there shall be deposited with Prescott National Bank of Prescott for the benefit of the company an amount equal to eighty (80) per cent., which shall only be subject to withdrawal by the properly elected certifying settlement as above. Arizona Life Insurance Co., Geo. Moselle, Agent."

Indorsed on the back thereof, in writing, was this memorandum agreement: "I hereby agree to return to John Lindell at the end of ninety days his full subscription or any part of same, as he may desire. [Signed] Geo. Moselle."

Appellee made the cash payment to Moselle, the agent of the appellant, and delivered to him his note or notes for balance. Within 90 days from July 31, 1911, appellee demanded of the appellant the return of the cash payment of \$312.50, which was refused. No other payments were made, and no stock was ever issued to appellee. This suit was instituted to recover the cash payment of \$312.50. It was tried by the court without a jury, and judgment went against appellant for the full amount, together with interest at 6 per cent. from July 31, 1911. From the judgment and order overruling motion for a new trial, this appeal is prosecuted.

It is the contention of appellant that the written indorsement on the temporary receipt was the personal obligation of Moselle and not the obligation of the insurance company, and that the court erred in admitting it in evidence and in permitting witness Lindell (appellee) to testify that Moselle told him that he was acting, in making such agreement, for and in behalf of the company and not for himself, because said evidence was for the purpose of varying or altering the unambiguous terms of a written contract.

[1] The memorandum agreement to refund the cash payment made by appellee is certainly binding upon Moselle, who signed it, but the question is whether the rules of evidence will permit the use of oral evidence for the purpose of showing that, in the execution of the agreement, Moselle was the agent acting for and in behalf of his principal, the insurance company, and though the latter is not disclosed as principal yet it is bound by the agreement.

Jones in his Commentaries on Evidence, vol. 3, § 452, states the rule: "In order to charge the real principal, it is always competent, in whatever form a parol or written contract is executed by an agent, to ascertain by evidence dehors the instrument who is the principal; whether it purports to be the contract of an agent or is made in the name of the agent as principal. So that, while, if one signs an agreement without indicating in any way that he acts as agent for a principal, he cannot, in order to escape the liability, prove by parol that he was acting for another, yet such agency may be proved for the purpose of binding the principal, or for the purpose of giving the principal the benefit of the contract."

Wigmore on Evidence, vol. 4, § 2438, gives the rule as follows: "(a) In the first place, where the unnamed principal is unknown to the obligee, it is proper to give force to the contract between principal and agent for the purpose of charging or entitling the principal, though not of exonerating the agent, unless in the particular case the document plainly was intended to deal otherwise with the transaction. (b) In the second place, where the unnamed principal was known to the obligee but nevertheless not named in the document, the rule may here equally permit the agreement to be available for the former purpose above mentioned; yet the ordinary inference will be that the named parties intended the document to be exclusive of all other parties, unless a contrary intention be made to appear."

In 10 Cyc. 1051, the rule is stated to be: "Another branch of this doctrine, applicable to simple contracts in writing other than negotiable instruments, but not applicable to negotiable or to sealed instruments, is that, where the contract in point of fact is executed by an agent on behalf of an undisclosed principal, the fact that it was so executed may be proved by parol evidence, so as to charge the undisclosed principal, but not for the purpose of releasing the agent. This rule applies whether the unnamed principal is a natural person or a corporation."

In *Barbre v. Goodale*, 28 Or. 465, 43 Pac. 378, 379, the question was as to "whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution." That court held the better rule to be

to allow the parol testimony, stating: "That the intention of the party must be gathered from his words, and the various circumstances which surround the transaction, as its practical effect is to promote justice and fair dealing. \* \* \* This doctrine must be limited to simple contracts, and may not be extended to negotiable instruments and specialties under seal, as they constitute an exception to the rule."

In *Richards v. Warnekros*, 14 Ariz. 488, 131 Pac. 154, it was held by this court that parol testimony was not admissible to bind a principal whose name is not disclosed upon the face of a negotiable instrument, and suggested inferentially a contrary doctrine as to simple contracts.

We think the evidence complained of was properly admitted, and that the finding of the court that Moselle, in making the agreement to refund, acted for and in behalf of the insurance company is fully sustained by the evidence. But it is contended by appellant that the agent Moselle in making such agreement exceeded his authority, and that there was a want of power in the insurance company to enter into such an agreement, as it is in excess and outside of its charter rights. These questions were not raised by the appellant in its answer. The answer is an unverified general denial. Our statute (paragraph 1358, R. S. 1901) provides that an answer denying "the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority," unless the truth of the pleadings appear of record, shall be verified by affidavit.

[2] This action is founded on the written promise to return the cash payment at any time within 90 days, if so desired by appellee, and it is charged in the complaint that the instrument containing such promise was executed by appellant, acting by and through its authorized agent Moselle. Under the law, without a verified denial of this allegation, it stands admitted as true. *City Water Works v. White*, 61 Tex. 536; *Thompson on Corporations*, vol. 3, § 3253.

[3] The want of power in the appellant to make the agreement, not having been set up in its answer, is not before the court.

"On the theory that affirmative defenses must be specially pleaded, in order to raise the question of the want of power of a corporation to perform a particular act, or the authority of some officer or agent to execute the instrument in controversy, or that a particular transaction is illegal, the want of power on the part of the corporation to do the act, or the lack of authority on the part of the officer or agent executing the instrument, or the illegality of the transaction, must be specially pleaded." 3 *Thomp. Corp.* 3254.

The court gave judgment for interest at 6

per cent. per annum from July 31, 1911, the date upon which appellee paid the \$312.50 cash payment. The evidence is to the effect that appellee demanded the return of his money within the 90 days, but no definite day is fixed.

[4] We think that interest should be allowed only from the date of demand, and under the evidence that might have been the last day of the 90 days in which he was permitted to exercise his option of demanding a return of his \$312.50. The interest should run from October 31, 1911.

Let the judgment be modified in that respect, and, as thus modified, affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

#### COCHISE COUNTY v. MICHELENA.

(Supreme Court of Arizona. April 18, 1914.)

COURTS (§ 56\*)—INTERPRETERS—FEES—COURT'S LIABILITY.

Civ. Code 1901, par. 2505, authorizes the appointment of interpreters, who may be summoned in the same manner as witnesses, and Laws 1903, No. 91, § 1, declares that supervisors may pay interpreters' fees to persons who shall act as such in the prosecution or defense of criminal cases. *Held*, that an interpreter cannot maintain an action against a county for fees, unless the services were rendered in the prosecution or defense of a criminal case or in a civil case in which the county was a party, so that a complaint for such fees against a county, which was silent as to the character of the cases in which plaintiff served, did not state a cause of action.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 194-197; Dec. Dig. § 56.\*]

Error from Superior Court, Pima County; Wm. F. Cooper, Judge.

Action by Pedro Michelena against Cochise County. Judgment for plaintiff, and defendant brings error. Reversed.

W. G. Gilmore, Co. Atty., of Tombstone, and Alexander Murry, Asst. Co. Atty., of Bisbee, for plaintiff in error. Charles Blenman, of Tuscon, for defendant in error.

KROOK, J. Action by Pedro Michelena, defendant in error, plaintiff below, against Cochise county, plaintiff in error, defendant below, to recover compensation for services and expenses rendered and incurred as Spanish interpreter in the district court of the Second judicial district of the territory of Arizona in and for Cochise county. It is alleged in the complaint that said Pedro Michelena was subpoenaed to appear before said district court in said county on the 24th day of April, 1911, and sets forth the issuance of this subpoena, his attendance in obedience thereto, and that said services were reasonably worth the sum of \$5 per day; that the itemized claims therefor were presented to, and the payment thereof recommended by, the presiding judge, and were thereupon presented to, and filed with, the board of super-

visors of Cochise county, according to law, and by said board disallowed; and that less than six months have elapsed since said claims were so rejected by said board. Neither the complaint nor any of said claims (copies of which are attached to said complaint as exhibits) state whether the services rendered were rendered in civil or criminal cases, or in civil cases in which the county was interested. Defendant below filed a general demurrer, which was overruled by the trial court, and judgment rendered for the plaintiff below in the amount claimed in his complaint, and for costs. Defendant below brings error.

The contention of plaintiff in error is that, in the absence of an express averment that the services were rendered in criminal cases, or in civil cases in which the county was interested, the complaint fails to state a cause of action.

The defendant in error, on the other hand, claims that the complaint contains the usual counts for services rendered, and that, from the facts stated, it must be presumed that the same were rendered in the prosecution or defense of criminal cases.

Two questions arise, namely: (1) In what cases is a county liable for interpreter's fees? (2) Was the demurrer properly overruled?

It is apparent, from an examination of our statutes relating to court interpreters, that a county cannot be held to answer for fees claimed by an interpreter while acting as such in civil cases in which the county is not interested. In paragraph 2505, R. S. Arizona 1901, it is provided that: "The court may when necessary appoint interpreters, who may be summoned in the same manner as witnesses, and shall be subject to the same penalties for disobedience." And in section 1, No. 91, Laws of 1903, that: "The boards of supervisors of the various counties in this territory are hereby authorized to audit and pay interpreters' fees to persons who shall act as such in the prosecution or defense of criminal cases in the various courts of the territory. However such compensation shall not exceed for interpreters in the justice courts the sum of 2 dollars and fifty cents per day, and the district courts, not exceeding the sum of five dollars per day." Therefore a person cannot maintain an action against the county for interpreter's fees, unless they are for services rendered in the prosecution or defense of criminal cases, or in civil cases in which the county is a party.

The complaint is wholly silent as to the character of the cases in which the plaintiff is alleged to have served as interpreter, nor can it be inferred from any statement contained therein. As the right to recovery in this action depends upon whether the services were performed under the specified conditions of the statute, the complaint should state facts sufficient to bring the case

within said provisions, and a failure to do so renders it fatally defective. *Malone v. Escambia County*, 116 Ala. 214, 22 South. 503; *Tweedy v. Freemont County*, 99 Iowa, 721, 68 N. W. 921; *Pitkin County v. First Nat. Bank*, 6 Colo. App. 423, 40 Pac. 894; *Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345, 347.

The demurrer, therefore, should have been sustained.

Judgment reversed, with leave to defendant in error to amend his complaint, if he be so advised.

FRANKLIN, C. J., and ROSS, J., concur.

CUNNINGHAM, J., being disqualified, and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. CARL G. KROOK, Judge of the Superior Court of the State of Arizona in and for the County of Mohave, to sit with them in the hearing of this cause.

#### MACHOMICH MERCANTILE CO. v. HICKEY.

(Supreme Court of Arizona. April 15, 1914.)

#### 1. APPEAL AND ERROR (§ 1078\*)—WAIVER OF ERRORS—FAILURE TO ARGUE.

Where the reasons set up as grounds for the assignment that the court erred in overruling the motion for a new trial were not argued, they would not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

#### 2. PLEADING (§ 34\*) — COMPLAINT — SUFFICIENCY.

In construing the language of a complaint, every reasonable intendment should be made to sustain the pleading, if possible.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

#### 3. PLEADING (§ 192\*) — COMPLAINT — SUFFICIENCY.

That a complaint alleged legal conclusions instead of facts did not make it bad on general demurrer, where the intention of plaintiff was apparent.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 408-427; Dec. Dig. § 192.\*]

#### 4. TRIAL (§ 82\*)—RESERVATION OF GROUNDS OF REVIEW.

A general objection to evidence not stating any point was wholly unavailable.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 194-210; Dec. Dig. § 82.\*]

#### 5. TRIAL (§ 314\*)—DELIBERATIONS OF JURY—URGING OR COERCING AGREEMENT.

A statement of the trial judge, after the jury had considered a case during one night and until noon of the following day, that the case had been twice tried, and that he hoped they would arrive at a verdict one way or the other, did not require a reversal.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 472, 473, 747, 748; Dec. Dig. § 314.\*]

Appeal from Superior Court, Cochise County; Fred Sutter, Judge.

Action by D. P. Hickey against the Machomich Mercantile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lee O. Woolery, of Tombstone, and F. M. Doan, of Douglas, for appellant. Williams & Flanigan, of Bisbee, for appellee.

SHUTE, J. The plaintiff in the court below, D. P. Hickey, brought suit against the appellant, Machomich Mercantile Company, a corporation, to recover on an express contract the sum of \$1,208.88, which the said Hickey claimed to be due him as salary earned while in the employ of the defendant, the appellant here.

The question is brought here upon six assignments of error which will be taken up and disposed of in their order as presented by the appellant.

[1] In the first assignment of error the appellant contends that the trial court erred in overruling its motion for a new trial. It sets up as a ground for this eight different reasons, none of which are argued, and will not be considered here. *Bail v. Hartman*, 9 Ariz. 321, 83 Pac. 358; *Mayhew v. Brislin*, 13 Ariz. 109, 108 Pac. 253; *Southern Pacific Co. v. Richey*, 13 Ariz. 67, 108 Pac. 225; *Webb v. State*, 14 Ariz. 506, 131 Pac. 970.

The second assignment of error is that the court erred in overruling defendant's general demurrer to plaintiff's second cause of action. This involves the question whether a pleading that states conclusions instead of facts is good as against a general demurrer.

[2] It has long been the rule in this state that, in construing the language of a complaint, every reasonable intendment should be made to sustain the pleading, if possible. *Santa Fé, etc., Ry. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216; *Phillips v. Smith*, 11 Ariz. 309, 95 Pac. 91; *Tevis v. Ryan*, 13 Ariz. 120, 108 Pac. 461.

[3] Conceding, for the purpose of this opinion, that the complaint states conclusions of law, an examination of the pleading complained of reveals what the intention of the plaintiff, Hickey, was. It is a general rule under the Codes that allegations of legal conclusions instead of facts upon which they are based do not usually make a pleading bad on general demurrer. This, we think, should be the rule. 31 Cyc. 280.

[4] The third assignment of error by the appellant goes to a question of evidence. The appellant claims that the trial court erred in overruling a general objection to the question: "How much experience have you had as a dry goods man?" To this question, the defendant entered this objection: "We object to the question, if the court please." It is a rule of evidence in this state that a general objection is wholly unavailing, and that a "party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language

of the old authorities, he must lay his finger upon the point of objection." *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Phoenix Ry. Co. v. Landis*, 13 Ariz. 80, 108 Pac. 247.

[5] In the fourth assignment of error the appellant complains of an oral statement made by the trial judge to the jury, as follows: "I hope the jury will arrive at a verdict. As the case has been tried twice, I would like very much to have a verdict one way or the other."

This statement was made by the trial judge after the jury had considered the case during one night and until noon of the following day. In support of this assignment of error, the appellant cites several cases, the only one of which that seems to be in point is the case of *Wootan v. Partridge*, 39 Tex. Civ. App. 346, 87 S. W. 356. This case seems to support the contention of the appellant that the language complained of was prejudicial to him. The case is without any reasoning whatever, and is unsupported by any authority. The other cases which have been cited by counsel are readily distinguishable from the case at bar. It does not seem to us from an examination of the language complained of that there could have been any injury to the appellant by reason of it. We recognize that, where cases are decided upon the weight of the evidence, courts should be very careful of their expressions in the presence of the jury. We do not think, however, that the language complained of was error.

The fifth and sixth assignments of error are not argued by the appellant.

There appearing no error in the record of the case, the judgment of the lower court is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

CUNNINGHAM, J., being disqualified, and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. G. W. SHUTE, Judge of the Superior Court of the State of Arizona in and for the County of Gila, to sit with them in the hearing of this cause.

#### McCLAUGHERTY v. ROGUE RIVER ELECTRIC CO.

(Supreme Court of Oregon. April 7, 1914.)  
1. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of an employé of an electrical company, the admission of evidence that the witness would have understood the directions of the defendant's superintendent as meaning that the work was to be done hot, that is, without turning off the current, is not ground for reversal, where such testimony does not materially contradict that of defendant on the same subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]



**2. MASTER AND SERVANT (§ 119\*)—INJURIES TO SERVANT—PLACE TO WORK—STATUTORY PROVISIONS.**

Under Employers' Liability Act (Laws 1911, p. 16), providing that, in the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the supports bearing live wires shall be designated by a color or other designation which shall be instantly apparent, and live wires shall be strung at such a distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock, the furnishing of switches at some distance from a point where work is required to be done, by which the current may be turned off entirely, does not exculpate an electrical company from negligence in failing to comply with the specific requirements of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. § 119.\*]

**3. ELECTRICITY (§ 14\*)—MASTER AND SERVANT (§§ 101, 102\*)—CARE REQUIRED.**

Electricity is a dangerous element, and in its use the highest degree of care is required to protect employees and the public.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14;\* Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**4. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—STATUTORY PROVISIONS.**

The Employers' Liability Act (Laws 1911, p. 16) eliminates the defense of assumption of risk in actions under it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

**5. DEATH (§ 95\*)—ACTIONS FOR CAUSING DEATH—DAMAGES.**

Under Employers' Liability Law (Laws 1911, p. 17) § 4, providing that, if there shall be any loss of life by reason of violations of the act, the widow of decedent, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action, without any limit as to the amount of damages which may be awarded, the measure of damages is the value of the life lost, not including compensation for grief or mental anguish of the beneficiary nor punitive damages, and is not confined to the pecuniary loss to the beneficiary; the act contemplating but one action for the injury.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.\*]

**6. DEATH (§ 95\*)—TRIAL (§ 256\*)—ACTIONS FOR CAUSING DEATH—DAMAGES.**

In an action, under the Employers' Liability Law (Laws 1911, p. 16), for causing death, the refusal of an instruction that the measure of damages is confined to the pecuniary loss to plaintiff, that is, to such an amount as would equal the value of decedent's services during his minority, less the reasonable cost of his support, together with such support as the father would probably have received from his son after majority, and the jury should consider the probable length of life of the father, and the relations between the father and son, was proper; and an instruction that the jury should consider decedent's age at the time of the injury, his probable expectancy of life, and determine the amount of damages the same as if decedent had lived and could have sued himself, and that the amount could not exceed the damages actually sustained, was sufficient in the absence of

a request for more specific instruction on some point within the purview of the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95;\* Trial, Cent. Dig. §§ 828-841; Dec. Dig. § 256.\*]

**7. DEATH (§ 9\*)—ACTIONS FOR CAUSING DEATH—STATUTORY PROVISIONS.**

Statutes creating a liability for causing death (L. O. L. §§ 34, 380; Employers' Liability Act [Laws 1911, p. 16]), while not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]

**8. DEATH (§ 18\*)—ACTIONS FOR CAUSING DEATH—RIGHT OF ACTION.**

The basis for recovery, under the Employers' Liability Law (Laws 1911, p. 16), for causing death is not the dependency of the plaintiff upon the decedent, nor pecuniary loss by plaintiff, though that may be proven as an element of damages, but is the existence of the relation of plaintiff to decedent required by the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

In Banc. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by Joseph P. McClaugherty against the Rogue River Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action is brought under the Employers' Liability Act, c. 3 (Laws 1911, p. 16), to recover \$25,000 damages for the death of plaintiff's son, alleged to have been caused by defendant's negligence. The jury returned a verdict for \$12,500. The court entered judgment thereon, from which defendant appeals.

James McClaugherty, the deceased, met his death May 27, 1911, from an electric shock. He was at the time in the employ of the defendant, and was of the age of 20 years 7 months and 10 days. His experience and knowledge in handling electricity had been gained during his employment by the defendant company for a period of between 8 and 9 months. He was told by the superintendent of the defendant to go to the cyanide plant about 1½ miles from Jacksonville, where he would find a 2,300-volt motor which he was required to install for the Clark & Henery Construction Company. On being so directed, he requested the superintendent to give him an assistant; but this request was not complied with. He was informed that he could get a common laborer to help him raise the poles, and that the Clark & Henery Company would probably furnish a man. The work required the running of three 2,300-volt wires from the motor to three 2,300-volt wires on a pole in the main line, and there making the connections. For this it was necessary to put a cross-arm on the pole immediately under the 2,300-volt wires. This pole carried one 2,300-volt wire on top, two immediately under it, one on either end of a cross-arm, and three 440-volt wires, two

on one side of the pole, and one on the other. Underneath these were two telephone wires of the defendant used in connection with its plant. The evidence tended to show that the telephone wires, which are regarded by electricians as dead wires, might become charged with electricity in rainy weather by induction from the live wires, which would, of course, complete the circuit, if brought in contact with one of the live wires either directly or through the medium of any body capable of conducting electricity. None of the wires were insulated, and the evidence of plaintiff tended to show that the distance of the wires from the pole, and from each other, was such that the place where the wires were charged with electricity was an unsafe one in which to perform the work at which the deceased was engaged at the time of the accident; that the defendant had placed cut-out switches or plugs at two points along this line between the power house and the place of the accident, one of which was in a substation at Jacksonville, a mile and a half from the scene of the injury, and the other on a pole about one-half mile from where the accident occurred. At this time the employees of defendant were divided into three classes: Groundmen, who were paid 28 cents per hour, linemen, who worked on live wires under direction, 32 cents per hour, and qualified linemen doing all kinds of work, including that on live wires, without supervision, 35 cents per hour. The men were advanced as their proficiency increased. Immediately prior to the time of the decedent's death he was working on live wires under direction, and receiving 32 cents per hour. When the work in question came up, the superintendent asked McClaugherty if he would like to take the job, and he appeared willing and anxious to do so. He was sent to do the work alone, receiving no particular instructions as to the manner of doing it. Nothing was said as to whether he should do it hot or cut off the electricity from the lines. The bill of exceptions discloses that the evidence of the plaintiff tended to show the location and arrangement of the wires on the poles, the distances between the poles and the wires, and the distances between the several wires, all of which warranted the jury in finding that the place was not a safe one, while the wires were charged with electricity, for James McClaugherty to perform the particular work he was required to do, by reason of the wires being too close to the poles, too close to each other, and not insulated; that he met his death from an electrical shock while performing the work he was sent to do, the shock being received by reason of the fact that the place where he was working was a dangerous and unsafe one in which to do the particular work he was performing, while the wires were charged with electricity, the 440-volt wire being 20 inches from the pole, and the only designa-

tion that would make the voltage wires instantly apparent being the extra large glass insulators on the top wires, the 440-volt wire having only ordinary insulators.

The brief of defendant states the following: "For the purpose of this appeal only, it is conceded that the state of the evidence was such as to make it a question for the jury whether the deceased was sufficiently qualified and experienced to be sent to do this work, without definite instructions, and to be intrusted with the discretion of looking after the safety of the place in which he worked."

The deceased left no widow or lineal heirs, and no mother surviving him. The plaintiff is the father of the deceased, and has resided in Texas continuously for many years.

Porter J. Neff, of Medford, and A. C. Hough, of Grants Pass (Neff & Mealey, of Medford, on the brief), for appellant. A. E. Reames, of Medford, for respondent.

BEAN, J. (after stating the facts as above). The part of the Employers' Liability Act particularly applicable provides as follows: "In the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the pole or supports as to permit repairmen to freely engage in their work without danger of shock." Then follows the provision: "And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." Section 4 of the act is as follows: "If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded."

Plaintiff complains that defendant violated the statute in the following particulars: (1) That the wires were not insulated where the employes were liable to come in contact with them; (2) that dead wires were mingled with live wires; (3) that the electric wires were so close to the poles that the workmen engaged in their work were in danger of a shock; (4) that the arms or supports bearing the live wires were not properly designated by color or otherwise; (5) that the cut-off switches were not near enough to the required work to make the use of the same practicable, and that an experienced electrician should have been immediately present to superintend and warn the operator, and that it was necessary for the company to have rules and specific regulations for the protection of the employes directing how the work was to be done. It is sufficient to say that the evidence tended to show a failure on the part of the defendant to comply with the terms of the statute, which is negligence per se. *Peterson v. Standard Oil Co.*, 55 Or. 511, 106 Pac. 837, Ann. Cas. 1912A, 625; *Burroughs v. C. L. Co.*, 58 Or. 270, 275, 114 Pac. 108; *Morgan v. Bross*, 64 Or. 63, 129 Pac. 118.

Mr. Loder, superintendent of the company, when questioned by a juror, testified: "Q. Let me ask—did you, as superintendent of construction, tell this boy he should cut the current off to make connection with hot wires? A. No; I didn't tell him to do so. \* \* \* Q. Is it your judgment to-day that it wasn't lack of judgment on McClaugherty's part in failing to turn off the current? A. Well, as I feel to-day, and as I felt then, is tempered by experience of subsequent things that have happened. I might say to-day that a man ought to have pulled those plugs, where, at that time, I might have—I certainly did feel that he was perfectly able and perfectly capable to do that job, and I may have felt and possibly said that it was all right. Q. Yes; I understand there are things happened to change your judgment. I will ask you if now, to-day you would tell him, James McClaugherty, to turn that current off, or do the job hot or cold? A. You bet your boots I would tell him to turn that current off. Q. Did you tell him? A. No, sir. Q. And the company didn't have any rules whether a man was to turn the current off, hot or cold? A. No, sir; they did not."

[1] Al Wright, witness for plaintiff, testified in part that he had been engaged in the electrical work for 2 years, having worked for the defendant under superintendent Loder for the past 18½ months; that he and James McClaugherty worked together quite a bit; that he heard McClaugherty ask Loder for help at the time the former was sent to do the work where the accident occurred; that he went to the place the next day with Mr. Loder, who finished the work in the presence of others; that the witness received

ed the same pay as McClaugherty, and had before this made a live or hot wire connection, but not unassisted. On cross-examination this witness testified in part to the effect that as to whether, if called upon to do the work, and there was means at hand whereby he could protect himself by turning off the electricity from the line, he would do it hot or deaden the line would depend upon circumstances; that in most cases he would have to figure it out himself; that in some cases he would take the safest; and the reason why a man in any instance would take the unsafe way would be on account of the distance he would have to go to kill the line. There was considerable evidence introduced as to how the work should be done, as to the danger, and the fact that a "line is never safe when working alone." On re-direct examination the witness was asked the question: Q. "Well, now, if you received instructions to do this work, you heard the instructions Mr. Loder said he gave, and you found the Opp mine beyond this place running, and the cyanide plant running, and he did not tell you to turn off the power, would you interpret his instructions to mean that you were to do it hot or turn it off?" To this counsel for defendant objected, on the ground that it was incompetent, irrelevant, and immaterial; that "it would be his interpretation." Owing to the particular cross-examination, the court allowed an answer, and defendant saved an exception. The witness answered: "I should judge that he meant to do it hot." It is contended that this was error. It is clear that the information elicited from the witness pertained to the custom of the officers of the company in vogue at the time, and the understanding of the employes as to the manner of directing how the work should be done, and not to the ultimate conclusion to be drawn by the jury. The evidence objected to does not come within the rule in *Johnston v. O. S. L.*, 23 Or. 94, 101, 31 Pac. 283. While the form of the question may not be perfect, the answer obtained was no stronger against the defendant than the testimony of the superintendent himself. It will be noticed from the excerpt of his evidence that he did not instruct the decedent to turn off the current of electricity, nor does he appear to claim that he expected it would be done. The testimony objected to does not, in effect, materially contradict that of the defendant upon the same subject. We fail to see that from any view defendant's rights were prejudiced.

[2] Defendant's counsel requested the court to give the jury several instructions which, prior to the passage of the Employers' Liability Act, would have been unobjectionable. The court refused to charge the jury as requested, to which defendant's counsel duly saved an exception.

The first requested instruction, the refusal of which is now urged as error, is based up-

on the contention that the defendant was not guilty of negligence if it furnished appliances and instrumentalities adequate to render the place safe where the decedent worked, and if he understood fully the dangers to be avoided, and the manner of using the instruments so as to avoid the danger, and voluntarily chose not to make use of them. This relates to the cut-off switches and their use.

The second instruction is to the effect that the defendant was not bound to insulate the wires if it provided adequate means of shutting off the electricity, and is based upon the contention that the decedent assumed the risk.

The third is to the purport that, if the jury found that insulation of the wires would have furnished partial protection, and that switches would have supplied more adequate protection, and rendered insulation unnecessary, then it was not negligence for defendant to furnish switches, and not provide the insulation.

The fourth is as follows: "If the defendant furnished the deceased appliances and instrumentalities adequate to render the place where he was required to work safe and suitable, and the deceased understood fully the dangers to be avoided, and the manner of using the instrumentalities and appliances so as to avoid these dangers, but nevertheless the deceased voluntarily chose not to make use of them, the defendant is not liable for the injuries sustained by the deceased from the dangers which would have been removed had the appliances been made use of."

The contention of the defendant as to all these requested instructions assumes that under the Employers' Liability Act the company was at liberty to furnish substitutes for those things required by the terms of the act; that is, instead of "full and complete insulation" being provided at all points where employees are liable to come in contact with the wires carrying electricity of a dangerous voltage, instead of dead wires not being mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires being "especially designated by a color or other designation which is instantly apparent," and instead of such live wires being strung far enough from the poles or supports to permit the repairmen to engage in their work without danger of shock, all as required by the act, the defendant could furnish cut-off switches so that the current of electricity could be shut off, and then the company would not be negligent, notwithstanding the fact that the provisions of the statute were not complied with. Such, however, is not the law. The requirements of the statute as to the safeguards enumerated are positive and mandatory. There are no alternatives. Such a protection as furnishing facilities for cutting off of the current would

come more particularly within the general requirements of the statute above quoted, and would not render the specific details as to transmission of electricity unnecessary, nor serve as an excuse for a noncompliance with the law in other respects, in case of injury by reason of such neglect. The statute, in making the regulations as to the location and insulation of the wires, presupposes that workmen will work on the poles or supports when the wires are charged. If, instead of the requirements enumerated, the law had provided that cut off switches should be provided, then defendant's contention would be maintainable.

[3, 4] Electricity is a dangerous element, and in the use thereof the highest degree of care is required to protect the life and limb of the employees and the public. 15 Cyc. 472; *Myers v. P. Ry. L. & P. Co.* (Or.) 138 Pac. 213, 215, and cases there cited. Our statute recognizes this rule, and makes plain provisions for minimizing the danger to life and limb in the transmission of this dangerous agent. It is asserted in the brief of defendant that the second instruction requested is based upon the principle that the decedent, by not turning off the current, assumed the risk. As we understand them, the other requests to charge the jury, taken in full, invoke the same principle. It was held, in the case of *Schulte v. Pacific Paper Co.* (Or.) 135 Pac. 527, that the effect of the Employers' Liability Act is to eliminate the defense of assumption of risk in actions within it, citing *Welsh v. Barber Pav. Co.*, 167 Fed. 465, 93 C. C. A. 101; *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657; *Bair v. Heibel*, 108 Mo. App. 621, 77 S. W. 1017.

The means of turning off the electricity was some distance from where the decedent was directed to install the motor; the cut-off plugs being about one-half mile, and the substation about 1½ miles therefrom. It does not appear whether McClaugherty had a key to the substation or not. The jury, in considering whether the company had complied with the general provisions of the statute referred to, may have believed that it was not practicable for the boy to turn off the current before making the connection of the wires. However this may be, the furnishing the switches would not exculpate the company from negligence in failing to comply with the other plain provisions of the statute, as to safeguarding the wires. There was no error in the refusal of the court to give the instructions requested by defendant. The trial court specifically instructed the jury as to the requirements of the statute, and that the question for them to determine was whether or not the defendant failed to provide any of the safety appliances or conditions alleged in the complaint, and whether such failure resulted in injury to James McClaugherty. We think the question of negligence was fairly submitted to the jury.

[5,8] As to the measure of damages, after telling the jury that, if they found that the decedent was guilty of contributory negligence, they should consider the same in fixing the amount of damages, the court instructed them in substance that, in case they found plaintiff was entitled to recover, in ascertaining the damages, they should take into consideration the decedent's age at the time of receiving the injury, his probable expectancy of life as shown by the evidence, and his earning capacity, and determine the amount the same as though decedent had lived and could have sued himself; that the amount could not exceed the damages actually sustained. The defendant's counsel objected and excepted to such instructions, and assigns the same as error. This raises the main question in the case, and is a very important inquiry. It is earnestly contended by defendant's counsel that the measure of damages under the statute is confined to the pecuniary loss to plaintiff by reason of the death of the son, that is, to such an amount as would equal the value of the services of decedent during his minority, less the reasonable cost of his support during that period, together with such assistance and support as the father would probably have received from his son after the latter's majority had he lived; that the jury should consider the probable length of life of the father, the relations existing between the father and the son, and the probable future assistance to the father from the son. They asked the court to so charge the jury. No question arises as to damages occurring between the time of the injury and the date of the death, as the latter was instantaneous. The right of action in a proper case nevertheless exists. *Perham v. Port. Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. Hence that part of the charge referring to the decedent as though he were alive and could have sued himself was, as we understand it, simply an illustration.

The Employers' Liability Act, as passed by the people of the state, differs from any other statute which we have been able to find; therefore the adjudications of cases under other acts are of but little assistance in applying the provisions of our statute. Some expressions in the earlier opinions in cases under statutes somewhat similar to our own shed light upon the principle involved. In *Pennsylvania R. Co. v. McCloskey's Adm'r*, 23 Pa. 526, an action brought by an administrator for the loss of the life of Wm. McCloskey by the negligence of the defendant, the trial court allowed the jury to find the damages according to the value of the life lost, to compute them by the probable accumulations of a man of such age, habits, health, and pursuits as the deceased during his probable lifetime. Mr. Justice Lowrie, in affirming the judgment, after discussing the ancient laws, at page 530 of the opinion, said: "Our

act of April 15, 1851, seems to express its purpose better than the English one heretofore referred to. \* \* \* The first of these sections is very plain, and it provides that the personal representatives may continue the action commenced; that is, may proceed and recover the very damages to which the deceased would have been entitled had he survived until verdict and judgment. The other section is somewhat less definite in regard to the damages intended; but this very indefiniteness is proof that no other thought was in the mind of the Legislature than the wrong and damage done to the decedent, else it would have been made to appear. If one section related to damages done to the deceased, and the other to damages done to his relatives, these contrasted thoughts could hardly have failed to come out clearly in the expression. But, even if this were otherwise, we do not perceive how it could influence the damages, for they must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss which the designated representatives shall have thereby sustained."

The case of *Railroad Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591, was brought under a statute of Illinois giving the right of action to the personal representatives of the person killed by such an act as would, if death had not ensued, have entitled such person to maintain an action for damages. The statute provided that "in every action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding," etc. It was held that it was not necessary to recovery that the widow and next of kin should have had a legal claim on the deceased for their support had he survived; that the damages in those cases must depend very much upon all the facts and circumstances of the particular case, and that, when the action is brought by the party himself for injuries to himself, there could be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body, so that, when the suit was brought by the representative for his death, the pecuniary injury resulting from the death to the next of kin was equally uncertain and indefinite; that in the latter and more difficult case, as in the former one, often difficult also, the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury applied to all the facts and circumstances. The court, at page 105 of 5 Wall., 18 L. Ed. 591, said: "But the statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law; and hence the amount recovered

is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin; in case of his death by the injury, the equivalent is given by a suit in the name of his representative."

In *Mollie Gibson Cons. Min. & Mill. Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850, the measure of damages was discussed. The court said: "It is always described as compensatory, and never as a solace for wounded feelings. It is, however, exceedingly clear that, while it is permitted to give testimony concerning the relations of the deceased to the plaintiff, in order to form a just estimate of the probable damage, yet the recovery is not to be measured or determined by the extent of the contributions or support furnished by the one to the other. In other words, although the deceased as a son may never yet have contributed to the support of his father, yet, when the son's age, habits, earning capacity, and the age of the father are once established, a recovery may be had for the probable injury which the father has sustained in the loss of his son."

The question was dealt with in *Trimmier v. Atl. & C. A. L. Ry. Co.*, 81 S. C. 203, 213, 62 S. E. 209, 212, a case which was submitted to the jury, practically the same as the one at bar. It was contended that the life expectancy of the person for whose benefit the action was brought should have been considered. The court said: "We fail to see where in the probable duration of the father's life has any relevancy to the issues involved, as the amount recovered is the absolute property of the beneficiary under the terms of the statute."

The cases of *Barksdale v. Railway*, 76 S. C. 183, 56 S. E. 906, and *Hull v. Railway*, 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213, sustain the proposition that it is not essential to the recovery of damages that the person for whose benefit the action is brought should be dependent upon the deceased for support, nor that the beneficiary should suffer pecuniary loss. See, also, *Clark v. Tulare Lake Dredg. Co.*, 14 Cal. App. 414, 112 Pac. 564; *Peters v. S. P. Co.*, 160 Cal. 48, 116 Pac. 400. The case of *Matthews v. Warner's Adm'r*, 29 Grat. (Va.) 570, 26 Am. Rep. 396, was brought under a statute of Virginia providing that the claim for damages may be maintained by the personal representative of one whose death has been occasioned "by the wrongful act, neglect, or default of any person or corporation." In that case an instruction was requested and refused as to the measure of damages, similar to the one requested in the case at bar, to the effect that, in assessing the damages, the jury must confine them-

selves to the injuries of which a pecuniary estimate can be made, with reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, to his mother from a continuance of the life of the deceased son. The Virginia statute declared that "the jury in any such action may award such damages as to it may seem fair and just," etc. In affirming the judgment, at page 577 of the opinion, Mr. Justice Christian said: "I think it is manifest that the Legislature intended, as in Kentucky, Iowa, Connecticut, and California (which states are exceptional to the English statute), to allow the jury in such cases to award punitive and exemplary damages."

Under the federal *Employers' Liability Act* (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), in case of the death of an injured employé, his personal representative brings the action for the benefit of those surviving him. They are entitled to the proceeds of any judgment recovered in the following order: (1) The surviving widow or husband and children of such employé; (2) if there be no husband, widow, or children, then for the benefit of the employé's parents; (3) if there be no beneficiaries in the first and second classes, then for the benefit of the next of kin dependent upon such employé. *Thornton's Fed. Em. Liability, etc., Acts* (2d Ed.) p. 168. On page 169 this author states: "If there be no widow or husband and children or parent of the deceased employé, then 'the next of kin dependent upon' him are entitled to the proceeds of the action. \* \* \* Partial dependency is sufficient to authorize the maintenance of the suit. But in the case of a widow, husband, child, or parent no question of dependency is involved." In support of the last statement, which is very pertinent to the construction of our statute, the case of *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.) 94 S. W. 352, is cited. In cases under the federal act the reason for requiring evidence that a beneficiary coming within the third class is dependent upon the deceased person is on account of the use of the words "dependent upon such employé." These words make a marked difference between the federal statute and the Oregon statute. It may be noticed, however, that under section 7054, L. O. L., parents are bound to maintain their children when poor and unable to maintain themselves, and children are bound to maintain their parents under like circumstances.

[7] The common-law rule of nonliability for the death of a person by reason of negligence or wrongful act was changed in this state before the adoption of the *Employers' Liability Act*. Sections 34, 380, L. O. L. The recent compensation acts, both American and English, and the *Employers' Liability Acts* illustrate the present day reaction against the severity of the common law. *Thornton's Fed. Em., etc., Acts* (2d Ed.) p. 3. The meas-

ure of damages under most of the statutes giving a right of recovery for the death of a person is the amount of pecuniary assistance and support which they might have reasonably expected to receive from the deceased had he lived. Note to Louisville, etc., Ry. Co. v. Goodykoontz (Ind.) 12 Am. St. Rep. 378. This rule, as we understand, is on account of the words of limitation found in Lord Campbell's Act and the statutes of the different states. In this the Oregon statute differs from those noted, especially as to the measure of damages. It plainly provides that for the loss of life by reason of the neglects, or failures, or violations of the provisions of the act by any owner, contractor, or subcontractor, or person liable under the terms of the act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action, without any limit as to the amount of damages which may be awarded. We think this statute clearly gives a right of action to the beneficiaries named therein for the value of the life of an employé lost by reason of the acts of negligence enumerated in the enactment. *Carlson v. O. S. L. Ry. Co.*, 21 Or. 450, 459, 28 Pac. 497. Such statutes, while they are not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law. 26 Cyc. 1360.

Mr. Justice Moore, in *McFarland v. Oregon Elec. Ry. Co. (Or.)* 138 Pac. 458, referring to section 4 of the Employers' Liability Act, says that it "is remedial, and, as far as possible, ought to be liberally construed in favor of the beneficiaries." In that case, Neal McFarland having died unmarried, without lineal heirs or adopted children, but leaving a mother surviving him, it was held that she was the sole beneficiary of any sum that might be recovered as damages resulting from the son's death, to the exemption of his father.

In *Hawkins v. Barber Asphalt Pav. Co. (D. C.)* 202 Fed. 340, 341, Mr. Justice Wolverton considered some features of this statute. He said: "It would seem that this statute gives an action for negligence arising from particular acts, and, so far as it gives a right of action for the death of a person, it is akin to Lord Campbell's Act. This may be termed a survival action. At common law there was no right of action for the death of a person; but it is the purpose of this act to give to certain individuals such a right. In my view of the statute, it gives but one action, which is not cumulative in its purpose or character. This action survives to the widow of the person killed, his lineal descendants or adopted children, etc., and the right of action is without limit as to the amount of damages."

In *Tiffany on Death by Wrongful Act*, § 158, commenting on the use of the word "pecuniary" as used in the New York act and others, it is stated: "The use of 'pecuniary'

to designate the kind of loss for which recovery can be had is misleading, for the damages are by no means confined to the loss of money, or of what can be estimated in money. \* \* \* The word has been used rather for the purpose of excluding from the recovery damages to the feelings and affections than of confining the damages strictly to those injuries which are 'pecuniary' according to the ordinary definition." In Illinois the rule is established that, where the next of kin sustain a lineal relation to the deceased, the law presumes some substantial damages from the relationship alone, and it is not essential to show that they received pecuniary assistance from the deceased, although, of course, it is competent to show that such assistance was given. *Tiffany*, § 167; *Dukeman v. Cleveland, C., C. & St. L. R. Co.*, 237 Ill. 104, 109, 86 N. E. 712.

In *Olivier v. Houghton St. Ry. Co.*, 138 Mich. 242, 101 N. W. 530, an action by an administrator for an injury causing death through negligence, at page 244 of the opinion, the court said: "When the deceased received his injury, he stood entitled to recover then and there the loss sustained by being deprived of the power to earn money during the period he would have lived had he not suffered the injury. It would not, under these decisions, have been any answer for defendant to say that, 'while this is precisely what we have deprived you of, you cannot recover at all, as we have, in addition to crippling you, shortened your life.'"

The Employers' Liability Act authorizes an action to recover compensation for the life lost through the negligence specified in the act. It contemplates but one action for such injury. The amount is not confined to the pecuniary loss occurring to the beneficiary, occasioned by the death of the employé. It was evidently intended that the surviving relatives named in the law should have the right to recover for the wrong causing the death. The instruction asked by defendant, limiting the damages to an amount equal to the value of the services of the decedent during his minority, less the reasonable cost of his support, together with the pecuniary assistance the father would probably have received after the son's majority had he lived, would confine the amount of compensation within narrower limits than contemplated by the terms of the act. To enforce such a measure of damages would be in effect interpolating words of limitation into the act. In its charge to the jury the trial court, by restricting the amount to the actual damages sustained, precluded the jury from awarding any compensation for any grief or mental anguish of the father of decedent, and also excluded punitive damages. The instruction given corresponds as nearly as the present statute would warrant to that approved in *Carlson v. O. S. L. Co.*, *supra*. The charge given by the trial court was a fair general

rule as to the measure of damages, and, in the absence of a request for more specific instruction upon some point within the purview of the statute, it was a sufficient guide to the jury in estimating the amount of compensation to be awarded for the death of plaintiff's son.

[8] The dependency of the plaintiff upon the decedent is not the basis of the action. There being no other relatives named in the act living, besides the father, his right of recovery is given by virtue of and is derived from the statute. In the absence of others having a superior right under the law, all that it was necessary for plaintiff to show upon this point to entitle him to recover was that he was the father of James McClaugherty, deceased, thus showing the kinship required by the act. Pecuniary loss by plaintiff may be proven as an element of damages; but such loss is not essential to recovery. *Barksdale v. S. A. L. Ry.*, supra; *Hull v. Railway*, supra.

There is necessarily difficulty in fixing a pecuniary value upon human life. In all actions for the wrongful death of a person, the amount of compensation to be recovered must depend to quite an extent upon the good judgment of the jury upon a consideration of all the facts and circumstances of each particular case under proper instructions as to the law applicable thereto. 13 Cyc. 375; *Carlson v. O. S. L. R. Co.*, supra. The physical condition, age, etc., of the father, the beneficiary, were not material as bearing upon the amount of recovery. *Seattle Electric Co. v. Hartless*, 144 Fed. 379, 75 C. C. A. 317. The right of recovery does not depend upon such conditions. The law confers the right in certain cases upon certain named beneficiaries. There was no error in failing to instruct the jury as requested by defendant's counsel.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

McNARY, J., did not sit.

## KLEIN v. KNIGHTS AND LADIES OF SECURITY.

(Supreme Court of Washington. April 22, 1914.)

### 1. INSURANCE (§ 719\*)—FRATERNAL BENEFIT INSURANCE—CHANGE OF CONTRACT.

Where the application for a fraternal benefit policy, the certificate, and the by-laws of the association provided that the member's rights should be subject to the by-laws then in force or thereafter enacted, the association could afterwards provide that the provision avoiding the policy, if insured commit suicide within two years after its issuance, should be extended to five years; such a change being contemplated by the policy and not violating any vested right.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

### 2. CONSTITUTIONAL LAW (§ 92\*)—VESTED RIGHTS—INSURANCE POLICY.

Where a fraternal benefit policy provided that the member's rights should be subject to changes in the by-laws, an amendment of the by-laws, after insured became a member, so as to make the certificate void if insured committed suicide within five years after issuance, instead of within two years, as provided therein when the certificate was issued, did not destroy any vested right under the policy; the right to commit suicide not being a vested right recognized by law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 207, 225-227, 237; Dec. Dig. § 92.\*]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge. Action by Floretta Klein against the Knights and Ladies of Security. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Roche & Onstine, of Spokane, for appellant. A. C. Shaw, of Spokane, for respondent.

MORRIS, J. Respondent brought this action to recover \$1,000 claimed to be due her as the beneficiary under an insurance certificate covering the life of her deceased husband, issued by the appellant. The appeal is from a judgment on the pleadings.

The facts disclosed by the pleadings and considered by the court in arriving at the judgment are these: On June 29, 1909, the deceased made application to become a member of the appellant society, a purely fraternal beneficiary association for the sole benefit of its members and their beneficiaries and not for profit. Among other stipulations in the application signed by the deceased were these:

"I further agree that should I die by suicide, whether sane or insane, that all rights hereunder are forfeited thereby, except as provided in sections 87 and 101 of the laws of the order."

"I further agree, if accepted as a member of the order, to fully abide by all its laws, rules and regulations now enacted, or that may be hereinafter enacted."

The application being accepted, a beneficiary certificate was issued to the deceased July 7, 1909, containing the following conditions and agreements:

"Gustave A. Klein is hereby admitted to beneficiary membership in this order. \* \* \* He is entitled to all the rights, benefits and privileges of membership therein, and at his death he having complied with all of the provisions of the constitution and by-laws of the order now in force or that may be hereafter enacted, and being at the time of his death a member of the order in good standing, the said national council hereby agrees to pay to Floretta Klein, bearing the relation to the said member of wife, the sum of \$1,000."



"(6) This certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the laws of the order, or for any other cause or causes of forfeiture which may be hereafter prescribed by this order by the amendment of said laws."

"(8) If the member to whom this certificate is issued shall die by said member's own hand, whether sane or insane, within two years after the delivery to said member of this certificate, then the said national council shall pay to the beneficiary or beneficiaries of the member one-fifth the amount of this certificate, less the amount due the reserve fund, to be first deducted from said one-fifth, and said national council shall not be liable for any further sum whatsoever."

The provisions of the by-laws referred to in the application are as follows:

"When Entitled to Benefits.—To be entitled to participate in the beneficiary fund, a beneficiary member shall comply with all provisions of the constitution and laws of the order, now in force or which may hereafter be enacted, and shall, at death or disability, be a member of the order in good standing."

"Section 101. Suicide.—In case any member holding a beneficiary certificate, heretofore or hereafter issued, shall die by his own hand, whether sane or insane, within two years after the delivery to him of his beneficiary certificate, only one-fifth of the amount of such beneficiary certificate shall be paid and the order shall not be liable to the beneficiary or beneficiaries for any further sum whatever, provided, that from said one-fifth there shall be deducted the amount due the reserve fund."

In September, 1910, the duly constituted governing body of appellant amended section 101 by extending the suicide provision from two to five years. Upon the argument for a new trial, the answer was deemed amended so as to allege that the assured had personal knowledge of this amendment. Gustave A. Klein died January 30, 1912; his certificate having been in force about two years and seven months. Appellant alleged in its answer he committed suicide, and tendered the amount claimed by it to be due the beneficiary upon the happening of such event.

[1] Under these facts this question is presented: Is the extension of the suicide clause from two to five years valid as to this certificate and therefore binding upon the beneficiary? Following the great weight of authority, we answer the question in the affirmative. The right of mutual benefit societies to change their by-laws so as to affect the rights of existing members presents a serious and difficult question upon which there is much division among the authorities. It may, however, be safely asserted that such right exists when it is expressly reserved by the society in its certificate of membership or in its by-laws, and such right

has been expressly recognized and assented to by the member in his application. The divergent views arise to the extent of the change permitted; one class of cases holding that these reservations of the right to amend and the assent thereto by the member justifies any change except a reduction in the amount payable by the certificate, and the other class holding that the societies may make such changes only as have to do with the duties and conduct of the members and the orderly administration of the affairs of the society. The greater number of cases hold to the former view, upon the theory that a party cannot claim the right to have a contract remain unaltered when the contract itself provides that it may be changed, and that the contract requiring submission to any change of by-laws that might be thereafter enacted, and the party assenting and accepting a certificate with such a clause therein, there is no vested right in having the contract in the certificate remain unchanged, because the recognition of the power to make new by-laws is necessarily a recognition of the right to alter or amend those theretofore made. *Niblack, Benefit Societies & Accident Insurance*, § 28; *Fulenwider v. Royal League*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1085.

[2] The contract between the assured and appellant consisted, not only of the certificate sued on, but also his application, and the rules, laws, and regulations of the order to which he had assented, together with the right reserved to alter, change, and modify those laws and regulations. No one has a right to presume that the by-laws of a society of this character will remain unchanged; and where, as here, there was a recognition of the right to make such change, the assured is bound to take notice of the existence and effect of the reserved power. To exercise a power that is expressly reserved and made a part of the contract is not to destroy a vested right, when it is in plain obedience to the rights conferred by the contract. *Court of Honor v. Hutchens* (Ind.) 79 N. E. 409.

To destroy a vested right arising out of a contract is in some way to impair or destroy the rights guaranteed by the contract, not to enforce them. If there is any right destroyed here, what is it? The only change is in the by-law relating to suicide. We cannot see how this change destroyed any vested right of the deceased, unless it can be said there is a vested right in the right to commit suicide. Speaking to this point in a like case (*Eversberg v. Supreme Tent Knights of Maccabees*, 33 Tex. Civ. App. 549, 77 S. W. 246), the court said: "We think the contention that the suicide amendment cannot be applied to the certificate sued on, because to so apply it would impair vested rights, is without merit. When the holder of the cer-

tificate became a member of the order, he expressly agreed that he would be bound by the laws of the order then in force or that might be thereafter adopted. He thus recognized the right of the order to change its by-laws, and consented in advance to be bound by any changes that might be made. That such an agreement is valid and binding seems to be settled by the great weight of authority." A like ruling is adopted in *Supreme Council Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299, citing *Fullenwider v. Royal League*, supra. In *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603, it is said on this question of vested rights: " \* \* \* A party's contract of insurance may be modified or varied by a subsequent law, and he be bound by it, either through the reserved power in the society to amend or enact such law, or by his contract with reference to future enactments, when it does not operate as a repudiation of its contracts, or a complete deprivation of the member's rights."

It cannot be said, in the language of the above case, that there is here a repudiation of the contract or a complete deprivation of the member's rights, since no right vesting in the deceased under the contract is destroyed or disturbed by the amendment, excepting the right to commit suicide within two years, which is not a right the law will recognize or enforce. In the following cases the right to amend suicide clauses is sustained, when that right was reserved in the certificate and assented to by the party in his application: *Knights of Golden Rule v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Knights of Pythias v. Trebbe*, 179 Ill. 348, 53 N. E. 730, 70 Am. St. Rep. 120; *Knights of Pythias v. Kutscher*, 179 Ill. 340, 53 N. E. 620, 70 Am. St. Rep. 115; *Shipman v. Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188; *Scow v. Royal League*, 223 Ill. 32, 79 N. E. 42; *Fraternal Union v. Zeigler*, 145 Ala. 287, 39 South. 751; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310; *Knights of Maccabees v. Nelson*, 77 Kan. 629, 95 Pac. 1052; *Olson v. Court of Honor*, 100 Minn. 117, 110 N. W. 374, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622; *Dornes v. Knights of Pythias*, 75 Miss. 466, 23 South. 191; *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786; *Chambers v. Knights of Maccabees*, 200 Pa. 244, 49 Atl. 784, 86 Am. St. Rep. 716; *Knights of Pythias v. La Malta*, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; *Eversberg v. Knights of Maccabees*, 33 Tex. Civ. App. 549, 77 S. W. 246; *Plunkett v. Heptasophs*, 105 Va. 643, 55 S. E. 9; *Hughes v. Wis. Odd Fellows*, 98 Wis. 292, 73 N. W. 1015.

The judgment is reversed, and the cause remanded for trial upon the questions of fact raised by the pleadings.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

## WILLIAMS v. PACIFIC COAST CASUALTY CO.

(Supreme Court of Washington. April 22, 1914.)

### 1. PRINCIPAL AND SURETY (§ 129\*)—DISCHARGE OF SURETY—ACTS CONSTITUTING—WAIVER.

Where the surety of a subcontractor for the improvement of a highway, knew that the contractor made advances to the subcontractor in settlement of his pay rolls for materials and for groceries used in a boarding house, and thereafter executed its written consent that payments might be made on a different basis from that stipulated in the contract, and, after the full contract price had been paid, consented to further payments by the contractor to complete the work, it was not released from liability by reason of the advancements.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 366-372; Dec. Dig. § 129.\*]

### 2. PRINCIPAL AND SURETY (§ 66\*)—CONTRACTS FOR STREET IMPROVEMENTS—LIABILITY OF SURETY.

Under Rem. & Bal. Code, § 1131, giving any person who, at the request of the owner, contractor, or subcontractor, improves a street a lien on the abutting property for the labor done, or materials furnished, the property of owners abutting on a street contracting for its improvement is subject to liens for labor performed and materials furnished in performing the work, pursuant to a contract with a subcontractor, within the latter's bond to the contractor, conditioned on the payment of claims constituting liens on the property.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 108-110, 112; Dec. Dig. § 66.\*]

### 3. PRINCIPAL AND SURETY (§ 149\*)—LIABILITY OF SURETY—ACTIONS—TIME TO SUE.

An action on the bond of a subcontractor, begun within six months after the completion of the contract, is brought within the six months' time fixed by the bond, where the surety waived a prior breach, and consented to the subcontractor's continuance of the work, where the amount due on the bond was not determined until shortly before the bringing of the action, and where the surety had an opportunity to protect its interests in the litigation determining the amount due.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 414; Dec. Dig. § 149.\*]

Department 2. Appeal from Superior Court, Spokane County; Sol. Smith, Judge.

Action by Clyde H. Williams against the Pacific Coast Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel R. Stern, of Spokane, for appellant. Danson, Williams & Danson, of Spokane, for respondent.

CROW, C. J. In December, 1910, the plaintiff, Clyde H. Williams, contracted with own-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ers of abutting real estate to improve Overbluff road, a street in the city of Spokane. Later he sublet the work by written contract to one William A. Glasson, and the defendant, Pacific Coast Casualty Company, a corporation, as surety, executed and delivered to plaintiff a bond in the penal sum of \$2,000 to secure the faithful performance of the sub-contract by Glasson. This is an action to recover the full penalty of the bond. From a judgment in plaintiff's favor, the defendant has appealed.

The evidence shows that Glasson's contract required him to complete the work by April 15, 1911; that monthly payments of 85 per cent. of estimates for labor and material were to be made to him; that if Glasson failed to pay valid claims incurred for labor and materials in the performance of the contract, respondent might pay the same; that early in March, 1911, Glasson was unable to meet his pay rolls; and that, to enable him to proceed with his contract, appellant, on March 16, 1911, executed and delivered to respondent a written instrument which provided that: "The said Pacific Coast Casualty Company, of California, does hereby consent that the said Clyde H. Williams shall be and is hereby permitted to advance and pay such amounts as may be necessary to take up and pay said unpaid pay rolls and other expenses to date, and which are estimated to be approximately \$1,000.00; and that, shall he elect to advance any other moneys during the progress of the work for like purposes, over and above 85 per cent. of the engineer's certificate, which, under said agreement, he is required to pay, then and in that case, upon completion of the work and improvements under said agreement, whether the same shall be completed by the said Glasson in accordance with the agreement, or by or under the direction of said surety, so much of said moneys now to be advanced for pay rolls and other expenses now due or maturing, and so much, if any, further moneys which said Williams may hereafter advance for like purpose, shall be reimbursed to him, either by repayment to him by said Glasson, or by being retained by said Williams from any moneys under said agreement; and that failure to so reimburse said Williams for moneys so to be advanced by him, or any part thereof, shall be deemed breaches of said agreement and failure to keep and perform same; and that any other breaches or failures, if any there shall be, shall be deemed covered and protected by said bond given by the party of the first part hereto, to the amount necessary to fully indemnify the said Williams and his executors, administrators, and assigns, but not exceeding in any case the penalty of said bond, \$2,000. It is further agreed and understood that the said Williams is not granted permission under this agreement to pay to said Glasson or other interested parties, any amounts that would pay under the contract

more than the amount of the contract, viz., \$7,982. \* \* \* It is further agreed that said Williams shall advise the said E. L. Ensign, or other attorney in fact of the Pacific Coast Casualty Company, of California, located in Spokane, Washington, from time to time upon request of any and all advances made by him for or upon said Glasson pay rolls and other expenses in excess of the 85 per cent. of the amounts of engineer's certificates as aforesaid, and also of any amounts repaid thereof, if any."

Thereafter respondent, by letters and reports, advised appellant of the several amounts disbursed by him from time to time for labor and materials. On May 26, 1911, he informed appellant that he had thus disbursed the full contract price of \$7,982; that 25 per cent. of the work was yet to be completed; and asked either that appellant consent to further payments to be made by him to the full amount of the bond, or that appellant take over the contract and complete the improvement. Appellant in response directed respondent to confer with its Spokane agent and report. Respondent did so, explaining all conditions, and was directed by the agent to let Glasson finish the work, as appellant did not wish to take over the contract. Appellant's agent further assured respondent that he was protected by the bond to the extent of \$2,000 over and above the contract price, and authorized respondent to pay all labor claims, and thus protect the abutting property from liens. Labor claims amounting to more than \$3,000 were thereafter paid by respondent. There is considerable dispute relative to certain advances made by respondent for groceries and other supplies furnished to the subcontractor to be used in a boarding house conducted by Glasson's wife, and at which the men employed by Glasson were boarders. Appellant insists that these payments were not contemplated by the contract or bond, but we regard the discussion of this question as immaterial, for the reason that, if all payments of this character were to be eliminated, the fact would still remain that respondent had paid for labor performed and material used in the performance of the work more than the contract price and face of the bond.

Appellant insists that, by the terms of its bond, it only became liable to respondent for the payment of claims which would support enforceable liens; that a public street cannot be subjected to any liens for which it was bound to reimburse respondent; that respondent from time to time made advances to Glasson without appellant's consent in violation of the terms of the contract and bond; and that appellant was thereby released from its liability as surety.

[1] The evidence does show that advances were made by respondent prior to the date on which the appellant executed the written consent above set forth. These payments were made in settlement of pay rolls, for ma-

materials used in the work, and for certain groceries used in the boarding house. Appellant, however, knew of these advances before it executed the written consent of March 18, 1911, and was thereafter advised from time to time of all further payments made by respondent until the full contract price was disbursed by him. In support of its contention that the advancements mentioned released it from liability, appellant cites the opinion of this court in *Black Masonry, etc., Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517. There the contract price was \$18,500. Payments to the contractor of 85 per cent. of the value of stone actually cut and placed in the building were to be made each month. \$3,500 of the contract was paid to him by the owners before any stone was placed in the building. Thereafter the owner and principal contractor, as beneficiaries of the bond, requested the surety company to approve such payments. This it promptly refused to do, declaring that the contract had been broken, and that it was released. At all subsequent times the surety company denied liability, refusing to conduct further negotiations. Similar facts do not exist in this case. Instead of denying liability, appellant executed its written consent that payments might be made on a different basis from that stipulated in the contract, and, after the full contract price had been paid by respondent, consented to further payments by him for the purpose of completing the contract. It is manifest that a mere statement of the facts is sufficient to fix appellant's liability. *Manhattan Co. v. Fidelity & Guaranty Co.*, 137 Pac. 1003, and cases therein cited. The controlling feature of this case is that appellant not only knew respondent was financing Glasson's undertaking, but it expressly consented to and ratified his acts.

[2] The surety bond, which, by its terms, designated respondent as "owner," provided that: "The 'surety' shall not be liable under this bond to any one except the 'owner', but it is agreed that the 'owner' in estimating his damage may include the claims of mechanics and materialmen, arising out of the performance of the contract, and paid by him only when the same, by the statutes of the state where the contract is to be performed, are valid liens against said property." Citing this stipulation, appellant, as above stated, insists that liens cannot be enforced against a public street; that the contract provided for a street improvement; and that appellant would be liable only to respondent for the payment of claims which would support valid and enforceable liens. Section 1131, Rem. & Bal. Code, provides that: "Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of, or adjoining the same, has a lien upon such real property for the labor

performed, or the materials furnished for such purposes." Respondent had a contract with the owners of the abutting property to improve this street. The work was not being done by the city, but was a private enterprise. Under the section quoted, work thus done would be subject-matter of valid liens upon the abutting property. Manifestly one of the purposes of the bond was to protect respondent from liability to the owners of abutting property for any such liens, as respondent would be required to satisfy them before he could demand payment from the property owners under his contract.

[3] Appellant further contends that Glasson breached his contract on March 16, 1911, and that this action was not brought within six months thereafter, the time limited by the bond. The breach mentioned was, as above shown, waived by appellant's subsequent acts, and, with its consent, Glasson continued the performance of his contract. Without entering upon a discussion of the evidence, it is sufficient to say that the contract was not completed until some time in the month of July, 1911, and that this action was commenced within six months thereafter. It further appears that various laborers and materialmen were seeking to foreclose liens upon the abutting property; that Glasson prosecuted a claim for extras, which respondent disputed; that all of these matters were litigated in a separate and single action, prior to the commencement of this action; that respondent notified appellant of the pendency of the prior action; that he tendered appellant an opportunity to appear and defend its interests therein; that appellant's attorney was present at the trial, and had an opportunity to protect appellant's interests; that the issues therein were not finally adjudicated until the month of December, 1911; that respondent did not ascertain the exact amount due him from Glasson until the termination of that litigation; and that immediately thereafter this action was commenced. We find no merit in appellant's contention that the action was not commenced in time.

The judgment is affirmed.

FULLERTON, MORRIS, MAIN, and ELLIS, JJ., concur.

GIBSON v. MORRIS STATE BANK et al. (Supreme Court of Montana. April 7, 1914.)

1. NEW TRIAL (§ 79\*)—MOTION—DETERMINATION—DIFFERENT TRIAL JUDGE.

Where a motion for a new trial in an equity suit was passed upon by a different judge than the one who presided at the trial, he should be governed by the rules followed by the Supreme Court in equity cases since the adoption of Rev. Codes, § 6253, requiring the review of questions of fact on appeals in equity cases, and should not set aside the findings, unless they are clearly against the preponderance of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 165½; Dec. Dig. § 79.\*]

**2. APPEAL AND ERROR (§ 1015\*)—REVIEW—NEW TRIAL—RULING OF DIFFERENT TRIAL JUDGE.**

On an appeal from the determination of a motion for a new trial by a judge other than the one who presided at the trial, the same presumption does not attach to his ruling as if he had heard the witnesses, in view of Rev. Codes, § 6179, providing that, where the reason is the same, the rule should be the same, and section 6178, providing that, where the reason ceases, so should the rule itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

**3. NEW TRIAL (§ 72\*)—SETTING ASIDE VERDICT—DIFFERENT TRIAL JUDGE.**

The trial court should not set aside the verdict of a jury, unless the evidence clearly preponderates against it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

**4. MORTGAGES (§ 38\*)—FORM—ABSOLUTE CONVEYANCE—SUFFICIENCY OF EVIDENCE.**

In a suit to quiet title, originally instituted as a suit to foreclose a mortgage, evidence held to clearly preponderate against the finding of the judge that a deed, given by the owner of land to a bank to which he was heavily indebted, was intended to be absolute deed, and not as a further security for the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\*]

**5. DEEDS (§ 121\*)—OPERATION—QUITCLAIM DEED.**

One who accepts a quitclaim deed acquires only the title of the grantor, even though full value be paid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 394-400; Dec. Dig. § 121.\*]

**6. MORTGAGES (§ 32\*)—FORM—ABSOLUTE CONVEYANCE.**

Where a deed, absolute in form, is given by a debtor to his creditor, if the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage, though the grantee may not regard it as such.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

**7. MORTGAGES (§ 36\*)—BURDEN OF PROOF—CHARACTER OF INSTRUMENT.**

The burden is upon him who alleges that an absolute deed is a mortgage to establish that fact by clear and convincing evidence, but the burden is sustained by showing that the debt for which the conveyance was executed remains uncanceled and is treated as an existing indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 96, 96; Dec. Dig. § 36.\*]

**8. MORTGAGES (§ 32\*)—CHARACTER OF INSTRUMENT—SUFFICIENCY OF EVIDENCE—RETENTION OF EVIDENCE OF INDEBTEDNESS.**

Where an absolute deed is given by a debtor to his creditor, and it appears that the antecedent debt has been canceled, the retention of the evidence of the debt by the grantee may be explained, but, if the indebtedness is not canceled, and proceedings are instituted to enforce it, no explanation can avoid the conclusion that the deed was security only, and not an absolute conveyance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

Appeal from District Court, Madison County; William A. Clark, Judge.

Action by Mary Gleim against the Morris State Bank, Charles L. Finch, and others, in which Elizabeth Gibson, as administratrix of

Mary Gleim, was substituted as plaintiff after the death of the plaintiff. From an order setting aside a decree in favor of the plaintiff and granting a new trial, plaintiff appeals. Affirmed.

Hall & Whitlock, of Missoula, for appellant. M. M. Duncan, of Virginia City, and W. A. Pennington, of Butte, for respondent.

BRANTLY, C. J. This action was originally brought by Mary Gleim to foreclose two mortgages upon a tract of land situate in Madison county, and described as the west half and the southeast quarter of section 35, and the southwest quarter of section 36 in township 1 south, of range 2 west of the Montana principal meridian. Subsequently the complaint was amended so as to change the action into one to quiet title. It was tried and decided upon the latter theory. After the appeal had been taken to this court, Mary Gleim died, and Elizabeth Gibson, the administratrix upon her estate, was substituted as plaintiff in her stead. The deceased obtained the title by quitclaim deed from the Morris State Bank of Pony, Mont., dated January 12, 1911. The title of the bank was evidenced by a warranty deed executed to it by the defendant Chas. L. Finch, dated January 7, 1907. This deed, though acknowledged, was not recorded. Prior to the date of the deed, Finch had become indebted to the bank in various amounts, for which he had executed his promissory notes as follows: One for \$2,275, dated March 21, 1903; a second for \$145, dated April 21, 1903; a third for \$1,627.25, dated June 7, 1905; and a fourth for \$700, dated June 7, 1905. To secure the payment of the first three of these notes, he had given mortgages to the bank upon all the land described. When the mortgages were executed, Finch was not the legal owner of the southwest quarter of section 36, but held it under a contract of purchase from the state of Montana. The note for \$700 was executed for money borrowed to pay the balance of the purchase price due the state. As additional security for its payment, Finch assigned to the bank his contract of purchase, and on June 10th thereafter a patent was issued by the state directly to the bank. The bank gave Finch a written statement to the effect that it held the title only as security for the payment of his indebtedness. At the time the warranty deed was executed, Finch's indebtedness to the bank amounted to about \$5,000. The bank did not then nor thereafter surrender Finch's notes, nor cancel the mortgages, but retained them intact. Just prior to or about the time of this transaction, Finch and the bank had executed a lease of the land to one Carter, the bank joining because it was the apparent owner of the 160 acres lying in section 36, under the patent. Finch then went to Silver Bow county, and resided there until this action

was brought. The bank collected the rent from Carter, and, after paying the taxes on the land and other charges, indorsed credits upon the second and third notes, but kept an account thereof upon its books under the title "C. L. Finch, Rental Ac." At the time the mortgage to secure the first note was executed, Finch was a single man. Before the latter transactions occurred, Finch and his codefendant, Adelene Vian Finch, began to cohabit, as husband and wife, and held themselves out as such until the land was leased to Carter. Apparently they separated at that time, and have lived apart ever since. The latter refused to join in the second mortgage and deed to the bank. When the deed was executed by the bank to the deceased, all the notes were transferred to her order without recourse, except the second. As appears by a memorandum written upon it, it had been fully discharged out of the rent received by the bank from Carter. By formal assignments in writing also, the mortgages, together with the notes secured by them, were transferred to the deceased. Each of the assignments authorized her, at her own cost and expense, "to have, use, and take all lawful ways and means for the recovery of said money and interest; and, in case of payment, to discharge the same mortgages as fully as the party of the first part might or could do if these presents were not made." Though the defendant Adelene Vian Finch filed an answer, she did not appear, nor was she represented at the trial.

The issues presented by the pleadings were two, viz.: (1) Whether the deed from Finch was intended as a mortgage by way of additional security for the indebtedness due, or was intended by him and accepted by the bank as a conveyance to it of his equity of redemption in full payment and discharge of his indebtedness; and (2) whether the deceased was a bona fide purchaser for value. The court found the issues in favor of the plaintiff. A decree was rendered and entered accordingly. The defendant Chas. L. Finch made his motion for a new trial on the ground, among others, of insufficiency of the evidence to justify the decision. During the pendency of the motion, the term of office of Hon. Lew L. Callaway, the judge who presided at the trial, expired, and the motion was submitted to Hon. W. A. Clark, who granted it. The plaintiff has appealed.

[1, 2] Though defendant's notice of intention recites several of the statutory grounds for a new trial, apparently the only ground urged at the hearing in the district court was the insufficiency of the evidence to justify the findings. We therefore have before us for decision the single question whether Judge Clark erred in granting the motion on that ground. It is argued by counsel for the plaintiff that, while it is the general rule that an order determining a motion for a new trial on the ground of insufficiency of the evidence will not be disturbed if the evi-

dence presents a substantial conflict, this rule has no application to a case in which, as in this, the motion has been submitted to and determined by a judge other than the one who presided at the trial. They say that, inasmuch as Judge Clark, not having seen the witnesses or heard their testimony, was compelled to gain his knowledge of the case from the record alone, he was in no better position to determine the motion than is this court, and hence that his order does not carry with it the presumption usually indulged on appeal in favor of such an order, viz.: That the ruling of the trial court will be accepted as conclusive, unless an abuse of discretion is made apparent. It is therefore argued that this court should examine the record and determine the question submitted, without regard to the conclusion arrived at by Judge Clark. The same contention was made in the recent case of *Leveridge v. Hennessy*, 48 Mont. 58, 135 Pac. 906, but was not considered or determined, because, as disclosed by the record, there was a decisive preponderance of the evidence in favor of the conclusion reached by the judge who presided at the trial, and hence there was no room for the exercise of discretion by the judge who ordered a new trial. It was there said: "The question is an interesting one and unsettled in this state, but we do not deem the present case an opportune one for its consideration." The statement that the question is unsettled in this state is not entirely correct. Several decisions heretofore made by this court either directly or in principle support counsel's contention. In the early case of *Orr v. Haskell*, 2 Mont. 225, in affirming an order denying a motion for a new trial, the court said: "It must be clear that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of the evidence or unsupported by it. And, if this is the rule, as it undoubtedly is, even in the court where the cause is tried, and before whom the witnesses appear and testify, a fortiori ought it to be the rule when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement." In *Landsman v. Thompson*, 9 Mont. 182, 22 Pac. 1148, after discussing and affirming the rule which ordinarily applies to cases presenting substantially conflicting evidence, the court said: "The rule above cited is based upon the ground that the judge below has heard the oral testimony, has observed the demeanor of witnesses, and had the benefit of living, speaking testimony, which in the Supreme Court is reduced to a lifeless printed record, for which reason it is presumed that the trial judge was in a better position to exercise a sound discretion than is the appellate court; and, if it does not appear that he has abused such discretion, his action will not be disturbed. In the case at bar, the judge who

granted the motion was other than the one who presided at the trial. The court has not therefore the benefit of the judgment of the trial judge, based upon his view of the animate witnesses. We occupy the same point of view as the judge passing upon the motion in this case, as far as the advantage of judging testimony is concerned. This court has, as the judge below had, nothing but printed testimony. Neither has any light, save from the inanimate type, and to that we must refer to decide whether the judge abused a discretion." It then proceeded to examine the record, and reached a conclusion upholding the ruling of the judge who granted the motion, on the ground that there was no substantial conflict in the evidence.

*Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866, is, in principle, also directly in point. That was an appeal from an order granting a motion to dissolve an attachment based exclusively upon affidavits. Recognizing again the general rule, the court there, through Mr. Justice Hunt, used this language: "It must be remembered that the case is not one where the witnesses testified in person, and where the manner in which they gave their evidence might have materially aided the trial judge in weighing their credibility. For this reason the case must be decided by this court precisely upon what was before the district court; that is, upon record evidence, and nothing else." Upon a consideration of the affidavits, the court reached the conclusion that the evidence preponderated against the conclusion of the trial judge, and reversed the order. Again, in *Wilson v. Barbour*, 21 Mont. 176, 53 Pac. 315, the appeal was from an order refusing to dissolve an attachment. The motion had been made upon documentary evidence disclosing a substantial conflict. The court nevertheless proceeded, as it had in *Newell v. Whitwell*, supra, to determine the merits of the motion, by deciding it upon the weight of the evidence. In *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25, the trial court had improperly excluded from the evidence certain letters exchanged between the plaintiff and the defendant. This court, upon concluding that they ought to have been admitted and considered upon the question whether or not the parties had separated by mutual consent, proceeded to give them such probative value as ought to have been accorded to them by the trial court, and determined the rights of the parties accordingly; and this it did upon the theory that it was in as good position to determine the value of the testimony as the trial court would be if a new trial should be ordered. While, in determining appeals from orders setting aside or refusing to set aside defaults and the like, this rule has not always been consistently observed, nevertheless there is no substantial ground upon which the propriety or the soundness of it can be questioned.

[3] A trial court should not set aside the

verdict of a jury, except for cogent reasons—that is, unless the evidence preponderates against it—for the right of trial by jury is a substantial, constitutional one, which should be respected accordingly. *Orr v. Haskell*, supra; *Sutton v. Lowry*, 39 Mont. 462, 104 Pac. 545. When the ground of the motion is insufficiency of the evidence, or other ground which appeals to the court's discretion, the verdict should not be disturbed, unless a refusal to do so would be to exceed the bounds of reason, all the circumstances being considered. *Murray v. Buell*, 74 Wis. 14, 41 N. W. 1010; *Root v. Bingham*, 28 S. D. 118, 128 N. W. 132. The term "discretion," as used in this connection, denotes "a legal discretion to be exercised in conformity with the spirit of the law and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." *Bailey v. Taaffe*, 29 Cal. 423. See, also, *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592, where the foregoing definition is approved.

When a motion for a new trial for insufficiency of the evidence is submitted to a judge other than the one who presides at the trial, for the very reason that he cannot call to his aid a recollection of the demeanor of the witnesses, he ought not to go further than to determine upon the dead record the question whether there is a decided preponderance of evidence against the verdict or decision. If such is the case, a new trial ought to be granted; otherwise not. On appeal this court will examine the record and determine whether the motion was properly determined. Such is the rule, as was recognized in *Orr v. Haskell*, and applied in *Landsman v. Thompson*, supra. There is perhaps a limitation of the rule as thus broadly stated, viz., that an order granting a new trial will not be set aside so readily as an order denying one; the reason being that the latter ends the case, so far as the trial court is concerned, whereas the former does not, but merely restores the parties to the same condition in which they were before the trial. Since the enactment of section 6253 of the Revised Codes, on appeals in equity cases, this court has observed the rule: The findings of the trial court will not be set aside unless there is a decided preponderance in the evidence against them; and, when the evidence as it appears in the record, fully considered, furnishes reasonable grounds for different conclusions, the findings will not be disturbed. *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860; *Copper Mt. Min. Co. v. Butte & C. O. & S. Co.*, 39 Mont. 487, 104 Pac. 540, 133 Am. St. Rep. 595; *Reid v. Hennessy Merc. Co.*, 45 Mont. 383, 123 Pac. 397; *Leveridge v. Hennessy*, supra. In the last case an order granting a new trial, made by

a judge other than the trial judge, was reversed as already noted.

Since this case came before Judge Clark upon the same record as that before us, there can be no sound reason why he should not have been governed, in his review of it, by the rule observed by this court on appeal, and the propriety of his action be determined accordingly. The same presumption may not attach to his ruling as would attach if he had heard and observed the living witnesses. "Where the reason is the same the rule should be the same;" but "when the reason of a rule ceases so should the rule itself." Rev. Codes, §§ 6178, 6179.

[4, 5] As we view the evidence, the vital question in the case is whether the deed to the bank was intended as additional security for Finch's indebtedness to the bank, or as a final discharge of it; for there is no evidence to justify a finding that the deceased purchased without notice of Finch's claim.

Though she paid full value, she accepted a quitclaim deed. This conveyed to her only such title as the bank had. *Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717. But, aside from this, the evidence shows affirmatively that, before the purchase was consummated, one Truesdale, who acted as agent for the deceased and conducted the negotiations for her, interviewed Finch, ostensibly to ascertain whether he asserted any claim to the land. In that interview Finch told Truesdale, in substance, that he owned the land subject to the mortgages held by the bank. He testified that he told Truesdale all the facts showing the relations of the bank to the title, including the fact that, though he had executed a deed to the bank, he held the title in his own name. Truesdale denied that he was informed by Finch of the existence of the deed; but the fact remains undisputed that he was informed of Finch's claim and the nature of it, and that he communicated this information to the deceased. Furthermore, soon after the purchase was consummated, the deceased instituted this action. The original complaint was for a formal foreclosure of the assigned mortgages. In the first count therein, which declared on the older mortgage, it was alleged: "That the condition of the said mortgage has been broken, in that the defendant Charles L. Finch has wholly failed to pay the said note or the interest on said note secured by said mortgage, and the said defendant is thereby indebted to plaintiff on said note and mortgage in the sum of \$4,413.50, with interest thereon at the rate of 1 per cent. per month from the 21st day of January, 1911." A like allegation is found in the second count. In the third count recovery was sought for the amount of the fourth note, together with \$87.25, advanced by the bank for the payment of taxes for the years 1905 and 1906, with interest thereon, with a foreclosure of Finch's equity in the portion of the land covered by the patent. The verification was by the de-

ceased upon her personal knowledge. The prayer demanded not only a personal judgment against Finch, but a deficiency judgment in case the amount due should not be fully satisfied by the sale of the property. Taking all these facts together, it is impossible to reach any other conclusion than that the deceased had full knowledge, not only of the claim of Finch, but also of its nature. It cannot be conceived that one who believes he holds title to property free from incumbrances or outstanding equities, can fall into such a mistake as to his rights as did the deceased when she filed the original complaint. And the presumption against her claim is strengthened by the fact that the record does not disclose any explanation as to why she brought the action as she did. Of course, if her claim, as now made, were well founded, it would be wholly unnecessary to inquire what were the relations between Finch and the bank. She would come within the protection of the statute. Rev. Codes, § 5750. As the case stands, she falls clearly within its exception.

The evidence on the main issue is not altogether free from doubt, but, viewed as a whole, we think it preponderates decisively against the finding of the trial court. The evidence tending directly or indirectly to sustain Finch's claim may be summarized as follows: The relations of Finch to the bank had their inception in the several loan transactions referred to in the statement. He testified that, about the time he executed the note, he had come to the conclusion that he had not been successful in his farming operations, and for this reason it would be better to lease the land and allow the rentals to be paid to the bank to be applied, first, to the payment of taxes and other charges, and then to the discharge of his indebtedness. He was then solicited by the officers of the bank to execute the deed; the claim being that this would be a better security than the mortgages, and would leave Finch in a better position to follow some profitable pursuit elsewhere. He agreed to do this upon the condition that the bank would give him a written defeasance. This, Mr. Gohn, the cashier of the bank, and who acted for it, agreed to do. Though the deed was executed and delivered, the defeasance was not. Finch did not insist upon having it, because, as he says, he trusted Mr. Gohn's assurances, when he subsequently demanded it, that the bank would not take any advantage of him. The understanding was that, apart from the change in the form of the security, the relation of mortgagor and mortgagee between himself and the bank would remain unchanged, he being at liberty at any time to discharge the indebtedness and redeem the land, or sell it to any purchaser he might find. The bank kept the notes uncanceled, collected the rents, paid the taxes, and credited the balance upon the indebtedness, keeping an account under the



title "C. L. Finch, Rental Ac." When the transfer was made to the deceased, with the notes and mortgages, the notes, except the smaller one, showed, by memoranda attached, the amount of principal and interest due to December 31, 1910. The memorandum attached to the oldest note contained the notation: "Secured by first mortgage." The second note had attached to it a similar memorandum, reciting: "This note is secured by mortgage sent you for \$1,772.25, which mortgage also secures a note for \$145.00 of Finch and Stafford, which note has been paid, out of rental account; hence the note No. 587, \$1,627.25, is the only one to be considered in connection with this mortgage." The small note bore upon its face the notation: "Pd. 12-30-1910"—and a memorandum attached recited: "This note credited and charged Finch Rental Ac. Dec. 29 (30) 1910." There are other similar circumstances disclosed by the books of the bank which, taken with the foregoing recitals, point strongly to the conclusion that the transactions between it and Finch were never regarded as having been merged in a settlement and discharge of Finch, but that he was regarded all the while by the bank as still its debtor. This conclusion is fortified indirectly by the fact that on February 8, 1911, within a month from the date of the transfer to her, the deceased instituted this action to foreclose the mortgages. This fact furnishes a presumption that she regarded herself, upon the information received from the bank, as being substituted in its place as mortgagee. It is further indirectly fortified by the fact that, while the officers of the bank who conducted the transaction with Finch must be presumed to have been men of experience and business capacity, and knew the rights of the bank, they, nevertheless, just prior to the transfer to deceased, had employed an attorney to bring an action for the foreclosure of the mortgages. Added to these circumstances is the fact that, at the time the deed was executed to the bank, no consideration was paid for it to Finch, either in the form of direct payment or by a credit upon his indebtedness to the bank. On the other hand, Mr. Gohn, the cashier, and Mr. Smith, the accountant of the bank, who overheard a part of the negotiations, both testified that Finch executed the deed in order to discharge his indebtedness to the bank, and to avoid the expense of foreclosure, without any reservation except to exact a promise from Mr. Gohn that the bank would not sell the land to the defendant Adelene Vian Finch; the reason being that, though Finch had theretofore cohabited with her and held her out as his wife, she was not, in fact, such, and for this reason, and because of his enmity toward her, growing out of their separation, he did not desire her to acquire the property. Both testified that this promise was made in writing, but that the writing was not signed. As to why the bank retained the notes

and mortgages, both explained that the purpose was to enable the bank to foreclose the mortgages and thus forestall any claim to dower in the land by Adelene Vian Finch, in the event she appeared to be Finch's lawful wife; she having refused to join in the deed. This explanation, if true and accepted as satisfactory, so far as concerns the first mortgage, because at the time of its execution Finch was admittedly a single man, does not explain the retention of the second mortgage and the notes secured by it. After Finch removed his residence to Silver Bow county, he did not again visit the bank, nor did he make any inquiry of it as to the condition of his indebtedness to it. Mr. Smith explained that the account of the bank was kept as it was in order that the actual cost of the land to the bank might at any time be ascertainable. Neither he nor Mr. Gohn offered any explanation of the fact that credits were indorsed on the notes, and that they were otherwise treated as if they represented continuing liabilities against Finch. Both explained that they were transferred to the deceased in order that she might use them to cut off the possible claim by Adelene Vian Finch. But that deceased did not so understand the transaction is clear, because, as above stated, in her original complaint she sought to charge Finch personally for the amount of the notes, and sought a deficiency judgment for any balance of the amount not satisfied by a sale of the land. There was some evidence as to the value of the land both at the time the deed was executed and at the time of the trial. At the date of Finch's deed, its value was not largely in excess of the amount of his indebtedness; at the date of the trial its value had greatly increased. On the whole, while it must be admitted that Finch's conduct subsequent to the execution of his deed is not altogether consistent with his testimony given at the trial, it is impossible to harmonize the admitted facts, as shown by the records of the bank and the conduct of its officers, with any other theory than that Finch's deed was not intended by him, nor accepted by the bank, as a conveyance of the title in payment of his indebtedness, but was intended and accepted as an additional security. The conclusion cannot be avoided that the bank retained the notes, not for the purpose stated, but as representing continuing liabilities; otherwise the giving of the deed operated as a discharge of them, as well as the mortgages themselves, and none of them could thereafter be made the basis of legal proceedings for any purpose. Judgments could not be secured upon the notes as against Adelene Vian Finch, because she had not signed them. Having been paid, they represented no valid claim against Finch.

[6] The rule applicable to this class of cases is stated by Mr. Devlin in his work on Deeds, as follows: "If the indebtedness remains uncanceled, the conveyance (absolute

deed) is treated in equity as a mortgage, though the grantee may not regard it as such; but he cannot hold the absolute title without at the same time relinquishing the right to compel payment on the deed." 3 Devlin on Deeds, § 1120. See, also, *Marshall v. Thompson*, 39 Minn. 187, 39 N. W. 809; *Simpson v. First Nat. Bank*, 93 Fed. 309, 35 C. C. A. 306; *Harmon v. Banking Co.*, 60 Or. 69, 118 Pac. 188; *Sutphen v. Cushman*, 35 Ill. 186; 3 Jones on Mortgages, 325; 27 Cyc. 1011, 1012.

[7] The burden is upon him who alleges that a deed absolute on its face is a mortgage to establish the fact by clear and convincing evidence. *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240. Yet this burden is, we think, fully sustained when it is made to appear that the debt secured remains uncanceled, and is treated as an existing indebtedness, and the relations of the parties remain unchanged after the delivery of the deed.

[8] If it appears that the antecedent debt has been canceled, or it is agreed upon the execution of the deed that this is to be done, the retention of the evidence of the debt by the mortgagee is subject to explanation. *Larson v. Dutiel*, 14 S. D. 476, 85 N. W. 1006; *Harmon v. Banking Co.*, supra. When, however, the mortgage indebtedness is left uncanceled, and is held by the mortgagee as a liability against the mortgagor, and proceedings are instituted to enforce it, no explanation can suffice to forestall the conclusion that the relation between the parties of mortgagor and mortgagee theretofore established remains unchanged. Whether the debt has been discharged is one of the crucial tests by which the rights of the parties are to be determined. *Harmon v. Banking Co.*, and *Sutphen v. Cushman*, supra.

The order is affirmed.

HOLLOWAY and SANNER, JJ., concur.

STATE ex rel. GENERAL ELECTRIC CO.  
v. ALDERSON, Secretary of State.

(Supreme Court of Montana. March 25, 1914.)

# 1. TAXATION (§ 40\*)—FEES IMPOSED ON CORPORATIONS—VALIDITY.

The fee imposed by Rev. Codes, § 165, fixing fees for the recording and filing of certificates of incorporation, based on the amount of capital stock, is not a tax, within Const. art. 12, §§ 1, 7, 11, providing for the levy and collection of taxes by general law, or within Rev. Codes, §§ 2499, 2502, requiring all taxable property to be assessed at its full cash value, but is an impost, an excise, or license tax exacted from every corporation, domestic or foreign, for the privilege of doing business within the state, and is authorized by Const. art. 12, § 1, empowering the Legislature to impose a license tax on persons and corporations doing business in the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 68-89; Dec. Dig. § 40.\*]

# 2. CORPORATIONS (§ 636\*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

The right of a foreign corporation to engage in purely local private business in the state is a matter of grace on the part of the state, and, in the absence of any contract right giving a foreign corporation the right to engage in business in the state, the state may exclude it, or may attach conditions which are unreasonable or which transgress a constitutional guaranty secured to the corporation in the state of its domicile.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. § 636.\*]

# 3. CORPORATIONS (§ 648\*)—FOREIGN CORPORATIONS—LICENSE FEES.

A decision of the Supreme Court that Rev. Codes, § 165, imposing a fee for the recording and filing of certificates of incorporation, does not permit the imposition of the fee on a foreign corporation seeking to engage in interstate commerce in the state does not prevent the Secretary of State from insisting on the payment of the fee for recording and filing the certificate of a foreign corporation intending to engage solely in private intrastate business.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2516; Dec. Dig. § 648.\*]

# 4. CONSTITUTIONAL LAW (§ 48\*)—VALIDITY OF STATUTES—CONSTRUCTION.

The court, in construing a statute, will adopt that construction which, without doing violence to the fair meaning of the language, will render the statute valid.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48.\*]

# 5. CORPORATIONS (§ 648\*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—STATUTORY REGULATIONS.

Rev. Codes, § 165, imposing fees for the recording and filing of certificates of incorporation of any foreign corporation, must be construed to apply only to foreign corporations seeking to conduct strictly private intrastate business, and not to foreign corporations seeking to engage in interstate commerce in the state, and, so construed, the statute is valid.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2516; Dec. Dig. § 648.\*]

Mandamus by the State, on relation of the General Electric Company, against A. M. Alderson, Secretary of State, to compel the latter to file a copy of relator's charter, and a certificate appointing an agent, and his acceptance. Dismissed.

Gunn, Rasch & Hall, of Helena, for relator. D. M. Kelly, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. The General Electric Company is a New York corporation with a capital stock of the par value of \$101,378,600, and owns property of the value of more than \$100,000,000, all located in states other than Montana. Desiring to conduct business in this state, the company tendered to the Secretary of State, for filing, a duly authenticated copy of its charter, a properly verified statement, a duly executed certificate appointing an agent, and the agent's acceptance of the office, together with a fee of \$13. The Secretary of State refused to file any of the papers unless a fee of \$10,322.86 was paid; hence this proceeding.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Sections 4413 and 4414, Revised Codes, provide that a foreign corporation of the character of this one, before doing business in this state, must file with the Secretary of State: (a) A duly authenticated copy of its charter; (b) a verified statement showing the amount of its capital stock, its assets, liabilities, etc.; (c) a certificate appointing a local agent upon whom service of process can be made; and (d) the written consent of the agent to act. Section 165, Revised Codes, fixes the fees which the Secretary of State shall collect as follows: "IV. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged: Amounts up to \$100,000.00, fifty cents per thousand dollars. Additional from \$100,000.00 to \$250,000.00, forty cents per thousand dollars. Additional from \$250,000.00 to \$500,000.00, thirty cents per thousand dollars. Additional from \$500,000.00 to \$1,000,000.00, twenty cents per thousand dollars. Additional over \$1,000,000.00, ten cents per thousand dollars. Providing that no fee for filing any articles of incorporation or increase of capital stock shall be less than \$20.00, except religious societies, churches, and organizations for religious purposes, not having a capital stock, and not being organized for the purpose of profit. \* \* \* X. For filing each certified copy of charter or articles of incorporation of any foreign corporation, the same fee shall be charged as is provided for in article IV of this section, for domestic corporations."

It is conceded that the papers tendered for filing were properly prepared and tendered, and that the amount of the fee demanded is correct, according to the schedule above. We are also advised by counsel that the business to be conducted by relator, if admitted into this state, will be strictly private, local, or intrastate business, and we are thereby relieved from any consideration of questions affecting interstate commerce or agencies of the government. It is insisted however, that section 165 above is invalid, as applied to this relator and other foreign corporations similarly situated, because it seeks to impose a tax upon property, none of which is within the state or within the jurisdiction of the taxing power of the state; and it is insisted that this doctrine is established and further discussion foreclosed by the decision in *Chicago, M. & St. P. Ry. Co. v. Swindlehurst*, 47 Mont. 119, 130 Pac. 966. That case was determined upon an agreed statement of facts which recited that the Chicago, Milwaukee & St. Paul Railway Company is a Wisconsin corporation, engaged as a common carrier in interstate commerce, and owning and operating lines of railway in South Dakota and other states; that the Chicago, Milwaukee & Puget Sound Railway Company is a Washington corporation, likewise engaged in interstate commerce as a common carrier and owning and operating a

line of road from the Puget Sound across Montana to Mowbrige, S. D., where it connects with the road first named above; that the Milwaukee Company was then about to purchase the line of the Puget Sound Company, and desiring to secure the advantages afforded by section 4299, Revised Codes, tendered to the Secretary of State a copy of its charter and \$1 as a filing fee. The Secretary of State declined to file the paper unless a fee of \$23,447.31, computed under subdivisions IV and X of section 165, Revised Codes, was paid. It was assumed that it was necessary for the Wisconsin corporation to file a copy of its charter with the Secretary of State. It was contended by its counsel that the exaction of a fee under section 165, Revised Codes, based upon the entire capital stock, interfered with the interstate business of the company and imposed a tax upon property situated without the state of Montana. After stating the questions involved and the contention of the railway company, this court, speaking through the Chief Justice, said: "The question submitted for decision is whether section 165 is invalid for either or both reasons assigned." Reference was then made to the decisions in *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, and *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and of these it was remarked: "These cases, particularly the first, are directly in point." A review of those cases was then made, and it was said: "This court is concluded by these decisions, and hence must declare section 165, supra, in so far as it applies to foreign corporations seeking to engage in interstate commerce in this state, inoperative and void." Nothing whatever is said in the opinion upon the contention made that the statute seeks to impose a tax upon property of the company without the state, and that question will now be treated as *res integra*.

That the fee demanded by section 165 is not a property tax at all is plainly apparent. Article 12 of our state Constitution provides for public revenue to be raised by taxation. Section 1 enjoins upon the Legislature the duty to prescribe such regulations as will secure a just valuation for taxation of all property, except such as is or may be exempt. Sections 11 and 7 provide:

"Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

"Sec. 7. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school,

municipal and other purposes, on real and personal property owned or used by them and not by this Constitution exempted from taxation."

The rate of taxation for state purposes is fixed by section 9, as amended, and can never exceed  $2\frac{1}{2}$  mills on each dollar of valuation. The property exempt from taxation is enumerated in section 2499, Revised Codes. Section 2502 provides: "All taxable property must be assessed at its full cash value. \* \* \*"

[1] The fee demanded by section 165 is graduated according to the par value of the company's capital stock, without reference to the full cash value of the property owned by the corporation. For instance: A corporation with a capital stock of \$100,000 is required to pay only \$50, though its property represented by that capital stock may be worth a million dollars. Furthermore, this fee is not a recurring one; it is demanded but once. That the Legislature did not treat it as a property tax is indicated by the failure to provide any means for its collection. A foreign corporation may be denied admission here, but it cannot be made to pay the fee in the same sense that any other taxpaying individual or corporation may be coerced into paying property taxes. This fee does not become a lien upon any property which the corporation may have in this state, as does a property tax under section 2600, Revised Codes. The amount of this fee is fixed by law and does not vary from time to time, while the rate of taxation for property taxes is fixed by the Legislature for the state and by the county boards for the respective counties, and varies from year to year with the necessities for greater or less revenue. These considerations justify our conclusion that the fee is not a property tax. It is an impost, an excise, or a license tax exacted of every corporation, domestic as well as foreign, engaged in intrastate business, for the privilege of doing business within this state, enjoying the protection of our laws and the pecuniary advantages afforded by our markets. It is authorized by our state Constitution, which declares: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." Article 12, § 1. The par value of the capital stock is merely made the standard or measuring rod, upon the assumption, whether justified or not, that the advantages gained by corporations in transacting business within this state will be in some measure proportioned according to the amount of their capital stock.

We are unable to appreciate the distinction attempted to be made by the Supreme Court of the United States between the Kansas statute, considered in *Western Union Tel. Co. v. Kansas*, above, and held to impose a general tax upon all of the property of the company, and the statute of Massachusetts, considered in *Baltic Min. Co. v. Commonwealth*, 231 U. S. 68, 34 U. S. 15, 58 L. Ed.

—, and held to be a mere excise; but, if we have accurately characterized our section 165 above, the latest pronouncement by that court justifies the existence of our statute and the method employed for determining the amount of the tax. It may be that our legislation is unwise in failing to fix a reasonable limit upon the amount to be exacted from any one corporation; but, if the authority is lodged in the state to exclude the relator altogether or to impose such terms to its admission here as may seem expedient, then the amount of the fee affords no tenable ground of opposition to the validity of the statute. If the amount demanded is more than the local, private business of relator will justify it paying, the tax can be avoided altogether by a renunciation of its intention to do such business. The state does not seek to compel it to engage in business here, nor does it attempt to collect this fee in the sense that property taxes or ordinary debts may be enforced. It merely says to the relator: You may engage in local, private business in Montana if you conform to the conditions imposed; otherwise you must stay out.

[2] If any one question can ever be deemed settled, this one ought to be settled, viz.: That a foreign corporation engages in purely local, private business in this state as a matter of grace on the part of the state, and not as a matter of right on the part of the corporation. From the decision in *Bank of Augusta v. Earle*, 13 Pet. 586, 10 L. Ed. 274, to the present day, that principle has been announced so often that further discussion of it ought to be deemed foreclosed.

In *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, the court, in considering the status of a foreign corporation, said: "The recognition of its existence even by other states, and the enforcements of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

In *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, there was involved the right of the state to exact a license fee and certain security from a foreign corporation seeking to engage in business in California, and of that right the court said: "The state of California has the power to

exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end." The doctrine was reaffirmed in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

No right guaranteed by the Constitution of the United States has been found more conveniently useful to corporations than the provision conferring upon federal courts jurisdiction of controversies arising between citizens of different states, and yet a state statute has been upheld which provides for revoking the license of a foreign corporation engaged in local, private business, if it removes a cause to the federal courts. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317.

The foregoing would seem to justify the conclusion that, in the absence of any contract right on the part of this relator to engage in business here, the state might exclude it altogether, and, as the corollary of that, might accomplish the same purpose by attaching impossible conditions, or conditions altogether unreasonable, or which transgress some constitutional guaranty secured to the company in the state of its domicile.

However, in *Baltic Min. Co. v. Commonwealth*, above, the authority of the state over the foreign corporation appears to be made to depend somewhat upon the validity of the reason which it assigns for its action, as evidenced by the following: "For example, a state may not say to a foreign corporation: You may do business within our borders if you permit your property to be taken without due process of law. \* \* \* To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union." Whatever may finally be determined to be the extent of state control over a foreign corporation situated as relator is, we are satisfied that the exaction demanded in this instance does not infringe upon any right of this relator which is guaranteed to it by the Constitution or laws of the United States, and that the state

may rightfully say: You may come into this state and engage in local, private business only on condition that you pay the fee required under section 165, above. *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 668; *Allen v. Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 89, 48 L. Ed. 184; *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877.

[3] But it is urged that, since section 165 above has been declared to be invalid, the Secretary of State did not have any authority for demanding the fee which he attempted to collect in this instance. Assuming the premise, the conclusion is inevitable; but we are not prepared to agree with counsel that section 165 was held to be invalid in the *Swindlehurst Case*, above, though it must be conceded at once that there is to be found, in the language employed in the opinion, some justification for the argument now advanced. That was an action to recover a filing fee paid under protest, and the one question presented for determination was: Can the Secretary of State demand the fee mentioned in section 165, subds. IV and X, from a foreign corporation seeking to engage in interstate commerce in this state? We held that he cannot, because to permit him to do so would impose a burden upon interstate commerce, and we epitomized our conclusion in the one sentence: "This court \* \* \* must declare section 165, supra, in so far as it applies to foreign corporations seeking to engage in interstate commerce in this state, inoperative and void." In our opinions we do not always employ language exactly apposite. The result rather than the form of expression is the factor kept in view, and is the factor which ought to be considered alone in determining what was decided in any given case. But, if we erred in our form of expression or in the reasons which prompted our conclusion, no false pride will deter us in the least from making correction at the earliest possible opportunity.

[4] It is an elementary rule of constitutional law and of statutory construction that the court shall adopt that construction of a given state statute which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution and laws of the United States. *Grenada County Supervisors v. Brogden*, 112 U. S. 281, 5 Sup. Ct. 125, 28 L. Ed. 704. It will not be assumed that our Legislature intended to usurp powers prohibited to it (*Sykes v. Mayor*, 55 Miss. 115); and, since it had been determined long prior to the enactment of section 165, above, that such an exaction from an interstate carrier could not lawfully be made by a state, we must assume that our lawmakers legislated in view of the declared policy of the law and intended to include only such foreign corporations as could lawfully be subjected to state regulation or control.

[5] It is true the terms used in section 165 are general, "any foreign corporation"; but these general words are to be construed so as to bring the statute into harmony with controlling statutory or constitutional provisions rather than to attach to them a meaning which assumes that the legislative assembly intended to usurp a power specifically denied to it by the Constitution of the United States. *Marshall v. Grimes*, 41 Miss. 27. This rule was enforced in *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004, where we considered the provisions of section 3386, Revised Codes, which in terms subject all property within a given district to the tax for special improvements. We held that, since the Legislature could not authorize a tax or assessment against property of the United States, the general terms of the statute would be held to include only such property as could be made subject to the assessment. The distinction between section 165, above, and the statute considered in *State v. Northern Pac. Express Co.*, 27 Mont. 419, 71 Pac. 404, 94 Am. St. Rep. 824, and the assessment treated in *State v. Western Union Tel. Co.*, 43 Mont. 445, 117 Pac. 93, is too clear to require comment.

To have been technically exact, we should have said in the *Swindlehurst* Case that section 165 does not have any application to foreign corporations seeking to engage in interstate commerce in this state. This is our holding, and, thus stated, the statute is left intact to apply to foreign corporations over which this state has the right to exercise some degree of regulation or control.

Our conclusion is that the Secretary of State was fully justified in demanding the fee under subdivisions IV and X of section 165, and for this reason the motion to quash the alternative writ of mandate heretofore issued is sustained, and this proceeding is dismissed.

Dismissed.

BRANTLY, C. J., and SANNER, J., concur.

#### LYON v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Montana. March 9, 1914.)

#### 1. RECEIVERS (§ 218\*)—WRONGFUL RECEIVERSHIPS—RIGHT OF ACTION ON BOND.

To authorize an action on a bond given to procure the ex parte appointment of a receiver, conditioned in the language of Rev. Codes, § 6701, for the payment of all damages sustained in case the applicant procured the appointment wrongfully, maliciously, or without sufficient cause, it was not necessary that it should be adjudicated on a motion to vacate the receivership that the appointment was procured without sufficient cause; and, if such adjudication was required, the judgment, in an action for a partnership dissolution and accounting, adjudging that defendant was the owner of the property, and that plaintiff had no interest therein, was a sufficient adjudication that the receiver-

ship was without sufficient cause, especially as a receiver will be appointed, when plaintiff presents a sufficient prima facie case, without inquiring into the merits, and in the court's discretion may not be vacated though the essential equities of the complaint are denied.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 427; Dec. Dig. § 218.\*]

#### 2. RECEIVERS (§ 58\*)—MOTION TO VACATE—DENIAL—CONCLUSIVENESS.

In an action for a partnership dissolution and accounting, an order denying a motion to vacate the appointment of a receiver was not conclusive that the appointment was rightful so as to defeat an action on the bond, where it was determined by the judgment that plaintiff had no interest in the property, as the only matters involved were the grounds of the motion, which could not present the rightfulness of the appointment as dependent upon the merits, and the merits could only be finally determined at the trial.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 97-102; Dec. Dig. § 58.\*]

#### 3. RECEIVERS (§ 218\*)—WRONGFUL RECEIVERSHIPS—RIGHT OF ACTION ON BOND.

In an action for a partnership dissolution and accounting, the judgment adjudging that plaintiff had no interest in the property, and ordering the receiver to deliver it to defendant, did not recognize the validity of the receiver's appointment so as to defeat an action on the receivership bond, because, instead of discharging the receiver, it gave him a lien on the property for his fees, and required him to make a further report, since he could not be discharged until the property was delivered and a report thereof made to the court; his right to fees, costs, and disbursements did not depend upon the propriety of his appointment, and the provision giving him a lien on the property, though erroneous, could not be taken advantage of in an action on the bond.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 427; Dec. Dig. § 218.\*]

#### 4. RECEIVERS (§ 57\*)—WRONGFUL RECEIVERSHIPS—RIGHT OF ACTION ON BOND—ESTOPPEL.

In an action for a partnership dissolution and accounting, an order, denying a motion to vacate the ex parte appointment of a receiver, based on procedural grounds, not being conclusive that there was sufficient cause for the receivership, defendant's failure to appeal therefrom did not estop him to question the propriety of the appointment in an action on the receivership bond.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 96; Dec. Dig. § 57.\*]

#### 5. JUDGMENT (§ 731\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where, in an action for a partnership dissolution and accounting, in which defendant denied the partnership and claimed to own the property involved, plaintiff alleged the value of the property to be \$4,000, while defendant denied that its value exceeded \$1,500, a judgment in defendant's favor was not conclusive as to the value of the property so as to defeat a recovery on the receivership bond, in excess of \$1,500; the judgment not finding, and it not being necessary to a determination of the issues, that it should find the value of the property.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1259, 1261; Dec. Dig. § 731.\*]

#### 6. RECEIVERS (§ 218\*)—ESTOPPEL BY RECORD—PLEADINGS.

In an action for a partnership dissolution and accounting, in which the issue was whether plaintiff had an interest in the property, an allegation of the answer as to the value of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property did not estop defendant to show a greater value in an action on the bond given to procure the ex parte appointment of a receiver, but at most amounted to a statement or admission of a fact provable in evidence.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 427; Dec. Dig. § 218.\*]

**7. RECEIVERS (§ 212\*)—WRONGFUL RECEIVERSHIPS—ACTION ON BOND—DAMAGES.**

Where a receiver appointed in an action returned only part of the property delivered to him, claiming that the remainder was lost or destroyed, though it was not shown that the loss was due to his fault, or could not have occurred without his fault, its value was recoverable in an action on the receivership bond, conditioned in the language of Rev. Codes, § 6701, for the payment of all damages sustained by reason of the appointment of the receiver, since the loss occurred because of the receivership.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 422; Dec. Dig. § 212.\*]

**Appeal from District Court, Jefferson County; J. B. Poindexter, Judge.**

**Action by John W. Lyon against the United States Fidelity & Guaranty Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.**

Gunn, Rasch & Hall, of Helena, for appellant. Ike E. O. Pace, of Whitehall, for respondent.

**SANNER, J.** Action on a bond arising out of the following circumstances: One Perrine brought suit in the district court of Deer Lodge county against J. W. Lyon, the respondent on this appeal, alleging the existence of a copartnership between himself and Lyon in the business of contract grading and roadwork, and in the ownership of 23 head of horses and certain grading equipment, all of the value of \$4,000, alleging that Lyon had applied all the receipts and profits of the business to his own use, and had refused to account for the same, alleging that Lyon was about to remove the property from Deer Lodge county, and that there was immediate danger of the property being removed beyond the jurisdiction of the court, and lost, materially injured, destroyed, and unlawfully disposed of, and praying for a dissolution of the partnership, for an accounting, and for the appointment of a receiver to take charge of the property, sell it, pay the liabilities of the firm, and divide the surplus. On August 18, 1908, an order ex parte was made by the court for the appointment of a receiver to take charge of and preserve said property. On August 22, 1908, one Calvert was clothed with that authority, but before he was permitted to take possession of the property, the court, on November 14, 1908, required Perrine to file the bond which forms the basis of the present action. This bond was executed by Perrine and the appellant, the United States Fidelity & Guaranty Company, for the sum of \$3,000, and conditioned for the payment to Lyon of all damages he might sus-

tain by reason of the appointment of the receiver and the entry by the receiver upon his duties, if such appointment was procured "wrongfully, maliciously or without sufficient cause." The receiver took possession of the property on December 1, 1908. Thereafter Lyon answered, in effect denying the partnership, or any ownership or interest of Perrine in the property. On May 26, 1910, the cause of Perrine v. Lyon, having been removed to the district court of Jefferson county, was called for trial, but Perrine did not appear, and was not represented, whereupon Lyon submitted evidence in support of his contentions, and judgment by the court was entered decreeing the sole ownership of the property to be in him, ordering the receiver to deliver the property to Lyon, he to hold it subject to the lien of the receiver for his fees, costs, and disbursements. On May 27, 1910, Lyon made demand upon the receiver for the property, and on June 1, 1910, the receiver, having had possession of the property about 18 months, delivered to Lyon 13 head of horses and part of the equipment.

The present action was commenced on July 8, 1911. The complaint, besides setting up the foregoing facts, alleges that the allegations of Perrine's complaint were willfully false and made maliciously and without sufficient cause; that Perrine procured the appointment of the receiver wrongfully, maliciously, and without sufficient cause; that in consequence of the appointment of the receiver, Lyon has been damaged as follows: \$3,000, the value of the property not returned to him by the receiver; \$3,000, the value of the use of the property while in the hands of the receiver, and \$1,000 in money and time expended defending himself against the action of Perrine and the receivership therein, that the receiver has a claim against the property amounting to \$3,600, and that demand was made upon Perrine and the appellant surety company to pay the penal sum of the bond, but this they have wholly failed and refused to do. A demurrer to the complaint was overruled, and the appellant answered, joining issue upon certain allegations of the complaint; the burden of the answer, however, is that on September 5, 1908, Lyon filed in the suit of Perrine v. Lyon a motion to vacate the order appointing the receiver, upon the ground of the insufficiency of the application therefor, and on the ground that no bond had been exacted, as required by section 953 of the Code of Civil Procedure (Rev. Codes, § 6701), which motion being denied and not appealed from, Lyon is estopped to now contend that the appointment of the receiver was procured wrongfully, maliciously, or without sufficient cause, and that Lyon by his pleading in Perrine v. Lyon denied that the value of the property was to exceed \$1,500, and alleged the cost of the same to have been \$1,400, by which denial and allegation, as well as by



the judgment in *Perrine v. Lyon*, the latter is estopped to now contend that said property had any greater value than \$1,500 when the receiver took possession of the same.

Upon the trial no attempt was made to establish the item of \$1,000, damages for loss of time and money expended in the defense of Perrine's suit; but the cause was submitted upon the value of the property not returned, and upon the value of the use of all the property during the receiver's possession of it. The verdict awarded respondent \$2,700 and judgment was entered accordingly. Motion for new trial was made and denied; hence these appeals.

Assignment is made of 11 alleged errors, by which it is sought to present three questions, viz.: Is this action maintainable upon the pleadings and the record? Was it permissible for the respondent to assert any value for the property in excess of \$1,500? Was it error to receive evidence and to instruct the jury concerning the value of the property not returned by the receiver to the respondent?

[1] 1. It is contended that this action is not maintainable upon the face of the record, because it was necessary to allege and prove an adjudication in *Perrine v. Lyon* that the appointment of the receiver was procured wrongfully, maliciously, or without sufficient cause; and this, it is said, not only does not appear from the complaint, but is specifically negated by the respondent's admission that he did move to vacate the appointment, that his motion was denied, and that he failed to take an appeal. The argument is that the receivership must be formally vacated in the primary suit, either upon motion in the court of original jurisdiction or upon appeal, that the order of the district court denying the motion to vacate was an adjudication in favor of the appointment, since no appeal was taken, and that the present attempt of the respondent to charge the appointment to have been made wrongfully, maliciously, or without sufficient cause is a collateral attack.

The bond which forms the basis of this action was given pursuant to the provisions of section 6701 of the Revised Codes; it is conditioned, as that statute provides, for the payment of all damages sustained "in case the applicant shall have procured such appointment wrongfully, maliciously or without sufficient cause." We see nothing in this language to indicate that a specific finding in the primary suit against the propriety of the receivership is an essential prerequisite to an action upon the bond, and we look in vain for any intimation that such finding must be in the nature of an order upon motion to vacate. What the statute requires, and what the bond expresses as a condition of liability, is a fact, viz., that the appointment was procured wrongfully, maliciously, or without sufficient cause; and, assuming that, to state a cause of action of this kind, the complaint must show an adjudication of that fact in the primary suit, it does not fol-

low that such adjudication must, in every case, occur in response to a motion to vacate, or that it cannot be implicit in the final judgment.

In the case of *Pagett v. Brooks*, 140 Ala. 257, 37 South. 263, relied on by appellant, the condition of the bond was that required by the statute of Alabama, viz., the obligees "shall pay or cause to be paid all damages which any person may suffer by the appointment of such receiver if such appointment be vacated." The cause in which the receiver was appointed was determined upon final hearing adversely to the complainants, and their bill was dismissed; but no order was made vacating the appointment of the receiver. The court said: "The question presented is whether a final decree upon the merits dismissing the complainant's bill, without more, operated to vacate the appointment of the receiver within the meaning of the statute and the condition of the bond. It cannot be seriously doubted that the burden is upon the plaintiffs to show, by averments and proof, in order to entitle them to a recovery, that the appointment of the receiver was vacated. His removal or discharge, if it be conceded that such was the effect of the decree, will not suffice. There is a clear distinction between vacating the appointment of a receiver and his removal or discharge. \* \* \* To vacate the appointment is to set aside the order of appointment because improvidently granted, the motion for which is based on the circumstances and conditions attending the appointment. \* \* \* The statutory requirement of giving this bond \* \* \* was simply to afford indemnity to a party who has suffered damages by reason of the improvident appointment of a receiver, and who has availed himself of the opportunity afforded him by the statutes of having the appointment vacated by an order of the chancellor or of this court." Counsel for appellant assert that the effect of the Alabama and Montana statutes is the same, because one way of establishing that a receivership was wrongfully procured is by an order of vacation; but surely this assertion answers itself. Our statute requires a fact; the Alabama statute requires an order of a specific kind; ours is directed to the wrongful act of a party, theirs to the improvident act of the court; ours emphasizes substance, theirs form. Whatever may be thought of the general reasoning of the *Pagett* Case, it is expressly grounded upon a provision so much narrower than ours, both in letter and in spirit, that the decision cannot have any value as a precedent for us.

Since our statute is designed to provide indemnity against wrongful receiverships, it has special application to those cases in which the appointment is wrongful because the plaintiff had no right thereto upon the merits. But this fact is not finally determinable anywhere short of trial. Receivership is an extraordinary remedy of ancillary



character; it cannot in itself be the ultimate object of a suit, but is permissible only in an action pending for some other purpose, and the chief reason for its allowance is to husband the property in litigation for the benefit of the person who may be found entitled thereto. Rev. Codes, §§ 6698-6704; *Benep-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024; *Vila v. Grand Island, etc., Co.*, 68 Neb. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791, 110 Am. St. Rep. 400, 4 Ann. Cas. 59. Hence such allowance in no wise affects the main controversy, or determines the final result. *High on Receivers* (4th Ed.) § 6. When, therefore, the plaintiff presents a sufficient *prima facie* case, the order will usually be made without inquiring into the merits of the case at large, and no showing upon the merits which the defendant can make before trial will absolutely entitle him to a vacation of the order. 34 Cyc. 129, 160. He may, upon affidavits before answer, or upon the answer if it has been filed, present his motion to vacate upon the ground that the essential equities of the complaint have been denied; he may support his motion by oral evidence upon the hearing, and his motion may or may not be granted, in the sound discretion of the court; but, whether granted or not, the parties are in no wise concluded upon the ultimate questions involved. 34 Cyc. 160, 161. It follows that to hold a technical vacation of the order of appointment prerequisite to the maintenance of an action of this kind, although the rightfulness of the appointment may depend wholly upon the merits of the plaintiff's claim, we must deny application of the statute to cases which it was clearly intended to cover, and strip the statute of the greater part of its meaning. This we have no disposition and no authority to do.

Nor does any controlling reason assert itself for the conclusion that, in a case where the rightfulness of the appointment depends upon the merits of the plaintiff's claim, there must be any express adjudication against the propriety of the appointment. It may be, as held in *Ferguson v. Dent*, 46 Fed. 93, that the ultimate defeat of the plaintiff does not always establish the impropriety of the appointment; but one cannot rightfully procure a receiver for property in which he has no interest, and where the very cause of action is a claim to ownership or interest in the property, where the right to a receiver is made to depend upon that, and where the final decree specifically adjudges the ownership of the property to be in the defendant, it seems gratuitous to say that from this a finding against the propriety of the receivership cannot be implied, or, if implied, cannot be sufficient.

Counsel cite *Joslin v. Williams*, 76 Neb. 594, 107 N. W. 837, 112 N. W. 343, as clearly showing "that in order to maintain an action on such a bond, it must first be judicially determined, in the manner provided by

law in the original action, that the receiver was wrongfully appointed." The *Joslin* Case, and also the case cited therein as the leading authority (*Haverly v. Elliott*, 89 Neb. 201, 57 N. W. 1010) were decided under a statute of Nebraska, which exacts of the applicant for a receiver a bond to pay all damages suffered by the adverse party "in case it shall be finally decided that the order ought not to have been granted." If this statute requires an express finding to the effect stated, it is open to the comment above made upon the statute of Alabama. As a matter of fact the Nebraska court merely recites that it was finally decided that the order ought not to have been granted, without stating how such decision was made, nor in what manner it is provided by law that such decision should be made, and the question of the form such decision must take was not involved.

So, too, our own case of *Thornton-Thomas Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10, urged as persuasive at least, is no authority for appellant's contention. There the appointment had been vacated by this court upon appeal for insufficiency in the preliminary showing. The procedure adopted was doubtless proper, and it may have been necessary in the particular circumstances; but it is nowhere suggested in the opinion that such is the indispensable procedure in every case, nor that it is always necessary to have an express adjudication against the appointment, nor that the final judgment against the plaintiff in the primary case may not carry the conclusion that the appointment was improper.

[2] What the issues were in *Perrine v. Lyon* is fully set forth in the pleadings at bar; from them we learn that Perrine sought the receivership to protect an interest which he claimed in the property as part owner thereof, and which claim Lyon denied, asserting sole ownership in himself. When the court by its judgment determined that Lyon was the owner, it necessarily found that Perrine had no interest, and therefore no sufficient cause for the appointment of a receiver. As between the parties to this action, that judgment was an adjudication, not merely of the conclusions expressed, but of everything necessarily included in them. Rev. Codes, § 7917; *Lokowich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063; *Howell v. Bent*, 48 Mont. —, 137 Pac. 49. Applying the same principle to the order made in *Perrine v. Lyon*, denying the motion to vacate the appointment, it may be conceded that such order was *res judicata* against the respondent, but only so far as it went. Since the only matters involved were the grounds of the motion, and since these did not and could not present the rightfulness of the appointment as dependent upon the merits of the case, and since the merits of the case could not be finally determined save at the trial, such adjudication is

of no effect upon the matter as now presented. For like reasons, and independently of others which suggest themselves, the contention that the case at bar is a collateral attack upon the order cannot be sustained.

[3] It is suggested, however, that the judgment itself clearly recognizes the validity of the appointment because it does not discharge the receiver, but gives him a lien on the property for his fees, and requires him to make further reports. As to this it is sufficient to say: The judgment commands the receiver to deliver the property to Lyon, and he could not be discharged until this was done and report thereof made to the court; his right to his fees, costs, and disbursements did not depend upon the propriety of his appointment (*Hickey v. Parrot S. & C. Co.*, 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510); he was entitled to have them fixed by the court, and this could not be done without a report; the clause of the judgment giving him a lien on the property indicates nothing save an error against Lyon, of which appellant cannot take advantage in this case.

[4] Some argument is devoted to the proposition that the respondent, by acquiescing in the order, is estopped to now question its propriety; and in this connection it is said that "Lyon was not obliged to leave the property in the possession of the receiver"; he could, by appealing from the order refusing to vacate the appointment and filing an undertaking, have procured a supersedeas, and thereby suspended the authority of the receiver and withdrawn the possession of the property from him. While the respondent moved to vacate the order appointing the receiver, basing his motion upon procedural grounds, and while his failure to appeal from the order denying that motion may be taken as an acquiescence in the last order and in the receivership, so far as it depended upon the grounds presented by the motion, still such acquiescence cannot be extended beyond the effect of the order itself. As we have held that the order was not an adjudication against the respondent upon the propriety of the receivership, so far as it depended upon the merits, the acquiescence is of no importance.

[5, 6] 2. The issues in *Perrine v. Lyon* were whether these parties were partners, and whether Perrine owned any interest in the property; and, although Perrine did allege the value of the property to be \$4,000, and Lyon did deny that it had any value above \$1,500, the judgment did not find, nor was it necessary to a determination of the issues that it should find, the value of the property. The respondent, therefore, was not barred by the judgment from asserting in this case that the property was of greater value. If he was not barred by the judgment, he was not estopped by the mere pleading of such matter; that amounts at most to

the statement or admission of an independent fact, presentable in evidence against him, and to be considered by the jury in fixing the amount of his damages. *Peterson v. Warner*, 6 Kan. App. 298, 50 Pac. 1091; *Thompson v. Currier*, 70 N. H. 259, 47 Atl. 76; *Posey v. Hanson*, 10 D. C. App. 496; *Hall v. McNally*, 23 Utah, 606, 65 Pac. 724. We see no error in this part of the proceedings.

[7] 3. The receiver returned only part of the property to the respondent, claiming that the remainder was lost or destroyed. The truth of this claim is not questioned; it was not contended upon the trial by any one that such loss was due to any fault of the receiver, nor does it appear that such loss could not have occurred without his fault; he is therefore presumed to have done his duty. But the loss occurred, and it occurred because of the receivership; this being true, the charge of error in receiving evidence upon the value of the property not returned by the receiver, and in submitting that question to the jury as an element of damages, is disposed of by the reasoning in *Thornton-Thomson Co. v. Bretherton*, cited above.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

#### MANHATTAN CO. v. WHITE.

(Supreme Court of Montana. Feb. 28, 1914.)

#### 1. TENANCY IN COMMON (§ 29\*)—MUTUAL RIGHTS AND LIABILITIES—REPAIRS.

Where the owner of a fractional interest in a canal and water right conveyed land, together with a part of such interest, by a deed which provided that the grantee was to assume his proportionate amount of the cost of maintaining the canal, the parties were tenants in common, and the grantor could not charge the grantee with any expense incurred in repairing or improving the canal except by consent, or, in case of necessity, upon prior notice to the grantee with demand and refusal to co-operate therein; the stipulation in the deed not admitting the necessity nor authorizing the doing of any particular work or any particular expenditure.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 89-92, 94; Dec. Dig. § 29.\*]

#### 2. APPEAL AND ERROR (§§ 889, 981\*)—AMENDMENT REGARDED AS MADE—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

The complaint could not be deemed amended to allege essential facts, nor could essential findings be implied to sustain a judgment for plaintiff, where the bill of exceptions presented no evidence, and did not disclose that such facts were established by evidence received without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3621, 3622, 3728, 3762-3771; Dec. Dig. §§ 889, 931.\*]

#### 3. APPEAL AND ERROR (§ 1176\*)—SCOPE AND EXTENT OF REVIEW—GRANTING RELIEF TO RESPONDENT.

Under Rev. Codes, § 7118, authorizing the review of orders, rulings, or proceedings com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plained of by the respondent, and providing that the Supreme Court shall reverse or affirm according to the substantial rights of the parties as shown by the record, where, on an appeal by plaintiff from a judgment in its favor for an insufficient amount, the defendant correctly insisted that the complaint was insufficient to support any judgment, the judgment would be reversed, with directions to sustain the demurrer to the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.\*]

Appeal from District Court, Gallatin County; J. M. Clements, Judge.

Action by the Manhattan Company against J. F. White. From a judgment for plaintiff for an insufficient amount, and from an order denying a new trial, plaintiff appeals. Order affirmed, and judgment reversed, with directions.

Hartman & Hartman, of Bozeman, for appellant. John A. Luce, of Bozeman, for respondent.

SANNER, J. The complaint alleges: That the plaintiff is the owner of 1306/1500 of what is known as the Moreland canal and water right in Gallatin county, Mont. That the defendant is the owner of 23/1500 of the same. That the defendant became such owner by virtue of a deed executed and delivered to him by the plaintiff on May 23, 1905, which deed, after describing certain real estate thereby conveyed, contains the following language: "Including with said land the following interest in and to the canal known as the Moreland canal, to wit: 23/1500 interest. The party of the second part to assume his proportionate amount of the cost of maintaining said canal." That said deed was delivered and accepted by the defendant in consummation of a certain written contract entered into by the plaintiff and the defendant on May 23, 1905, which contract contained the following provision: "Said White further agrees to stand 23/1500 of cost of maintenance of said Moreland ditch." That between May 23, 1905, and December 31, 1900, "plaintiff did and performed all the work and labor and furnished all the money expended in and about the maintenance of said canal during said time, and in full completion of said work of maintenance, said work and labor done and money expended amounting in the aggregate to the sum of \$5,458.04; and that the share thereof due from defendant to plaintiff pursuant to the covenants and agreements of defendant contained in said deed and contract as aforesaid amounts to \$302.12 (or 23/1500 of said sum of \$5,458.04), no part of which has been paid, though defendant has often been requested to pay the same by plaintiff."

A general demurrer to this complaint was overruled, and after answer by the defendant and trial to the court, without a jury, the plaintiff was adjudged to have and recover

the sum of \$72.80. The plaintiff, deeming that judgment inadequate, appeals therefrom, as well as from an order overruling its motion for new trial.

[1] Certain contentions are presented in support of the appeals, grounded upon an alleged misconstruction by the trial court of the provisions of the contract and deed above quoted; but these we cannot consider, for the reason that the respondent, invoking the provisions of section 7118, Revised Codes, insists—and quite correctly—that the complaint does not state facts sufficient to support any judgment. Under the facts stated by the complaint, the parties stand in the position of tenants in common. This circumstance is recognized and argued by the appellant itself. Such being their situation, neither was the agent of the other; neither could charge the other with any expense incurred in the repair or improvement of the common property, except by consent, or, in case of necessity, upon prior notice to the other with demand and refusal to co-operate therein. Freeman, Cotenancy, etc., §§ 182-185, 261, 262; 38 Cyc. 50; Ward v. Ward, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911, and note; Cooper v. Brown, 143 Iowa, 482, 122 N. W. 144, 136 Am. St. Rep. 768; note to Robinson v. McDonald, 62 Am. Dec. 482; Stickley v. Mulrooney, 86 Colo. 242, 87 Pac. 547, 118 Am. St. Rep. 107; Mumford v. Brown, 6 Cow. (N. Y.) 475, 16 Am. Dec. 440; Kidder v. Rixford, 16 Vt. 169, 42 Am. Dec. 504; Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693; Welland v. Williams, 21 Nev. 280, 29 Pac. 408; Stevens v. Thompson, 17 N. H. 103; Taylor v. Baldwin, 10 Barb. (N. Y.) 582.

[2] It was therefore necessary for the appellant to allege and prove consent or ratification, or, failing that, necessity with a prior notice, demand, and refusal. The complaint does not contain any such allegations, and the deficiency was not supplied by pleading the deed, because the stipulation above quoted—which is the only one at all pertinent—merely fixes the measure of respondent's general duty, and cannot be construed as referring to the particular work or expenditure in question, nor as an admission of its necessity, nor as an authorization of appellant to do it either then or at any particular time. It was not found by the court that there had been consent, notice, demand, or refusal. To sustain any judgment, we should be required to deem the complaint amended, and to imply essential findings; but the complaint cannot be deemed amended, because the bill of exceptions does not present any evidence or disclose that any of these facts was established by evidence received without objection, and we cannot imply findings of fact without either pleadings or proof.

[3] As the case is presented, the duty of the court is to make disposition of it according to the substantial rights of the parties

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

as shown upon the record. Rev. Codes, § 7118.

The order appealed from is therefore affirmed; but the judgment is reversed, at the cost of appellant, and with directions to the district court of Gallatin county to vacate its order overruling the demurrer to the complaint, and to enter an order sustaining the same.

BRANTLY, C. J., and HOLLOWAY, J., concur.

#### In re GALLATIN IRRIGATION DIST.

(Supreme Court of Montana. March 10, 1914.)

#### 1. WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICTS—ESTABLISHMENT—JURISDICTION.

The power of the district court to establish an irrigation district under Laws 1909, c. 146, providing for the organization and government of irrigation districts, can only be exercised when the court acquires jurisdiction of the subject-matter by the filing of a petition signed by a majority in number of the holders of title or evidence of title, who own a majority of the acreage; but, where the subject-matter and the parties are before the court, the statute and rules of procedure will be liberally construed to carry into effect the purpose of the statute.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

#### 2. WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICTS—ESTABLISHMENT—JURISDICTION.

Where a petition to create an irrigation district under Laws 1909, c. 146, gives the names of individuals and corporations as owners, and also gives the name "Garnett Bros.," the court, giving to the quoted words their ordinary meaning, must conclude that there are at least two persons included therein, in determining the number of landowners; and where the evidence shows that "Garnett Bros." included three persons, the three must be included in determining the number of landowners, to determine whether the petition has been signed by the requisite number.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

#### 3. WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICTS—PETITION—QUALIFIED SIGNERS—"EVIDENCE OF TITLE."

A homestead entryman or a desert entryman, prior to the making of final proof, has no title or "evidence of title," within Laws 1909, c. 146, providing for the organization of irrigation districts on petition signed by a requisite number of holders of title or evidence of title.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

#### 4. WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICTS—PETITION—AMENDMENT.

Where the petition for the establishment of an irrigation district under Laws 1909, c. 146, showed on its face that the court did not acquire jurisdiction, because the petition was not sufficiently signed, the refusal to allow an amendment by the addition of names of other qualified petitioners was not erroneous, especially where the petition, even when amended,

would not show the requisite number of qualified signers.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

#### 5. WATERS AND WATER COURSES (§ 226\*)—IRRIGATION DISTRICTS—PETITION—AMENDMENT.

The court, in proceedings for the establishment of an irrigation district under Laws 1909, c. 146, may, in its discretion, exclude proposed lands from the district by permitting an amendment to the petition; but, in the absence of any abuse of discretion in refusing to exclude lands by amendment to the petition, its decision will not be disturbed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. § 226.\*]

#### 6. WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICTS—ESTABLISHMENT.

The procedure for the creation of an irrigation district under Laws 1909, c. 146, is wholly statutory, and the statutory requirements must be complied with.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

#### 7. WATERS AND WATER COURSES (§ 225\*)—IRRIGATION DISTRICT—ESTABLISHMENT—PROCEDURE—COSTS.

Owners who file a protest in proceedings for the establishment of an irrigation district under Laws 1909, c. 146, on the ground that the petition has not been signed by a requisite number of qualified petitioners, may, on the dismissal of the proceedings for want of a requisite petition, recover as costs fees of witnesses present to testify that the plan for irrigation proposed was impractical, that there was not sufficient surplus or flood water to irrigate the lands, and that all the lands in the district produced crops without artificial irrigation, though the witnesses were not subpoenaed, sworn, or examined.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 317; Dec. Dig. § 225.\*]

#### 8. Costs (§ 184\*)—WITNESS FEES.

A successful party cannot recover as costs fees of a witness not called or examined, without showing that the testimony which he was expected to give could reasonably be offered as relevant, competent, or material to the issues raised.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715-736; Dec. Dig. § 184.\*]

Appeal from District Court, Gallatin County; Albert P. Stark, Judge.

Petition for the establishment and organization of an irrigation district in Gallatin county, to be known as the Gallatin Irrigation District. From an order dismissing the petition at the cost of the petitioners, they appeal. Modified and affirmed.

H. D. Kremer and Hartman & Hartman, all of Bozeman, for appellants. John T. Smith & Son, of Livingston, and Ike E. O. Pace, of Whitehall, for respondents.

HOLLOWAY, J. On January 27, 1913, there was filed with the clerk of the district court of Gallatin county a petition for the creation of an irrigation district under the provisions of chapter 146, Laws 1909. The petition suggests a name for the proposed

district, describes by government subdivisions all lands sought to be included, gives the names of all holders of title or evidence of title and the post office addresses of all who are nonresidents, describes the source of intended water supply and the means of irrigation, and concludes with a prayer for appropriate relief. A map showing the proposed district and irrigation system accompanied the petition, and a sufficient bond, duly approved, was furnished. An order was made fixing a time and place for hearing; the statutory notice was given, and proof of service made. Before the hearing a protest in writing on behalf of 27 of the owners named in the petition, and 8 others, was filed, objecting to the petition and to the organization of the district upon some 12 grounds, among which are: That certain petitioners are not the owners or holders of title, or evidence of title, to any lands in the proposed district, and that "a majority in number of the holders of title or evidence of title to lands susceptible of irrigation from the same alleged general source and by the same general system of works have not signed the petition herein, nor proposed the establishment and organization of said system."

At the hearing, counsel for the petitioners moved to amend by adding to the petition the names of 8 other qualified petitioners and the description of certain land. The motion was denied pro forma, with leave to renew it; but counsel did not avail themselves of the privilege extended. The petitioners also moved to further amend by striking from the petition the names of Nancy L. Woodward, executrix, and "Garnett Bros.," and the descriptions of all lands accredited to these parties in the petition. This motion was denied, the court assigning as its reason that "it appears upon the face of the petition that these persons are the owners of lands susceptible of irrigation from the same general source, and included within the boundaries of the proposed district." The court then proceeded to ascertain whether the petition was in fact signed by a majority of the holders of title or evidence of title to the lands described therein, and upon such hearing it was made to appear that 2 of the signers are homestead entrymen, and a third is a desert entryman, no one of whom has made final proof; that "Garnett Bros." consists of J. E. (or Edwin) Garnett, Frank Garnett, and Addie Garnett, and that Nancy L. Woodward is the executrix of the last will of A. J. Woodward, deceased; that the estate is in process of administration in the district court of Gallatin county; that the heirs at law of A. J. Woodward are Nancy L., the surviving widow, and seven children; that certain lands are entered upon the assessment roll to "Garnett Bros.," but the records indicate that the ownership is in the three Garnetts named; that portions of the Woodward lands are assessed to "A. J. Woodward," and the records of the state land office disclose that they were purchased

from the state by "Nancy L. Woodward, Adm'r." Upon this showing the district court entered an order dismissing the petition at the cost of the petitioners. The appeal is from that order.

[1] The avowed purpose of chapter 146, above, is to provide for the creation, organization, and management of irrigation districts. When one of these districts is created, it becomes a public corporation, with certain enumerated powers, among which are to procure an irrigation system by purchase or construction, and to pay for the same and for the upkeep or running expenses. The management is vested in a board of three commissioners appointed for their initial term by the court, and elected thereafter annually by the landowners of the district who are qualified electors under the act. Upon this board are conferred very extensive powers. The members are allowed compensation for their services, are permitted to employ clerical help, engineers, common laborers, and others, at the expense of the district, to incur indebtedness, to purchase property, etc. The apparent theory of the statute is the naked right of the majority to rule. It requires a majority of the landowners (using the term "landowners" herein to indicate the holders of title or evidence of title), who also own a majority of the acreage, to initiate the movement for the creation of one of these districts; but a bare majority may succeed in having a district created over the protest and objection of the minority. While there is an initial limit of \$10,000 placed upon the power of the board to incur indebtedness for a water system and to charge the district therefor, the written consent of a bare majority of the landowners who own a majority of the acres in the district removes that limitation. Under the act as it stood at the time this proceeding was instituted, the board could incur an indebtedness against the district to the extent of \$5,000 in any one year. Under the amendment made to section 38 by the Legislature in 1913 (Laws 1913, c. 127), a much wider latitude is allowed. Section 19 prescribes the qualifications of district voters. Neither the nonresident landowner nor the resident landowner who does not possess the qualifications of an elector at our general state or school elections has any voice whatever in the management or control of a district after it is organized.

These observations upon the general character of the legislation are made to indicate the extent to which all the proceedings as against a minority landowner are in invitum, and the extent to which the minority member is at the mercy of the majority. His property may be incumbered against his will, and he may be compelled to respond for debts which he never contracted or authorized. The proceeding is somewhat analogous to that invoked in creating special improvement districts in cities and towns. The power to create one of these districts, and

certain supervisory control over its affairs after it is created, are lodged with the district court. But the court must acquire jurisdiction of the subject-matter and of the parties before it can order a district created, and the act provides just how such jurisdiction shall be obtained. When once the subject-matter and the parties are before the court, then the provisions of the act and the rules of procedure are to be given most liberal construction, to the end that the purpose of the act may be carried into effect. Jurisdiction over the subject-matter is acquired when a proper petition is filed with the clerk of the district court. In order to be of any avail—in order to set the machinery of the law in motion—such petition must be signed by a majority in number of the landowners who also own more than half of the acreage in the proposed district. For the purpose of determining whether a petition meets these requirements, the court is authorized by section 4 to take testimony if necessary. A domestic corporation is treated as an individual, and a guardian, executor, administrator, or trustee residing in this state is authorized to act for his ward, estate, or beneficiary, as the case may be, so far as exercising the voting power is concerned. Section 19. In the instant case the petition names 61 individual or corporate owners, and in addition thereto names Nancy L. Woodward, executrix of the last will of A. J. Woodward, deceased, and "Garnett Bros." as owners. The petition is signed by 32, not including either Mrs. Woodward or Garnett Bros.

[2] The fact that Nancy L. Woodward is executrix of the last will of A. J. Woodward, deceased, of itself means nothing. We are not advised as to the provisions of the will, or whether Mrs. Woodward is sole devisee of this particular land; but it is unnecessary to determine whether "Nancy L. Woodward, executrix," should be counted as one landowner, for the result would not be affected. While an individual might conduct his business under the name "Garnett Bros.," we think those terms imply, *prima facie*, more than one person. This must be so, if any attention whatever is paid to the ordinary usage of common English words. The word "brothers" is the plural of "brother" and means more than one. Counting Garnett Bros. as 2 persons, at least, and the petition on its face discloses that it fails to meet the requirements of sections 1 and 2 of the act. There are at least 64 landowners in this district, and the petition was signed by only 32, which is not a majority. When the court heard evidence, the deficiencies of the petition were made all the more apparent. Garnett Bros. are 3 persons, while of the 32 who signed 3 are clearly not qualified signers under the act.

[3] Neither a homestead nor desert entryman has any title or evidence of title to the land held by him, prior to the time he makes

final proof. It is not even necessary to consider the effect of the lien of a bond issue upon the lands held by these three, to determine that the act never contemplated that government lands are to be included in one of these districts. The ordinary overhead or running expenses of a district are to be met by an annual levy of taxes (section 49) imposed upon all lands therein "except such lands as have been included within such district on account of the exchange or substitution of water." Section 48. That a settler upon government lands does not have a taxable interest in the land prior to making final proof has been the universal holding, or practically so, of all the authorities. If we deduct the names of the homestead and desert entrymen, the petition has but 29 qualified signers as against a total of 65 at least.

[4] Doubtless if the trial court had felt certain that the petition was *prima facie* sufficient, it would have permitted it to be amended by the addition of the names of the 3 other qualified petitioners; but when it appeared that 3 of the original petitioners were not qualified to sign, the addition of three other names would not have rendered the petition sufficient. As we said above, after it is shown that the court has jurisdiction, the most liberal rules of procedure should be applied; but in the face of a showing that jurisdiction had not been acquired in the first instance, the court cannot be put in error for failing to do what it had no power to do, or what would have been useless.

[5] Section 4 contemplates that the court may exclude lands from the proposed district, but certainly the most that can be said of the action of the court upon petitioners' request to exclude the Woodward and Garnett lands is that it exercised its discretion against permitting the amendment, and in the absence of any showing of abuse of such discretion, and in the presence of petitioners' own showing that those lands lie within the proposed district and are susceptible of irrigation from the same general source and by the same general system as the other lands mentioned, the order cannot be disturbed. A very wide discretion appears to be lodged in the district court, and rightfully so, if the act is to be made workable.

[6] This procedure is purely statutory. The act prescribes in detail the steps necessary to be taken to clothe the district court with authority to act, and these statutory requirements must be fully met before the court can proceed. When it thus appeared that the petition was not sufficient to give the court jurisdiction, the order of dismissal was the only one which the court could make.

[7] Upon the entry of the order the objectors filed a memorandum of costs, including therein mileage and per diem for 14 witnesses and per diem for 2 others,

amounting in all to \$284. A motion to tax and to strike out every one of these items was made and overruled, and error is assigned. Appellants object to the allowance of any fees to these witnesses because they were not subpoenaed, sworn, or examined. An affidavit by counsel for the objectors was filed, setting forth generally that the witnesses were present to testify (1) that the petitioners' plan for irrigating the lands in the proposed district is impractical; (2) that there is not sufficient surplus or flood water at the intended source of supply to fill the proposed reservoir or to irrigate the lands in the proposed district; and (3) that all of the lands in the district produce crops without artificial irrigation, and the increased yield would not compensate for the added expense. Section 3 of the act provides for notice of a hearing upon the petition for the creation of a district, and section 4 declares: "Upon such hearing all persons interested whose lands or rights may be damaged or benefited by the organization of the district or the irrigation works or improvements therein or to be acquired or constructed as hereinafter set forth, may appear and contest the necessity or utility of the proposed district, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto." If, then, the questions of the necessity and utility of the proposed district were properly before the court for determination, it seems clear that the evidence which these witnesses were called to give was relevant, competent, and material. Appellants cannot complain that they were not subjected to additional expense for the service of subpoenas upon these witnesses; and neither are they in a position to urge that the witnesses were unnecessary because the petition was insufficient. The objectors were required to be prepared to contest the petition upon its merits, if the trial court ruled against them upon the preliminary objections to its sufficiency.

[8] No explanation is offered for the presence of the witness Thomas Copenholt. One party to a controversy cannot mulct his adversary for the expense of a witness who was not called or examined, in the absence of some showing that the testimony which he was expected to give, could reasonably be offered as relevant, competent, or material to the issues raised for trial. The item of \$12 charged for that witness should have been eliminated.

The cause is remanded to the district court, with direction to strike from the cost bill the item of \$12 charged for the witness Thomas Copenholt, and with this modification the order of the district court will stand affirmed.

Modified and affirmed.

BRANTLY, C. J., and SANNER, J., concur.

STATE ex rel. DWYER v. DUNCAN, Mayor. (Supreme Court of Montana. April 3, 1914.)

1. APPEAL AND ERROR (§ 374\*)—UNDERTAKING ON APPEAL—MUNICIPAL OFFICER.

It being only by reason of his acts as executive head of the police department, by virtue of his being mayor, that a cause of action is stated against defendant, he is within Rev. Codes, § 7196, dispensing with the giving of an undertaking on appeal by a municipal officer, appealing in an action to which he is a party in his official capacity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2005-2010; Dec. Dig. § 374.\*]

2. MANDAMUS (§ 154\*)—AFFIDAVIT—EXISTENCE OF OFFICE.

In the absence of special demurrer, or motion to make more specific, the existence of the office to which plaintiff seeks restoration is sufficiently stated by the allegation of the affidavits for the writ of mandamus that he was appointed to the office of lieutenant of police of the police department of the city of B., a permanent existing office, created under the rules and regulations of the department promulgated by the city council and under authority of the statute.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.\*]

3. PLEADING (§ 403\*)—DEFECTS—AFFIDAVIT FOR MANDAMUS—AIDED BY ANSWER.

The allegation in the answer, that on a certain day relator was a member of the police department of the city of B., holding the position of lieutenant of police, to that extent aids the affidavit for mandamus to be restored to office.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

4. PLEADING (§ 428\*)—OBJECTIONS TO EVIDENCE—RIGHT TO OBJECT.

Defendant may not object to introduction in evidence by plaintiff of an ordinance the existence of which is pleaded in the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.\*]

5. MUNICIPAL CORPORATIONS (§ 180\*)—POLICE DEPARTMENT—OFFICERS.

The metropolitan police law (Rev. Codes, §§ 3304-3317) contemplates that in addition to the office of chief of police, which the act itself creates, other offices under the chief shall be established by the council of a city organizing its police department in conformity therewith.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 449-457, 466, 482; Dec. Dig. § 180.\*]

6. MUNICIPAL CORPORATIONS (§ 180\*)—ORDINANCE—FORCE AND EFFECT.

An ordinance of a city, providing for organization of its police department in conformity with the metropolitan police law (Rev. Codes, §§ 3304-3317) when duly passed, has the force and effect of a statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 449-457, 466, 482; Dec. Dig. § 180.\*]

7. MUNICIPAL CORPORATIONS (§ 185\*)—POLICE OFFICERS—RETIREMENT—CIVIL SERVICE.

The civil service principle being the foundation of the metropolitan police law (Rev. Codes, §§ 3304-3317), retiring to the eligible list a lieutenant of police, followed immediately by the appointment of another to fill the office, does not operate to deprive him of his office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509; Dec. Dig. § 185.\*]

### 8. MUNICIPAL CORPORATIONS (§ 185\*)—POLICE OFFICER—RESTORATION—WAIVER.

One removed from the office of lieutenant of police of a city does not, under the principle that one office is vacated by the incumbent accepting an incompatible office, waive right to restoration to such office by accepting temporarily, pending proceedings for restoration, an appointment as deputy county inspector of weights and measures.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509; Dec. Dig. § 185.\*]

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Mandamus by the State, on the relation of Michael J. Dwyer, against Lewis J. Duncan, as Mayor of the City of Butte. Judgment for plaintiff, and defendant appeals. Affirmed.

Alex Mackel, W. F. Davis, and N. A. Roterling, all of Butte, for appellant. J. E. Healy, of Butte, for respondent.

**HOLLOWAY, J.** This proceeding in mandamus was instituted by Michael J. Dwyer to compel the mayor of Butte to restore him to the office of lieutenant of police in the police department of the city of Butte. From a judgment awarding the peremptory writ, this appeal is prosecuted. To avoid confusion of terms, the relator in the lower court will be designated plaintiff, and the mayor defendant.

[1] 1. A motion to dismiss the appeal has been interposed upon the ground that an undertaking on appeal was not furnished. Section 7196, Revised Codes, provides that an undertaking on appeal shall not be required from any municipal officer who appeals in an action or proceeding to which he is a party in his official capacity. In his affidavit for the writ plaintiff alleges: "13. That at all times herein mentioned the said defendant and respondent was and is the mayor of the city of Butte, Silver Bow county, Montana, and all of the said acts and things herein set forth and complained of were done and suffered and committed as against the said relator and by said respondent in the official character and capacity of respondent, as the executive head of the police department of the said city of Butte," etc. This statement was made advisedly. As an individual, the defendant is powerless to make any order affecting the police force of the city of Butte. It is only by virtue of the fact that he appears in his official capacity that a cause of action can be stated against him. Under the section above, he was entitled to prosecute this appeal without furnishing an undertaking.

[2-4] 2. Contention is made that the affidavit for the writ does not state a cause of action, in that it does not allege the existence of the office to which plaintiff seeks restoration. The allegation of the affidavit is: "6. That in December, 1910, and on the 28th day thereof, this affiant was permanently ap-

pointed to the office of lieutenant of police of the police department of the city of Butte, the same being an office created under the rules and regulations of the said department and by those promulgated by the city council of the said city, in addition to and under authority of the statute in that case made and provided, and said office is now and at all times has been a permanent office in the said police department of the said city, now existing and never abolished in any way." This is not the orthodox method of pleading the existence of an office created by a municipality and of the existence of which the court could not take judicial notice. The application of elementary rules of common sense to this allegation could not leave any one in doubt as to the pleader's meaning. In the absence of a special demurrer or a motion to make more specific, this allegation is sufficient. Defendant himself in his answer alleges: "That on the 31st day of May, 1911, the above-named relator was a member of the police department of the said city of Butte, holding the position of lieutenant of police," and to this extent the answer aids the complaint or affidavit.

To prove the existence of the office, plaintiff offered in evidence Ordinance 825 of the city of Butte, and we are introduced to a rather remarkable situation presented by defendant vigorously objecting to the introduction in evidence of an ordinance the existence of which he pleads in his answer as follows: "That there is in existence, and in full force and effect, Ordinance No. 825 of the series of ordinances of the city of Butte, entitled 'An ordinance establishing and creating a police department of the city of Butte, prescribing the duties and regulations of the members of said police department,' \* \* \* which said ordinance created a police department within the said city of Butte under and by virtue of what is commonly known as the metropolitan police law." The trial court properly refused to entertain the objection under these circumstances. The trial of a lawsuit is not a mere gladiatorial contest of wits. An honest effort to determine the relative rights of the parties is now being emphasized.

[5-7] 3. With these preliminary matters aside, the one question presented for our determination is: Was plaintiff entitled to be restored to the office of lieutenant of police? The circumstances of his probationary appointment to the police force, his permanent appointment, his appointment as lieutenant of police, his removal from active service to the eligible list, and the offer of the city to restore him to active service as a patrolman, need not be considered at length. Plaintiff was removed from active duty, along with 14 or 15 patrolmen, by resolution of the city council and direction of the mayor, because the department had more men in active service than the needs of the city de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



manded or its financial condition would justify. It appears that, in retiring these men to the eligible, waiting list, the authorities selected the members of the police force in the inverse order of their appointments, taking those who had served the shortest periods of time.

Our metropolitan police law (sections 3304-3317, Rev. Codes) contemplates that in addition to the office of chief of police, which the act itself creates, there shall be different grades and other offices established by the city council (section 3314), or by the mayor in the event the council fails to act (section 3305). For instance, in section 3308 it is provided: "The mayor and (or) the chief of police subject to the approval of the mayor shall have the power to suspend a policeman, or any officer under the chief, for a period of not exceeding ten days in any one month without any hearing or trial." The city of Butte by ordinance provided for the organization of its police department in conformity with that act. Under Ordinance No. 825 above, the department comprises one chief of police, one captain, one lieutenant, two sergeants, three jailers, three patrol drivers, one detective, and such number of patrolmen as may be required. The act also contemplates that charges against any officer in the department shall be heard by the examining and trial board (section 3309), and that reduction in rank or grade may be imposed as punishment in case the officer, other than the chief, is found guilty (section 3308).

The civil service principle is the foundation of the law. The fundamental idea upon which the system rests is that appointments to and promotions in the department shall depend upon merit and not upon favoritism. When Ordinance 825 was duly passed, it had the force and effect of a statute. 28 Cyc. 391; McQuillin on Municipal Ordinances, § 12. The office of lieutenant of police was created by that ordinance, and when filled by the appointment and qualification of plaintiff, he was protected by the life tenure principle to the same extent as is the chief of police, so long as the necessities which called for the creation of the office, in the first instance, exact that it be filled. The office of chief of police is required to be maintained. The subordinate offices need not be. They are created to meet the needs of the city; and if out of the necessities of any given case a reduction in the number of members of the force becomes imperative, patrolmen may be relegated to the eligible list—not, however, to make room for others—and likewise a captain, lieutenant, or sergeant may be retired from active service, but not to make way for some one else to take his office. The spirit of the law requires that, whenever additional patrolmen are needed, those who have been relegated

to the eligible list shall be called in the order of their appointments; and if considerations of economy have caused the office of lieutenant of police to be vacated by the retirement of the incumbent to the waiting list, the same spirit of the law demands that, whenever that office is again filled, the former incumbent shall be restored, in preference to any one else.

The record before us discloses that when this plaintiff was retired to the eligible list, and the office of lieutenant of police became vacant, the defendant immediately appointed another to fill the office. This was a clear violation of the civil service principle, and did not operate to deprive the plaintiff of his office.

[8] 4. It is insisted that whatever right plaintiff may have had to be restored to the office he seeks he waived by accepting an incompatible office. The record discloses that some time after this proceeding was instituted, and while waiting for its termination, plaintiff accepted temporarily the appointment as deputy inspector of weights and measures for Silver Bow county. We recognize the general rule to be as stated by counsel for appellant: That one office is vacated by the incumbent accepting an incompatible office. The reason for the rule is that it is contrary to public policy that the same individual should undertake to perform inconsistent and incompatible public duties (Mechem's Public Offices and Officers, § 419); but when the reason of a rule ceases, so should the rule itself. It appears as somewhat of a novelty in the law for this defendant to urge that the duties of the office of inspector of weights and measures are inconsistent with the duties which his own wrongful act prevents this plaintiff from performing. It will be time enough to raise this objection if plaintiff attempts to perform the duties of both offices at the same time.

We find no error in the record. The motion to dismiss the appeal is overruled, and the judgment is affirmed.

**Affirmed.**

BRANTLY, C. J., and SANNER, J., concur.

HICKS et al. v. RUPP et al.

(Supreme Court of Montana. March 28, 1914.)

1. PLEADING (§ 48\*) — COMPLAINT — SUFFICIENCY.

Under the statute, as well as under the general rule of law, if plaintiff is entitled to relief under the facts alleged, considered from any viewpoint, the complaint will be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 105, 106; Dec. Dig. § 48.\*]

2. QUIETING TITLE (§ 7\*)—CLOUD ON TITLE.

A suit to cancel an instrument as a cloud upon title is maintainable under the general ju-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—7.

risdiction of courts of equity, based upon the principle of quia timet.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.\*]

### 3. CANCELLATION OF INSTRUMENTS (§ 8\*) — CAUSE OF ACTION—INJURY.

Under Rev. Codes, § 6115, providing that a written instrument, as to which there is a reasonable apprehension that, if left outstanding, it may cause serious injury to one as to whom it is voidable, may be ordered canceled, plaintiff must show that injury may result if the instrument is outstanding, in order to have it canceled.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 2; Dec. Dig. § 8.\*]

### 4. CANCELLATION OF INSTRUMENTS (§ 37\*) — ALLEGATIONS OF COMPLAINT—SUFFICIENCY.

A complaint, in a suit to cancel a contract to convey, which did not specifically allege that the contract was in writing, so as to be sufficient under the statute of frauds, or that it was executed so as to be entitled to record, but did allege that defendant renounced all liability thereunder, and that plaintiffs rescinded it and resumed possession, did not sufficiently allege facts showing that the contract, if left outstanding, would probably injure plaintiff, so as to authorize cancellation.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.\*]

### 5. FRAUDS, STATUTE OF (§ 71\*) — SALE OF LAND—NECESSITY OF WRITING.

A contract for the sale of land must be in writing to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 113-139; Dec. Dig. § 71.\*]

### 6. QUIETING TITLE (§ 50\*)—RELIEF—DAMAGES.

The complaint alleged that plaintiff agreed to sell to defendant land with personalty thereon, and that defendant afterwards abandoned possession of the property, and removed and retained the personalty, and plaintiff resumed possession and elected to rescind the contract, and suffered damage, by defendant's conduct in renouncing the contract, in a certain sum, including the reasonable value of the personalty removed from the land and the value of its use and occupation while defendant was in possession, and further prayed that the contract be canceled as a cloud on plaintiff's title. *Held*, that the complaint sufficiently alleged a cause of action at law for the value of the personalty retained by defendant, and for use and occupation, so that such relief may be granted on proper proof, though cancellation was denied.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. § 100; Dec. Dig. § 50.\*]

### 7. VENDOR AND PURCHASER (§ 116\*)—RESCISSION OF CONTRACT—LIABILITY OF PURCHASER—RESTORATION OF PROPERTY.

Upon repudiation of a contract to convey by the purchaser, and its rescission by the vendor, the purchaser was bound, without demand, to restore to vendor the personalty received under the contract, and to compensate the vendor for the use and occupation of the land under Rev. Codes, §§ 5075, 5076, requiring one who obtains a thing by a consent afterwards rescinded to restore it without demand to the former possessor, unless he has acquired title superior to such possessor's.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208; Dec. Dig. § 116.\*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by James H. Hicks and another

against Albert Rupp and others. From a judgment dismissing the action, and from an order denying a new trial, plaintiffs appeal. Reversed and remanded.

Galen & Mettler, of Helena, for appellants. Geo. A. Maywood, of Philipsburg, for respondents.

BRANTLY, C. J. This action was brought to have canceled a contract for the sale of real estate and personal property, and for damages. A demurrer interposed to the complaint having been overruled, issues were made up by answer thereto and reply. At the trial, however, when the plaintiffs offered evidence to sustain their allegations, the defendants objected to its introduction, on the ground that the complaint did not state a cause of action. The objection was sustained. Thereupon, after a formal offer of proof by plaintiffs which was rejected, the court dismissed the action, and ordered judgment for the defendants for costs. The plaintiffs have appealed from the judgment and an order denying their motion for a new trial.

The complaint alleges that on April 9, 1910, the plaintiffs and the defendants entered into a contract, by the terms of which the plaintiffs agreed to sell to the defendants, and defendants agreed by buy, a tract of land consisting of about 2,280 acres, together with a large amount of personal property thereon, situated in Lewis and Clark county, at a gross price of \$30,000; that the plaintiffs were the owners of the property; that the defendants paid to the plaintiffs the sum of \$5,000, and agreed to pay the balance of \$25,000 on or before January 1, 1911; that the plaintiffs thereupon, and in accordance with the terms of the contract, delivered to the defendants all of said property, and that defendants took possession of it; that thereafter, on May 13, 1910, the defendants paid to plaintiffs the further sum of \$5,000 to apply on the purchase price; and that there was then deposited in escrow by the plaintiffs a warranty deed, duly executed and acknowledged, to be delivered to defendants upon their payment of the full sum of \$20,000, without interest, as stipulated in the contract. A memorandum signed by the parties, accompanying the escrow, stated the purpose of the deposit and the condition upon which the depository should make a delivery to the defendants. It provided that, in case payment should not be made promptly on or before January 1, 1911, as stipulated in the contract, the escrow should be returned to the plaintiffs on demand within 30 days, at the expiration of which period the responsibility of the depository should cease. It is alleged that on or about January 1, 1911, the defendants, without notice to plaintiffs, and without their knowledge or consent, abandoned possession of the land, and left it wholly unoccupied; that the land

remained so unoccupied until on or about March 21, 1911, when the plaintiffs resumed possession, by reason of the termination of the rights of the defendants; that defendants wholly failed to make the payment of \$20,000, though demand therefor was frequently made by plaintiffs; that, upon such demand, the defendants informed the plaintiffs that they renounced the contract and refused to recognize any liability thereunder; and that on the last-mentioned date the plaintiffs elected to rescind the contract, and, through their attorneys, gave defendants written notice of their election. The notice is set out in the complaint. After reciting generally the terms of the agreement, the possession and use by the defendants of the property, and their refusal to make the final payment of \$20,000, it continues: "We are therefore directed by Mr. and Mrs. Hicks to notify you, and we do hereby notify you, and each of you, that they do now rescind the contract for the sale of their ranch and property to you, for the reason that you have not paid in full the consideration therein agreed to be paid, and that the time for such payment has passed. The payment which you have made falls far short of compensating them for the actual market value of the personal property taken by you and converted to your own use, to say nothing of the damage to the ranch itself and for the use of the ranch, and for other damages caused to them by your failure to keep your contract." It is alleged that, when the defendants abandoned possession of the land, they removed therefrom all of the personal property included in the contract and converted it to their own use, having disposed of the greater portion of it to third persons. It is further alleged that the plaintiffs at all times were ready and willing to comply with all the terms of the contract, and would have done so but for the conduct of the defendants, rendering their compliance impossible; and that they were thus compelled to elect to rescind the contract in order to protect their rights; and that the plaintiffs suffered damage by the conduct of the defendants in renouncing the contract to the amount of \$23,532. This sum includes \$14,000, the reasonable value of the personal property removed from the land when defendants abandoned it and converted to their own use, \$3,600, the value of the use and occupation of the premises by the defendants during the time of their possession, and various other items claimed on grounds specifically alleged. It is further alleged that the contract of sale is a cloud upon plaintiffs' title. The prayer is that the contract be canceled; that plaintiffs have damages against the defendants in the sum of \$23,532, less the payment of \$10,000 made by the defendants at the time the contract was entered into; and that they be awarded the costs of the action. There is also a prayer for general relief.

So far as it is disclosed by the record, the theory upon which the trial court proceeded is indicated by the objection by counsel for the defendants to the introduction of evidence. The specific grounds thereof were: (1) That it appeared that the contract alleged, having been extinguished, no longer existed, and therefore that damages could not be recovered for a breach of it; and (2) that the damages alleged were not such as could be recovered for the breach of the contract under the provisions of the Codes. But it is not important to ascertain upon what theory the result was reached. That the action of the court in sustaining the objection was erroneous is clear. The question confronting the trial court was, and the one submitted to this court is, whether the complaint states facts sufficient to entitle the plaintiffs to any relief.

[1] The rule is well established in this jurisdiction, both by the statute and the numerous decisions of this court, that, if upon the facts stated, from any point of view, the plaintiff is entitled to relief, the complaint will be sustained. *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 576; *Rev. Codes*, § 6713.

[2] We inquire first, then, whether the facts stated justify the equitable relief demanded. A suit to have canceled and declared void an instrument which constitutes a cloud upon the title of plaintiff is referable to the general jurisdiction which courts of equity exercise upon the principle of *quia timet*. *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700; *Story's Equity Jurisprudence* (10th Ed.) § 701; 2 *Pomeroy's Equitable Remedies*, 685; 6 *Cyc.* 286. In the *Revised Codes* are found these sections:

"Sec. 6115. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

"Sec. 6116. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury within the provisions of the last section."

These provisions, taken together, clearly define the rule, with its limitations, under which the equitable jurisdiction of the court may be invoked. The instrument in question must be in writing and must be of such a character that, if left outstanding, it will menace with injury the person against whom it is void or voidable; hence, if its invalidity appears directly or constructively upon its face, the court may not interfere.

[3] Clearly, also, if it does not appear,

either from the instrument itself or the statement of facts explaining its character, that, if left outstanding, it will or may result in injury, the court ought not to interfere. In other words, a case must be stated which falls within the rule. *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Hibernia S. & L. Soc. v. Ordway*, 38 Cal. 681; 6 Cyc. 324. In *Hibernia S. & L. Soc. v. Ordway*, it was said: "In an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. To merely name the instrument, therefore, might not ordinarily be sufficient." In order to invoke the jurisdiction, therefore, the complaint must disclose the facts necessary to show that, but for the interposition of the court, the plaintiff may suffer injury.

[4] The complaint here falls to disclose that the contract is of such a character that, if it remains outstanding, it will be a menace to plaintiffs' title, or probably imperil it in any way.

[5] Apart from the bare legal presumption that it is in writing (the complaint does not state so specifically), and is therefore sufficient to meet the requirements of the statute of frauds (*Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Ryan v. Dunphy*, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; 1 Moak's Van Sanford on Pleading [3d Ed.] 266, 674; 9 Ency. Pl. & Pr. 700), it does not appear that it is of record or that it was executed with the formalities entitling it to be put upon record. Moreover, it is alleged that the defendants renounced it, repudiating all liability under it, and that the plaintiffs rescinded it, and resumed possession of the land. While sufficient is alleged to excuse the plaintiffs from making a formal offer to refund the payments made (*Arnold v. Fraser*, supra) in the particular above pointed out, the complaint is wholly insufficient to invoke the equity power of the court.

[6] In the second place, we inquire whether the facts stated are sufficient to warrant other relief. Stripped of the unnecessary allegations, we think the complaint states a cause of action at law, not for damages for a breach of the contract, but to recover, as damages, the value of the personal property retained by the defendants and the use and occupation of the land during the period it was in possession of the defendants. *Pomeroy's Eq. Jurisprudence*, § 110; *State v. Snyder*, 66 Tex. 687, 18 S. W. 106; 6 Cyc. 285.

[7] Upon the repudiation of the contract by defendants and the rescission of it by the plaintiffs, the obligation at once arose upon the part of the former, without demand to restore to the latter the personal property received under the contract, and to render compensation for the use and occupation of the land, to say nothing of the other items

claimed as additional damages. Rev. Codes, §§ 5075, 5076.

We are not concerned now with the question what the plaintiffs may be able to establish by the evidence. If they can show what they allege upon the plainest principles of justice, they will be entitled to a substantial verdict, after credit has been allowed to the defendants for the amounts paid by them.

The judgment and order are reversed, and the cause is remanded for trial on the merits. Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

HANSON v. SWARD et al.†  
(Supreme Court of Kansas. April 11, 1914.)

(Syllabus by the Court.)

1. WITNESSES (§ 21\*)—EXAMINATION—REFUSAL TO ANSWER QUESTION—PUNISHMENT FOR CONTEMPT.

Whether a question put to a witness, in a case where the court has jurisdiction of the subject-matter and of the person, and which he refuses to answer, is pertinent and proper is for the determination of the court, and not the witness, and, if he persists in his refusal, he will be subject to punishment for contempt.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 87-41; Dec. Dig. § 21.\*]

2. WITNESSES (§ 21\*)—REFUSAL TO TESTIFY—IMPRISONMENT FOR CONTEMPT.

Imprisonment may be imposed, not only as punishment for contumacy, but also to compel obedience to a lawful order, and to enforce the production of testimony deemed to be necessary to the administration of justice.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 37-41; Dec. Dig. § 21.\*]

3. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT OF ADMINISTRATOR—COLLATERAL ATTACK.

The appointment of an administrator is not open to collateral attack merely because the appointee is not next of kin to the deceased whose estate is being administered.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182, 1411; Dec. Dig. § 29.\*]

4. FALSE IMPRISONMENT (§ 20\*)—PETITION—SUFFICIENCY.

On an examination of the averments of appellant's petition, it is held that they fail to state a cause of action for false imprisonment against the appellees.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 86-97; Dec. Dig. § 20.\*]

Appeal from District Court, McPherson County.

Action by John F. Hanson against Swen A. Sward and others for false imprisonment. From judgment for defendants, plaintiff appeals. Affirmed.

John F. Hanson, of Lindsborg, for appellant. Frank O. Johnson, of McPherson, for appellees.

JOHNSTON, C. J. [4] This was an action brought by the appellant, John F. Hanson, to recover \$50,100, as damages for alleged

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied May 13, 1914.

false imprisonment. It was brought against the appellees, Swen A. Sward, the probate judge of McPherson county, and the three sureties upon his official bond, O. Emil Gustafson, the sheriff, and the 20 sureties upon his official bond, John Ekblad, who was the administrator of the Hannah Linderholm estate, and his attorney, Frank O. Johnson. In the petition the appellant alleged that he was subpoenaed as a witness in behalf of the administrator of the Linderholm estate in a controversy wherein Anton Linderholm and others had presented claims against the estate, and to bring with him books of account, receipts for payments, checks, and other evidences of the payment of money to Anton Linderholm, Emil E. Linderholm, Justus Linderholm, and Ida A. Tarnstrom, and also all papers, notes, or accounts showing the transactions had or made by Hannah Linderholm while she was acting as the administratrix of the estate of Swan Linderholm, deceased. It was alleged that, in answer to the subpoena, appellant appeared before the probate court, and after affirmation he was asked a question pertaining to the claims filed against the estate by Anton Linderholm which he declined to answer, saying that the question did not pertain to the controversy upon which he had been subpoenaed to testify. The probate court then ruled that the appellant must answer the question; but he asserted that the court had no jurisdiction to require him to answer, and, still refusing, he was held to be in contempt of court, and it was adjudged that he should pay a fine of \$25, and stand committed until the fine should be paid and the question answered. It was further averred that under this order the appellant was committed to the county jail by the sheriff, that afterwards he was released on a bond given pending a hearing on a writ of habeas corpus before the Supreme Court, and that subsequently that court remanded him to custody, and he was held in jail for a period of about eight months, when he was released. He further alleged that the contempt proceedings were void, and his punishment illegal, because the probate court had no jurisdiction to compel him to testify in the proceedings before it; that Ekblad, who was moving in the proceedings, was not next of kin to the deceased, and was therefore not legally appointed administrator; that the order of commitment was void, because it did not state the extenuations offered by the appellant, nor comply with the Code provisions relating to punishment for contempt. A demurrer to the petition was sustained, and appellant complains of the ruling.

[1] Most of the questions raised on this appeal have already been determined adversely to appellant's contention. It was decided in habeas corpus proceedings, and upon similar averments, that it was the duty of appellant to answer the question propounded to

him in the probate court. In *re* Hanson, 80 Kan. 783, 105 Pac. 694; In *re* Hanson, 81 Kan. 608, 106 Pac. 276.

[2] The allegations of appellant's petition indicate that the question was relevant, and, besides, the probate court which had jurisdiction of the case determined that the question asked was pertinent and proper. Being vested with jurisdiction of the subject-matter and of the person, the relevancy of the inquiry was a question to be determined by the court, and not by the witness. It has also been determined that the probate court had the power to make the particular order that was made. In *re* Hanson, 80 Kan. 783, 105 Pac. 694. On a hair-splitting theory as to the propriety of the question asked, which was utterly untenable, the appellant persisted in his contumacy, and hence was held in jail for a long time. However, he could have secured his release at any time by answering a few simple questions, which he now says he would willingly have answered if they had been asked in a different way. He was held in custody, not alone as punishment for contumacy in willfully disobeying a lawful order of the court, but also to compel obedience to an order which the court had a right to make, and which was deemed necessary to the administration of justice. While the imprisonment was long, the court had the power to continue the commitment of appellant as long as his contumacy continued. As was well remarked by Mr. Justice Graves in the habeas corpus proceeding: "If courts were limited in their power to enforce proper orders, as urged here, contumacious witnesses could effectually impede and embarrass them to such an extent as practically to prevent the administration of justice." In *re* Hanson, 80 Kan. 783, 787, 105 Pac. 694, 696.

[3] There is nothing substantial in the claim of appellant that the imprisonment was illegal because Ekblad, who was appointed administrator, was not next of kin to Hannah Linderholm, deceased. The probate court had authority to appoint an administrator, and, even if the wrong person was appointed, his appointment would be valid until it was set aside in a proceeding brought for that purpose. Letters of administration are not open to collateral attack such as appellant is attempting to make. This was determined in *Ekblad, Adm'r, v. Hanson*, 85 Kan. 541, 117 Pac. 1028. See, also, *Taylor v. Hosick, Adm'r, etc.*, 13 Kan. 518; *Brubaker v. Jones*, 23 Kan. 411.

Some other questions have been discussed by appellant; but all not specifically mentioned here have, like those mentioned, been considered and decided in earlier cases brought in or to this court by appellant.

The appellant did not state a cause of action against any of the appellees, and the ruling of the district court sustaining the demurrer to his petition must be affirmed. All the Justices concurring.

**HODGES v. D. M. FERRY & CO.**

(Supreme Court of Kansas. April 11, 1914.)

*(Syllabus by the Court.)***Sales (§ 168½\*)—CONTRACT—CONSTRUCTION.**

The rule stated in the case of Hollingsworth v. Colthurst, 78 Kan. 455, 96 Pac. 851, 18 L. R. A. (N. S.) 741, 130 Am. St. Rep. 382, applied to a contract for the growing and delivery of a crop of watermelon seeds, and held, that acceptance of and payment for the crop were left to the consideration, judgment, and satisfaction of the purchaser, subject to the limitation that he should act in good faith.

[Ed. Nota.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. § 168½.\*]

Appeal from District Court, Stevens County.

Action by G. W. Hodges against D. M. Ferry & Co. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

F. S. Macy, of Liberal, and Standish Backus, of Detroit, Mich., for appellant. S. W. Smith, of Osborne, for appellee.

BURCH, J. In the season of 1911 the plaintiff, Hodges, grew a crop of watermelon seeds, and in November, 1911, delivered it to the defendant under a contract the material portions of which follow: "It is further mutually agreed that upon delivery of the crop it is to be carefully weighed and tested. Any necessary remilling is to be done by D. M. Ferry & Co., at their expense. Payment is to be made only for such seed as they consider sufficiently clean, bright, and vital for seedsmen's use; no credit being given for dirt, damages, or poor seed which has to be removed. In all cases the screenings and culls are to remain the property of the party who separates them from the crop. It is further mutually agreed that, if the crop as delivered is impure through fault of the grower, or in any other respect is, in the judgment of D. M. Ferry & Co., unfit for seedsmen's use and cannot be made fit without an unreasonable amount of recleaning or handpicking, D. M. Ferry & Co. may refuse to accept it in fulfillment of this contract. \* \* \* In consideration of the faithful carrying out of the provisions of this agreement on the part of said G. W. Hodges, and for his services in the growing and delivering said seeds, D. M. Ferry & Co. hereby agree to pay him at the rate of 12 cents per pound for all the seed satisfactory to said D. M. Ferry & Co. which he may deliver in accordance with this agreement in excess of the stock seed furnished him, said payment to be made immediately upon the receipt of such seed, and the ascertaining by said D. M. Ferry & Co. that it is vital and fit for seed purposes." The seeds were rejected. In an action to recover the compensation stipulated in the contract, the plaintiff prevailed, and the defendant appeals.

The court interpreted the contract as providing for payment for such seeds as were

sufficiently clean, bright, and vital for seedsmen's use, payment to be made as soon as the defendant ascertained the fact, and instructed the jury that the principal question for them to determine was whether or not the seeds were sufficiently clean, bright, and vital for seedsmen's use.

The contract provided that payment should be made, not for such seeds as were sufficiently clean, bright, and vital for seedsmen's use, but for such seeds only as the defendant considered of that character. The right was expressly reserved to reject the crop, not if it was unfit for seedsmen's use, but if, in the judgment of the defendant, it was unfit. The agreement to pay was, not for all seeds which were clean, bright, and vital, but for all seeds which were satisfactory to the defendant. The only provision of the contract in which a reservation of this kind was not inserted was the clause relating to time of payment. Since the condition upon which any payment depended was already fixed, it was not necessary that it should be repeated there, and acceptance of and payment for the crop were left to the consideration, judgment, and satisfaction of the defendant. It follows that the contract was misinterpreted, and the case was sent to the jury on a wrong theory.

The contract belongs to the class considered in the case of Hollingsworth v. Colthurst, 78 Kan. 455, 456, 96 Pac. 851 (18 L. R. A. [N. S.] 741, 130 Am. St. Rep. 382): "Parties to a contract may lawfully stipulate that performance by one of them shall be to the satisfaction of the other. \* \* \* If such a contract be made, the party to be satisfied is the judge of his own satisfaction, subject to the limitation that he must act in good faith. He should fairly and candidly investigate and consider the matter, reach a genuine conclusion, and express the true state of his mind. He cannot act arbitrarily or capriciously, or merely feign dissatisfaction. The application of these principles is not limited to transactions involving personal taste and preference."

The actual character of the seeds, whether clean, bright, and vital according to some standard of seedsmen or not, was not the matter to be determined, and was not even pertinent to the issue, except in connection with proof of bad faith.

It will be observed that the defendant's seed-growing contract has been materially changed since the decision in the case of Ferry v. Ballinger, 8 Kan. App. 756, 60 Pac. 824.

Strangely enough the court permitted the jury to be interrogated specially concerning whether or not the defendant acted in good faith in rejecting the seeds. The answer was, "We don't think they did." This answer might well result from the wrong interpretation placed on the contract by the court in the instructions given, and from the fail-

ure of the court to instruct on the subject of candor and good faith in the exercise of consideration and judgment respecting the quality of the seeds, and on the subject of the genuineness of the defendant's dissatisfaction with them. Besides this, the court rejected evidence material to the question propounded to the jury.

After receiving the seeds, the defendant proceeded to make a germination test by methods long in use which were described in detail. Only 40 per cent. of the samples sprouted. The seeds were then remilled, and 3 samples of the clean product were tested, which showed a vitality of 56 per cent., 54 per cent., and 54 per cent., respectively. In March, 1912, 26 samples were tested, which showed an average vitality of 50% per cent. Check samples employed in making the test showed a vitality of from 94 to 96 per cent. The average for watermelon seeds generally is, according to the experience of the defendant, 86 per cent., and the defendant requires a vitality of at least 75 per cent. before it considers watermelon seeds merchantable for seed purposes. In March, 1912, the defendant sent samples of the seed to the botanist in charge of the seed laboratory of the United States Department of Agriculture, together with the following letter:

"March 15, 1912. Mr. Edgar Brown, Botanist in Charge of Seed Laboratory, U. S. Department of Agriculture, Washington, D. C.—Dear Sir: Under another cover we are mailing you to-day two samples, No. 1 and No. 2, of watermelon seed, taken from an identical lot number 64480, and shall be pleased to have you make a germination test and report to us the result at your earliest convenience. If there is any charge for this work, we shall be glad to remit on receipt of your bill. Respectfully, D. M. Ferry & Co."

The plaintiff was duly advised of this action, and portions of the samples sent to the government laboratory were sent to the plaintiff. In response to the letter quoted, the defendant received the following letter:

"United States Department of Agriculture, Bureau of Plant Industry. [JFL] Seed Laboratory, Washington, D. C., April 3, 1912. D. M. Ferry & Co., Detroit, Mich.: Final report of germination test of seed received March 18, 1912. Test number 146466, sender's mark No. 1, name of seed watermelon 64480. Duration of test in days, 8; germination per cent., 54.5%. Test number 146467, sender's mark No. 2, name of seed watermelon 64480. Duration of test in days, 8; germination per cent., 56.5. Delay in receiving reports can be saved by submitting your samples to our Branch Seed Laboratory, Agricultural Department Station, Lafayette, Indiana. E. Brown, Botanist in Charge of Seed Laboratory.

"The name of the United States Department of Agriculture must not be used for ad-

vertising purposes in connection with this report."

The court refused to allow this letter to be read in evidence and refused testimony that the defendant considered the percentage of vitality stated in the letter to be too low to be acceptable. Both were relevant to the question of the good faith of the defendant in rejecting the seeds. The letter was not, of course, admissible as evidence of the actual vitality of the seeds.

The judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring, except MASON, J., who did not sit.

STATE ex rel. DAWSON, Atty. Gen., v. LEAVENWORTH CITY & FT. LEAVENWORTH WATER CO.

(Supreme Court of Kansas. April 11, 1914.)

(Syllabus by the Court.)

WATERS AND WATER COURSES (§ 202\*)—WATERWORKS COMPANY—CONTROL.

Upon the facts stated in the opinion, it is held that a waterworks company engaged in supplying water to the city of Leavenworth and its inhabitants, and also to the United States military prison, the federal prison, Ft. Leavenworth, the National Soldiers' Home, and other public and private institutions outside the city (four-ninths of the total amount of water furnished being to outside consumers), is within the provisions of section 3 of chapter 238 of the Laws of 1911, and therefore subject to the control of the public utilities commission.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 276; Dec. Dig. § 202.\*]

Action by the State, on relation of John S. Dawson, Attorney General, against the Leavenworth City & Ft. Leavenworth Water Company, to compel the company to put in force water rates fixed by ordinance. Demurrer to answer overruled, and action dismissed.

John S. Dawson, Atty. Gen., C. P. Rutherford, of Leavenworth, and F. B. Dawes, of Clay Center, for plaintiff. A. E. Dempsey, of Leavenworth, and S. W. Moore and Sam'l W. Sawyer, both of Kansas City, Mo., for defendant.

PORTER, J. In 1882, the city of Leavenworth, a city of the first class, granted a franchise to the defendant to use the streets, alleys, and grounds of the city for the purpose of placing water pipes therein and to furnish the city and its inhabitants with water. The franchise was to continue for a period of 20 years; the city reserving the right, after the expiration of that time, to purchase the waterworks, with all extensions, rights, and franchises belonging thereto. The franchise was accepted, and the defendant erected its waterworks plant, and from that time to the present has been furnishing water to the city and its inhabitants.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Subsequent to the passage of the franchise ordinance and its acceptance by the water company, the Legislature, in 1883 (section 2, c. 34, Laws of 1883), passed an act declaring that such contracts and franchises shall not extend for a longer period than 20 years, unless extended as provided in the act; and further provided therein that, after the expiration of such period, in case the city failed to purchase such waterworks, then the owners thereof should thereafter have possession and enjoy all the rights, privileges, and franchises theretofore granted to or acquired by them, and power to maintain and operate the waterworks, with all the rights, franchises, and privileges theretofore held and granted, until the city should purchase the same. The act, by express terms, was made to apply to franchises before that time granted by cities to waterworks companies.

The 20-year period for which the original franchise was granted has long since expired. The city has failed to exercise its privilege of purchasing the waterworks, and in November, 1913, the city passed an ordinance regulating the rates to be charged by the defendant to the city and its inhabitants for water furnished, and providing certain conditions upon which the defendant should make extensions of its pipes and mains to accommodate the city and its inhabitants, and also providing other regulations with respect to furnishing meters to private consumers. The old rates for water furnished the inhabitants was 50 cents per 1,000 gallons. The new ordinance fixed the rate to be charged at 30 cents. The defendant refused to obey the ordinance, and continued to keep in force the old rates, and this action was brought for a mandatory order requiring the company to comply with the ordinance and to observe and put in force the rates fixed thereby.

The water company filed its answer and return to the alternative writ, claiming: First, that the mayor and commissioners of the city of Leavenworth have no jurisdiction of the matter, and have no right to fix rates for water furnished the people, nor in any way to regulate the conduct of the defendant; that the jurisdiction of such matters is in the public utilities commission of the state. In the answer and return it is further claimed that, if the mayor and commissioners of the city have power to regulate the defendant, the ordinance of 1913 is unconstitutional and void, for the reason that in the original ordinance of 1882 a contract in regard to such matters was made and the rates which the defendant should charge for water were fixed, as well as the conditions under which the company should be required to extend its mains, and hence that the new ordinance is, in effect, a law of the state that impairs the obligations of the contract embodied in the original ordinance, and is therefore unconstitutional and void. The case is submitted upon demurrers to the answer and return.

At the outset it is necessary to determine

the jurisdictional question, and, as we have arrived at the conclusion that the defendant is correct in the contention that the public utilities commission, and not the city, has exclusive jurisdiction of the subject-matter of the controversy, the other questions raised by the demurrers and which are discussed in the briefs need not be considered.

The public utilities act is chapter 238 of the Laws of 1911. By section 1 the commission is given "full power, authority and jurisdiction to supervise and control the public utilities \* \* \* doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." The only exception to this unlimited control is contained in section 3, where the power of regulation of "all public utilities and common carriers situated and operated wholly or principally within any city, or principally operated for the benefit of such city or its people" is vested exclusively in the city.

It is alleged in the petition and in the alternative writ that the defendant is furnishing water to said city and the inhabitants thereof, to divers and sundry people, and to private and public institutions in and outside of said city, including parks, public schools, the United States military prison, the federal prison, Ft. Leavenworth, Soldiers' Home, and hospitals, and to charitable institutions. The answer admits these allegations, and further alleges that the defendant, in addition thereto, furnishes water to other persons outside of the city; that, of the whole amount of water furnished consumers, four-ninths thereof is furnished to consumers outside of the city; that all of defendant's settling basins, intake pipes, and power plant are located outside of the city of Leavenworth; that the only facility located within the city of Leavenworth (except its pipe lines, hydrants, and facilities used in connection therewith) is a distributing reservoir; and that, of the entire value of the defendant's plant (\$720,000), not less than \$490,000 is devoted to the service of the city of Leavenworth and private consumers therein.

It is quite obvious from the admitted facts that, under the terms of the statute, defendant's plant cannot be deemed a utility "situated and operated wholly or principally" within the city, nor can it be said to be "principally operated for the benefit of such city or its people." The evident purpose in adopting the law was to provide for uniformity throughout the state in the control and regulation of public utilities and in the rates to be charged by them, and to create a special tribunal for that purpose. Public utility statutes are of comparatively recent origin, but are generally regarded by the courts as entitled to a liberal construction, in order to advance the benefits sought to be gained, and to avoid the evils sought to be averted by the Legislature. *City of Troy v. United Traction Co.*, 202 N. Y. 333, 95 N. E. 759. We



do not believe that, by the use of the word "principally," the Legislature intended to mean a mere majority of the people served by a utility, nor that it was intended that the value and extent of the physical plant and machinery employed in furnishing public service should be appraised in order to determine whether the utility is principally operated for the benefit of a city, and the people thereof. Nor can we conceive that the situation is altered in any respect by the fact that the United States government is one of the largest consumers of water among those supplied by the defendant outside the limits of the city. Doubtless the federal government could avail itself of any rates for service established by the state, but that question is not before us. The facts here present a stronger case for control by the public utilities commission than those in *State ex rel. v. Gas Company*, 88 Kan. 165, 127 Pac. 639, or *City of Emporia v. Telephone Co.*, 90 Kan. 118, 133 Pac. 858. In both of the cases cited it was held that the utility fell within the jurisdiction and control of the public utilities commission.

The other questions of law raised by the answer and return are not deemed to be difficult of solution; and, as a matter of fact, the parties are not very far apart in their contentions as to the law. The defendant concedes the power of the state, through some agency, to regulate the rates to private consumers, but contends that the state has no power to change the contract rate in the ordinance for water furnished to the city, nor to impose upon the defendant additional burdens respecting the extension of mains and the furnishing of meters to private consumers. It would be useless for us to pass upon questions of law which will depend largely upon the facts to be determined by the utilities commission after a full hearing.

It follows that the demurrers must be overruled, and the action dismissed, for the reason that the jurisdiction and control of the controversy is in the public utilities commission. All the Justices concurring.

# TECZA v. SULZBERGER & SONS CO.

(Supreme Court of Kansas. April 11, 1914.)

## (Syllabus by the Court.)

### 1. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—NEGLIGENCE — INSUFFICIENT LIGHT.

The evidence held sufficient to justify a finding that negligence of an employer in not providing sufficient light was the proximate cause of an injury to an employé.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

### 2. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—DANGEROUS PREMISES—WAIVER OF OBJECTIONS.

The fact that an employé has worked for years under the same conditions does not neces-

sarily preclude his recovering damages against his employer upon the ground of negligence in failing to provide sufficient light, apart from any consideration of complaint on his part, or of any promise to repair the defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Porter, J., dissenting.

Appeal from District Court, Wyandotte County.

Action by Mike Tecza against the Sulzberger & Sons Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Angevine, Cubbison & Holt, of Kansas City, for appellant. David F. Carson, of Kansas City, for appellee.

MASON, J. Mike Tecza recovered a judgment against Sulzberger & Sons Company, on account of personal injuries received while in its employ. The defendant appeals.

The evidence tended to show these facts: The plaintiff's duties required him to overhaul hams while in the process of pickling. This involved changing them from one hog-head or vat to another. The vats were arranged in double rows—one row on top of the other—in a room about 100 feet square. Each vat was 3 feet and 7 inches high, and 3 feet 5 in diameter, weighing about 300 pounds, and holding about 1,400 pounds of hams, besides the brine poured over them. The plaintiff was engaged in removing one of the upper vats. He undertook to shift it from the top of two other vats to a truck of the same height, and, in so doing, fell and received the injuries on which he based his action.

[1] The petition alleged various forms of negligence, including lack of light, insufficient help, projecting nails on the vat, and worn out flooring, made slippery by water and grease. In answer to a question requiring them to state fully of what the defendant's negligence consisted, the jury answered: "Insufficient light." This excludes other forms of negligence, and the judgment must be reversed, unless it can be sustained upon that theory. *Sugar Co. v. Riley*, 50 Kan. 401, 406, 31 Pac. 1090; *Plummer v. Railway Co.*, 86 Kan. 744, 745, 121 Pac. 906; *Hayden v. Railway Co.*, 87 Kan. 438, 124 Pac. 165. The plaintiff contends that the question was one that ought not to have been submitted, under the rule that the jury should not be cross-examined by questions relating to matters of evidence. *Madison v. Railway Co.*, 88 Kan. 784, 129 Pac. 1187. This, however, was a fair question, relating to one of the ultimate and vital issues of the case. In saying that the negligence of the defendant consisted in failing to furnish sufficient light, the jury must be deemed to say that their verdict is not based upon any other form of negligence.

The two principal questions upon which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

the case turns are: (1) Was there any evidence that the deficient light was the proximate cause of the plaintiff's injury? and (2) if so, must the plaintiff be regarded as having assumed the risk resulting from that deficiency?

The plaintiff did not in so many words say that his fall was caused by the want of light. He testified that but one electric light was supplied to light the place where he was at work, and this was 50 feet away; that there were sockets for others, but they were not in use; that he was furnished a coal oil lantern, which he hung near where he was working; that the floor was wet and greasy, and that there were holes in it. He gave his testimony through an interpreter, who rendered his answers sometimes in the third and sometimes in the first person. Substantially all the evidence on the subject of the manner of his injury is contained in these extracts from the record: "Q. Show us there how you did it, used the truck; tell how you did it. A. He was pushing that way on the truck. Q. Edging it off that way? A. Yes, sir. Q. What happened when you got it out that way? A. He said that is the way it started in on the truck (witness here illustrates), like that the way he is showing you; then he could not push it any further; then that truck backed this way and that fell over; then that hurt him right on the side. Q. What caused you to fall? A. There was because of that—because when the truck hit him and he fell right over onto the barrel. Q. What made you fall over? A. Because his foot slipped. Q. Tell the jury whether or not you could see the floor, and see all of those things at the time you were working there. A. He said he couldn't see nothing along there, all round; just what he seen from the light that was on the barrel. Q. Tell the jury whether or not you saw that fat, and saw those holes down there under where you were standing. A. He said it was too dark to see ever. Q. At the time of the accident, did you step on a piece of fat that caused you to slip? A. I could not tell, because, when I was moving those vessels, my foot slipped, and then I fell. Q. Your foot slipped on the floor, did it? A. When the truck slipped back and the vat moved and my foot slipped, then I fell. Q. Was the floor slippery at the place where you were standing at the time of the accident? A. It was pretty dark, and I could not see everything there, because it was wet and damp" We conclude that this evidence is sufficient to justify a finding that the plaintiff's fall was caused by insufficient light. The precise way in which the accident occurred is not clear, but there is room for the inference that a better light would have enabled the plaintiff to secure a firmer footing, and to move the vat in such a manner as to retain a surer balance.

[2] The plaintiff had worked for seven

years under substantially the same conditions. He testified that he had complained of the absence of light and of the other matters referred to in the petition, and that he had been promised that changes should be made. On cross-examination, he said that these complaints and promises were made on every day for seven years. It is argued that the defense of assumption of risk cannot be defeated by a showing of a promise to repair, the performance of which was so long deferred. The jury were not required to take literally the statements concerning the period over which the complaints extended, especially in view of the manifest difficulty the plaintiff had in comprehending the questions asked and in making his answers intelligible. But, apart from this consideration, we think the defense of assumed risk was not conclusively established. In order that a recovery shall be defeated upon that ground, the plaintiff must not only have known of the existing conditions; he must also have realized and appreciated the danger that resulted from them. 26 Cyc. 1189. This is not necessarily established by the fact that he made complaint; in doing so he may have had in mind merely the inconvenience that resulted from the want of additional lights. The matter of making the place safe to work in was not his problem. He was not required to take notice of any but the most obvious dangers. But much more than this was required of the employing company. It was under an obligation to consider carefully whether existing conditions involved any unnecessary danger; to use all reasonable care to see that the place was made safe, not only with respect to apparent risks, but also with respect to any that were latent. *King v. King*, 79 Kan. 584, 100 Pac. 503. It cannot be said, as a matter of law, either that the danger resulting from insufficient light was so obvious that the plaintiff must have known of it, or that it was so remote that the defendant could not be charged with knowledge of it. Both questions were for the jury.

Objection was made to the testimony of a physician concerning the plaintiff's condition, on the ground that it was founded in part on the subject's own statements. The record as a whole, however, seems to indicate that this was not the case. Complaint is made of the restriction of the cross-examination of plaintiff with respect to the use of benches in place of the trucks some years before. We think no substantial prejudice is shown in this connection. The petition alleged that the projecting nails from the lower hoops of the vat caught upon the truck, causing it to move, and thereby occasioned the accident. It is argued that no recovery could be had except upon proof of this fact. The petition also alleged generally that the injury happened by reason of all the acts of negligence set out. We think

no fatal variance is shown. In one place in the charge it was said that it was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work. The defendant thinks this exacted too high a standard of diligence. If the instruction was not technically accurate, it was not prejudicial. *Kamera v. Boiler Works*, 82 Kan. 432, 108 Pac. 806; *Reynolds v. Mining Co.*, 90 Kan. 208, 133 Pac. 844. Complaint is made of the failure of the court to require more definite answers to special interrogatories submitted to the jury, to which they replied: "We do not know." No request on the subject was made at the time; the defendant's counsel not being present. The answers being equivalent to a simple negative, there was no occasion for the court to send the jury back on its own motion. The jury were told that, in certain circumstances, the plaintiff would be regarded as having assumed the "ordinary" risks of his employment, and could not recover for any injury resulting therefrom. The use of the word "ordinary" is complained of, but we think it was not misleading under the facts of this case. Among other issues submitted was the question whether nails projected from the barrel and caught on the truck. This is objected to on the ground that there was no evidence of any such projecting nails. One witness, however, testified that some of the vats had loose brads or nails. The matter is of the less importance because the jury rested the verdict upon negligence in failing to provide more light.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, SMITH, BENSON, and WEST, JJ., concurring.  
PORTER, J., dissenting.

#### WOODELL et al. v. GIBSON et al.

(Supreme Court of Kansas. April 11, 1914.)

(*Syllabus by the Court.*)

#### PLEADING (§ 127\*)—ADMISSION—CONTRACT.

A defendant who is sued upon a contract to accept and pay for a policy of life insurance, and defends on the ground that the plaintiffs had failed to keep a promise to pay a loan commission for him, being of a less amount than the insurance premium, does not thereby admit a liability for the difference, where it is not shown that he was given an opportunity to obtain the policy without the payment of the full premium.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.\*]

Appeal from District Court, Pratt County.

Action by E. C. Woodell and others, partners doing business under the name of the Farmers' Loan & Realty Company, against W. P. Gibson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Simmons & Tinder, of Hutchinson, and W. B. Hess, of Pratt, for appellants. Barrett & Turner, of Pratt, for appellees.

MASON, J. E. C. Woodell and others, partners doing business under the name of the Farmers' Loan & Realty Company, made an arrangement with W. P. Gibson to aid him in obtaining a loan of \$26,500 on his land, in consideration of which he was to procure through them a life insurance policy of a like amount. The loan was negotiated, and the money paid to Gibson through a bank. Gibson gave the partners an order on the bank for the amount of the insurance premium (\$2,385), to be paid out of the proceeds of the loan, but he afterwards stopped payment on it. The partners brought action against him, but failed to recover, and now appeal.

Gibson defended on the ground that a part of his contract with the plaintiffs was that he was to pay no commission on the loan, whereas, in fact, he was required to pay a commission of \$1,855 to the company that made it. He testified that the agreement was that he was to take the insurance only in case he was relieved from the payment of any commission. Woodell and other witnesses testified, in effect, that the understanding was that Gibson was to pay the commission. The plaintiffs contend that Gibson's testimony was self-contradicting, and that the evidence against him was so overwhelming that a new trial should be granted on that account. We think, however, that an issue was presented for the determination of the jury, and that we are not warranted in setting aside their verdict, which has been approved by the trial court.

The plaintiffs further contend that they should at all events recover the difference between the amount of the premium and the amount of the commission, or \$530. The argument is that, inasmuch as Gibson concedes that he was to pay the plaintiffs the premium of \$2,385, provided they paid the commission on the loan, or \$1,855, he was indebted to them on his own showing for the difference, which, in any event, he should have paid. The difficulty with this reasoning is that the evidence does not show—at least, not conclusively—that Gibson was ever given to understand that he could obtain the policy by the payment of the \$530. He testified that the policy was offered to him, and that he refused to accept it, but the circumstances were such as to warrant the inference that, in accepting it, he would bind himself to pay the full premium, as well as the commission. There was no testimony that he was ever told he could have the policy by the payment of \$530, leaving open the question of his liability for the remainder of the premium. Woodell testified that the plaintiffs agreed with Gibson that they would themselves advance the premium to the insurance company, and that they had done so. Gibson denied such an agreement, and testified that he had never heard of it until the petition was filed. The policy appears to have

been left with the bank for delivery to Gibson, but the evidence cannot be said to establish that it was actually in force, and certainly does not prove that he knew he was protected by it.

The judgment is affirmed. All the Justices concurring.

SMITH, CAREY & CO. (McDERMOTT, Intervener) v. ATCHISON LIVE STOCK CO. et al.

(Supreme Court of Kansas. April 11, 1914.)

(Syllabus by the Court.)

EVIDENCE (§ 178\*)—BEST AND SECONDARY—PRELIMINARY PROOF.

Where evidence in writing is shown to have existed which would establish a fact very material in the trial of an action, and such writing is admitted to have been in the possession of a party to the action whose liability in a large sum may depend upon the words in the writing, it is error to admit other evidence of the contents of the writing until it fairly appears that the writing is lost beyond recovery or has been destroyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

On rehearing. Reversed and remanded.

For former opinion, see 90 Kan. 258, 133 Pac. 723.

J. W. Orr and Waggener & Challis, all of Atchison, for appellant. C. J. Conlon and J. L. Berry, both of Atchison, for appellee.

SMITH, J. A general statement of the case and of the proceedings is given in the former decision. Smith, Carey & Co. v. Live Stock Co., 90 Kan. 258, 133 Pac. 723. The principal ground of error urged on the rehearing is the admission over appellant's objection of the affidavit and testimony of William McDermott, intervener, as to the contents of a letter written by him to E. D. Small in reply to an application for the original loan of \$10,000; the contention on the part of appellant being that the loan was made to the Small Bros. and that the name of the Atchison Live Stock Company as indorsed on the back of the note by one of the Small Bros., as manager of the Atchison Live Stock Company, as security. On the other hand, the appellee contends that the loan was made to the Atchison Live Stock Company and the note was secured by the Small Bros., individually, as sureties. The letter of E. D. Small, one of the partners and an officer of the Atchison Live Stock Company, applying for the loan, and the reply of Mr. McDermott thereto, constituted the contract antecedent to the execution of the note for the loan. This letter was produced in evidence and was clearly an application of the Small Bros. for the loan. McDermott's contention is that in his letter, replying to the application, he proposed to

make the loan to the Atchison Live Stock Company, and that the loan was consummated in accordance therewith to the corporation. It is conceded that the note for the loan was signed on the face by the individual members of the firm of Small Bros. and was indorsed on the back, "Atchison Live Stock Company by J. D. Small, Mgr." As to the presumptions arising therefrom, the court correctly instructed the jury as follows: "The jury is instructed that, where the name of one who is neither the payor nor payee of a note appears on the back thereof, his relation to such note is prima facie that of guarantor and not as principal, and one who seeks to show that his relation to such note is that of principal has the burden of proving that fact." The contents of the McDermott letter in reply to the application was therefore of vital importance in the determination of the issues; it was addressed and mailed to E. D. Small, who wrote the application. After procuring an order for the inspection of the books, papers, etc., as indicated in the former decision, the appellee took the deposition of E. D. Small in the state of California, to which place Small had removed. Neither the plaintiff nor the receiver appeared at the taking of the deposition, but on the trial made full objections to each question and answer as incompetent, immaterial, and irrelevant, which objections were overruled.

As stated in the abstract, without objection, E. D. Small testified as follows: "I wrote the letter dated May 10, 1901, addressed to Wm. McDermott at Milwaukee, Wis., attached to the deposition and marked 'Exhibit B.' There was but one loan of \$10,000 made by Wm. McDermott, which was spoken of in this letter. The application for such loan was made in this letter. I have not the original letter of Wm. McDermott in answer to my letter making the application for this loan and dated May 10, 1901. I do not know where it is. I do not remember of having received it, but know I received it in answer to that." Referring further to the McDermott letter, the following questions were asked of E. D. Small and the answers given: "Q. Can you state what became of the letter? Would you say it was lost or destroyed? A. It was lost or destroyed as far as I know." And again: "Q. State whether or not that letter was lost or destroyed? A. It was lost or destroyed as far as my knowledge goes." No evidence was given by the witness in his deposition, nor was he asked, whether he had made any search for the letter or made any attempt to find it or when or where he last had it or saw it. Relying upon this proof of the loss of the letter, the intervener was allowed, over the objection of the appellant, to introduce his affidavit setting forth, from recollection, a copy of his letter. He also went upon the witness stand and

testified orally, in substance, to the same effect. The appellant objected and excepted on the ground that it was secondary evidence, and that no proper foundation had been laid that the primary evidence could not have been procured, and that there was no evidence that the original evidence was either lost beyond recovery or was destroyed. The objection should have been sustained. There was no other competent evidence of the inception of the transaction except the note was pleaded and not put in issue. The so-called admission of J. D. Small at Battle Creek, Mich., seems also to have been in his own interest. If the loan was not in fact made to the Atchison Live Stock Company, it was made to the Small Bros. co-partnership of which the witness E. D. Small was a member and against whom a personal judgment in another action was possible.

The loss or destruction of the McDermott letter was not properly established. The answers of the witness E. D. Small seem to be evasive, and, while he says he received the letter, he did not testify positively that it was either lost or destroyed. Where evidence in writing is shown to have existed which would establish a fact very material in the trial of an action, and such writing is admitted to have been in the possession of a party to the action whose liability in a large sum may depend upon the words in the writing, it is error to admit other evidence of the contents of the writing until it fairly appears that the writing is lost beyond recovery or has been destroyed.

The judgment is reversed, and the case is remanded for a new trial. All the Justices concurring.

SMITH et al. v. CITY OF RATON et al.  
(Supreme Court of New Mexico. Feb. 23, 1914.  
Rehearing Denied April 24, 1914.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS (§ 907\*) — MUNICIPAL BONDS—OPERATION OF STATUTE.

Subsections 6 and 67, § 2402, Comp. Laws 1897, examined. *Held*, that the first paragraph of subsection 6, authorizing the issuance of municipal bonds for certain purposes, and providing the procedure therefor, which portion of said subsection was enacted as a part of section 14, c. 39, Sess. Laws 1884, was not repealed, modified, or amended by subsection 67, enacted as section 1 of chapter 70, Sess. Laws 1897.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

2. MUNICIPAL CORPORATIONS (§ 907\*) — MUNICIPAL BONDS—OPERATION OF STATUTE.

The first paragraph of subsection 6 of section 2402, Comp. Laws 1897, is not inconsistent with any provisions of the state Constitution, and was therefore continued as a law of the state by virtue of section 4 of article 22 of our Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

3. MUNICIPAL CORPORATIONS (§ 268\*) — POWERS—ERECTION OF BUILDINGS.

Under the power granted to cities and towns by subsection 5, § 2402, Comp. Laws 1897, to erect all needful buildings for the use of the city or town, such municipalities are limited to the erection of such needful buildings as may be required for public uses, or for municipal uses and purposes, and contradistinguished from private or quasi public uses, and, if the primary object of a building to be constructed is a municipal purpose, the fact that it may be incidentally used for theatrical purposes may not have the effect of rendering the action in erecting it invalid; but where the paramount purpose and object is for other than strictly municipal purposes, legislative authority is lacking in this state for the erection of such buildings by cities and towns.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 717; Dec. Dig. § 268.\*]

Appeal from District Court, Colfax County; T. D. Lieb, Judge.

Injunction by James R. Smith and others against the City of Raton and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Plaintiffs below, appellees here, brought this action in the district court of Colfax county, as residents and taxpayers of the city of Raton, seeking to enjoin the defendants, below, the city of Raton and its officers, from constructing a so-called municipal building, and issuing bonds for that purpose. By an ordinance adopted March 15, 1912, the question of authorizing the city council to contract an indebtedness on behalf of the city by issuing its said bonds therefor "in an amount not exceeding \$25,000, for the purpose of erecting public buildings in and for the city of Raton," was submitted to the qualified electors of the city at the general election of April 2, 1912, at which election the proposed bond issue was authorized by the requisite majority of the qualified electors. Thereafter the municipal authorities caused to be prepared certain plans and specifications which were approved by the building committee and the city council; it being the intention of the said city council to construct the building according to said plans and specifications, if they could pay for it.

A preliminary restraining order was issued by the district court and was subsequently made permanent; the opinion of the district court being based upon the following propositions, to wit: (1) That appellants failed to file with the proper officer of the city of Raton, prior to said election, a carefully prepared estimate of the approximate cost of the proposed improvement, as specified in chapter 70 of the Session Laws of 1897, the same being subsection 67 of section 2402 of the Compiled Laws of 1897; (2) that the municipal building sought to be built under the proceedings herein was about to be erected for an opera house; that the main object of said building, as shown by the plans and specifications introduced in evidence, was an

opera house, and all other purposes or uses sought to be made of said building were incidental, both of which propositions were fully covered by findings of fact, appearing in the final decree of the district court, in substantially the language quoted supra.

H. L. Bickley, J. Leahy, and H. M. Rodrick, all of Raton, Pershing & Titsworth, of Denver, Colo., and Albert T. Rogers, Jr., of Las Vegas, for appellants. E. C. Crampton, Hugo Seaberg, O. L. Phillips, and R. C. Alford, all of Raton, and C. A. Spiess, of East Las Vegas, for appellees.

HANNA, J. (after stating the facts as above). Our first inquiry is directed to the validity of the election of April 2, 1912, upon the proposed bond issue by the city of Raton, notwithstanding the absence of a sworn estimate of the approximate cost of the proposed building, which was required by subsection 67 of section 2402, C. L. 1897, defining powers of municipalities.

It has been decided by this court in *Lanigan v. Town of Gallup*, 17 N. M. 627, 131 Pac. 997, that sections 12 and 13 of article 9 of the Constitution, limiting the powers of municipalities in the creation of debt, are not self-executing. Appellants concede this, and contend that full and ample legislative authority for the issuance of the bonds in question is to be found in subsection 6 of section 2402, C. L. 1897, with the provisions of which subsection the city of Raton has fully complied.

Under the provisions of this subsection, all municipalities were authorized to contract an indebtedness and issue bonds for specified purposes, including the erection of public buildings, provided no debt be created, except for supplying the city or town with water, unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors as shall have, in the preceding year, paid a property tax and a majority of those voting shall vote in favor of creating such debt. Subsection 6 of section 2402, C. L. 1897, as compiled, is derived from two sources. The first paragraph of the subsection was a part of section 14, chapter 39, Sess. Laws 1884, entitled "An act to incorporate cities and towns." The second paragraph of the subsection was enacted as section 4 of chapter 46, S. L. 1893, and provides for special elections to vote upon issuing bonds "for the construction of sewers or other public improvements."

Subsection 67 of section 2402, C. L. 1897, was enacted by the Legislature of 1897 as section 1 of chapter 70, entitled "An act relating to municipal corporations." This subsection (67) in terms provided that any incorporated city, town, or village, having a population of at least one thousand, should have power to erect and operate waterworks, etc.; to construct public buildings, etc.; to

issue bonds for the purposes mentioned, limited, however, as to a total bonded indebtedness of not to exceed 4 per centum of the value of taxable property therein: Provided, before such bonds could be issued, a special election be held, upon notice prescribed in the act, and that two-thirds of the legal votes cast at such election be in favor of the issue of the bonds, that a special tax be levied each year to provide a sinking fund and to pay the interest on the bonds, that a carefully prepared estimate of the approximate cost of the proposed improvement must be filed with the clerk, or other proper officer, and no bonds issued in excess of such estimate. The act further provided for the execution of the bonds, the denominations thereof, the term thereof and the interest thereon, and sale at not less than par, with other minor details not necessary to this discussion.

This act, somewhat in detail, defined the powers of municipalities upon the subject of borrowing money and issuing bonds for four purposes, viz.: constructing public buildings, sewers, waterworks, and gasworks, all of which powers had been conferred by the act of 1884 compiled as the first paragraph of subsection 6 of section 2402, C. L. 1897.

The essential differences between the two subsections is as follows: Subsection 6 provides for a vote upon the issuance of the bonds at a *regular* election and an authorization by a majority of the qualified electors who have paid a property tax the preceding year, while subsection 67 provides for a special election and authorization of the bond issue by an affirmative vote of two-thirds of all legal votes cast at such election. It is also worthy of note that subsection 67 conferred upon municipalities power to borrow money and issue bonds to provide means for protection from fire, and to lay off and improve streets and alleys, falling, however, to cover certain powers conferred by subsection 6, viz.: The purchase of waterworks, construction of canals, purchase of canals, purchase of gasworks, purchase of illuminating gas and to pay deficiency in the treasury.

From the fact that subsection 67 did not cover all the purposes of subsection 6, and provided for special elections as distinguished from regular elections, and the further fact that 67 in terms provided that the municipalities within the purview of the act "shall have all powers now given by law to incorporated towns," it is earnestly contended by counsel for appellants, that it was not the intention of the Legislature, in adopting subsection 67, to repeal subsection 6. The repealing clause of the act including subsection 67 did not specifically repeal subsection 6, but contained the usual formula: "All acts or parts of acts in conflict with this act are hereby repealed."

[1] In this connection it is ably contended by counsel for appellees that both subsections

6 and 67 are complete bonding acts, in which all necessary requirements are provided, and that subsection 67 impliedly repeals subsection 6, so far as repugnant. It is so generally recognized that courts should give such construction to statutes apparently in conflict that both may stand that citation of authority is unnecessary. Likewise it is universally conceded that repeals by implication are not favored, and are not to be indulged unless it is evident that the Legislature so intended.

It is to be presumed that the Legislature had in mind all existing laws upon the same subject at the time it gave consideration to and passed a statute. If there be no express reference to the existing statute, or apparent intention on the part of the Legislature to repeal the same, it is to be concluded, and it is a sound canon of construction, that the Legislature did not intend to abrogate the former law relating to the same matter, unless the later act is clearly repugnant to the prior one, or completely covers and embraces the subject matter thereof, or unless the reason for the prior act is removed.

In this case appellees contend that the later act covers the former act, but a careful study of both does not warrant such conclusion. Not only are several purposes of the earlier act not included within the later act, but the later act may well be considered as intended simply to enlarge the powers conferred by the first act and provide for special elections in addition to a general election as provided by the act of 1884.

In this connection our discussion is limited to that portion of subsection 6 passed by the Legislature in 1884. The latter portion of the subsection, adopted in 1893, is probably repugnant to the provisions of subsection 67, and therefore repealed by that subsection. This portion of subsection 6 is not involved in the present case, and it is therefore not necessary for us to pass upon the question of its repeal at this time.

Other than as thus qualified, we are of the opinion that subsections 6 and 67, while dealing with the same subject-matter in a general way, were not necessarily repugnant, but were designed to effect different objects, i. e., the method of holding the election upon the question, and except as qualified, are both to be considered as existing statutes of the territory at the time of its admission as a state.

[2] Therefore, in view of our conclusion that both subsections 6 and 67 were existing laws of the territory of New Mexico at the time of its admission as a state, except so far as the second paragraph of subsection 6 may be repugnant to the provisions of subsection 67, it only remains necessary for us to consider whether either, or both, of the subsections referred to were inconsistent with the provisions of the Constitution, and for that reason were not carried forward under statehood, because of the provisions of the

Constitution set forth in section 4 of Article 22, which provides as follows: "All laws of the territory of New Mexico in force at the time of its admission into the Union as a state, not inconsistent with this Constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed."

In this connection it becomes quite evident that the first paragraph of subsection 6 is in full conformity with, and not in any way inconsistent with, section 12 of article 9 of the Constitution. And this being the law under which the city of Raton attempted to conduct its election, and there being no controversy as to the compliance with this section, the question is clearly disposed of, and it does not seem necessary to us at this time to consider the effect of the Constitution upon subsection 67. It might be argued that the provisions of subsection 67 inconsistent with the Constitution would be inoperative by reason of the repugnance or inconsistency, but that the provisions of the Constitution in this respect, being self-executing, would supplement the provisions of subsection 67, and constitute a comprehensive law upon the subject, when read together with the self-executing provisions of the Constitution. This aspect of the question has not been presented for our consideration, and it is unnecessary for the purposes of this case to now decide that subsection 67 is in force in whole or in part, or affected by reason of self-executing provisions of the Constitution which might be read into the act, or considered in connection with it, for which reason we deem it best not to pass upon the question of the status of subsection 67 at this time.

For the reasons heretofore given, we are of the opinion that the absence of the sworn estimate of the approximate cost of the proposed improvement, prescribed by the terms of subsection 67, did not constitute an omission which would invalidate the election of April 2, 1912, and that the decree of the honorable district judge in this respect is therefore erroneous.

[3] We therefore pass to the consideration of the second phase of the question, namely, that the court erred in holding that the so-called municipal building, sought to be built under the proceedings had, was to be erected as and for an opera house; that the main object of said building, as shown by the plans and specifications introduced in evidence, was an opera house, and all other purposes or uses sought to be made of the building were incidental; and that it is not within the power of the city council to appropriate public money to the use of the building of an opera house, or of a building whose main object was that of an opera house.

It appears from the evidence in the case that plans and specifications for a proposed municipal building had been approved, and that it was the intention of the city council

to construct a municipal building in accordance with such plans and specifications, provided the city had the funds available for the construction of the building, and that there was a divergence in the evidence as to the probable cost of the building constructed in accordance with such plans and specifications. It is conceded that the cost must not exceed the funds lawfully available for the purpose, and that if no other funds be available, except the proceeds of the proposed bond issue, then the cost should not exceed \$25,000. It is also conceded by appellants to be their desire to construct a municipal building containing, not only suitable offices for the officials, but a public hall or auditorium of sufficient capacity to accommodate public meetings of the people of Raton, and of such character as to afford facilities for public entertainments, theatrical or otherwise. In this connection it is pointed out by appellees, and evidently borne out by the facts, and certainly by the finding of the district judge, that a very large portion of the building would be devoted to such an auditorium, equipped as an opera house, with stage, boxes, and seating accommodations; even dressing rooms having been provided by the architect.

Numerous authorities have been cited by both appellants and appellees, but we do not desire to make this opinion unduly lengthy by a consideration of the numerous decisions, all of which have been examined and carefully considered. After thorough consideration of all the authorities cited in the briefs of counsel, we have reached the conclusion that, if the primary object of a building to be constructed is a municipal purpose, the fact that it may be incidentally used for theatrical purposes may not have the effect of rendering the action in erecting it invalid. *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166; *Jones v. Camden*, 44 S. C. 319, 23 S. E. 141, 15 Am. St. Rep. 819.

It is, of course, well settled that a municipal corporation has such powers, and such only, as are, first, expressly granted; or, second, such as are fairly and necessarily implied from those granted; or, third, such as are essential to the declared purpose of the incorporation. *Brooks v. Brooklyn*, 146 Iowa, 186, 124 N. W. 868, 26 L. R. A. (N. S.) 425.

By appellants it is contended that the city of Raton clearly had the power to erect the building contemplated, under and by virtue of the provisions of subsections 5, 56, and 6, of section 2402, C. L. 1897, which subsections are as follows:

"5. To erect all needful buildings for the use of the city or town.

"56. To provide for the erection and care of all public buildings necessary for the use of the town."

"6. To contract an indebtedness \* \* \*

by borrowing money or issuing the bonds \* \* \* for the purpose of erecting public buildings."

It is not our desire to put a strict construction on the grant of statutory power to municipalities, nor is it our intention to judicially legislate upon the question of the power granted in this instance. It is doubtless true that the power can be given to municipalities to construct opera houses or other public buildings of like character. We fully appreciate that municipalities are called upon in the present day and age for the exercise of powers not heretofore considered necessary to be exercised by municipalities. But, notwithstanding this fact, we believe that it is for the Legislature, and not for the courts, to extend the powers of municipalities to meet modern conditions; and, after careful consideration of the statutes quoted, we are constrained to believe that the powers therein conferred must be limited to the erection of such needful buildings as may be required for public uses, or for municipal uses and purposes as contradistinguished from private or quasi public uses, such as the one under consideration. In considering this phase of the present case, we must bear in mind that the learned district judge found as a matter of fact, and incorporated in his decree, the conclusion that the particular building here in question was about to be erected by the said city of Raton "as and for an opera house, that the main object of said building, as shown by the plans and specifications introduced in evidence, was an opera house, and all other uses sought to be made of such building were merely incidental."

Thus we find that the issue as presented to the district court was resolved by him as clearly showing a paramount use of the building for other than strictly municipal purposes. It is contended that the courts cannot control the discretion of the municipal authorities said to exist, because it is urged that it is for the city council, or city authorities, to determine what is or is not a municipal or public purpose. While we concede the general rule with regard to the discretion of municipal officers in the exercise of certain functions of government, we do not think this is a case where the rule can be applied. In the present instance, the question under consideration is rather one of whether the use to which the money of the taxpayer is to be applied is a public one, which becomes a question of law as limited and defined by the statutes upon the subject, and to be resolved and considered in the light of the rules of construction, which, in our opinion, are the outgrowth of a disposition on the part of the courts to arrive at not only a reasonable rule of construction, but one not tending to cast upon the taxpayer obligations which his citizenship in the community do not necessarily impose.



We do not disagree with the views of the Supreme Court of Massachusetts, as announced in the case of *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123, that it is not incompetent for a city to appropriate public money for the erection of the building which is larger than its present needs for municipal purposes require. We agree that the municipality may allow such portions of such building to be used for other purposes than municipal, either for a stipulated rent or price, or gratuitously, and that in erecting a public building a city need not limit the size to actual existing needs, but may make reasonable provision for probable future needs.

In concluding this opinion, we desire to observe that appellants have here contended that the relief afforded to plaintiffs below in this case should not go to the extent of a prohibition against the issuance of municipal bonds for the purpose of constructing a public building in the city of Raton of a reasonable character; in other words, that the injunction granted should be directed to the character and plan of the proposed building, rather than a general prohibition. In support of this view of the matter, it is urged that the city council had not undertaken to adopt final plans and specifications, nor had it attempted to let a contract for any particular kind of a building; that until it did so the court was necessarily, in granting the relief, striking at a mere conjecture. While it is true that the record discloses evidence that it was the intention of the city council to proceed in the erection of the building in accordance with the plans and specifications which had been approved, provided the city found itself possessed of sufficient funds to do so, there would seem to be some merit in the contention of appellants, and we believe it is clear from the foregoing opinion that we hold that the election and authorization of the bonds was in full conformity with our statutes governing such matters. We are also clear in our opinion that this court is bound by the finding of the district court that the paramount purpose of this building was for other than municipal uses and purposes.

Therefore the injunction granted by the district court, in our opinion, was properly issued so far as this phase of the question is concerned.

While it appears from the examination of the final decree that the district court found that the estimate of the approximate cost of the proposed improvement had not been filed with the proper officer in the city of Raton, as required by chapter 70 of the Session Laws of 1897, which appears as subsection 67 of section 2402, C. L. 1897, with which conclusion of the district court, as to a necessity therefore, we are unable to agree, nevertheless it appears that the injunction

was directed against the erection of the particular building referred to in the complaint, and the plans and specifications. There is substantial evidence to support the finding that the city council was about to erect a building in conformity with such plans and specifications, and such as referred to in the complaint, and in view of the fact that the district court had an opportunity of hearing the witnesses and considering this phase of the question, and can therefore better judge concerning the weight of this evidence, for such reason we are not disposed to disturb the finding.

Wherefore, inasmuch as the permanent injunction was limited in its effect to a restraint upon the authorities in the matter of the erection of this particular building, we consider that the injunction was proper, and the decree of the lower court should be affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

#### BRINTON v. STEELE, Judge.

(Supreme Court of Idaho. April 22, 1914.)

#### 1. MANDAMUS (§ 172\*)—SUBJECT OF RELIEF—ENFORCEMENT OF MANDATE OF APPELLATE COURT—SCOPE OF INQUIRY.

In a hearing upon an application for a writ of mandate against a district judge, to command and direct such judge to enter findings and judgment in accordance with the mandate of the appellate court, the only question to be considered and passed upon is to determine the meaning and intent of the mandate of the appellate court, and ascertain whether or not the decision and judgment of the district judge, or the proposed decision and judgment, are in compliance with such mandate.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 381-385; Dec. Dig. § 172.\*]

#### 2. BOUNDARIES (§ 43\*)—DESCRIPTION—SUFFICIENCY—DECREE.

A finding and decree of court, in an action to establish a boundary line between adjoining lands and to quiet title, which finds and adjudges that a certain row of poplar trees, which trees are three feet in diameter, constitutes the boundary line between the adjoining properties, and that the boundary line of one of the tracts of land is on the east side of such row of trees, and the boundary line of the other tract is on the west side of such row of poplar trees, is not sufficiently specific and definite and certain, and does not definitely establish such line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 208; Dec. Dig. § 43.\*]

Original action for writ of mandate by Caleb Brinston, attorney in fact of Thomas W. Jones, against Edgar C. Steele, Judge. Alternative writ issued, and answer and return made, and upon hearing a modified order of mandate directed.

Ben. F. Tweedy, of Lewiston, for plaintiff. George W. Tannahill, of Lewiston, for defendant.

AILSHIE, C. J. This is an original application for a writ of mandate. This pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—8

ceeding grows out of the case of *Brinton v. Steele*, decided by this court and reported in 23 Idaho, 615, 131 Pac. 662. The plaintiff herein contends that the district judge is not complying with the judgment and order of this court as decided in the *Brinton-Steele* Case, and that he is not following the mandate of this court.

The district judge has answered the alternative writ, and appended thereto a copy of the findings which he proposes to make and enter herein as findings carrying out the judgment and order of this court, as he understands the same to have been made and entered by this court in *Brinton v. Steele*, *supra*.

[1, 2] The only thing to be determined in the present case is whether or not the proposed action of the district judge will carry out and be in compliance with the previous judgment of this court. In the opinion in *Brinton v. Steele* this court said: "In the decree the court adjudges that the line between lots 12 and 13 is on the west side of the row of poplar trees extending through and across said tract of land, marking the western boundary line of lot 12. The finding and decree, therefore, are uncertain as to the exact line of division between lots 12 and 13 as located by the trial court, and if it was the intention of the trial court that the line of division is established on the west side of the row of poplar trees, such line would not follow the north line of lots 22, 23, and 24 of the survey made by Briggs and Maxon, which was adopted and approved by the trial court as establishing the true line between lots 12 and 13, as found in finding 11. From the finding it is apparent that the dividing line between lots 12 and 13 is and should be fixed from the survey made by Briggs and Maxon, by making proper apportionment of excess land in the southern ends of lots 12 and 13; and, that being true, the true line between the two lots should be established and identified by a clear description in the findings and decree, and also upon the ground by proper monuments."

This court intended to approve the finding of the trial court to the effect that the Briggs and Maxon survey established the true line between the properties of these contending parties. This court was also of the opinion, as indicated by the above excerpts from the decision, that the physical markings on the ground made by the surveyor and the reference thereto in the findings and decree were not sufficient to definitely and permanently locate and establish the dividing line between the lands of these parties. It was therefore the unanimous opinion of this court that definite and certain monuments should be established between these lands, and that the decree should be definite and certain as to the dividing line between them.

The proposed findings and decree submitted with the answer of the district judge are not sufficient in that respect to comply with or

satisfy the judgment of the court. Proposed finding No. 11 falls short of fixing a definite boundary line between these lands. That proposed finding is as follows: "The court further finds that the row of poplar trees extending from the north boundary of said lots to the south boundary of the same is located substantially upon the line between lot 12, block 30, of the original plat of the city of Lewiston, Idaho, and lot 13, block 30, of the original plat of the city of Lewiston, Idaho, and that the said row of poplar trees has marked the boundary line between the said two tracts of land for more than 30 years last past, and that no owner of land on the west side of said poplar trees has claimed an interest in land lying east thereof, and no owner of land lying upon the east side of said row of poplar trees has claimed any part or portion of the land lying west of said row of poplar trees, prior to the commencement of this action."

It will be noticed from the foregoing that the court fixes a row of poplar trees as the boundary line between lots 12 and 13, and states that these trees have constituted the boundary line between the two tracts of land for a period of more than 30 years, "and that no owner of land on the west side of said poplar trees has claimed an interest in land lying east thereof, and no owner of land lying upon the east side of said row of poplar trees has claimed any part or portion of the land lying west of said row of poplar trees." Now, according to this finding, the court apparently proposes to designate the boundary line of one lot on the *east side* of this row of poplar trees and the boundary line of the other lot on the *west side* of these trees, and the evidence shows that these trees are now about *three feet in diameter*. The result would be that there would still be a strip of about three feet of ground, ever increasing as the trees grow, that would continue to be in dispute, or which no one will own. Thirty years ago it was easy enough to refer to these as the boundary line between the two lots, because they were very small; but now it is a very different thing, and besides the land is more valuable than it was 30 years ago.

The court should direct the surveyor, whose survey has been adopted, and which he proposes to follow in this case, to go upon the ground and there establish permanent and lasting monuments, and these should be referred to in the findings and decree so definitely and certainly as to leave no doubt as to the exact points through which this dividing line runs. Evidently the court means to find that the dividing line between these adjoining properties runs through the center of this row of trees. These trees are now old and decaying, and will doubtless be removed from the ground in a very few years, and a decree referring to them will then be as uncertain and indefinite as has been the line during the past. It will then take ex-

traneous and oral evidence to prove the location of this line.

No writ will issue in this case, but a copy of this opinion will be transmitted to the district judge, who is directed to proceed at the earliest date compatible with the business of his court to cause the boundary line to be marked and established, and enter findings and decree in accordance with the foregoing directions. No costs awarded.

SULLIVAN, J., concurs.

### STOLL v. COMMERCIAL NAT. BANK.

(Supreme Court of Utah. March 27, 1914.)

#### 1. BANKS AND BANKING (§ 139\*)—LIABILITY TO DEPOSITORS—VIOLATIONS OF DIRECTIONS.

Where plaintiff directed the defendant bank not to honor any further checks drawn by one purporting to act as her agent, and the bank allowed him to draw out all of her funds then on deposit, it cannot escape liability for its act in honoring his checks drawn after more funds had been deposited, upon the theory that the revocation of the agent's authority applied only to those funds then on deposit, and did not apply to those later deposited, because that deposit was made in a new account by reason of the bank's system of bookkeeping.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 406-409; Dec. Dig. § 139.\*]

#### 2. BANKS AND BANKING (§ 154\*)—DEPOSIT—AUTHORITY TO DRAW CHECKS.

In an action by a depositor who claimed that the defendant bank had wrongfully honored checks drawn on her account by one purporting to act as her agent, evidence held insufficient to show that the bank was justified in believing that the agent whose authority had been revoked was entitled to draw checks.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.\*]

#### 3. BANKS AND BANKING (§ 154\*)—RIGHTS OF DEPOSITOR—AUTHORITY OF AGENT TO DRAW CHECKS.

Where a depositor notified a bank not to cash any more checks drawn by one purporting to act as her agent, and the agent thereafter sold her property, depositing the proceeds to her credit, and sending her a check therefor, signed in her name per him as agent, the depositor's presentation of the check for payment after retention for several days is no evidence showing the bank's authority to honor other checks drawn by the agent in the interim.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Eliza D. Stoll against the Commercial National Bank. From judgment for part of plaintiff's claim, she appeals. Reversed and remanded, with directions.

N. V. Jones, of Salt Lake City, for appellant. H. J. Dinwiny, of Salt Lake City, for respondent.

STRAUP, J. The defendant is a banking institution in Salt Lake City. The plaintiff was one of its depositors. She brought this

action to recover for moneys which she alleged were paid out on her account without her authority, and for an accounting. She was given judgment for \$194.63, and appeals. She claims on the record she is entitled to a judgment for \$900.75 more, and interest thereon.

[1] In October, 1908, she was the owner of a rooming house in Salt Lake City. One D. B. Russell was one of her roomers. On the 16th of that month she sold the rooming house to one Ray, and for the greater part of the purchase price took his promissory notes secured by chattel mortgage on the furniture. The mortgage was recorded. The business, or some of it connected with the sale, was conducted by Russell for the plaintiff. She was indebted to the owner of the building for rent in the sum of \$58.35. The Ray notes were left with the owner's attorneys until the rent should be paid. About that time, or shortly thereafter, she moved to Idaho. Later she sent a check to Russell at Salt Lake City for \$58.35 to pay the rent. He took up the notes and mortgage, and took them to the defendant's bank, and there applied for a loan of \$200 in the name of the plaintiff, and offered to give the Ray notes and mortgage as security. His authority to negotiate the loan was questioned by the bank. He produced what the witnesses called a power of attorney which, he claimed, authorized him to do business for the plaintiff. The instrument was not in possession of either party, and hence was not produced at the trial. The witnesses who saw it testified that it was a writing of but a few lines on note paper in Russell's handwriting, apparently signed by the plaintiff, and that the substance of it was to give Russell "power to transact business for" the plaintiff. It was not acknowledged and not recorded. The plaintiff denied that she signed it, or that she gave Russell any such authority or power whatever. He, in virtue of such pretended power of attorney and authority, borrowed \$200 at the bank, signed a note for that amount in plaintiff's name, per his name as agent or attorney in fact, deposited the Ray notes and mortgage as security, then deposited the \$200 and the check for \$58.35 in defendant's bank in plaintiff's name, and then drew checks on the account in plaintiff's name, per his name as agent or attorney. In that manner he drew a check in favor of the attorneys for the owner of the building for the rent, and also drew other checks in the same manner on the account. Later he wrote the plaintiff that he had borrowed \$200 at the bank, and stated that he himself desired \$15, and later wrote that he needed \$65 for his own use. The plaintiff, as she testified, becoming suspicious, on the 8th day of November, 1908, wrote the bank, "Please do not cash any checks in my name not coming direct from me here at Twin Falls, Idaho."

That letter was received by the bank on the 11th of that month. That the letter was written and so received by it is not disputed. It ever since remained in its possession, and, on notice, was produced by it on the trial. On the 11th, when the bank received the letter, there was standing to the plaintiff's credit in the bank the sum of \$135. She, by this action, has not sought to repudiate the loan, nor to recover for anything which the bank paid out on checks drawn by Russell prior to November 11th. She seeks to recover the moneys which the bank thereafter paid out on his checks drawn on her account. Notwithstanding the instructions and directions received by the bank from the plaintiff, it nevertheless, on the 11th of December, honored and cashed a check presented by Russell drawn on plaintiff's account, in her name, per his name as agent or attorney, for the sum of \$135. That was all the money she then had on deposit to her credit. In the early part of January, 1909, Russell, without the knowledge, consent, or authority of the plaintiff, released the Ray mortgage of record, and resold the rooming house to one Amy for a consideration of \$1,880, \$1,200 of which was paid by check, payable to the order of the plaintiff, and \$680 in promissory notes executed by Amy, and secured by mortgage. Russell took the \$1,200 to the bank, indorsed it in plaintiff's name, per his name as agent, and deposited \$1,106.90 to her credit, and in her name, and took the balance, \$93.10, in cash, which he kept. Then he drew a check in plaintiff's name, per his name as agent, payable to the bank, in the sum of \$106.90, the balance due and unpaid on the \$200 loan. That left \$1,000 standing to plaintiff's credit in the bank on the 12th of January, 1909. It is this money—the \$1,000—which later was drawn out by Russell in violation of her directions, for which she claims additional judgment. On the 12th of January Russell wrote the plaintiff that he had resold the rooming house, and that there was to her credit in the defendant's bank \$1,000, and that he had by registered package sent her the Amy mortgage and a check for \$1,000, payable to her order, signed in her name, per his name as agent, and advised her that, if she left the money in the bank, she could get 4 per cent. interest, or, if she desired to use it, to indorse the check and mail it to the bank, and request a New York draft. That was the first knowledge she had that Russell had resold the rooming house. She at once communicated with friends at Salt Lake City concerning the matter, and on the 25th mailed the check unindorsed to the bank, and requested a New York draft for \$1,000. The check and letter were received by the bank on the 28th. It replied that: "The check is unindorsed. We are holding this check until we can see Mr. Russell, as he has not yet deposited funds to meet the same." There was not then \$1,000

to her credit. Between the 12th and 19th of January Russell drew on the \$1,000 deposit by checks, most of them payable to and presented by himself, one for \$750, and all of them for his benefit, signed in plaintiff's name, per his name as agent, until the amount on the 19th of January was reduced to \$9.25. Then Russell absconded, and has not been heard of since. That he was an imposter and a cheat is clearly shown.

The court awarded plaintiff a judgment for \$135, the amount which was on deposit to her credit November 11, 1909, when the bank received her letter notifying it not to cash any check not coming direct from her at Twin Falls, and for \$9.25, the amount still standing to her credit, and interest on these amounts, a total of \$194.63. But the court did not award her anything for other moneys checked out on her account by Russell after the receipt of the letter by the bank. This on the theory, as found by the court: "That, with the payment of the defendant of the \$135 check on December 11, 1908, all the money on deposit in the defendant bank, and which was obtained as a loan, was paid out, and that account closed, and, when the deposit of the \$1,106.90 was made by Russell January 12, 1909, a new account was opened, and the defendant believed, and was justified in the belief, that the new transaction, viz., the deposit of said money by Russell, and the drawing of the checks as attorney in fact, or agent of the plaintiff, were authorized by plaintiff, and within authority of said Russell. That plaintiff is not entitled to judgment against the defendant for any sum or amount, except for \$135, with interest from December 11, 1908, amounting to \$182.25, and \$9.25, with interest from January 20, 1909, amounting to the sum of \$12.38, in all the sum of \$194.63."

The only direct evidence to support this finding is the testimony of the defendant's bookkeeper that plaintiff's "account was closed on December 11, 1908," when Russell drew the \$135 check, all the money the plaintiff then had at the bank, and that, when Russell thereafter, on the 12th of January, deposited to her account and credit the \$1,200 Amy check, less \$93.10 cash kept by him, a new account was opened. Hence the defendant contended, and the court found, that the letter written by plaintiff in November directing the bank not to pay any checks in her name not coming direct from her applied only to the so-called first account, and not to the second. We see nothing in the record to justify that. The plain disregard of plaintiff's directions given the bank cannot be justified by its mode of bookkeeping, or by entries made by it on its books closing and opening accounts. It cannot by its own boot straps lift itself out of trouble in any such manner as that. Nor may it justify such disregard by placing a construction on plaintiff's letter which it will not bear—that it applied to

plaintiff's funds on deposit in December, but not to those in January. That is a war-rantable interpretation of plaintiff's letter.

[2, 3] The court awarded the plaintiff judgment for the \$135, on the theory that whatever power or authority Russell had to draw on her account was revoked by her letter to the bank. No other power or authority whatever thereafter to draw on her account by Russell is shown or found. The court, nevertheless, found that the bank, after it received the letter, believed, and was justified in the belief, that he was authorized to draw on her account. But there is nothing to support that. Between the 11th of December, when the bank cashed and honored Russell's check for \$135, which the court found was unauthorized, and January 12th, when he deposited \$1,106.90 to plaintiff's credit, and drew checks on her account, no dealings or transactions whatever were had between the plaintiff and the bank, nor was there anything said or done by her to show that any such power was restored or reconferred. The bank, on the 11th of December, honored and cashed Russell's check for the \$135 in utter disregard of plaintiff's letter, and likewise in January cashed and honored his checks in utter disregard of her directions and instructions. It did not then treat the letter revoking Russell's authority applicable to the so-called one account and inapplicable to the other. It wholly disregarded and ignored it as to both. But it is claimed that the plaintiff, by holding the \$1,000 check which Russell had mailed to her on the 12th of January until the 26th, when she sent it to the bank, and requested a New York draft, acquiesced in Russell's authority to draw checks. There is nothing to that. The bank had no knowledge whatever of that check until the 28th of January, when it received it from the plaintiff. Prior to that, between the 12th and the 19th, it had honored and cashed Russell's checks drawn on her account until on the 19th it was reduced to \$9.25. So the knowledge which it obtained on the 28th in no sense influenced it in honoring and cashing Russell's checks drawn on her account and presented by him prior to that time. Such subsequently acquired knowledge cannot be looked to to support the finding that the defendant believed, and was justified in the belief, that Russell was authorized to draw the checks drawn and presented by him after the letter of revocation. Nowhere has the court even found that Russell was in fact at any time authorized to draw on plaintiff's account. It but found that the defendant believed, and was justified in the belief, that he was authorized. But nothing was found, nor does the record show anything, to support that. The court finds that "on November 2, 1908, Russell presented to the bank a paper purporting to be signed by plaintiff, apparently genuine, empowering him to attend to

her business in Salt Lake City"—the so-called power of attorney. No finding is made that it was signed by her, or that she in fact had given him any such authority. But the court expressly finds that the defendant, on the 11th of November, received from the plaintiff the letter which in clear terms directed it not to cash any checks in her name not coming direct from her, and that the defendant thereafter, without authority, honored and cashed Russell's check for \$135 on the 11th of December, thus recognizing and treating the letter as a revocation of Russell's authority and power to draw checks on her account. Now, what happened thereafter to show that any such authority or power was restored or reconferred? Nothing is found, nor pointed to, except the \$1,000 check which Russell mailed to the plaintiff, but of which the bank had no knowledge whatever, until 10 or 15 days after it had honored and cashed Russell's checks reducing the account to \$9.25.

We think on the record, and on the facts found by the court, except the conclusion or finding referred to which is wholly unsupported, and not justified, the plaintiff is entitled to a judgment for the additional sum prayed for, \$990.75, and interest. The case is therefore remanded, with directions to so amend the findings and the judgment. Appellant to recover costs.

MCCARTY, C. J., and FRICK, J., concur.

# OBRECHT v. NIELSON LAND & WATER CO. et al.

(Supreme Court of Utah. March 27, 1914.)

## VENDOR AND PURCHASER (§ 116\*)—CONSTRUCTION.

In 1908 plaintiff agreed to purchase land, one payment to be on delivery of the contract and another on June 1, 1909, and defendants agreed to plant the premises for a commercial peach orchard during the early spring of 1909. The contract also provided that at any time after June 1, 1909, plaintiff, if he should become dissatisfied with the purchase or unable to make further payments, should be entitled to a return of all money paid. Held that, where plaintiff made the first payment on delivery of the contract and part of the second payment before June, 1909, but defendants breached the contract by their failure to plant the trees for a peach orchard, he can recover the payments made; the contract not requiring a second payment for the purchaser to recover the first.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208; Dec. Dig. § 116.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Joseph A. Obrecht against the Nielson Land & Water Company and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

C. E. Norton, of Salt Lake City, for appellant. Geo. M. Sullivan, of Salt Lake City, for respondents.

STRAUP, J. A demurrer for want of facts was sustained to plaintiff's complaint. On his failure to amend, the action was dismissed. He appeals, and complains of the ruling sustaining the demurrer.

In the complaint it is alleged that the plaintiff and the Little Valley Land Company, on the 3d day of August, 1908, entered into a written agreement, by the terms of which the latter agreed to sell and convey to the plaintiff certain real estate, ten acres fully described, situate in Grand county. A copy of the contract is attached to the complaint and made a part of it. It provides that the consideration to be paid by the plaintiff is \$3,000, \$250 on the delivery of the contract, \$250 June 1, 1909, \$250 June 1, 1910, \$250 June 1, 1911, and \$250 June 1, 1912. When such payments are made, the Little Valley Land Company agreed to convey the premises by warranty deed and to take a mortgage back for the balance of the unpaid purchase price. It further agreed to plant the premises "to a commercial peach orchard," and to plant the peach trees "during the early spring of 1909," and to care for and replant them, and to care for and to cultivate the premises, etc., until June 1, 1912. The contract further provides: "It is further understood between the parties to this agreement that if said second party shall at any time after June 1, 1909, become dissatisfied with his purchase, or through sickness or death cannot make further payments on this contract, then, upon sixty days notice in writing by himself or his legal representatives given to the first party of the agreement, the said second party can have returned to him all the money that he will have paid to the first party on this contract, together with six per cent. interest." Then it is alleged that the Little Valley Land Company sold and assigned all its lands and contracts entered into with purchasers, including the plaintiff's, to the defendant Nielson, and that he sold and assigned to the defendant, the Nielson Land & Water Company, but that each expressly agreed to carry out all the contracts of the Little Valley Land Company, and assumed and agreed to discharge and perform all its liabilities and obligations with respect thereto. It is further alleged that the plaintiff, on the 3d of August, 1908, when the contract was entered into, paid \$250, and on the 17th of August of that year paid the further sum of \$168, or a total of \$418. Then it is alleged: "That the said defendants have wholly failed, neglected, and refused to keep and perform the agreements hereinbefore set forth, or any part of them, and the defendants have failed, neglected, and refused, and they still fail, neglect, and refuse, to perform any of the covenants in said agreement contained, and they have not cultivated the

said premises, or any part thereof, and they have not planted the said premises, or any part thereof, to a peach orchard, or in any manner reclaimed or cultivated said premises. That on July 3, 1911, at Salt Lake City, Utah, more than 60 days prior to the commencement of this action, this plaintiff notified the said defendant, in writing, by registered mail, and in person, that he had become dissatisfied with such purchase, and that through sickness and death he cannot make further payments on the said agreement of purchase, as therein provided, and the plaintiff then and there demanded that the said defendants return to him all of the money he had paid to said defendants upon the said agreement, to wit, the sum of \$418, together with interest thereon at 6 per cent. per annum from August 17, 1908, until paid, all of which the defendants failed, neglected, and refused to do, and the defendants now refuse to refund the said money or any part thereof, and the defendants refuse to perform said agreement and plant the said premises to orchard, as agreed to, or to permit plaintiff to have possession of said premises or any part thereof." It is further alleged that all of the defendants are insolvent.

The demurrer was sustained on the theory that, by the first quoted provision of the contract, the plaintiff could not maintain an action for the recovery of any moneys paid by him, unless he had made at least two full payments, one of \$250 on the execution of the contract, and the other \$250 on or before June 1, 1909; and since the allegations of the complaint show that such payments were not so made, the allegations being that he paid \$250 on the execution of the contract the 3d of August, 1908, and on the 17th of that month an additional sum of \$168, he had not himself performed, and could not recover back any of the moneys paid by him. We think the ruling wrong. The Little Valley Land Company agreed to plant the premises in trees "during the early spring of 1909." It is alleged the defendants did not do that, did nothing, and wholly failed and refused to perform any of the covenants and agreements of the contract on their part to be performed. The plaintiff was required to make the second payment of \$250 on June 1, 1909. He did not fully do that. But it is alleged the defendants breached the contract and wholly failed and refused to do anything towards cultivating or improving the premises or planting the trees, before the plaintiff was required to make the second payment.

Then the plain terms of the contract are: If he "shall at any time after June 1, 1909, become dissatisfied with his purchase," he, on 60 days' notice, "can have returned to him all the money that he will have paid" on the contract. Does this mean that, to entitle him to recover back the first payment, he must also fully pay the second? That if he had fully paid the second on the 1st of

June, 1909, then on the 2d of June he could have maintained an action to recover back all that he had paid; but since he did not fully pay the second he is not entitled to recover anything? That is not what the contract means—pay to-day so that he may sue to-morrow to recover it back. The language used does not require the doing of any such vain thing as that, especially as to the insolvent defendants, who, as is alleged, failed and refused to do anything, and committed breaches of the contract before the plaintiff was required to make the second payment. The obvious meaning of the contract is that, if the plaintiff, at any time after June 1, 1909, became dissatisfied, he, on 60 days' notice, was entitled to have back all moneys paid by him on the contract, together with 6 per cent. interest. No other conditions are imposed by the contract, and no other may be imposed by the court.

We think the complaint states a cause of action, and that the court erred in sustaining the demurrer.

The judgment is reversed, and the case remanded, with directions to reinstate the case, to overrule the demurrer, and give defendants five days to answer. Costs to appellant.

McCARTY, C. J., and FRICK, J., concur.

## BURDETTE v. UNIVERSAL CLEANSER & MFG. CO. et al.

(Supreme Court of Utah. April 2, 1914.)

### 1. CORPORATIONS (§ 30\*)—CONTRACTS OF PROMOTERS—RIGHT TO STOCK.

A contract of sale of an undivided one-tenth interest in a business and the property used therein stipulated that a corporation should be formed to take over the business and property, and that the buyer should receive one-tenth of the stock of the corporation. The seller alone organized the corporation, and the articles of incorporation provided that a specified number of shares should be retained for the benefit of the corporation. The buyer accepted one-tenth of the balance of the stock. *Held*, that the buyer, on accepting the stock, became a stockholder, and consented to the articles of incorporation, and could not compel the issuance to himself of any part of the shares set apart for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.\*]

### 2. CORPORATIONS (§ 30\*)—STOCKHOLDERS—RIGHTS OF STOCKHOLDERS.

A stockholder cannot claim a segregation of his interest in the corporate property, and the only way by which a segregation may take place is by declaring a dividend on profits or a stock dividend, and in either case each stockholder receives in proportion to the number of shares he holds, and a stockholder entitled under contract to a specific part of the stock of a corporation cannot compel the issuance to himself of any part of the stock set apart for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 30.\*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Joseph Burdette against the Universal Cleanser & Manufacturing Company and others. From a judgment for plaintiff against defendant John Peterson, rendered after a dismissal of the action as against the other defendants, defendant John Peterson appeals. Modified and affirmed.

M. E. Wilson and E. A. Walton, both of Salt Lake City, for appellant. Stewart, Stewart & Alexander, of Salt Lake City, for respondent.

FRICK, J. The plaintiff brought this action in equity for the specific performance of a certain agreement entered into between himself and the defendant John Peterson, the Universal Cleanser & Manufacturing Company, O. W. Carlson, E. R. Morgan, Charles Backman, and David Howells, and said John Peterson, as the board of directors of said Universal Cleanser & Manufacturing Company, a corporation, and said John Peterson as an individual were all made parties defendant to the action. At the hearing the action was dismissed as against all of the defendants except John Peterson, against whom alone judgment was duly entered as hereinafter stated, from which he appeals.

[1] The agreement sued on is as follows: "Salt Lake City, Utah, Sept. 3, 1909. I, John Peterson, of Salt Lake City, Utah, for value received in the sum of \$250.00 cash from Joseph Burdette second party of the same place, receipt of which is acknowledged, hereby grant, bargain and sell the following described articles and business, to wit: An undivided one-tenth interest in that certain business known as the Universal Manufacturing Company, now doing business at #24 W. North Temple St. in Salt Lake City, Utah, which business includes the manufacture and ownership of what is known as 'Sweepola, Tapis-Lavo, Magic Paper and Wall Cleaner,' also house cleansing articles such as soap, scouring and cleansing articles, liquid metal polish and any and all other articles connected with said business, including also a one-tenth interest in all rights of patent connected with any of said articles whether now procured or to be procured in the future. It is further agreed that within a reasonable time a corporation is to be organized owning all of said articles and business and patents, and that said second party shall have a full one-tenth interest represented by this sale in said corporation. Witness the signatures of the parties hereto the day and year first above written. John Peterson. J. Burdette."

The plaintiff, respondent here, after referring to said agreement in his complaint, alleged that on the 5th day of June, 1910, the corporation provided for in said agreement was duly incorporated and organized by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

name above stated; that the individual defendants mentioned constituted the board of directors of said corporation at the time this action was commenced; that said corporation was capitalized for \$300,000, which capital was divided into 300,000 shares of the par value of \$1 each; that 130,000 shares of said capital stock were issued to said John Peterson, and that he, according to the books of said corporation, is the owner and holder of said 130,000 shares of stock; that said corporation was organized and its capital stock was based entirely upon the property described in the agreement aforesaid, of which the respondent was the owner of one-tenth and said Peterson of nine-tenths, and that said corporation accepted said property in full payment for said capital stock; that, under the terms of said agreement, respondent was entitled to a one-tenth part of the capital stock of said corporation; that, after said corporation had been duly organized, said Peterson transferred to respondent 10,000 shares of said capital stock, and no more, and has failed and refused and still refuses to transfer or issue to him the remainder of said one-tenth part of said capital stock, to wit, 20,000 shares. There are other allegations which were material and proper in the court below, but which are not necessary to this appeal. Respondent prayed that said Peterson be compelled to comply with the terms of said agreement, and that he be required to transfer the remaining 20,000 shares of said one-tenth part of said capital stock to respondent, or that he have judgment for the value of said stock.

The defendants filed a joint answer in which they practically admitted the allegations of the complaint, except that respondent was entitled to any further shares of stock. They also set up two affirmative defenses: (1) That 10,000 shares was all that respondent was entitled to receive in the corporation that was actually organized; and (2) that he had received and accepted in full accord and satisfaction 10,000 shares as and for his interest in said corporation.

While the case was equitable, a jury was nevertheless called, and, in addition to their general verdict in favor of respondent, they also answered special findings submitted to them, which are as follows:

"First. Did the plaintiff, Joseph Burdette, agree with the defendant John Peterson to accept 10,000 shares of the capital stock of the Universal Cleanser & Manufacturing Company in full payment and satisfaction of his rights, as set forth in that contract made and entered into between the plaintiff and the defendant and designated as plaintiff's Exhibit A? Answer: No.

"Second. Was the defendant corporation, the Universal Cleanser & Manufacturing Company, organized pursuant to the contract, plaintiff's Exhibit A, between the plaintiff and the defendant? Answer: Yes.

"Third. Was the business and personal

property referred to in the contract between the plaintiff and the defendant, plaintiff's Exhibit A, transferred to the defendant corporation as the assets of said corporation? Answer: Yes."

The court adopted both the general verdict and the special findings of the jury, and also made findings of its own which, in view of the conclusions reached, we do not deem necessary to set forth here.

At the trial it was admitted, as part of respondent's evidence, that the corporation was capitalized for \$300,000, which was divided into 300,000 shares of the par value of one dollar each; that of the capital stock there was issued to four of the directors, as qualifying stock, 4,000 shares, to appellant 130,000 shares, to O. W. Carlson 75,000 shares, to which we shall refer again hereafter. It was also conceded that there were placed in the treasury 91,000 shares. If we add the several amounts issued to the 91,000 shares not issued, the whole 300,000 shares of the capital stock are accounted for. As we have seen, under the agreement, and as found by the jury, appellant and respondent furnished all of the property upon which the capital stock of the corporation in question is based in the following proportions: Appellant nine-tenths and respondent one-tenth, for which one-tenth he was to receive a "full one-tenth interest" in the corporation. When the corporation was organized, however, it was provided in the articles of incorporation as follows: "It is mutually agreed and understood that the said 91,000 shares of stock be and are hereby contributed by the stockholders of this corporation to the treasury of said corporation for its development and to pay its debts; it being expressly understood and agreed that the said 91,000 shares contributed as aforesaid be sold and disposed of for the benefit of this corporation at such time and place and on such terms as the board of directors of the corporation may in their judgment deem best."

Respondent, however, insisted at the trial in the court below, and that court agreed with him, that, notwithstanding the foregoing provision in the articles of incorporation, he nevertheless was entitled to one-tenth of said 91,000 shares as well as of one-tenth of the 209,000 remaining shares which had been issued, for the reason, as his counsel contended, that the one-tenth part of the 91,000 shares is based on the property accepted by said corporation precisely the same as the one-tenth part of all other stock is based thereon. In justice to counsel it should, however, be stated that the appellant, in organizing the corporation, entirely ignored the respondent and gave him neither part nor share in the corporation, nor any voice in its organization or management. The principal, if not the only, question on this appeal, therefore, is: What should respondent recover, if anything, in this action? It will be observ-



ed that respondent claimed his interest in the corporation after it was organized, and he actually accepted 10,000 shares of its capital stock. This acceptance must be deemed to have been pursuant to the provisions contained in the articles of incorporation, and he thus became a stockholder in the corporation under said articles, and as such brings this action asking for the remainder of the one-tenth part of the shares of stock he claims to be entitled to in said corporation. Respondent was not required to come in as a stockholder at all. The appellant having ignored respondent's rights under the contract, and having excluded him from participating in the corporation, he could have sued appellant for damages for a breach of said contract. This respondent did not choose to do, but he chose to sue for and seek to recover his interest in the corporation as a stockholder. And perhaps he chose the wiser part. In view that the remedy against appellant may have been inadequate, he at least had the legal right to do this. But, having chosen to claim his interest as a stockholder under the articles of incorporation, he must also be deemed to assume the burdens that are cast upon a stockholder by those articles. It is there provided that 91,000 shares of the capital stock are set apart to be used for the benefit of the corporation, which is simply another way of stating that they are set apart for the joint benefit of the stockholders, since whatever benefits the corporation in a pecuniary way, in the nature of things, must benefit the stockholders. Respondent, in claiming as a stockholder, must therefore be held to have consented to the provisions contained in the articles of incorporation by which the 91,000 shares were set apart as a working capital, and which thus, in one sense at least, became an asset of the corporation. Therefore he is not entitled to have issued to himself now any part of the 91,000 shares directly, since he holds his interest in them and is benefited indirectly as a shareholder as he is in all the assets of the corporation. Respondent, therefore, cannot recover any part of said 91,000 shares for the reason that, in claiming as a shareholder, he must be deemed to have consented that said 91,000 shares shall not be distributed among the shareholders, but that the same shall constitute an asset of the corporation in which he has an interest in proportion to his holdings in the corporation.

However, there is still another reason why respondent is not entitled to have issued to himself any part of said 91,000 shares unless the same should be issued to the shareholders as a stock dividend. The 91,000 shares are now an asset of the corporation and must be treated the same as any other property owned by it must be treated.

[2] It is elementary that a shareholder cannot claim a segregation of his interests in the corporate property. The only way that segregation may take place is by de-

claring a dividend of earned profits or by making what is called a stock dividend. When either method is resorted to, each shareholder receives in proportion to the number of shares he holds in the corporation; that is, in the ratio that the shares owned by him bear to the whole number of shares that have been issued by the corporation and are outstanding. If, therefore, the 91,000 shares should be sold at a dollar a share, and a dividend of that sum should be declared, respondent, as a shareholder, would obtain his proportion thereof in the ratio just stated. If, upon the other hand, such stock is issued in payment for property purchased by the corporation, or if its outstanding debts were paid from the proceeds derived from its sale, then, in either case, respondent would be benefited by having the shares he holds in the corporation enhanced in value to the extent that outstanding debts were paid and canceled or to the extent that property had been acquired by the corporation. It is in that way, and not by having a part of the 91,000 shares of stock directly issued to himself, that he receives his benefits. He cannot have both. The principle is clearly illustrated by the Supreme Court of California in *Tulare v. Kaweah Canal & Irr. Co.*, 44 Pac. 662.<sup>1</sup> By receiving one-tenth of the issued stock, respondent possesses one-tenth of the voting power, and his stock represents one-tenth of the assets of the corporation. He thus has just what the agreement between him and appellant provides for, namely, "a full one-tenth interest in said corporation." The court therefore erred in awarding to respondent a one-tenth part of the 91,000 shares of stock which was placed in the treasury. The amount allowed respondent, for the reasons just stated, must therefore be reduced by 9,100 shares, which would leave 10,900 that should be issued to him if that number must not be reduced for another reason now to be stated.

Recurring now to the 75,000 shares which were intended for O. W. Carlson. It was made to appear at the trial that he did not accept them or any part thereof. Appellant's counsel therefore contend that a further deduction from what was allowed respondent should be made in an amount equal to a one-tenth part of said 75,000 shares, or 7,500 shares, which would reduce the amount to be allowed respondent from 10,900 to 3,400 shares. This being a case in equity, if the evidence justified it we might make the correction ourselves; but we are unable to determine from the evidence what disposition was made of the 75,000 shares of stock. To void injustice, therefore, we leave the question open with respect to whether the 75,000 were surrendered to the corporation and thus became an asset or whether

<sup>1</sup> Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 113 Cal. xvii.

they were returned to Mr. Peterson to be dealt with by him. If the 75,000 shares are in fact a part of the assets of the corporation the same as the 91,000 shares, then respondent cannot obtain any part thereof, for the same reasons that he cannot obtain any part of the 91,000 shares. But if the 75,000 shares did not actually become a part of the assets of the corporation, or if said shares were controlled by Peterson for his benefit, then respondent is entitled to a one-tenth part thereof, or to the one-tenth part that did not become assets of the corporation, as the case may be.

The judgment, therefore, will have to be modified as indicated above, and this case will have to be remanded to the district court, with directions to ascertain whether the said 75,000 shares, or any part thereof, were turned back into the treasury of the corporation as unissued stock, and whether the same became assets of the corporation. If the court shall find that the 75,000 shares were not issued and that they actually belong to the corporation, then the court is directed to reduce the amount allowed respondent in the judgment, first, by deducting from the 20,000 shares thus allowed the 9,100 shares; and, second, by deducting from the 10,900 shares remaining 7,500 shares, leaving to be awarded to respondent either said 10,900 shares or only 3,400 shares, in accordance as the court shall find the facts to be as above indicated.

Counsel for appellant, in their brief, have also argued three other propositions. We have considered them, and in our judgment counsel, in neither instance, have overcome the presumption of the correctness of the findings and conclusions with respect to those propositions, or either of them. The findings and judgment must therefore stand, and are affirmed, except as modified by the deductions which are to be made upon the conditions above stated.

The case is therefore remanded to the district court, with directions to modify its findings upon the one question indicated herein, and to hear the evidence upon that question, and to make findings and conclusions in accordance with the evidence adduced upon that subject, and to enter judgment in accordance with the evidence adduced and in accordance with the views herein expressed; the judgment to be in the alternative. Each party to pay one-half of the costs incurred in this court.

#### BANK OF AMERICAN FORK v. SMITH et al.

(Supreme Court of Utah. April 2, 1914.)

#### 1. SUBSCRIPTIONS (§§ 12, 17\*)—CONSTRUCTION—EFFECT OF INSTRUMENT.

An instrument provided that the subscribers agreed to build a bridge across a river and agreed to pay "from \$100 to \$500 each," as might be required to complete the bridge, that

they had each deposited \$100 in plaintiff bank to be checked out by J., secretary and treasurer, the balance to be forthcoming as called for by him to complete the bridge, which was to be completed within 30 days, or before then, if possible. *Held*, that the contract was in the nature of a subscription by which each subscriber bound himself to contribute not to exceed \$500, for the construction of the bridge as called for, each subscriber being severally liable on the contract to the amount of his subscription, and that it was no defense to such liability that the treasurer borrowed the sum necessary to complete the bridge from plaintiff bank, instead of immediately calling on the subscribers therefor.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 11, 18; Dec. Dig. §§ 12, 17.\*]

#### 2. SUBSCRIPTIONS (§ 15\*)—CONSTRUCTION OF BRIDGE—TIME.

Where a subscription contract for the construction of a bridge provided that it should be completed within 30 days, or before then, if possible, but the subscribers made no protest nor objection to the progress of the work, nor to the delay beyond the time specified, time was not of the essence of the contract, nor a condition precedent, and hence the delay was no defense to the subscribers' liability.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 14-17; Dec. Dig. § 15.\*]

#### 3. SUBSCRIPTIONS (§ 16\*)—EQUITABLE ASSIGNMENT—SUBROGATION.

Where after defendants had subscribed to the construction of a bridge for their joint benefit, their representative, empowered to construct the bridge, borrowed money necessary for that purpose from plaintiff bank, and applied the same to the construction of the bridge, instead of immediately calling in the subscriptions, his act constituted an equitable assignment of the obligations assumed by the subscribers to the bank, and it was entitled to sue on the subscription in its own name as the real party in interest.†

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. § 18; Dec. Dig. § 16.\*]

#### 4. SUBSCRIPTIONS (§ 10\*)—CONSTRUCTION—SCOPE OF LIABILITY.

A subscription provided that the subscribers agreed to pay from \$100 to \$500 each, as might be required to complete a specified bridge, that they had deposited \$100 each in a certain bank to be used by J., the balance to be forthcoming as called for by him to complete the bridge, etc. After several had signed the instrument it was presented to L., who drew a line under the previous signatures, signed his name and that of his brother, and wrote after each \$25. His brother repudiated such act and refused to be bound. *Held* that L. was at most liable for \$50.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 10, 23; Dec. Dig. § 10.\*]

Appeal from District Court, Salt Lake County; Geo. C. Armstrong, Judge.

Action by the Bank of American Fork against David Smith and others. Judgment for plaintiff and defendants appeal. Affirmed in part and reversed in part.

A. C. Hatch and Chase Hatch, both of Heber City, for appellants. Van Cott, Allison & Riter, of Salt Lake City, for respondent.

FRICK, J. This action was brought to recover a specific amount of money from each one of the defendants named above. The ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† National Fire Insurance Co. v. Denver & R. G. R. Co., 137 Pac. 656, 658.

tion was dismissed as to the defendant Wm. H. Lindsay, and he will not be considered further as in the case. While the complaint is framed in two counts, and is very long, yet, as we construe it, the action is based on a written agreement entered into between the parties, which, in words, figures and marks, is as follows:

"American Fork, Utah, Jany. 29, 1909.

"We, the undersigned, hereby agree to build a bridge across Green river at the mouth of Dry Wash, Uintah county, Utah, for the purpose of ferrying our sheep &c.

"We also further agree to pay from \$100.00 to \$500.00 each, *or as much more* as may be required to complete said bridge. We have this day deposited \$100.00 each, *to be deposited* in the Bank of American Fork, American Fork, Utah, to be checked out by Jacob E. Jensen, Sec. and Treas. and the balance is to be forthcoming, as soon as called for by Jacob E. Jensen, as Sec. & Treas. to complete said bridge.

"Said bridge is to be completed within thirty days from above date, or before 30 days if possible.

"After completion of said bridge, we the undersigned do hereby bind ourselves and will incorporate, and said company shall be called the Green River Transient Company.

"Jensen & Coddington,

"Per J. E. Jensen.

"Crystal Bros.,

"Per J. S. Crystal.

"W. H. Grant.

"Price Bros.,

"By M. E. Price.

"David Smith.

"Albert Smith.

"R. Jones & Sons.

"Wm. Coleman & Clotworthy.

"James L. Lindsay, \$25.00

"William H. Lindsay, \$25.00."

The words in italics were erased by drawing a pen through them after the agreement had been subscribed by the first four subscribers, and before any of the appellants subscribed it. The first four subscribers, however, approved and complied with the terms of the agreement as altered by the erasure, and hence no question arises with respect to said alterations. After the first four had subscribed the agreement, one of their number, M. E. Price, came to Salt Lake City where he first presented it to David Smith, the fifth subscriber, who it seems was also interested in the construction of the bridge referred to in the agreement. Mr. Smith, was, however, not satisfied with the wording of the writing, in that it was left uncertain as to the amount each subscriber might be called on to pay, so he erased the words "or as much more" from the agreement, and by doing so left the maximum amount to be paid by each subscriber \$500

and no more. Mr. Smith paid Price the \$100 mentioned in the agreement. The agreement was then presented to the subscribers next in the order it is signed by them, and they all signed the same as changed by Mr. Smith and each paid \$100. After this the agreement was presented to James L. Lindsay, who, with an indelible pencil, drew a line below the other names on the paper and then signed his own name thereto, and, without the knowledge or authority of his brother, Wm. H. Lindsay, also signed the latter's name, and placed \$25 opposite his own and \$25 opposite his brother's name and paid the two sums to Mr. Price. Wm. H. Lindsay, however, repudiated the act of his brother, and, it being conceded that James L. Lindsay had no authority from his brother, the latter was dropped out of the case. The erasure of the words "to be deposited" is wholly immaterial here, and requires no consideration. The pleadings are very long, taking up about 75 pages of the printed abstract. We shall not attempt to set them forth even in substance. It must suffice to say that the five defendants who remain in the case, after admitting the signing of the agreement and the payment of the amounts hereinbefore stated, set up various defenses, all of which were fully gone into at the trial. The principal defense, however, was, that the payment of \$100 made by each was all that each one was required to pay. Mr. Lindsay's defense was that he was not indebted in any sum. The evidence adduced at the trial is quite voluminous, so much so that we shall not even attempt a synopsis thereof, and we shall refer to such parts only as may become necessary to make clear the point decided.

The case was tried to the court without a jury. The findings of the court fairly reflect both the pleadings and the evidence, and, after setting forth the agreement sued on, are in substance as follows: That all the parties who signed the agreement were engaged in the business of buying, selling, grazing, and herding sheep in Utah, and were desirous of constructing a bridge across Green river in said state, so that they could more conveniently and at less expense drive their sheep from one side to the other of said stream in certain seasons of the year, and thus avoid long drives with their sheep; that all parties desired that such bridge should be completed within 30 days after January 29, 1909, and that "with that end in view each of the parties signing said agreement promised and agreed to pay as much as \$500 towards the completion of such bridge, except the said James L. Lindsay, who promised and agreed to pay the sum of \$250, if so much should be required, and, if not so much was required, to pay proportionately to the amount necessary to be raised." That shortly after January 29, 1909, J. S. Crystal and M. E. Price, acting for and in behalf of all of the parties to said agreement, commenced the construction of said bridge. That the

money paid in by said parties soon was exhausted, and J. E. Jensen, the person named in said agreement, acting as secretary and treasurer, for and in behalf of all the parties thereto, being unable to reach all of said parties, and it having become necessary to obtain money to complete said bridge, and that without borrowing money "it was an impossibility to complete said bridge within a reasonable time"; that the first four subscribers of said agreement paid in full the amount agreed by them to be paid for the construction of said bridge, but that the other parties to said agreement did not pay anything except the amount paid by each at the time said agreement was signed. That the said J. E. Jensen, as the secretary and treasurer of Green River Transient Company (that being the name in which the business was transacted), acting in behalf of all of said parties to said agreement, for the purpose of constructing said bridge, on the 24th day of March, 1909, borrowed from the respondent the sum of \$1,000, and as evidence of such indebtedness made and delivered a promissory note in the name of said company, to the said respondent, payable on or before six months after date; that thereafter, on April 27, 1909, for the purpose aforesaid, said Jensen borrowed an additional \$500 from the respondent, and on June 21, 1909, for the purpose aforesaid, borrowed from it a further sum of \$250, which last two amounts were also evidenced by promissory notes as aforesaid. That on July 1, 1909, said Jensen took up said three notes by giving in the name of said company one note amounting, with interest, to the sum of \$1,779.65. That no payments have been made on said last-mentioned note on either principal or interest, except that on August 29, 1909, there was paid the sum of \$275 to be applied on the principal of said note, and October 14, 1909, there was paid the sum of \$196 to be applied on the principal, and the interest thereon has been paid to October 1, 1909; that said money was all necessarily used in the construction of said bridge and was placed to the credit of said company in the respondent bank, and was checked out by the secretary and treasurer for the use and benefit of all the parties to said agreement. That the respondent loaned said money as aforesaid in good faith, relying on said agreement and upon the obligations of the parties subscribing the same assumed therein. That in June, 1909, "the said Jensen, as such officer, duly notified each of the parties to said agreement who had not paid in full that a meeting of the parties to such agreement would be held in American Fork, county of Utah, and state of Utah, at 10 o'clock a. m., on July 1, 1909, to hear the report of what had been done under said agreement and to transact any other business that might come before the parties interested in such agreement. The said notice was received by all of such parties, and said meeting was attended by sev-

eral of the parties thereto, and on July 2, 1909, the said J. E. Jensen, as such officer, duly notified all the parties to such agreement who had not paid in full that a meeting of the stockholders of said company was held at the said hall aforesaid. That a financial report of the condition of the company mentioned in such agreement was read and upon motion accepted. That such report showed that the company's indebtedness contracted in constructing said bridge amounted to \$2,263.47, and that in order to meet such indebtedness and to take up said notes at the bank of said plaintiff, and thereby to stop the interest, an assessment of 230 per cent. was levied on the amount that each of the parties to said agreement had paid, and that such sum was payable at once to the said J. E. Jensen, as such officer, and it was also reported that four herds of sheep had crossed said bridge since its completion." That afterward on about August 20, 1909, said Jensen again duly notified all the parties to said agreement who had not fully paid their subscription of the facts contained in the preceding findings, and also notified them that unless the amount due from each one was paid, the same would be placed in the hands of an attorney for collection. That all of the parties received the notices aforesaid. That although each of said parties had full knowledge that said bridge was being erected and completed after the time specified in the agreement, yet none of them ever protested or made any objection with respect thereto.

The court then makes negative findings covering all of the defenses set up in the several answers of the defendants, and finds the amount due to the respondent to be the sum of \$1,308.35, with interest thereon at the rate of 8 per cent. from October 1, 1909, and further finds that there is due from the defendant David Smith the sum of \$230 with interest at 8 per cent. from October 1, 1909, from the defendant Albert Smith a like sum with interest, from the defendants Jones & Sons a like amount with interest, from the defendants Coleman & Clotworthy a like amount with interest, and from the defendant James L. Lindsay the sum of \$115 with interest as aforesaid. Conclusions of law in conformity with the foregoing findings were also made in favor of plaintiff, and judgment was entered against each one of said defendants for the several amounts aforesaid, all bearing interest at the rate of 8 per cent. from October 1, 1909, until paid.

All of the defendants except Wm. H. Lindsay appeal from said judgment. The assignments are very numerous, covering 26 pages of the printed abstract. As we view the matter, very many of the assignments are formal rather than substantial, and many things are discussed in the briefs of counsel which in our judgment are not involved in the ultimate question to be decided. Whether the appellants, of any of them, are liable in this action, in our judgment, depends upon

the legal effect to be given to the agreement which they all admit they signed.

[1] We certainly are not met with any great difficulty in determining the meaning of the agreement itself, nor in determining the object the parties had in view in entering into it. To our minds it is as clear as anything can be that the agreement is in the nature of a subscription contract, by which each subscriber binds himself to contribute a stipulated amount for a specified object or purpose. In the agreement in question we think each subscriber, except the last two, bound himself or itself to pay a sum not exceeding \$500 for the purpose of constructing a certain bridge. Of that sum each one of the subscribers, except the last two, paid the sum of \$100, all of which was deposited in the plaintiff bank to be used, and was necessarily, as the court finds, used, for the purpose specified. Under the agreement, in addition to this \$100 paid as aforesaid, an additional amount, not exceeding, however, the sum of \$400, could be called for from each subscriber, except the last two, if that amount were required to complete the bridge, which was the object contemplated in the agreement. If, therefore, the amount which each agreed to pay for and which was necessary to complete the bridge had been called for while the same was in process of construction, or immediately upon its completion, by Mr. Jensen as the fiscal agent of the parties, and whom they appointed as such in their agreement, no one, we think, would seriously contend that the subscribers of the agreement, except the last two, would not have been liable up to the maximum amount specified in the agreement, or for any sum less than that amount which was necessary to complete the bridge. Does the mere fact that Mr. Jensen did not then collect the money, or that either he or some one else advanced the amount necessary to complete the bridge upon the faith of the agreement, in any way affect the legal liability or moral obligation of the appellants for any sum less than the maximum amount which was necessarily used in completing the bridge? Appellants were not concerned who, if any one, for the time being advanced the money to construct the bridge. All they were concerned about or interested it was that the money was necessarily used in completing the same. The court found, and the finding is sustained by the evidence, that all the money obtained by Mr. Jensen, the fiscal agent of the parties, was necessarily used in completing the bridge. We are not dealing with a case where an agent has attempted to bind his principal by pledging the credit of such principal without his authority or consent, either express or implied.

[2] It is wholly immaterial whether the materials to be used in the bridge were paid for or not so far as appellants' liability is concerned. They are not sued upon any obli-

gation except one entered into by themselves. The borrowing of the money to complete the bridge is a mere incident. They each agreed to contribute a specified amount for the purpose of completing the bridge, and all that is asked of them, and all that the court required of them, except James L. Lindsay, is to comply with their promises. To talk about agency and the implied authority of an agent merely tends to becloud the issues. Nor should they escape liability merely because the bridge was not completed within the 80 days specified in the agreement. Time was not made of the essence, neither was it made a condition precedent. Moreover, the court found that all of the appellants had knowledge of the fact that the completion of the bridge was delayed, but notwithstanding that fact they made neither protest nor objection to the progress of the work nor of the delay. The defense of time is therefore not open to them. Again, while it is true that each subscriber is individually or severally liable on the subscription contract, yet the only objection the appellants, or either of them, made respecting parties was that not all of the subscribers to the agreement were joined as parties to the action. Their objection, therefore, was the very reverse of the one they might have interposed. Nor is the objection in the form it is raised that the plaintiff cannot recover available to the appellants.

[3] We think that, when the agreement and the transactions had under it are considered as a whole, what Mr. Jensen did in obtaining money from the plaintiff at least amounted to an equitable assignment of the obligations assumed by, as well as the rights arising under the agreement to, the plaintiff. After the plaintiff had advanced the money necessary to complete the bridge to Mr. Jensen in reliance upon the obligations assumed by appellants in the agreement, it became the real party in interest. We have recently held that under our Constitution and statutes the equitable assignee of a chose in action is the real party in interest, and may sue as such assignee, notwithstanding that such could not have been done at common law. *Nat'l Fire Ins. Co. v. Denver & R. G. R. Co.*, 137 Pac. pp. 655, 656. But no objection was made that the plaintiff was not the real party in interest. The defense made is based on the ground that in no event are appellants liable either to the plaintiff or to any one else. For the reasons stated, therefore, we are of the opinion that the judgment against all of the appellants, except James L. Lindsay, should be affirmed.

[4] We cannot conceive, however, upon what theory the judgment against Mr. Lindsay was entered or can be sustained. The plaintiff in this case cannot recover upon an estoppel, or as an innocent holder of commercial paper as against Mr. Lindsay. Mr. Lindsay, therefore, like all the other appellants,

must stand or fall by the terms of the agreement he signed. When he subscribed the agreement all the others had already done so. Therefore none of them could be affected by what he did. It is very clear to us that Mr. Lindsay regarded the agreement as a subscription contract, and that in subscribing it he, as a subscriber, could limit his own liability. It is also clear that in drawing a line under the names of the prior subscribers he intended to make his subscription distinct and separate from the others, in form as well as in substance. He, therefore, agreed to subscribe \$50 toward the building of the bridge, and said so by what he wrote. How what he did can be construed to mean that he obligated himself to pay not exceeding the sum of \$250, or one-half of the maximum sum mentioned in the agreement, is a matter beyond our comprehension. Mr. Lindsay was either bound by all the terms of the agreement, or was bound only by such as he imposed on himself. As we read the contract, he assumed the burden of paying \$50—no more, no less. It is conceded that he paid that amount; hence he has complied with the obligations he assumed by subscribing the agreement. We have less difficulty in arriving at this conclusion because plaintiff's counsel concede that Lindsay did not assume to pay the maximum amount specified in the agreement, although it had been found that that amount was necessary to complete the bridge. To concede that is to concede that Mr. Lindsay assumed no further obligation under the contract after he had paid the \$50 subscribed by him.

From what has been said it follows that while the judgment against the four appellants first named in the title should be and is affirmed, the judgment against James L. Lindsay is reversed, and the action as against him is dismissed, the plaintiff to recover costs as against all the appellants except James L. Lindsay and he to recover costs against the plaintiff.

MCCARTY, C. J., and STRAUP J., concur.

#### STATE v. REESE.

(Supreme Court of Utah. March 20, 1914.)

#### 1. LARCENY (§ 40\*)—EVIDENCE—SUFFICIENCY—OWNERSHIP OF PROPERTY.

In a prosecution of a railroad employé for larceny, evidence that the railroad was in possession of the stolen goods as common carrier, and was in the act of transporting them, was sufficient to show title as alleged.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126, 160; Dec. Dig. § 40.\*]

#### 2. CRIMINAL LAW (§ 567\*)—EVIDENCE—CORPORATE EXISTENCE.

In a prosecution for larceny, evidence held sufficient to show the corporate existence of a railroad company by general reputation.†

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1276; Dec. Dig. § 567.\*]

#### 3. CRIMINAL LAW (§ 395\*)—EVIDENCE—COMPELLING ACCUSED TO CRIMINATE HIMSELF—ARTICLES TAKEN FROM ACCUSED.

After a railroad employé was arrested, and while being taken to the station, he wrote on a sheet of paper an offer to give money to the officer in charge if he would release him, and the officer by force took this paper from him. Held, that under the circumstances disclosed by the evidence this paper was properly admitted as evidence against the accused on the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. § 395.\*]

#### 4. LARCENY (§ 62\*)—SUFFICIENCY OF EVIDENCE—TAKING AND ASPORTATION OF PROPERTY—CONSENT OF OWNER.

In a prosecution of a railroad employé for larceny of property from the railroad company, evidence held sufficient to show want of consent of the railroad.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 153, 162; Dec. Dig. § 62.\*]

Appeal from District Court, Salt Lake County; F. C. Loofbouroow, Judge.

J. C. Reese was convicted of larceny, and he appeals. Affirmed.

W. W. Ray and R. B. Porter, both of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

FRICK, J. J. C. Reese, the defendant, was convicted of the crime of grand larceny, and appeals.

The evidence relating to the larceny, briefly stated, strongly tends to establish the following facts: At the time of the alleged larceny the appellant was in the employ of the Denver & Rio Grande Railway Company, as a conductor of one of its freight trains. His run was between Helper and Salt Lake City, Utah. He was conductor of the train and in charge of the car between Helper and Midvale, from which it is alleged the stolen property was taken. At Midvale the train and car aforesaid passed into the charge of another conductor, but the appellant remained in his own caboose. The merchandise alleged to have been stolen consisted of 100 children's dresses which came into the possession of the Denver & Rio Grande Railway Company as follows: The original bill of lading was introduced in evidence, and from it it appears that the Waseca Manufacturing Company of Philadelphia, Pa., on the 1st day of December, 1912, packed and shipped to Hazlet & Tough at Petaluma, Cal., via "Union C. B. & Q., D. & R. G. and Western Pacific" railroads, as common carriers, "one crate of girls' dresses." It further appeared that those dresses were packed and shipped in a large wooden box 2x2x4 feet in size over the "P. R. R.," which initials were shown to represent the Pennsylvania Railroad, which operated a line between Philadelphia and Chicago; that at the latter place the box aforesaid was transferred from the P. R. R. to a car of the "L. S. & M. S. R. R.," which car was No. 46759. It was shown that the in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
†State v. Brown, 26 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545.

tials L. S. & M. S. R. R. stood for Lake Shore & Michigan Southern Railroad, and that the car aforesaid was taken from Chicago by the "C. B. & Q. Ry.," which was shown to be the Chicago, Burlington & Quincy Railway, and was by that company transferred at Denver, Colorado, to the "D. & R. G. R. R.," which was shown to be the Denver & Rio Grande Railroad Company, and that that company took the car at Denver and transported it over its road westward to Salt Lake City. The car in question passed into the charge of appellant at Helper, Utah, and he there received the bill of lading before referred to. When appellant's train arrived at Midvale station in Salt Lake county, some distance south of Salt Lake City, he could not proceed any farther with his train on account of the 16-hour service law, and his train was there turned over to Conductor Bruner, who attached appellant's train to his and brought them both into Salt Lake City as one train. Appellant's train was placed in front of Bruner's train and caboose and was located about the middle of the whole train. When the train had reached a point at or near Tenth South street, Salt Lake City, Mr. Bruner, in looking out of his caboose, saw a large bundle thrown from about the middle of the train. This bundle, it was shown, contained the 100 girls' dresses shipped from Philadelphia to Hazlet & Tough as aforesaid, and which had, by some person, been removed from the crate, or box in which they had been packed and shipped as aforesaid. Some one had gained access to car No. 46759 by shifting the car door, which could be done by reason of the absence of a bolt or nut without breaking the car seal, which was found intact. When the train had arrived at Murray station, which is between Midvale and Salt Lake City, Conductor Bruner had occasion to go into appellant's caboose for a chain, and in doing so he saw a bundle which appeared similar to the one thrown off the train, but which he thought was appellant's bedding and blankets. Appellant got off the train at Seventh South street, Salt Lake City, and walked north to Third South street, where he hailed an expressman whom he employed to take him to Tenth South street to get a bundle, or some bundles, for him. The expressman asked appellant some questions, which, it seems, he was not willing to answer, and the colloquy between them almost resulted in losing the expressman the job, which, it seems, he was unwilling to lose. The appellant got into the express wagon and they drove down to Tenth South street, where appellant requested the expressman to stop. Appellant got out of the wagon and went some distance farther south on the railroad right of way, and after arriving at the point where the bundles were lying, and after looking in all directions, he beckoned the expressman to drive down to where the bundles were; and after the expressman had arrived

there the appellant proceeded to load the bundles into the express wagon, and while in the act of doing so was arrested by a special agent of the railroad company who was concealed in the vicinity watching the actions of appellant. The special agent compelled the appellant to get into the express wagon, and the appellant, the special agent, and a brakeman, together with the bundles, were taken to the station of the railroad company by the expressman in his wagon. On the way appellant offered the special agent various sums of money if the latter would "keep quiet" about the matter. In making this offer appellant wrote on a blank leaf of his train book, which he held up so that the special agent could and should see what he had written, and in holding up the book the special agent, by the exercise of some force, tore the leaf on which the offer was written from the book and also took the book from appellant, and the leaf and the book from which the leaf was torn were produced in evidence against appellant at the trial. It was shown that the wholesale price of the dresses was a little in excess of \$100 and that the retail price thereof was not quite \$200. It was also shown that the official who alone had the power to give consent to remove the dresses from the car had not given such consent. The box in which the dresses had been packed, and the dresses themselves, were also clearly identified by the young man who packed and shipped them at Philadelphia, and who had prepared the bill of lading, which he also identified. There were also shown other facts of a circumstantial nature which tended more or less strongly to connect the appellant with the larceny. We do not deem it necessary to set them forth here. Nor do we deem it essential to set forth the evidence offered by appellant in his own behalf, since the jury were not required to believe it, and, in view of the verdict returned, could not have believed his statements.

[1] The first error assigned is that the state failed to prove that the title to the stolen property was in the Denver & Rio Grande Railroad Company. The proof is ample to show that the railroad company was in possession of the goods as bailee in its capacity of a common carrier, and that it was, at the time of the larceny, in the act of transporting the same. The fact that the railroad company had possession of the stolen goods and was in the act of transporting them also answers the contention that the proof is not sufficient to show that the same were shipped from Philadelphia or that they were transferred at Chicago, as claimed by the state.

[2] It is next contended that the state failed to prove the corporate capacity of the Denver & Rio Grande Railroad Company. The state undertook to prove the corporate capacity of the railroad company pursuant to Comp. Laws 1907, § 4859, which, among other

things, provides that in criminal cases corporate capacity "may be proved by general reputation." That is, the corporate existence of the railroad company in this instance could be shown by proof that the general reputation of the railroad company was that it was a corporation and transacted business as such. The same question was before this court in *State v. Brown*, 33 Utah, 109, 93 Pac. 52, where it was held that the proof was insufficient. The same case, however, was again before this court. 36 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545. In the latter case the proof was held sufficient. While in that case the evidence is not set forth in the opinion, yet we have examined the printed abstract filed in that case in which the evidence is set forth, and the evidence in this case is substantially the same as it was in that case. In view that we held the evidence sufficient in that case, that case must control the present one upon that question. The contention therefore cannot be sustained.

[3] It is next contended that the leaf torn from appellant's train book, and the book itself, were improperly admitted in evidence against appellant because they were taken from him by the use of force by the special agent who arrested him. When the book and leaf were taken from appellant he was under arrest. Appellant testified in his own behalf, but he did not deny the fact of offering the special agent money to keep quiet; nor did he in any way deny or explain his own conduct in that regard. He did not claim that excessive, or any, force was used. We see no reason why it was not proper to show all that occurred or what was said and done by the appellant at the time of his arrest and immediately thereafter. While we do not wish to be understood as unconditionally approving the use of force in taking property from one who is accused of an offense, yet we cannot interfere with convictions which are otherwise regular, proper, and legal for matters of this character.

[4] It is next contended that the necessary want of consent by the railroad was not sufficiently shown. We think it was. Want of consent when property is taken from a corporation certainly, like any other essential fact, may be shown by circumstantial evidence. Moreover, where property is taken secretly and without the owner's knowledge, the proof of nonconsent may be inferred from other facts, since it cannot be assumed under such circumstances that the owner consented. 18 A. & E. Ency. Law (2d Ed.) 469.

The contention that under the evidence the court should have directed the jury to return a verdict of not guilty is clearly untenable. To hold that under the facts and circumstances of this case the jury were not justified in returning a verdict of guilty would amount to offering a premium to the employees of common carriers to steal the goods

of shippers while in transit. In our judgment the jury were not only authorized to return a verdict of guilty in this case in view of the whole evidence, but we cannot see how they could have done otherwise under their oaths.

The judgment is affirmed.

McCARTY, C. J., and STRAUP, J., concur.

### DOTSON v. HOGGAN.

(Supreme Court of Utah. April 2, 1914.)

#### 1. CORPORATIONS (§ 89\*)—STOCKHOLDERS—ASSESSMENTS—PAYMENT.

Where defendant deposited in a bank to a corporation's credit \$500 of his own money, all of which he used in paying corporate debts, he was entitled to credit for such sum on an assessment subsequently levied on his stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 367-379, 381, 382; Dec. Dig. § 89.\*]

#### 2. CORPORATIONS (§ 259\*)—CREDITORS—STOCKHOLDERS—RIGHT TO SUE.

A creditor of a corporation has no cause of action on which he may sue a stockholder directly for a corporate debt arising out of an assessment on the stock, unless the stockholder has consented to be so sued, but may only enforce such liability by process of garnishment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052-1067, 2272; Dec. Dig. § 259.\*]

#### 3. CORPORATIONS (§ 90\*)—STOCKHOLDERS—ASSESSMENTS—ENFORCEMENT.

Under Comp. Laws 1907, § 815, subd. 11, providing that the private property of a corporate stockholder if so provided in the articles is not liable for corporate debts, a stockholder may not be sued by the corporation for an unpaid assessment levied on full-paid stock, and his property taken to pay the same, but the assessment may only be enforced by a forfeiture of his stock or so much thereof as may be necessary to pay the assessment and a public sale thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.\*]

Appeal from District Court, Sanpete County; M. L. Ritchie, Judge.

Action by R. W. Dotson against James W. Hoggan. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Willard Hanson, of Salt Lake City, for appellant. Dilworth Woolley and Lewis Larson, both of Manti, for respondent.

FRICK, J. This is an action by a creditor of the States Mining Company, a mining corporation of Utah, against one of the stockholders of said corporation. The plaintiff obtained judgment against the stockholder, and he appeals.

Counsel for the plaintiff, respondent here, in their brief, say: "There is not much controversy between the parties to this action as to what the facts are." We concur in that statement. The difficulty in this case, however, does not arise with respect to the facts, but it arises with regard to the ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



plication of the law to the facts. The controlling facts, briefly stated, are as follows:

[1] The appellant and a number of his neighbors, all of whom live at Manti, Sanpete county, Utah, were stockholders of the States Mining Company, which owned and operated a mine located in Beaver county, Utah. The respondent is a merchant of Minersville, Utah, and in furnishing supplies for the corporation aforesaid became one of its creditors. In September, 1907, appellant was installed as general manager of said mine. At that time the mining company was indebted to a number of creditors, of whom respondent was one. It appears from the evidence that the stockholders from time to time, or from month to month, made voluntary contributions, by some called assessments, from the proceeds of which the current expenses arising from the operation of the mine were paid; the mine itself not yielding any returns whatever. On the 25th day of September, 1907, the appellant deposited in the bank to the credit of the company the sum of \$500 of his own money all of which he used in paying company debts. On the 15th of October, 1907, appellant returned from Beaver county, where he had been carrying on the mining work at the mine, to Manti. At about that time, it seems, an informal meeting of a large number of the stockholders was held at Manti and the question of raising funds to pay off the debts of the company was discussed. Appellant then reported that the debts of the company amounted to about \$2,500 and that a one-half cent assessment, if paid in on the 500,000 shares of company stock outstanding, would produce that sum; that the amount of his assessment at that rate would amount to \$1,000, which he was willing to contribute if the other stockholders would contribute in like proportion. This, it seems, was agreed to by all present at the meeting. Pursuant to this agreement, one stockholder was assessed \$187.50, another \$82.50, a third \$82.50, a fourth \$45.25, a fifth \$45.25, a sixth \$86.50, a seventh \$94.50, and an eighth \$90.50; all of whom paid their respective assessments to appellant and said money was by him used in paying the debts of the company. In addition to the foregoing, there were also a few additional amounts paid in by some stockholders residing in Beaver county. The appellant contributed \$500 in addition to the \$500 he had already advanced, and the whole contention arises with respect to whether he was legally required to pay \$1,000 in addition to the \$500 advanced by him in September as aforesaid. The trial court found that he should pay \$1,000 in addition to the \$500 he had paid and entered judgment against him in favor of respondent for the sum of \$891.37, and for \$51.15 costs. The reason the court did not enter judgment for the full \$500 was because he allowed appellant credit on some pay-

ments he had made to some creditors of the company but refused to allow him credit for the full \$500 paid by him in September, although the court found that all of that amount was paid to the creditors of the company by appellant. We have carefully considered all of the evidence, and we cannot see how the court's findings and judgment can be sustained. If they are sustained, it will result in requiring appellant to pay a three-quarter cent assessment on his shares of stock while all the other stockholders are required to pay only a one-half cent assessment on theirs. Such an unequal burden should not be imposed upon a stockholder unless it is clear he has agreed to it and that it is in compliance with law. Suppose the corporation should have sued appellant to recover the \$1,000 assessment. Is it not clear that he could have offset the amount of the \$500 which he had advanced for the company against the claim of \$1,000? The respondent certainly enjoys no higher right against appellant than the corporation would have had.

[2, 3] Indeed, in our judgment, the respondent as a creditor of the corporation has no cause of action against appellant as a stockholder for a corporate debt unless the latter consented to be sued. There is no statute in this state whereby a creditor of a corporation may bring an action directly against a stockholder without the latter's consent to recover upon a corporate debt. Of course, if a stockholder is indebted to the corporation, a creditor of the latter may sue it, and in that action may garnishee the stockholder, and thus reach the money the stockholder owes to the corporation; but a creditor may not sue a stockholder directly and obtain judgment against him because he is indebted to the corporation. Under our statutes the private property of the stockholder, if so provided in the articles, is not liable for corporate debts. Comp. Laws 1907, § 315, subdv. 11. A stockholder, therefore, may not be sued by a corporation to recover an unpaid assessment which is levied on full-paid stock and his private property taken to pay the assessment. In view that the private property of a stockholder does not become liable, he has the option to pay the assessment upon his full-paid stock, or he may forfeit the stock or so much thereof as may be necessary to pay the assessment; such stock to be offered for sale at public sale. This is so because under our statutes (Comp. Laws 1907, § 331, as construed by this court in *Garey v. St. Joe Min. Co.*, 32 Utah, 497, 91 Pac. 369, 12 L. R. A. [N. S.] 554; *Nelson v. Keith-O'Brien Co.*, 32 Utah, 396, 91 Pac. 30), all assessments on full-paid stock are voluntary; that is, they can be made only by and with the consent of the stockholder. Such consent may be expressed in the articles of incorporation, as is usually done, or it may be given as was done in this case.

But whether it is given in one way or the other the legal effect is the same, namely, the stockholder has the option either to pay the assessment or forfeit his stock, and unless he consents he may not be sued in the courts to recover the assessment by the corporation, much less by one of its creditors. If this were permitted, the statute exempting the stockholder's private property would be nullified by the courts. Treating this case, therefore, as one where the stockholder has consented to be sued—that is, where he did not timely interpose the necessary objection that he could not be sued to recover the alleged unpaid assessment—yet, in so treating it, we have been forced to the conclusion that, as a matter of both fact and law, the stockholder in this case, the appellant here, has paid in full the one-half cent assessment on his stock to which he assented, by the payment of the \$500 in September and the remaining \$500 in October following when the other stockholders paid their assessments. Assuming therefore that he has waived all other objections to being sued by respondent, yet he certainly did not waive the right of making the defense of payment. This defense was open to him under all circumstances, and if he had consented to be sued by the corporation itself he could have successfully defended the suit on that ground, and what he could have done as against it he certainly, in the absence of an estoppel, may also do as against a creditor of the corporation.

For the reasons stated, the judgment cannot prevail. It is therefore reversed, and the cause remanded to the district court of Sanpete county, with directions to grant appellant a new trial and to proceed with the case in accordance with the views herein expressed. Appellant to recover costs.

MCCARTY, C. J., and STRAUP, J., concur.

MELLEN v. VONDOR-HORST BROS. et al.  
(Supreme Court of Utah. April 2, 1914.)

1. APPEAL AND ERROR (§ 750\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where the court's ultimate conclusions disclosed by the judgment are contrary to law applicable to the undisputed facts, appellant, assigning error on the judgment, may have the error reviewed, regardless of whether he may have other assignments reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074-3083; Dec. Dig. § 750.\*]

2. MUNICIPAL CORPORATIONS (§ 373\*)—IMPROVEMENT CONTRACTS—LABOR AND MATERIALS—REMEDIAL STATUTES—CONSTRUCTION.

Comp. Laws 1907, § 1400x, authorizing any laborer or materialmen of a contractor of any public corporation for the construction of any public work to maintain an action for the labor or materials, and obtain a judgment for the amount due to the contractor, is a remedial statute, and must, in furtherance of justice, re-

ceive a liberal construction and application to accomplish its purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.\*]

3. MUNICIPAL CORPORATIONS (§ 373\*)—CONTRACTS FOR PUBLIC BUILDINGS—RIGHTS OF LABORERS AND MATERIALMEN.

The action authorized by Comp. Laws 1907, § 1400x, authorizing actions by laborers and materialmen of contractors of school districts and other public corporations for public work to recover judgment not in excess of the amount due the contractor, is one to reach a fund, and is maintainable without first obtaining a personal judgment against the contractor, and without obtaining personal service on the contractor, who is a nonresident, and it is only necessary to show that a part of the contract price is unpaid and in the hands of the public corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.\*]

4. MUNICIPAL CORPORATIONS (§ 373\*)—LIABILITY OF SURETY.

Where the surety of a contractor of a school district for the erection of a school building agreed to perform the contract on the abandonment of the work by the contractor, and applied labor and materials furnished the contractor for the building, the contract was not abandoned, but the surety took the place of the contractor, and the laborers and materialmen of the contractor could, under Comp. Laws 1907, § 1400x, recover the amount due from the district under the contract, and thereby satisfy their claims.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.\*]

5. MUNICIPAL CORPORATIONS (§ 373\*)—LIABILITY OF SURETY.

One furnishing labor or materials in the erection of a building of a public corporation need only, when seeking judgment under Comp. Laws 1907, § 1400x, for the amount due from the public corporation to the contractor, allege and prove the making of the contract for the work and that he furnished labor and material for the contractor in the erection of the building, that same has not been paid for, and that a part of the contract price remains in the hands of the public corporation, and he may then obtain relief, though the contractor abandoned the work and his surety completed it according to the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.\*]

6. MUNICIPAL CORPORATIONS (§ 373\*)—LIABILITY OF SURETY.

One seeking judgment, under Comp. Laws 1907, § 1400x, for labor and materials furnished in the erection of a public building need not, as against the contractor's surety, allege that certificates of the architect, provided for in the contract, were issued, because his claim is based on the statute and not on the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.\*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Joseph W. Mellen against Vondor-Horst Bros. and others. From a judgment of dismissal rendered after the sustaining of a demurrer to the complaint interposed by defendant the Fidelity & Deposit

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Company of Maryland, plaintiff appeals. Reversed and remanded, with directions.

Stewart, Stewart & Alexander, of Salt Lake City, for appellant. Pierce, Critchlow & Barrette, of Salt Lake City, for respondents.

FRICK, J. Joseph W. Mellen, the appellant, commenced this action against Vondor-Horst Bros., a corporation, hereafter called the contractor, and against the board of education of Salt Lake City, hereafter designated respondent, to recover the value of labor and material which it is conceded he performed and furnished the contractor for the construction of a certain school building for respondent, as hereinafter stated. Appellant also made the Fidelity & Deposit Company of Maryland, hereafter called surety company, a party to the action, but the court sustained the demurrer of the surety company to the complaint against it, and thus the surety company went out of the case. No service was obtained upon the contractor, which is a nonresident corporation of and absent from the state of Utah. It is not necessary to refer to the pleadings. The respondent and the surety company were represented by the same counsel in the court below. The facts are really quite simple and are not in dispute.

On or about November 2, 1908, the respondent entered into a written contract with the contractor whereby the latter agreed to erect and complete a certain school building in Salt Lake City for the agreed price of \$71,000. One of the conditions of said contract was that said contractor should furnish a bond, as required by our statute, for the sum of \$35,500, conditioned for the faithful performance of said contract, and the surety company executed and delivered the bond aforesaid. After the contract and bond had been executed and delivered, the contractor, in pursuance of said contract, employed the appellant to make the excavation for the basement of the school building and to furnish some sand and gravel, all of which was to be used, and which it is conceded was used, in the construction of said building, and which excavation and material is conceded by respondent to be of the value of \$2,148.45, and that all was used in the construction of said school building. After the excavation had been made and the material furnished as aforesaid, and some trees had been removed from the building site, the contractor proceeded no farther with the contract. The respondent, on the 6th day of April, 1909, using the language of its counsel, "after repeated efforts to locate" the contractor, terminated its employment under the contract. Immediately after terminating the employment of the contractor under said contract, respondent wrote the surety company as follows: "The board of education of Salt Lake City, Utah, on the evening of

the 6th day of April, 1909, at a regular session of said board passed a resolution terminating the employment of Vondor-Horst Brothers, a corporation, under that certain contract made and entered into by and between said Vondor-Horst Brothers, a corporation, with the said board on the 2d day of November, 1908, a copy of which resolution is herewith served upon you, together with a copy of the certificate of said architect made on said 6th day of April, 1909. The said board will therefore proceed in accordance with article 5 of said contract to complete the work included in said contract."

The surety company on April 17, 1909, replied to said letter as follows: "As surety upon the bond of said Vondor-Horst Bros. we hereby offer to undertake the construction and completion of the said Jefferson school in accordance with the terms and condition of the contract given by you to said Vondor-Horst Bros. and in accordance with the plans and specifications referred to in said contract. We will place a reliable contractor upon the work and rush the same to completion. *All payments specified in the Vondor-Horst contract shall be made to us (as) they become due and we will settle with the contractor.*" (Italics ours.)

On the 19th, two days thereafter, the respondent accepted the proposition of the surety company by adopting the following resolution: "Resolved: (1) That the said offer made by the Fidelity & Deposit Company of Maryland, the surety as aforesaid, be and the same is hereby accepted, and the said Fidelity & Deposit Company of Maryland is hereby given the right to enter upon the lands and premises upon which the building under said contract is to be constructed and take possession of all materials, tools, and appliances thereon; (2) that all sums of money payable under said contract, as the same become due and payable, as therein set forth, shall be made to the said Fidelity & Deposit Company of Maryland at Salt Lake City, Utah, and in accordance with the terms and conditions of said contract."

The employment of the contractor was terminated by respondent pursuant to certain provisions contained in the contract, which are as follows: "Article 5. Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractors, to provide all such labor or materials and deduct the cost thereof from any money then due or thereafter to become due the contractors under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient

ground for such action, the owner shall also be at liberty to terminate the employment of the contractors for the work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereof, and to employ any other person or persons to finish the work and to provide the materials therefor; and in case of such discontinuance of the employment of the contractors they shall not be entitled to receive any further payment under this contract until such work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed all expenses incurred by the owner in finishing the work such excess shall be paid by the owner to the contractors, but if said expenses shall exceed said unpaid balance the contractors shall pay the difference to the owner. The expenses incurred by the owner, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through said default, shall be audited and certified by the architects, whose certificates thereof shall be conclusive upon the parties."

The surety company, pursuant to the resolution, and with the consent of the respondent, and in accordance with the terms and condition of the contract entered into between the contractor and the respondent, erected and completed said school building according to the plans and specifications, and in doing so used the excavation made by appellant, and also used the material furnished by him, and received from respondent certain payments in accordance with the terms of the contract. It also did some extra work for which it was allowed extra pay. The surety company, in completing said school building, however, expended considerable more money than the contract price, for which it has received nothing. While the building was in process of construction, and after the surety company had appropriated appellant's labor and material, he, pursuant to Comp. Laws 1907, § 1400x, to which we shall refer hereafter, filed a claim with respondent for the amount claimed by him, and asked that his claim be paid out of the money due on the contract. In view of said claim, respondent withheld from the contract price approximately \$4,000, so that, in case it shall be held by the courts that appellant's claim should be paid out of the money due on the contract, such might be done without harm to respondent. The \$4,000 is still in the hands of respondent and is by it held until it is determined whether it is all to be paid to the surety company or part thereof to appellant in payment of his claim.

The district court, it seems, proceeded on the theory that in view that there was no privity of contract between appellant and the surety company, and further that in its bond it had not obligated itself to pay any claims

against or obligations assumed by the contractor, for those reasons appellant had no cause of action against the surety company. The court further held that there was nothing due from the respondent to the contractor upon the contract, and that for that reason appellant cannot recover against respondent under section 1400x, which, so far as material here, is as follows: "Any person partnership, or corporation who has done work or labor or furnished materials to any principal contractor for the construction or repair of any public work of any character for any county, town, city, village, or school district, may maintain an action therefor in the county in which such work, labor, or materials were done or furnished, against such principal contractor and such county, town, city, village, or school district, jointly, for the recovery thereof; but no judgment shall be rendered against any defendant therein, other than such principal contractor, for any amount greater than the amount due from it to such principal contractor at the time of the commencement of such action. Such county, town, city, village, or school district, when served with summons in any such action, may give notice thereof to such principal contractor, and on so doing need not further defend such action. On rendition of judgment in such action against such principal contractor, the court may also render judgment against such county, town, city, village, or school district for the amount due from it to such principal contractor at the time of the commencement of such action, or for a sufficient amount to pay the judgment recorded against the principal contractor, and payment thereof shall discharge its indebtedness to such principal contractor, in the amount so paid."

The court therefore dismissed appellant's complaint and denied him any relief, and he appeals.

[1] At the threshold we are met with respondent's counsel's contentions that, in view of the record, there is nothing before us for review. Without now setting forth the actual state of the record, it must suffice to say that appellant has assigned error in the judgment and now insists that the court erred in entering the judgment or decree appealed from against him. The ultimate conclusions of the court are reflected in the judgment, and, if those conclusions are clearly contrary to the law which is applicable to the undisputed facts, then the judgment is erroneous, and the appellant, having assigned error upon it, has a right to have that error reviewed, regardless of whether he is also entitled to have his other assignments reviewed or not. Counsel's contentions, therefore, cannot prevail.

[2] The rights of appellant against the fund in question, as well as the remedy which shall be applied, must be determined upon equitable principles rather than upon

strict legal rules. The statute we have quoted is, in and of itself, highly remedial, and must thus, in furtherance of justice, receive a liberal construction and application so as to accomplish its real object and purpose. Before the statute was enacted, those who furnished materials or performed labor for any contractor on any public building or structure were required to look for their compensation to the contractor who constructed the building or structure alone.

[3] Under the statute, however, any person who has furnished any materials or has performed any labor for such contractor for the construction of such building may, at any time before the contract price has been fully paid, bring an action setting forth the foregoing facts, and, if anything is due from such contractor to such person for such materials or labor, the latter may obtain pay directly from the fund held by the public corporation for which the building is constructed to the extent that there is anything in the hands of such corporation which is due on the contract. Under the statute, where a contract is conceded, the only two questions to be determined are: (1) Is there anything due by the contractor to the claimant for materials furnished or labor performed for the construction of the public building or structure? And (2) was there any part of the contract price in the hands of the public corporation at the commencement of such action which is to be paid on the contract? Under this statute, it is entirely immaterial whether the building costs the contractor more or less than the contract price. That is, the claimant's rights to recover against the fund does not depend on whether the contractor makes any profit on the building or not. In the case at bar the question of appellant's right to recover, it seems, was in the district court controlled by the fact that, after he had furnished the materials and performed the labor, the contractor, who had defaulted and thus had not complied with the provisions of its contract, had abandoned the contract immediately after the materials and labor in question were furnished. Having abandoned the contract, it is contended by the respondent, and the court so held, that it was not indebted to the contractor in any amount whatever, and, not being so indebted, no recovery could be had by appellant under the statute. Whether this conclusion is sound depends altogether upon whether, under the undisputed facts and circumstances of this case, appellant may or may not have recourse against the fund in the hands of respondent which should by it be paid as part of the contract price agreed on in the contract. As we construe the statute, the action therein contemplated is one by which a fund is to be reached rather than one in which a personal judgment is intended to be obtained against any one, except, possibly the contractor. In our judgment it is not essential that, in the ac-

tion provided for in the statute, the person bringing it and claiming a part or all of the fund in question shall first obtain personal service on the contractor, or that a personal judgment be first obtained against him before recourse may be had against the fund in the hands of the owner of the building, in case such personal service cannot be made within the state of Utah; but it is enough if it be shown that the claimant has furnished materials or performed labor for the contractor for the construction of a public building or structure, and that there was a part or all of the contract price still unpaid and in the hands of the owner of the building or structure when the action was commenced, and that personal service could not be made upon the contractor.

This case affords a striking illustration of both the justice and utility of such a construction. Here, notwithstanding the fact that the statute (Comp. Laws 1907, § 1952), pursuant to which the building contract was entered into, provides that the respondent is required to enter into a contract with a "responsible bidder," it actually entered into a contract with a foreign corporation which, it seems, was hopelessly insolvent, if not at the time the contract was entered into, at least shortly thereafter. Moreover, this foreign corporation was one of which it seems appellant knew nothing, and with which it had no means of communicating, and of whose whereabouts, for some time before its employment under the contract was terminated, respondent according to its own statements, knew nothing, and, for aught that is made to appear, never knew anything concerning its whereabouts thereafter. If, therefore, the respondent had no means of communicating with its own contractor, which it, tacitly at least, held out as being financially and otherwise responsible by awarding the contract to it, why should a claimant under the statute be compelled to obtain personal service upon such a contractor before he may have recourse to the fund in the hands of respondent which remained unpaid on the contract price of the contract under which the claimant furnished the materials and performed the labor, all of which was used in the building which was constructed under the contract? Again, for aught that appears here, the insolvent condition of the contractor may have resulted in a dissolution of that corporation. In view of all these contingencies, which may arise in any case, we do not think it was contemplated by the statute that a claimant should be required to obtain personal service upon a nonresident defaulting, and, perhaps, defunct corporation before the former can be given any relief against the fund in the hands of the owner of the building constructed under the contract. It abundantly appears from this record that appellant could not obtain personal service upon the contractor, and it is conceded upon all hands that respondent still held a portion of the

contract price, and more than sufficient to pay appellant's claim. If, therefore, appellant may obtain relief under the statute, the mere fact that he did not obtain personal service upon the contractor does not stand in his way.

[4] The question, however, next arises: Which one, the contractor or the surety company (which stands in the shoes of the contractor for the purposes of this case), is, for the purpose of claiming the fund, to be regarded as the contractor under the statute? It is not a case where, after a contractor had defaulted and abandoned his contract, a new contract is entered into with a different contractor. In this case the surety company became the alter ego of the contractor. In our judgment its relation to the contract and the contractor, in law, was akin to that of an assignee who assumes to perform the terms of a contract unconditionally in consideration of receiving the fruits thereof. The surety company stepped into the shoes of the contractor and did precisely what the latter had agreed to do—no more, no less—to comply with the precise terms and conditions of the contract. No new contract was entered into. No changes were made in the existing one, except that the surety company stepped into the shoes of the defaulting contractor. The surety company having thus succeeded to all of the rights and privileges provided for in the contract, it must also be deemed to have assumed all of its burdens imposed by the statute, so far, at least, as such burdens were a part of the thing which was to be accomplished under the contract. This, in our judgment, was the view entertained by the surety company when it wrote: "All payments specified in the Vondör-Horst contract shall be made to us (as) they become due, and we will settle with the contractor." Here we have a recognition of the legal principle that, although in strict compliance with the terms of the contract there may perhaps be nothing due the contractor from the respondent, yet, notwithstanding that fact, there may be something due or become due to it under the statute for materials furnished or labor performed which the surety company appropriated to its own use and benefit, and which became a part of the building which it agreed to erect and complete. By what is said by the surety company it is assumed, and we think correctly so, that, in view of the contractual relations existing between respondent and the contractor, there may have been no legal obligation on the part of the former to pay the latter anything, yet as between the surety company and the contractor the case might possibly be different. If, therefore, the surety company appropriated labor and materials furnished for the building in question, which materials and labor were not paid for, although obtained at the request of the contractor, why should it not be held that the surety company, under the peculiar

facts of this case, must yield its claim to the fund as against all such materials and labor which it appropriated and used in the construction of the building? Why, in adjusting its claims against the contractor into the shoes of which it stepped, may it not receive credit for all such payments from it? If that is not the proper method of adjusting such claims, then it must follow that the surety company may recoup its losses, if any, by appropriating the labor and materials which were furnished to complete the contract but not paid for. Could anything be more glaringly unjust and inequitable, and would not such a course, if upheld, practically nullify the statute, and especially so in a case where the contractor is a foreign corporation which is wholly insolvent and defunct? The surety company having entered the arena in this action as a gladiator participating in the struggle for the purpose of obtaining some of the spoils, it cannot now maintain the high ground of a mere sponsor for one of the parties, in which situation it had the right to insist upon a strict and exact compliance with all the conditions and provisions of the contract between respondent and the contractor. If it desired to maintain its advantage as surety or indemnitor, it should have permitted the respondent either to complete the building itself or readvertise for bids to complete the same. Whether, under the statute, respondent could legally have completed the building without readvertising for bids over objection may well be doubted under the authorities. Upon that question, however, we express no opinion. See *City of Chicago v. Hanreddy*, 211 Ill. 30-33, 71 N. E. 884.

Assuming, however, that respondent had completed the building, the surety company would have been liable on its bond only for the excess over the contract price, if any, that respondent would have been compelled to pay to complete the building in accordance with the terms of the contract; and, if a new contract had been let, then for the difference, if any, between the contract price of the new contract and the old contract price, if the former was in excess of the latter. In the latter event the respondent would, under the statute, again have been required to obtain a new bond for the faithful performance of the second contract, and the surety company could safely have paid the difference, if any, as above indicated, and then would have been discharged from all obligations under its bond. If, however, new bids had been called for, there would have been an entirely new contract, and no doubt, under such circumstances, in view of the stipulations in the first contract, which would have been entirely abandoned by all the parties, the appellant's only remedy would have been against the contractor. In view of what was done, however, the contract in question was not abandoned at all, but was kept alive, and its terms and conditions were perform-

ed by the surety company instead of by the contractor. In performing them (that is, in constructing the building), the surety company appropriated and used materials and labor which had been obtained for the purpose of completing the contract, but which had not been paid for by the contractor. So long as the surety company merely sustained the relation of a surety, and so long as it claimed neither part nor share in the fruits arising out of the contract, it could say: "I am under no obligation to pay for materials or labor furnished my principal, since I did not undertake to do so." How can it now claim that no one can prefer any claim against the fund in the hands of respondent for labor and materials which the surety company appropriated to its own use, and which were used for the purpose of completing the very contract which gives rise to the fund in question? Why does not the claim of appellant come squarely within the spirit, if not within the very letter of section 1400x? We think that, so far as the fund is concerned, under the statute, the claim of the surety company stands precisely the same as would the claim of the contractor.

That the contract in question, under the circumstances, was not abandoned is, we think, made quite clear in the following cases; *Murphy v. Buckman*, 66 N. Y. 297; *Crawford v. Becker*, 13 Hun (N. Y.) 375; *Gillen v. Hubbard*, 2 Hilt. (N. Y.) 303.

If we pass now to a consideration of the case upon general principles of law and equity, we again arrive at the conclusion that the surety company, under the peculiar facts and circumstances of this case, cannot successfully claim the entire fund as against appellant's claim. While the law is well settled that, under a contract and bond such as were entered into between the contractor and respondent and between it and the surety company, the latter was not liable on the bond for any materials or labor not paid for by the contractor, although the same was used in the building, yet it seems such is not the law where, as here, the bondsmen steps into the shoes of the defaulting contractor and assumes the performance of the contract. The law in that regard is tersely, and we think correctly, stated in 6 Cyc. 83, in the following words: "On default of the builder (contractor), in cases where the contract requires him to pay for all labor and material furnished, a right of action directly against the sureties accrues to unpaid laborers, materialmen, and subcontractors; in the absence, however, of the provision the sureties are not liable, unless they have completed the building on his default, and under an agreement with him collected the price from the owner."

We have already called attention to the fact that the surety company insisted that the whole contract price should be paid to it. Such was done with the exception of the

\$4,000 which is now held by respondent, and which is held by it for no other reason except to await the final result of this action. In view of the law as we have quoted it from Cyc., we again ask: Why should not appellant successfully invoke the aid of the court to obtain so much of the contract price as remained in the hands of respondent when this action was commenced and as shall be necessary to pay his claim in case it be found that the claim is reasonable and just? To limit the recovery of appellant to the amount still in the hands of respondent, under the statute, in no way conflicts with the rule that a surety is not liable for the debts of the contractor. So far as respondent is concerned, it has conceded the claim to be both reasonable and just, but, in view of the ruling of the district court in sustaining its demurrer, the surety company has not had the opportunity to test the reasonableness of appellant's claim against the fund.

[5] This brings us to the last phase of this controversy. While it is true that we cannot, on this appeal, review the court's ruling on the demurrer, interposed by the surety company against the complaint filed against it and reverse the judgment upon that ground, yet in view that the court has proceeded and has made rulings that are clearly contrary to law, and in view that such rulings directly affect the judgment, and for that reason the same must be reversed, we may indicate our view of the law upon the questions involved. The court seems to have proceeded upon the theory that, before the appellant may make the surety company a party to this proceeding, he must set forth a cause of action such as will entitle him to a personal judgment against it, and the same theory was adopted with regard to respondent. If *Clore v. Johnson* (Ky.) 56 S. W. 5, shall be taken as an authority, then it seems appellant would be entitled to a judgment against the surety company. In that case the contractor, who had agreed to construct two houses, defaulted, and one of the materialmen then stepped in and undertook to complete the contract, just what the surety company undertook to do in this case, with the exception that the surety company here formally and expressly agreed to comply with all the conditions of the contract. In completing the two houses, the materialman aforesaid made use of some of the material which had been furnished by a third party to the contractor, but which had not been paid for by the latter. The person whose material was so taken and used sued the materialman and recovered judgment against him for the value of such material. It is true that in that case, if the headnote alone is looked to, it would seem that the decision is based on the fact there stated that the person whose material was taken and used as aforesaid had notified the

materialman not to use it without paying for it. When we look at the body of the decision, however, it is seen that the decision is not based upon any such narrow ground, but that it is held that the materialman was liable for the reasonable value of the material used by him because he had appropriated and used it in the completion of the buildings. If it be said that in the case at bar the material and labor furnished by appellant were furnished to the contractor, and that therefore he must look to the latter alone for payment, the same could have been said in the case just referred to.

The case does not proceed upon an express contract, but it proceeds upon one implied by law, which arises out of the fact that one has voluntarily assumed to complete a certain contract for his own protection, and in doing so has invaded the property rights of another, and the law thus provides a remedy. In the case at bar the surety company not only appropriated the material for its own benefit, and did so to complete the contract of another, but it did so with the express provision that it assumed to perform all the conditions of such contract. The surety company insisted upon receiving the fruits of such contract, and in return for this it also assumed all of the obligations and conditions arising out of the same. One of the conditions imposed by our statute upon such contracts was that the value or price of the material furnished by any one for the construction of a public building might be claimed by the person furnishing the material out of the contract price to be paid to the contractor. If the value of the material thus could have been withheld out of the contract price as against the contractor, why not also as against the one who assumed to perform that very contract, and especially so as against one who claimed the entire fruits of such contract? In making the claim under the statute, appellant is not seeking a personal judgment against either respondent or the surety company. He therefore is not required to state a cause of action in the ordinary acceptation of the meaning of that term against either, such as would entitle him to a personal judgment. All that he is required to allege and prove against the surety company, as well as against respondent, is that a contract has been entered into between the respondent and the contractor for the construction of a public building; that he furnished labor and material for the contractor which was used in said building; that such labor and material have not been paid for, stating the value thereof and the amount claimed by him; that in the performance of said contract the contractor has defaulted, alleging the facts in that regard, and that the surety company has stepped into the shoes of the defaulting contractor for the purpose of completing the contract; that at the commencement of the

action there was a portion of the contract price still in the hands of respondent, stating the amount thereof if he can, and that the surety company claimed some interest in the fund still in the hands of respondent, stating such interest. The foregoing, when stated in the legal form of pleadings generally, together with the necessary averments of inducement and other formal parts of a pleading, would seem to be entirely sufficient to invoke the power of the court to grant the relief prayed for under section 1400x. Of course issue can be joined on the foregoing allegations, or upon any one of them, and the court may then determine the truth with respect to such issue. In a case where personal judgment is sought against the contractor, the allegations as against him should be made sufficient for that purpose. In entertaining the view the district court did with respect to the law, it was utterly impossible for appellant to state a so-called cause of action against either respondent or the surety company. We are clearly of the opinion that in taking such a view the district court erred, which error resulted in entering the judgment against appellant.

[8] We remark that, at the hearing, respondent's counsel intimated that appellant could not recover because certain certificates which were to be issued by the architect in charge were not issued. There is nothing in this contention. Appellant does not sue on the contract, but his claim, if any he has, is based on section 1400x. We remark further that, in order to avoid all misconception respecting the scope of this decision, we desire to say that the relief here granted to appellant is based entirely upon the fact that the surety company in this case assumed and agreed to perform, and did perform, the contract entered into by its principal, and in such performance appropriated the material and labor furnished and rendered by the appellant in pursuance of the contract, and itself received the benefit of them, and thus stood in the shoes of the original contractor, its principal, at least to the extent of unpaid moneys in the hands of the school board due on the contract, and, in such respect, to some extent as though the original contractor, instead of its sureties, had performed the contract and constructed the building under its provisions.

In view of the conclusions reached by us, we have not deemed it necessary to allude to any other of the assignments of appellant. None of the errors alleged can arise again, and for that reason we need not refer to them specially.

Although this is an equity case where, under ordinary circumstances, we would be empowered to enter a judgment here, yet, in view that the surety company has not had an opportunity to litigate the reasonableness of appellant's claim against the fund in question because it was not a party to the ac-



tion, we deem it but fair and just to remand the cause.

The judgment or decree dismissing appellant's complaint is therefore reversed, and the cause is remanded to the district court of Salt Lake county, with directions to set aside its findings of fact and conclusions of law, to reinstate the case, to permit appellant to make the surety company a party to this action by filing a proper complaint against it as in this opinion indicated, to proceed to hear the parties upon the questions and matters outlined in this opinion, and to proceed to a determination of the case in accordance with the views expressed herein. Appellant to recover costs.

McCARTY, C. J., and STRAUP, J., concur.

### ATWOOD v. UTAH LIGHT & RY. CO. (No. 2560.)

(Supreme Court of Utah. April 23, 1914.)

#### 1. NEGLIGENCE (§ 93\*)—IMPUTED NEGLIGENCE— —DRIVER OF VEHICLE—INJURY TO INVITEE.

Where plaintiff was injured while riding as the guest of L., who was driving, L.'s negligence, if any, was not imputable to plaintiff, she having no reason to believe that he was other than a careful and competent driver, but she was liable only for the results of her own negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

#### 2. STREET RAILROADS (§ 99\*) — INJURIES TO TRAVELERS—COLLISION—NEGLECT.

While plaintiff and her sister were riding in a single-seated rig as the guests of L., he drove across one of defendant's street railway tracks in order that he might get one of his horses farther away from passing cars and prevent him from shying, as he had previously done when a car passed. A car approached from the rear with considerable noise and at high speed, and, just as it was about to pass, the horse became frightened from some cause and, with his head down, crowded his mate toward the car and so near the track that the front post of the car, while missing the buggy, struck the horse nearest it, threw him down, and upset the buggy, throwing plaintiff out and injuring her. *Held*, that plaintiff, as a matter of law, was not negligent, and that the court's failure to submit the question of her negligence to the jury was not error.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 200-216; Dec. Dig. § 99.\*]

#### 3. DAMAGES (§ 158\*) — PERSONAL INJURIES — EARNING CAPACITY—PLEADING.

Where plaintiff's injuries were fully described in her complaint and were of such a nature and extent as to necessarily deprive her from following her usual vocation for a time, the court properly authorized the jury to award damages for injury to her ability to earn a living and to acquire money or other property, though impairment of her earning capacity was not pleaded as such.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-444; Dec. Dig. § 158.\*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by Ione Atwood against the Utah Light & Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. L. Williams, Geo. H. Smith and H. B. Thompson, all of Salt Lake City, for appellant. Powers, Marioneaux, Stott & McKinney, of Salt Lake City, for respondent.

FRICK, J. The plaintiff brought this action to recover damages for personal injuries which she claimed were sustained through the alleged negligence of the defendant. The plaintiff, an unmarried woman of 36 years of age at the time of the accident, was riding in a topless single-seated buggy with one Samuel J. Lindsay, 30 years of age, and with her sister. They were driving north on State street and south of the corporate limits of Salt Lake City on the evening of June 14, 1912, between 8 and 9 o'clock. The horses were owned by Mr. Lindsay and were hitched to the buggy, and he was driving them. Mr. Lindsay, it appears, was a capable driver, having had much experience in driving and handling horses. All three were sitting on the one seat, the two women on the seat proper, while Mr. Lindsay "was sitting on the girls' knees." State street is macadamized for several miles south of the city limits, and at the time of the accident the defendant had laid a one-track street car line which it operated by moving cars thereon between Salt Lake City and Murray, which is some five or six miles distant from the southern limits of Salt Lake City. Lindsay was driving north on the east side of the car track until after he had met and passed a street car which was running south. As this car approached the team, the horse nearest the car shied at the approaching and passing car, and after it had passed the buggy Lindsay drove across to the west side of the car track. The car track was laid to the east of the center of State street, so that the traveled portion of the street on the east side of the track was about 18 or 20 feet, while the roadway west of the track was approximately 40 feet wide. The north-bound travel on the street was, as a general thing, on the east side of the track, while the vehicles going south proceeded on the west side thereof. Immediately after the car going south had passed Lindsay, he noticed a car coming from the south. This car, however, was still some distance to the south, and Mr. Lindsay testified that he drove across to the west side of the street because the horse hitched on the west side had shown a disposition to shy at the street car, and hence he wanted to place the other horse, which was not afraid of street cars, between the car coming north and the horse that had shied, with the view of preventing the horse from shying again. He was driving on a sharp trot parallel with the street car track and some few feet distant there-

from when the street car was about to overtake him. The occupants of the buggy say the street car was being operated at a fast rate of speed, and, when still some distance to the south, the motorman blew the whistle and afterwards sounded the bell or gong from time to time as the car approached nearer the buggy. Just before the street car was about to pass the horses and buggy, the horse on the west side seemed to become frightened for some cause, and, with his head down, crowded the horse on the east side over towards and so near the track that the front post of the street car, while missing the buggy, nevertheless struck the horse on the east side, knocking him down, which caused the buggy to upset, and Lindsay fell out of the buggy, and the plaintiff was likewise thrown therefrom and from the fall sustained the injuries complained of. Plaintiff was riding on the west side of the buggy seat; her sister on the east; and Lindsay was sitting on their knees, as before stated. There was nothing that prevented Mr. Lindsay from driving farther to the west on the west side of the street. It seems the women were without fear, and apparently had no thought that there was any danger in driving along as they did, except such as might arise in case Lindsay drove too near the street car track. Both women were out driving with Mr. Lindsay upon his invitation, and merely for pleasure. Defendant also proved that immediately after the accident Mr. Lindsay had said that a dog running from the west towards the team had frightened the near horse. While Mr. Lindsay did not admit the statement in that form, he nevertheless did admit that he said at the time that he thought it might have been a dog that frightened the horse, because he did not think that the street car could have done it; but he said he did not know it was a dog. The motorman also testified on behalf of the defendant, and in his testimony said that he saw the team and buggy driving ahead of the car all the time after they had crossed the street car track; that the street car was running about 20 miles an hour; that the team and buggy were always a safe distance from the track until just a moment before the car struck the horse, when it seemed to him that the team suddenly swerved to the east towards the track, but that it was done so quickly that he could not stop the car in time to prevent the collision with the horse.

Upon substantially the foregoing facts the jury returned a verdict for the plaintiff, upon which judgment was duly entered, and from which defendant appeals.

The court charged the jury upon the question of plaintiff's negligence as follows: "You are instructed that the plaintiff in this case is not responsible for the acts of negligence of Lindsay, the driver, if any you find him guilty of, and, if plaintiff sustained an injury by means of a collision be-

tween Lindsay's carriage and the street car, she may recover damages from any party by whose fault or neglect the injury occurred. The negligence of the driver of the carriage in which plaintiff was riding will not prevent her from recovering damages against the street car company if the defendant company was also negligent and such negligence proximately contributed to her injury. You are instructed that there is no evidence in this case of any negligence on the part of the plaintiff." The court, in another paragraph, also, in different phraseology, practically expressed the same thought.

Appellant excepted to all of the foregoing charge and now insists that the court erred in stating the law. Appellant contends that, under the evidence, Mr. Lindsay was guilty of negligence, and it is insisted that, under the circumstances of this case, his negligence was imputable to respondent. It is further contended that, although Lindsay's negligence be not imputable to respondent, she nevertheless was also guilty of negligence. In this connection it is contended that, if her conduct did not constitute negligence as matter of law, it nevertheless was such that it should have been submitted to the jury, and it was for them, and not for the court, to say whether she was guilty of negligence or not.

[1] In view of the relationship existing between Mr. Lindsay, the driver of the team and buggy, and the respondent at the time of the accident, the doctrine of imputed negligence, in our judgment, has no application in this case. The case of *Lochhead v. Jensen*, 129 Pac. 347, decided by this court in December, 1912, is, we think, in principle not distinguishable from the case at bar. That was a case where one person, upon invitation of another, was riding in the latter's automobile, and, while so riding, the automobile was overturned, and the invitee was killed. We held, in the absence of evidence to show that the deceased had exercised any control over or direction of the operation or handling of the automobile, or consented to, or acquiesced in the manner of its operation, the negligence of the driver could not be imputed to the deceased. True, in that case the deceased was riding in the rear seat, but it was shown that the automobile was an open one, and we cannot see how, under the evidence, it would have made any difference if he had actually been sitting in the front seat with the driver. While in this country the courts are practically unanimous in repudiating the doctrine of imputed negligence as it was first declared in England, except in a particular class of cases to be noted hereafter, yet, notwithstanding the repudiation of the doctrine, there is considerable diversity of opinion with regard to the precise duties that are imposed upon the person who is riding in the vehicle or conveyance of another in case of danger, and also with regard to when a particular rela-

tionship of the parties may make the doctrine applicable in a particular case.

Counsel for appellant have cited numerous cases emanating from courts of last resort of many jurisdictions, including many federal cases, in which the variant views of the courts are reflected. We cannot take time to review those cases here. It must suffice to say that we have carefully examined them, and, after doing so, we are still of the opinion that the law is correctly stated by Mr. Justice Straup in *Lochhead v. Jensen*, supra. We shall, however, refer to one case, namely, *Cotton v. Willmar & S. F. Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935. We do this because, in our judgment, the prevailing modern view of the courts upon the subject is clearly stated by the Supreme Court of Minnesota. It is there said: "One group of cases charges the passenger with the absolute duty of keeping a lookout for his own safety, and does not permit him to trust to the care of the driver, while another allows him to rely upon a driver, whom he believes to be careful and competent, without being subject to the implication of negligence. 2 Thompson, Neg. § 1621, and cases there cited. But the rule which has met with general approval in the more recent cases makes the passenger responsible only for his personal negligence, and leaves it to the jury to determine whether, under the circumstances, he was justified in trusting his safety to the care of the driver and not looking and listening for himself. The negligence of the driver is thus not imputed to the guest or passenger, but the circumstances may be such as to make it the duty of the passenger to look and listen and attempt to control the driver for his own protection. The passenger is thus held responsible for his own negligence but not for the negligence of the driver. He must exercise due care and caution, and, if his negligence contributes approximately to the accident, he cannot recover damages." Many cases are cited in support of the text. After pursuing the subject further in the same strain, the court also takes up the question of the relationship of the parties. Upon that subject it is said: "The appellant contends that the court erroneously instructed the jury as to the relation which existed between the respondent and the driver. The rule that the driver's negligence is not imputable to a person who is being carried in a vehicle is only applicable in cases where the relation of master and servant or principal and agent does not exist. \* \* \* [Citing cases.] So, where the parties are engaged in a joint enterprise or in a common employment, the negligence of one is imputable to all." The court then quotes and adopts the language used in another case as follows: "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of

interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management." (Italics ours.) See *Cunningham v. City of Thief River Falls*, 84 Minn. 27, 86 N. W. 763.

Upon the general proposition, see 33 Cyc. 1015, where the rule is as well stated as it can be in view of the diversity of opinions and in making a very general statement of the law. We call especial attention to the italicized portion of the foregoing quotation, because in many of the cases the conditions contained therein, or at least some of them, are either overlooked or ignored. Such is the fact in many of the cases cited by appellant's counsel. As we have seen from *Lochhead v. Jensen*, those conditions have now become a part of the law of negligence in this jurisdiction. The equity and utility involved in the application of those conditions to cases like the one at bar must be apparent to all, and hence no further discussion is required. By overlooking or ignoring those conditions, or at least some of them, some of the courts have been led to apply the essence of the obsolete doctrine of imputed negligence in some concrete instances when the same courts by their words have repudiated the doctrine in toto. For example, it is held in some of the cases that, when A. invites B. to take a ride in a vehicle under the control of and driven or directed by A., nevertheless, if B. suffers injury through A.'s negligence, the latter's negligence is imputed to B., unless B. by some affirmative act attempted to avoid the accident. Those cases, in our judgment, go too far, since they impose the same duty on B., who has no control or direction over the vehicle, as they do upon A., who owns, controls, and, at the time, directs the same. It no doubt is the law, as contended by appellant's counsel, that every occupant of a vehicle, in which he is riding, must always exercise ordinary care for his own safety, and if, by the exercise of such care, he could avoid injury to himself, but fails to do so, he cannot recover, regardless of the fact that he had no control or direction of the vehicle in which he was riding at the time of the accident and injury. But, as has been well stated by the Supreme Court of Minnesota in *Howe v. Minneapolis, etc., Ry. Co.*, 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616, "we think that it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, who he had no reason to suppose was neglecting his duty, that he was required, when approaching a railway crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team." This seems to us good sense as well as good law. Of course every one who may be riding in a vehicle, whether

as passenger, invitee, or otherwise, must always exercise ordinary care and prudence to avoid injury to himself, and to that end, in case of imminent danger, must leave the vehicle in case such a course is practical and necessary to avoid injury. Again, he may not sit silently by and permit the driver of the vehicle to encounter or enter into open danger without protest or remonstrance and take the chances, and, if injured, seek to recover damages from the driver of the vehicle or from the one whose negligence concurred with that of the driver's, or from both. We, however, have no such case here. Under the evidence, we cannot see how respondent, by the exercise of any reasonable prudence or foresight, could have avoided either the accident or the injury to herself. But, as already intimated, counsel for appellant strenuously insist that it was for the jury to say whether, in view of all the circumstances, respondent did exercise that degree of prudence and care which the law imposed upon her. It may be conceded that ordinarily, where an accident occurs and injury results, the question of whether the injured person has or has not exercised the degree of care imposed by law is one of fact to be determined by the jury. It is, however, equally true, that where the facts are not disputed, and are of such a character that reasonable minds can arrive at but one conclusion, then it is the duty of the court to declare such conclusion as a matter of law. The doctrine has so often been declared in this jurisdiction that it is not necessary to refer to the cases again.

[2] The facts here are not disputed at least not with regard to respondent's conduct. Now, what was there in her conduct from which a jury, or anybody else, would be justified to find that anything she did or omitted to do was the proximate cause of, or directly contributed to, the accident and consequent injury? Indeed, if the question of appellant's negligence were before us for review, we would hardly know how to decide. While that question is not before us, and while we express no opinion on it one way or the other, yet we have no hesitancy in saying that the question, to say the least, is not free from doubt. While, therefore, there may be doubt with regard to appellant's as well as Mr. Lindsay's negligence, and while, as to their conduct, it may have been perfectly proper to submit the question of negligence to the jury as a question of fact, yet we can see no reason whatever why, under the undisputed evidence, respondent's conduct should likewise have been submitted to the jury. In that regard we think the case comes directly within the principle laid down in *Lochhead v. Jensen*, where we held that the question of the negligence of the deceased, who was riding in the rear seat of the automobile was properly withheld from the jury. Upon principle, respondent's relation to Mr. Lindsay is no different than was the relation of

the deceased to the driver of the automobile referred to in *Lochhead v. Jensen*. So far as the evidence discloses, respondent had no control over the buggy, nor any power to direct either the team or Mr. Lindsay; nor is there anything in the evidence from which any one can say that, under the circumstances she did not act with reasonable care and prudence. As a matter of course, in cases like the one at bar, the trial courts should ordinarily submit the question of negligence to the jury; and such should be done in all cases when there is any substantial evidence upon which a finding of negligence can be based. Where, however, as here, there is no such evidence, the question must be determined as one of law and not of fact. We remark that it is not our purpose in this case to lay down any rule with respect to when and under what circumstances the relation of parties is such that the negligence of one may be imputed to the other. Indeed, it is our purpose not to do so. The only reason we had in view in saying what we have was to make clear that the case at bar does not come within the doctrine of imputed negligence. That is all we can or do decide in this case upon that phase of it. We however, further hold that, under the undisputed evidence, respondent, as matter of law, was not guilty of negligence, and hence the trial court did not err in charging the jury as it did.

[3] It is further contended that the court erred in charging the jury that, in the event they found for respondent, they should take into consideration "the probable effect of her injury upon her ability to earn a living and to acquire money or other property." It is contended that no such issue was presented by the pleadings. The injuries sustained by respondent were, however, fully described in her complaint, and from their nature and extent it was apparent to any one that the injuries described would necessarily, for some time at least, deprive respondent from following her usual vocation and thus affect her ability to earn money, etc. Under such circumstances it is not necessary to specially allege that the injured person's ability to earn money was impaired. The general rule is correctly stated in 13 Cyc. 187, in the following words: "Where the injury alleged will necessarily render a person less capable of performing his usual business duties in the future, proof of the impairment of his general earning capacity may ordinarily be given under the general allegation of the injury, and damages resulting therefrom, such as the inability to attend to his ordinary business, without a special averment that plaintiff will be unable to earn as much in the future as in the past, or without specially averring the nature of his occupation or employment, although a few courts seem to require a greater strictness and definiteness in the allegation."

We are clearly of the opinion that the dis-

trict court committed no error in its charge to the jury.

The judgment is affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

### In re COLLING'S GUARDIANSHIP.

(No. 5838.)

(Supreme Court of Oklahoma. April 7, 1914.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 671\*)—PRESENTATION FOR REVIEW—EVIDENCE.

Where a consideration of the assignments of error require an examination of the evidence, and the case-made does not disclose the evidence introduced at the trial, or does not show all of the evidence, no questions for review are presented by such assignments, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

Appeal from District Court, Muskogee County; R. P. De Graffenried, Judge.

In the matter of the Guardianship of Ma-hnda Colling, a minor. Jane Howard was appointed guardian in the place of Elijah Mucker, and a final accounting rendered by Mucker. From an order changing the account to show a balance due the minor, Mucker appeals. Dismissed.

H. T. Walker, of Muskogee, for appellants. Harry G. Davis, of Muskogee, for appellee.

RUSSELL, J. An investigation of this record discloses that the appellants' third, fourth, fifth, sixth, seventh, and eighth assignments of error require an examination of the evidence introduced at the trial in the court below, and as the case-made does not contain any of the evidence upon said matters in the court below the appeal is dismissed. *Graham et al. v. Atwood*, 136 Pac. 1080, and authorities there cited; *Waltham Piano Co. v. Wolcott*, 135 Pac. 339, and authorities there cited. All the Justices concur.

### O'NEIL et al. v. JAMES. (No. 5172.)

(Supreme Court of Oklahoma. April 14, 1914.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 305\*)—NEW TRIAL—ASSIGNMENTS OF ERROR.

Where the plaintiff in error fails to assign as error the overruling of his motion for a new trial, the Supreme Court has no power to review errors alleged to have occurred during the progress of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1759-1764; Dec. Dig. § 305.\*]

#### 2. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—PRELIMINARY PROCEEDINGS.

Errors of law occurring during the preliminary proceedings before trial, such as rul-

ings relating to process, service, motions, or demurrers, should be specially assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

#### 3. APPEAL AND ERROR (§ 553\*)—ASSIGNMENT OF ERROR—DEMURRER TO THE PETITION.

A ruling of the court upon a demurrer to the petition may be presented by a transcript, without bill of exceptions or case-made, provided the ruling upon the demurrer is one of the assignments of error in the petition in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.\*]

#### 4. APPEAL AND ERROR (§ 725\*)—ASSIGNMENTS OF ERROR—OVERRULING OF DEMURRER.

Error of the trial court in overruling a demurrer to the petition is not presented for review by an assignment of error in the petition in error which reads: "(4) The judgment of the court in all these matters is contrary to law and against all the competent evidence which was introduced and heard upon the trial."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3002-3005; Dec. Dig. § 725.\*]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Smeal James, a minor, by Serena James, his guardian, against George F. O'Neil and the Okla Oil Company. Judgment for plaintiff, and defendants bring error. Dismissed.

Sherman, Veasey & O'Meara, of Tulsa, for plaintiffs in error. Carr & Field and Thompson & Patterson, all of Pauls Valley, for defendant in error.

KANE, J. [1] This cause was submitted on a motion to dismiss, filed by the defendant in error, upon the ground that the plaintiff in error did not assign as error the action of the trial court in overruling his motion for a new trial, and, inasmuch as all errors assigned in the petition in error are such as should have been presented to the court below for re-examination, by a motion for a new trial, the Supreme Court is without authority to review such errors. The motion to dismiss seems to be well taken. *Whiteacre v. Nichols*, 17 Okl. 387, 87 Pac. 865; *Martin v. Gassert*, 17 Okl. 177, 87 Pac. 586; *Southwestern Cotton Seed Oil Co. v. Bank*, 12 Okl. 168, 70 Pac. 205; *Kimbriel v. Montgomery*, 28 Okl. 743, 115 Pac. 1013; *Meyer v. James*, 29 Okl. 7, 115 Pac. 1016; *Stinchcomb et al. v. Myers*, 28 Okl. 597, 115 Pac. 602; *Haynes et al. v. Smith*, 29 Okl. 703, 119 Pac. 246; *Butler v. Oklahoma State Bank*, 36 Okl. 611, 129 Pac. 750.

Counsel for plaintiff in error concedes the rule to be as above stated, but contends that under his fourth assignment of error, which is, "The judgment of the court in all these matters is contrary to law and against all the competent evidence which was introduced and heard upon the trial," the question of whether the petition states facts sufficient to constitute a cause of action may be re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

viewed under the present state of the record. This contention is without merit for at least two reasons: (1) The fourth assignment of error merely refers to the assignments which precede it in the petition in error, which are all errors occurring at the trial, and avers that in the particulars therein stated the judgment is contrary to law and against all the competent evidence. (2) If the fourth assignment could be construed to mean that the judgment of the court is contrary to the law and the evidence, it would merely state one of the statutory grounds for a new trial, which it would be necessary to embrace in a motion for a new trial and present to the court below for re-examination before it would be reviewable in the Supreme Court.

[2-4] There is no assignment of error which in terms attempts to attack the sufficiency of the petition. The rule is well established in this jurisdiction that errors of law occurring during the preliminary proceedings before trial, such as rulings relating to process, service, motions, or demurrers, should be specially assigned. *Boyd v. Bryan*, 11 Okl. 56, 65 Pac. 940; *Menten v. Shuttee*, 11 Okl. 381, 67 Pac. 478. In the latter case it was said: "While the ruling upon the demurrer to the amended petition is the only question presented by the transcript which under our practice is proper for consideration, that ruling is not assigned as error, and is not reviewable. This court will not review rulings and orders of the trial court which are not complained of and embraced in the petition in error."

Discussing the same question in a later case, decided since statehood, *Haynes v. Smith*, supra, Mr. Justice Williams, who delivered the opinion for the court, says: "The record, however, is certified as a transcript, and, if any assignment of error in the petition in error raises any question that could be brought up on transcript, the appeal should not be dismissed. The following are the assignments of error in the petition in error: (1) Verdict and judgment contrary to law. (2) Judgment and verdict not sustained by the weight of evidence. (3) Error in the instructions given the jury. (4) Irregularities in the proceedings at said trial, by which the defendants were prevented from having a fair trial. (5) Errors of law occurring at the trial, and excepted to by plaintiff in error. The assignments of error in the petition in error raise questions that it is essential to bring up the evidence and rulings of the trial court thereon, either by case-made or bill of exceptions, in order to determine whether there was error. \* \* \* The overruling or sustaining of a demurrer to a pleading is not included in 'errors of law occurring at the trial.' \* \* \* It follows that no error is assigned in the petition in error that may be reviewed on a transcript."

Subsequent to the filing of the motion to

dismiss, counsel for plaintiff in error filed a motion asking leave to amend his petition in error by adding assignments of error to the effect that the court erred in overruling his motion for a new trial, and in overruling his demurrer to the petition. As the time for appeal from the action of the court in the above matters has expired, the motion asking leave to amend the petition in error must be overruled. It has often been held by this court that such assignments of error constitute new and distinct assignments, setting up a new cause for the reversal of the judgment of the lower court, and amendments to the petition in error embracing such assignments cannot be made after the statutory time for perfecting an appeal has expired. *Smith v. Alva State Bank*, 35 Okl. 638, 130 Pac. 916; *M., O. & G. Ry. Co. v. McClellan*, 35 Okl. 609, 130 Pac. 916.

For the reason stated, the appeal must be dismissed. All the Justices concur.

#### GLOCKNER v. JACOBS. (No. 3342.)

(Supreme Court of Oklahoma. April 14, 1914.)

##### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONFLICTING EVIDENCE.

This cause was submitted to the jury on an issue joined upon mutual accounts existing between plaintiff and defendant, and a verdict returned in favor of plaintiff. *Held* that, where a cause is tried to a jury, and a general verdict returned, a judgment rendered on the verdict, and the evidence is conflicting and contradictory, and there is competent evidence to sustain the verdict, this court will not undertake to weigh the evidence or to determine where the preponderance lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 2. PRINCIPAL AND AGENT (§ 33\*)—RIGHT TO TERMINATE RELATIONSHIP.

G., a wholesale merchant, employed J. as salesman to sell goods manufactured by G., and the employment was for no specified time. *Held*, that G., the principal, could, by notice, arbitrarily discontinue the services of J.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 54; Dec. Dig. § 33.\*]

#### 3. PRINCIPAL AND AGENT (§ 63\*)—CONVERSION OF SAMPLES—LIABILITY OF AGENT.

Where the principal delivers to his agent, who is employed as salesman, certain samples to be used in the sale of the principal's goods, and the principal thereafter discontinues the services of said agent, and requests a return of the samples, and at this date the principal is indebted to the agent for commissions on sales made, the agent notifies the principal, refusing to return the samples until his commissions have been paid, and thereafter sells the samples, and applies the proceeds on what is due him by the principal, *held* that, there being no evidence of bad faith on the part of the agent, he will not be liable to the principal for the invoice price of said samples as of date they were delivered to him, in the absence of testimony showing a special or peculiar value to the principal, but will

be liable only for the fair market value of said samples at the time they are sold.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 105-112; Dec. Dig. § 63.\*]

4. TRIAL (§ 344\*)—ASSIGNMENT OF ERROR—IMPEACHMENT OF VERDICT.

Upon grounds of public policy, jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict, to show on what ground it was rendered, or that they made a mistake, misunderstood the law or the result of their finding, nor permitted to show what items entered into the verdict, nor how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when same is attempted to be impeached.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 813; Dec. Dig. § 344.\*]

Error from County Court, Osage County; C. T. Bennett, Judge.

Action by B. F. Jacobs against J. Glockner. Judgment for plaintiff, and defendant brings error. Affirmed.

H. P. White and Joseph D. Mitchell, both of Pawhuska, for plaintiff in error. H. B. Martin, of Tulsa, Chas. E. Bush, of Lindsay, Cal., and Jno. Y. Murry, Jr., of Tulsa, for defendant in error.

RIDDLE, J. Plaintiff in error, defendant below, is engaged in the wholesale business in the city of New York. Defendant in error, plaintiff below, is a traveling salesman, employed by defendant to sell ladies' ready to wear merchandise, upon a commission of 7½ per cent. on all sales, except that he was not to have a commission on sales on which collection could not be made by the defendant. The agreement between the parties was consummated through correspondence. Plaintiff alleges in his petition that he had sold goods for defendant to the amount of \$3,000; that he had sent in three orders which defendant refused to accept, and that he deposited \$100 with defendant as security for payment of said three orders, and that defendant still retains said money; that defendant is due plaintiff the sum of \$225, commission on sales, and \$100, the money deposited with him as security; that the orders upon which the \$100 was deposited were never filled.

Defendant filed his answer, consisting of a general denial and affirmative allegations in the nature of a counterclaim, alleging that plaintiff had wrongfully withheld the samples sent him, of the value of \$275.25; that plaintiff's commissions and the \$100 cash received from plaintiff by defendant amount in the aggregate to the sum of \$253.82; that plaintiff is indebted to defendant in the sum of \$21.43 in excess of amount due plaintiff, as shown by an itemized statement attached to said answer. Defendant prays judgment for said amount. It is admitted in the reply filed by plaintiff that he sold the samples, after several demands on defendant for his commissions and the return of the \$100 deposited as

security; that defendant refused to remit the amount of his (plaintiff's) commissions and the \$100, and for that reason he sold the samples, and applied the proceeds to the amount due him. Defendant notified plaintiff by letter, of date September 27, 1909, discontinuing him as salesman, and requesting return of the samples.

The case was tried to a jury and a verdict returned in favor of plaintiff for the sum of \$250. A remittitur of \$48 was entered by the plaintiff, and judgment rendered for him for the amount of \$202. Defendant prosecutes this proceeding in error, and in his petition in error sets out six assignments.

Under this record, the only question for determination is as to whether or not plaintiff in error, defendant below, is indebted to defendant in error, plaintiff below, or whether the defendant in error is indebted to plaintiff in error upon the counterclaim filed. This issue was fairly submitted to the jury for its determination, and the verdict of the jury was in favor of plaintiff. This verdict has been approved by the trial court.

[2] There are two or three propositions discussed by plaintiff in error, however. The first proposition which he discusses and quotes considerable authorities relating to the power of a principal arbitrarily discontinuing his agent. This question is not an issue in the record, as defendant in error concedes that this may be done. Plaintiff never made any attempt to represent the defendant after the date of the letter of September 27, 1909, discontinuing his services; hence it is unnecessary to notice the point further.

It is next contended that the plaintiff lost his right to commissions by failure to obey the instructions of his principal. We do not deem this question before us inasmuch as the only instance in which it is claimed that the plaintiff failed to obey the instructions of defendant was long after he had ceased to be his agent, and this was in regard to his failure to return the samples; therefore the authorities cited on this point are not applicable.

[1, 3] It is also contended that plaintiff was guilty of conversion of the samples sent him to be used in representing defendant; that he thereby became liable and indebted to defendant in the sum of \$225.25, the amount of the original invoice price. Plaintiff does not controvert the proposition that he should be charged for the value of the samples sold or in case of conversion, but his contention is that he would only be liable for the fair market value of the property at the time of the conversion; and that, under the testimony, the market value was shown to be \$123, the amount for which they were sold. In the absence of any testimony as to any peculiar or special value to plaintiff, in our judgment, this would be the measure of damages for the conversion of the property. There seems to be no contention but that

plaintiff was entitled to the \$100 advanced as security for certain purposes; and, in fact, the defendant has given him credit for said amount on his claims against plaintiff. In substance, the testimony on the part of plaintiff shows that he had sold under his contract with defendant approximately \$4,000 worth of merchandise; and that he was entitled to 7½ per cent. as commission thereon; and that defendant was further indebted to him in the sum of \$100 cash, deposited as herein stated. Defendant admits the item of \$100, and claims that plaintiff is indebted to him upon commission advance on certain sales which had not been paid by customers who became bankrupts to whom plaintiff sold goods, and that plaintiff is indebted to him in the sum of \$21.43 over and above the amount due plaintiff. These issues were submitted to the jury under proper instructions, and the jury returned a verdict in favor of plaintiff in the sum of \$250, and, after a remittitur of \$48, the court approved the verdict, and entered judgment in the amount of \$202. It is the opinion of the court that there is sufficient testimony tending to sustain the verdict.

[4] Under the sixth assignment of error, defendant undertakes to show that the verdict of the jury was irregular, in that it was arrived at by each juror suggesting an amount which plaintiff should recover, adding the total sums together, and dividing same by six, and that the quotient should be the verdict of the jury. He undertakes to prove this state of facts by the affidavit of one of the jurors, W. R. Wells. If defendant was permitted to impeach the verdict of the jury in this manner, it is doubtful whether the matters set out in the affidavit of the juror would bring the defendant within the rule laid down by the decisions cited and relied upon. It is the opinion of the court that the verdict of the jury cannot be impeached in this manner. This would be doing indirectly what is prohibited from being done directly. *Tulsa Street Ry. Co. v. Jacobson*, 136 Pac. 410; *Wade v. Cornish*, 23 Okl. 40, 99 Pac. 643; *Grant v. Milam*, 20 Okl. 672, 95 Pac. 424; *Kuhl v. Supreme Lodge Select Knights & Ladies*, 18 Okl. 383, 89 Pac. 1126.

We have examined the record and briefs of counsel in this case carefully, and, finding no substantial error in the proceeding and judgment appealed from, the judgment of the trial court is affirmed. All the Justices concur.

ST. LOUIS & S. F. R. CO. v. FITTS.  
(No. 4047.)†

(Supreme Court of Oklahoma. March 10, 1914.)

(Syllabus by the Court.)

1. CARRIERS (§ 239\*)—PASSENGER—PAYMENT OF FARE.

The fact that no fare was paid for a child by the person in charge of her upon the train

did not prevent her from being a passenger, where she was riding with the knowledge and consent of the conductor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.\*]

2. CARRIERS (§ 316\*)—INJURIES TO PASSENGER—BURDEN OF PROOF.

Evidence tending to show the occurrence of a lurch or a jerk of a passenger train of sufficient violence to throw from the seat, whereon she was quietly sitting as a passenger, a child five years old, and to almost throw from their seats two adult passengers, justifies an inference of some breach of the duty owed to the injured person by the carrier, and casts the onus upon it of relieving itself of responsibility by showing that the injury was the result of an accident which the exercise of due skill, foresight, and diligence could not have prevented.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. § 316.\*]

3. CARRIERS (§ 320\*)—QUESTION FOR JURY—EVIDENCE.

In such action, where the evidence of the plaintiff makes out a prima facie case, which is rebutted by the evidence on the part of the carrier, it is not error to refuse to take the case from the jury. It is their duty to pass upon the credibility of the witnesses and the weight of their testimony.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. § 320.\*]

4. INSTRUCTIONS APPROVED.

Instructions examined, and held to be substantially correct.

5. APPEAL AND ERROR (§ 1004\*)—EXCESSIVE VERDICT—EVIDENCE.

Where there is nothing in the record to indicate that the action of the jury was in any way influenced by bias, passion, or prejudice against the losing party, we are precluded from setting their verdict aside as excessive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.\*]

Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by Vira Fitts, by her next friend, W. B. Fitts, against the St. Louis & San Francisco Railroad Company for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. J. Q. A. Harrod, of Oklahoma City, for defendant in error.

KANE, J. This was an action for damages for personal injuries, commenced by the defendant in error by her next friend, plaintiff below, against the plaintiff in error, defendant below. Upon trial to a jury there was verdict for plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It was alleged that the plaintiff, a child of about five years old, was riding with her mother, who had purchased a ticket upon one of the defendant's passenger trains, and that she was injured by being thrown from the seat, where she was quietly sitting, by a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 23, 1914.



sudden and heavy jerk of the train forward, and that the jerk was due to the carelessness and negligence of the defendant. The grounds for reversal which we deem it necessary to notice may be stated as follows: (1) The plaintiff was not a passenger, because she did not purchase a ticket and did not pay her fare upon the train, but was riding free with her mother, who had purchased a ticket. (2) There is not sufficient evidence to establish negligence on the part of the defendant. (3) The court erred in certain instructions given to the jury. (4) The verdict of the jury is excessive and appears to have been given under the influence of passion and prejudice.

[1] The general rule is that where one is on a passenger train of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, he is presumptively a passenger. 4 Elliott on Railroads (2d Ed.) vol. 4, § 1578. In the case of Southern Railway Co. v. Lee (Ky.) 101 S. W. 307, 10 L. R. A. (N. S.) 837, the court held that the fact that no fare was paid for a child by the person in charge of him upon the train did not prevent him from being a passenger, where he was riding with the knowledge and consent of the conductor.

[2] The injury was inflicted while the train was in motion, running between two stations. In answer to questions put to her on direct examination, touching the manner of the injury, Mrs. Fitts, the mother of the injured child, testified as follows: "A. The train leapt forward right hard and threw her out of her seat. \* \* \* Q. Whereabouts were you at the time that that jerk occurred? A. I am not positive where it was at. It was somewhere between and Ardmore however, somewhere thereabouts Madill. \* \* \* It give a jerk, and jerked her out of her seat, and liked to have jerked me out. Q. Did she fall? A. Yes, sir. Q. Where did she fall? A. She fell and struck the seat right in front of her. \* \* \* Q. You speak of that just being hard. Did it affect you sitting in your seat? A. I had a baby in my lap, and it liked to jerked him out of my lap, and liked to jerked my head off. Q. Was it beyond the ordinary jerk of a train? A. Yes, sir; I should say it was. \* \* \* Q. You have been on trains, haven't you, and rode on trains? A. Yes, sir; a few times. Q. You have felt the ordinary and usual jerk from trains? A. Yes, sir; I felt it that day until I got that one. Q. Well, did you ever feel a train jerk as hard? A. No, sir."

Another witness, a passenger, testified as follows: "Q. Did anything happen while you were on the train with Mrs. Fitts that day to Vira Fitts? A. Yes, sir; she got seriously hurt on the train. Q. Well, explain to the jury now, you say she got hurt, how she got hurt. A. Well, sir, the train gave a jerk and threw her out of the seat and struck her forehead here on the arm, on the seat right in front of her. \* \* \* Q. Do you know what

had been done to the train just before the accident occurred? A. No, sir; I don't. Q. What? A. No, sir; I don't know what happened to the train, but it gave a terrible jerk, and liked to have jerked me off the seat. I was sitting in the seat nursing Mrs. Lauderdale's baby, and it liked to jerked me off my seat."

The contention of counsel for the railway company is that the foregoing evidence and other circumstances shown by the record present a case identical in principle to *St. Louis & S. F. R. Co. v. Gosnell*, 23 Okl. 588, 101 S. W. 1126, 22 L. R. A. (N. S.) 892, and that this case must be governed by the opinion in that case. From an examination of the many cases cited by counsel for the respective parties, it is apparent that there is considerable difference of opinion as to whether proof of the injury to a passenger, resulting from a jerk of the train or car wherein he is riding, raises a presumption of negligence against the carrier. Each case, it seems, must depend largely upon its own peculiar facts in applying the rule of *res ipsa loquitur*. Whilst there seems to be no well-defined line of divergence between passenger and freight train cases, there is very little doubt that the rule applied to the facts developed in *St. Louis & S. F. R. Co. v. Gosnell*, supra, pertaining to a passenger upon a freight train, is supported by a preponderance of the freight train cases. The cases from Missouri, copiously quoted from in the opinion, and which probably influenced the court more than any others in reaching its decision, are all freight train cases and all support the doctrine laid down in the opinion, except *Guffey v. H. & St. J. Ry. Co.*, 53 Mo. App. 462. The general rule, however, is that where the thing which causes the accident is exclusively controlled or managed by the carrier, and the accident is such as in the ordinary course of events does not happen if those who have the control or management use proper care, it affords reasonable evidence, in the absence of explanation by the carrier, that the accident arises from want of care. *Gilmore v. Brooklyn Heights Ry. Co.*, 6 App. Div. 117, 39 N. Y. Supp. 417. Among the cases governed by the foregoing rule are those where the injury arose from sudden starts, sudden stops, jerks, jolts, etc. The tendency of the decisions seems to be that if the jerk is of such violence that it it would not be one likely to occur, or necessary, in the ordinary operation of transportation, a presumption of negligence will arise. It has been held that a very violent jerk of a car, resulting in injury to a passenger, raises a presumption of negligence against the carrier. *Chicago City R. Co. v. Morse*, 98 Ill. App. 662; *Evansville & T. H. R. Co. v. Mills*, 37 Ind. App. 598, 77 N. E. 608; *Southern R. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979. And that a violent jerk, throwing a passenger down and out of a car, raises a presumption of negligence in the carrier. Ill. Cent.

R. Co. v. Beebe, 60 Ill. App. 363; Griffin v. Pacific Elec. R. Co., 1 Cal. App. 678, 82 Pac. 1084; Scott v. Bergen County Traction Co., 63 N. J. Law, 407, 43 Atl. 1060; Consolidated Traction Co. v. Thalheimer et al., 59 N. J. Law, 474, 37 Atl. 132; Lomas v. N. Y. City Realty Co., 188 N. Y. 628, 81 N. E. 1169. And that evidence that a passenger standing on the running board of a crowded car was thrown off and killed by a jerk sufficiently violent to throw standing passengers off their footing makes a prima facie case against the carrier. Sheeron v. Coney Island & B. R. Co., 78 App. Div. 476, 79 N. Y. Supp. 752. And that where a passenger, while free from contributory negligence, is thrown from his seat and injured while going around a curve, a presumption of negligence arises. Fitch v. Traction Co., 124 Iowa, 665, 100 N. W. 618. Other cases in point to the same effect are Lavis v. Wisconsin County Ry. Co., 54 Ill. App. 636; Dougherty v. Mo. Ry. Co., 81 Mo. 325, 51 Am. Rep. 239; B. U. Ry. Co. v. Hale, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 761; Murphy v. Coney Island & B. Ry. Co., 36 Hun (N. Y.) 199; Guffey v. H. & St. J. Ry. Co., 53 Mo. App. 462; Burr v. Pennsylvania Ry. Co., 64 N. J. Law, 30, 44 Atl. 845.

We think the case at bar belongs to the foregoing class. The train upon which the plaintiff was riding was a passenger train, equipped primarily for the carriage of passengers. One reasonably may expect to ride on the modern passenger train, not only in comparative safety, but with a considerable degree of comfort. We venture to say that a railway company, of which it could truthfully be said that a jerk of sufficient violence to throw a child five years old out of her seat where she was quietly sitting, and "liked to have jerked" two adults out of their seats, and "liked to have jerked the head off" one of them, was an ordinary occurrence, would not enjoy the patronage of the traveling public to any great extent. We therefore conclude that evidence tending to show the occurrence of a lurch or a jerk of a passenger train of sufficient violence to throw from the seat whereon she was quietly sitting as a passenger a child five years old, painfully injuring her, and to almost throw from their seats two adult passengers, justifies an inference of some breach of the duty owed to the injured person by the carrier, and casts the onus upon it of relieving itself of responsibility by showing that the injury was the result of an accident which the exercise of due skill, foresight, and diligence could not have prevented.

[3] In such action, where the evidence of the plaintiff makes out a prima facie case, which is rebutted by the evidence on the part of the carrier, it is not error to refuse to take the case from the jury. It is their duty to pass upon the credibility of the witnesses and the weight of their testimony.

[4] We have examined the instructions, the giving of which counsel for defendant assign as error, and are of the opinion that, considering them in connection with all the other instructions given, they are substantially correct. Some of the objections urged against them have been fully answered by what we have heretofore said; the balance, we think, are without merit.

[5] Whilst the verdict is larger, perhaps, than the members of the court would render, if sitting as jurors, there is nothing in the record to indicate that the action of the jury was in any way influenced by any bias, passion, or prejudice against the defendant. We are therefore precluded from setting the verdict aside as excessive.

Finding no reversible error in the record, the judgment of the court below must be affirmed. All the Justices concur.

HOEHLER et al. v. SHORT. (No. 4025.)†  
(Supreme Court of Oklahoma. March 10, 1914.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 901\*)—PRESENTATION OF ERROR—AFFIRMANCE.**

Error is never presumed by this court. It must always be affirmatively shown by the record, and, where this is not done, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 1771, 3870; Dec. Dig. § 901.\*]

**2. PLEADING (§ 34\*)—SUFFICIENCY—APPEAL.**

A petition unchallenged by demurrer or motion, and against which no objection is raised by objecting to the testimony, will, when its sufficiency is questioned for the first time in this court on appeal, be held good if, by a liberal construction, it states, even though defectively, a cause of action in favor of the plaintiff and against the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 54, 66-74; Dec. Dig. § 34.\*]

**3. PLEADING (§ 433\*)—SUFFICIENCY—OBJECTION.**

Where there has been no appearance in the court below on the part of any of the defendants until after judgment has been rendered against them, objections to the sufficiency of the petition upon the ground that the same does not state facts sufficient to support the judgment rendered should not be sustained, unless there is a total failure to allege some matter essential to the relief sought, nor where the allegations are simply incomplete, indefinite, or conclusions of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

**4. MUNICIPAL CORPORATIONS (§ 538\*) — ASSESSMENT — INJUNCTION — PETITION — SUFFICIENCY.**

Petition examined, and held sufficient to support the judgment rendered by the trial court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1194, 1253; Dec. Dig. § 538.\*]

Error from District Court, Murray County; R. McMillan, Judge.

Action by Nellie Short against F. C. Hoehler and another, doing business as Hoehler & Cummings. Judgment for plaintiff, and defendants bring error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 28, 1914.

Warren K. Snyder, Harry White, and G. A. Paul, all of Oklahoma City, for plaintiffs in error. Walter E. Latimer, of Sulphur, for defendant in error.

KANE, J. This proceeding was instituted by the defendant in error, Nellie Short, for the purpose of enjoining a pretended special assessment wrongfully levied, as she alleges, against her property. After the original petition had been filed, plaintiff filed an amended petition wherein she joined Hoebler & Cummings, as parties defendant, alleging that they were the owners and holders of the bonds issued in pursuance of said pretended special assessment. There was no appearance on the part of any of the defendants, and, when the cause was reached for trial, the court below, upon the showing made by the plaintiff, granted her the relief prayed for; whereupon the plaintiffs in error herein filed their petition in error in this court, to which they attached a transcript of the record for the purpose of having reviewed, as far as possible, the action of the trial court. It is apparent from this brief statement of the proceedings that the only errors of which the plaintiffs in error can avail themselves are such as appear upon the face of the record, which in this case consists of the petition filed by the plaintiff in the court below.

[2, 3] The rule is that a petition unchallenged by demurrer or motion, and against which no objection is raised by objecting to the introduction of testimony, will, when its sufficiency is questioned for the first time in a motion for a new trial, or in this court on appeal, be held good if, by a liberal construction, it states, even though defectively, a cause of action in favor of the plaintiff and against the defendant; and such objection should not be sustained, unless there is a total failure to allege some matter essential to the relief sought, nor when the allegations are simply incomplete, indefinite, or conclusions of law.

[1] Error is never presumed by this court. It must always be affirmatively shown by the record, and, where this is not done, the judgment must be affirmed. *Hall v. Bruner*, 127 Pac. 255. In another case, *Wass v. Tenant-Stribling Shoe Co.*, 3 Okl. 152, 41 Pac. 339, it was held that "a petition attacked for the first time in the Supreme Court for the reason that it does not state facts sufficient to constitute a cause of action will be liberally construed, in order to uphold the judgment rendered in the trial court."

[4] By applying the foregoing rule, we think the petition is sufficient to support the judgment rendered. Counsel for plaintiff in error refer to the Street Improvement Laws of the state, cite several authorities construing the same, and quote from one of them as follows: "When a majority of the property owners on any street or part of a street of not less than 2,000 feet in length have duly petitioned the city council of a city of the first class to pave such street, or part thereof, with material used for standard paving,

designating the same, and said council having proceeded to pave such street in accordance with the prayer of such petition, no resolution or notice of intention to pave, or publication thereof, being required, such improvement will not be restrained, or the power of equity permitted to be invoked, to stop such improvement, on account of irregularities in the procedure subsequent to the presentation of the petition as provided by law, when there is neither any allegation nor proof as to fraud, or that the party complaining sustains any specific injury on account thereof, or that there was reason to believe that there would have been a less bid for such paving, especially when the complainant never protested against said contract, or sought to have such irregularities or defects remedied, corrected, or amended before said council, and afterwards stood by and permitted the contractor, without warning or protest, to proceed under said contract or undertaking, prejudicing himself by an outlay, and partially completing same by making a part of such improvement." *Paulsen v. City of El Reno et al.*, 22 Okl. 734, 98 Pac. 958. Such undoubtedly is the rule in street improvement cases. But in the instant case there is nothing in the petition, construing it liberally in order to support the judgment rendered below, that would warrant the court in inferring that the city authorities, in doing the acts of which the plaintiff complains, were pretending to act by virtue of the street improvement laws, or attempting to proceed in accordance with their provisions. On the contrary, the petition alleges that what the city authorities did in the premises was contrary to law, and constituted wrongs and torts against the plaintiff and her property, that their acts greatly depreciated the value thereof, and that, by reason of said wrongs and torts on the part of said city authorities, there is an attempted assessment charged up against plaintiff and the said two lots, amounting to the sum of \$584.10 on one, and \$257.70 on the other lot. It was further alleged that, by reason of said wrongs and torts, she cannot get into her said property with a wagon or vehicle, as formerly, and that said alleged assessment is not a legal charge against her said property, as the same has not been benefited, and, if allowed to stand, will confiscate said property. The petition further alleges that: "Said assessments are not just or legal, and the same are a cloud on the title of plaintiff's two said lots and void, and, if said defendants are not enjoined, they will sell plaintiff's said lots and put her and her children out of their home, and that said defendants are threatening to sell said lots and plaintiff's said home and put her and her children out of their home, and will do so if they are not enjoined by this court. That said alleged grading assessments and charges and lien against plaintiff's said lots are in violation of the United States and state Constitutions and laws of this state."

It is true that a great many of the foregoing allegations, and many more to the same effect not herein noticed, are merely conclusions of law; but, as hereinbefore pointed out, objections to the petition in the circumstances of this case "should not be sustained, unless there is a total failure to allege some matter essential to the relief sought, or when the allegations are simply incomplete, indefinite, or conclusions of law." Assuming, as we must, that the allegations of the petition are true, it would be difficult to conceive a more wanton and flagrant disregard of the rights of the plaintiff than it discloses.

We think the judgment of the court below ought to be affirmed. It is so ordered. All the Justices concur.

SCOTT v. JACOBS et al. (No. 3361.) †  
(Supreme Court of Oklahoma. March 24, 1914.)

*(Syllabus by the Court.)*

INDIANS (§ 18\*)—ALLOTMENTS—DEATH OF ALLOTTEE—DEVOLUTION OF ALLOTMENT.

Where, on August 16, 1890, a duly enrolled citizen of the Creek Nation died at the age of two years, before receiving her allotment, leaving her surviving a father and a sister, born, not of the father but of the same mother, all citizens of the Creek Nation, *held*, the Creek law of descent and distribution governed the devolution of the allotment, as directed by section 28 of the Original Agreement, ratified May 25, 1901, and that the father as the "nearest relation" inherited the land in fee to the exclusion of the half-sister.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

Error from District Court, Hughes County; John Caruthers, Judge.

Action by Agnes Scott, by her guardian, against John A. Jacobs and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Lewis C. Lawson, of Holdenville, for plaintiff in error. Mann, Rogers & Harris, of Holdenville, for defendants in error.

TURNER, J. On September 27, 1909, in the district court of Hughes county, Agnes Scott, by her guardian, sued John A. Jacobs, Barney Tiger, Samuel G. Start, and Mary E. Start to clear her title to 160 acres of land known as the allotment of Leona Tiger, alleging herself to be the sole heir of said Leona, who was deceased. Pending the litigation in the trial court, Agnes Scott died, and the cause was revived in the name of her executor. Later Samuel G. Start died, and the cause was there revived against Mary E. Start, his administratrix. There was trial to the court upon agreed statement of facts, and judgment for defendants, and plaintiff brings the case here.

The facts are that Leona Tiger, a duly enrolled citizen of the Creek Nation, on August 16, 1890, died at the age of two years, and

before receiving her allotment, leaving her surviving her father, Barney Tiger, and the plaintiff, Agnes Scott, a half-sister or the child of her deceased mother, Fannie Scott, by a former husband all duly enrolled citizens of the Creek Nation; that on November 18, 1901, certificate of allotment issued to Leona, and on July 25, 1904, a patent to her heirs; that on September 29, 1906, conceiving himself to be her sole heir under the Creek laws of descent and distribution, which it is agreed governs the devolution of this allotment, her father sold and by warranty deed conveyed the land to defendant John A. Jacobs, who, later, in the same manner, conveyed it to defendants Samuel G. and Mary E. Start. It is assigned that the court erred when he applied the law to the facts stated and held that Barney Tiger was the sole heir of the allottee, and, as such, his grantees were entitled to the land. Not so, as Leona Tiger was enrolled and died before receiving her allotment, she died seised of no inheritable estate therein (*Sanders v. Sanders*, 28 Okl. 59, 117 Pac. 338), and as no res existed for the law to take hold of until November 18, 1901, the date of her certificate of allotment (*Brady v. Sizemore et al.*, 33 Okl. 169, 124 Pac. 615), and as this was intermediate the date of the ratification of the Original and Supplemental Creek Agreements, counsel are right when they say that the Creek laws of descent and distribution govern the devolution of this allotment, being directed to apply by section 28 of said Original Agreement (31 Stat. 869, c. 676) ratified May 25, 1901. At the time of the creation of the res the law provided (section 6): "Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children the nearest relation shall inherit the property." *Laws Muskogee Nation 1880*, p. 132. At that time, her mother having died before her, that her father was her "nearest relation," within the contemplation of said section, is no longer an open question in this jurisdiction. *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624; *Barnett v. Way et al.*, 29 Okl. 780, 119 Pac. 418; *Hooks v. Kennard*, 28 Okl. 457, 114 Pac. 744.

Affirmed. All the Justices concur.

JONES et al. v. BENNETT. (No. 3386.) †  
(Supreme Court of Oklahoma. March 10, 1914.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—RULING ON DEMURRER.

Where a general demurrer is directed against a petition and overruled, whereupon the plaintiff files an answer, and thereafter, by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing Denied April 23, 1914.

leave of court, the plaintiff files an amended petition to conform to the proof, to the sufficiency of which no objection is made, the action of the court in overruling the demurrer to the original petition is not subject to review by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

## 2. FRAUDS, STATUTE OF (§ 58\*)—CONTRACT TO MAKE LEASE—REQUISITES.

A contract to make a lease, even though the lease must be in writing in order to conform to the statute of frauds, need not be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 90, 91; Dec. Dig. § 58.\*]

## 3. FRAUDS, STATUTE OF (§ 53\*)—PAROL LEASE.

A parol lease of real property for the period of one year does not come within the statute of frauds (section 941, Rev. Laws Okl. 1910), regardless of whether the term of the lease commences in present or in futuro.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 69, 80, 92; Dec. Dig. § 53.\*]

## 4. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR.

By section 4344, Wilson's Rev. & Ann. St. 1903, we are required to disregard any errors which do not affect any of the substantial rights of the losing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4036, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

Error from County Court, Tillman County; T. E. Campbell, Judge.

Action by W. R. Bennett against C. W. Jones and D. D. Shofner as individuals, and Jones & Shofner, copartners, composed of C. W. Jones and D. D. Shofner. Judgment for plaintiff, and defendants bring error. Affirmed.

O. B. Riegel, of Snyder, and Sam Johnson, of Tishomingo, for plaintiffs in error. Mounts & Davis, of Frederick, and Gray & McVay, of Oklahoma City, for defendant in error.

KANE, J. This was an action for damages for breach of contract, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, individually and as partners. The parties hereafter will be called plaintiff and defendants respectively as they were designated in the court below. The allegations of the petition as to the nature of the contract, out of which the controversy arose, are to the effect that the plaintiff and defendants entered into a verbal contract, whereby it was agreed that, if the plaintiff would construct a certain store building in the town of Tipton, Okl., the defendant would agree to rent said store building for one year, in order to run and carry on a hardware business therein, and would agree to give the plaintiff a position in said store as clerk for one year, at a salary of \$80 per month. Plaintiff further alleges that, in pursuance of said agree-

ment, he completed said building and performed all the conditions precedent on his part, but that the defendant failed and refused to accept said building and plaintiff's personal service pursuant to said contract; wherefore he prayed judgment. After a demurrer to the petition had been overruled, the defendant filed an answer consisting of a general denial and a specific denial of the existence of a partnership and that said alleged contract was at any time made. After the plaintiff introduced his evidence and rested, the defendant offered no evidence, and the court permitted the plaintiff to amend his petition to conform to the proof; whereupon the plaintiff filed an amended petition, setting forth his entire cause of action in conformity with the relief granted; whereupon the jury returned a verdict for the plaintiff in the sum of \$400, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The grounds of reversal as stated by counsel in their brief are as follows: (1) The court erred in overruling the demurrer to plaintiff's petition; (2) the court erred in refusing to instruct the jury to return a verdict for the defendant; (3) the verdict of the jury is contrary to law and the evidence; (4) the court erred in permitting plaintiff to file an amended petition after plaintiff rested his case; and (5) the court erred in submitting the seventh instruction to the jury.

[1] After the demurrer, which was directed against the original petition, was overruled, the defendant answered to the merits. Filing a plea to the merits after a demurrer is overruled is a waiver of the demurrer. *G., C. & S. F. Ry. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286. As the amended petition, to the sufficiency of which no objection was made, superseded the original petition, the action of the court in overruling the demurrer to the original petition, even if erroneous, could not affect any of the substantial rights of the defendant, and therefore could not be held to constitute reversible error. *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718, 115 Am. St. Rep. 568, 8 Ann. Cas. 632; *Palmer v. Hartford Dredging Co.*, 73 Conn. 182, 47 Atl. 125; *Fidelity, etc., Co. v. Nisbit*, 119 Ga. 216, 46 S. E. 444.

[2] Counsel in their brief present their second assignment of error as follows: "We believe that a fair interpretation of the petition is to the effect that the plaintiff intended to set out a cause of action for damages for an alleged breach of a contract whereby the defendant leased a building which plaintiff was about to construct in the new town of Tipton for the period of one year from its completion and employed plaintiff as a clerk for one year for the sum of \$80 per month. \* \* \* The allegation is not that the defendant had rented the building, but that he would agree to rent the same. Our position

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is that there could be no action against the defendants for breach of the rental agreement so long as the rental agreement had not, in fact, been made."

As we understand the pleadings, the verbal contract related to a future agreement to lease the building which was to be erected by the plaintiff for the period of one year, and to employ him as a clerk for the same period, at a stipulated salary per month, and the breach consisted in the refusal of the defendants to enter into the latter agreement. Such a contract is not invalid because not in writing. Counsel continues: "There is another conclusive reason why the demurrer should have been sustained: The petition on its face shows that the contract sued upon comes clearly within the statute of frauds."

As stated above, the verbal contract is not a contract to make a lease, and to employ the plaintiff, but is a contract based on a valid and independent consideration to make another contract on the happening of a certain event, to wit, the completion of the building by the plaintiff. A contract to make a lease, even though the lease must be in writing in order to conform to the statute of frauds, need not be in writing. *Tillman v. Fuller*, 13 Mich. 122.

[3] Moreover, in construing subdivisions 1 and 2 of the statutes of fraud (section 941, Rev. Laws 1910), by virtue of which counsel contend that the lease involved herein is void, this court, in a recent opinion, held that subdivision 1 applies to agreements other than those relating to land; and subdivision 5 governs with reference to agreements concerning real estate, and, if such parol agreement is for the lease of real property for a longer period, term, or duration than one year, then it is within the statute of frauds, but, if such parol agreement is for the leasing of real property for the term, duration, or period of one year or less, it does not come within the statute of frauds, regardless of whether the term of lease commenced in present or in futuro. *Sullivan v. Bryant*, 136 Pac. 412.

The court below did not abuse its discretion in permitting plaintiff to file an amended petition in conformity with the proof. Section 5679, Comp. Laws 1909 (section 4790, Rev. Laws 1910); *Willett v. Johnson*, 13 Okl. 563, 76 Pac. 174; *Snyder v. Rosenbaum*, 215 U. S. 261, 30 Sup. Ct. 73, 54 L. Ed. 186.

[4] We have examined the other assignments of error, and find nothing in the record to indicate that any action of the trial court affected any of the substantial rights of the defendant. By section 4344, *Wilson's Rev. Laws 1903*, we are required to disregard any errors which do not affect any of the substantial rights of the losing party. *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 350.

The judgment of the court below is therefore affirmed. All the Justices concur.

**FIRST STATE BANK OF DURANT v. SMITH. (No. 3353.)**

(Supreme Court of Oklahoma. April 14, 1914.)

*(Syllabus by the Court.)*

**1. ATTACHMENT (§ 47\*)—GROUNDS—FRAUDULENT CONVEYANCE—BURDEN OF PROOF.**

In order to sustain an attachment issued upon the ground that the defendant has disposed of his property with intent to defraud, hinder, or delay his creditors, the intent to defraud must be established by the person who alleges such intent.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 120, 861-876; Dec. Dig. § 47.\*]

**2. ATTACHMENT (§ 44\*)—GROUNDS—FRAUDULENT CONVEYANCE—PREFERRING CREDITOR.**

Such fraudulent intent will not be inferred from a finding of the trial court to the effect that the defendant disposed of his property for the purpose and with the intent to prefer one creditor over the others, and with the intent to delay the collection of plaintiff's claim until after the payment of the indebtedness due the preferred claimant.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 110; Dec. Dig. § 44.\*]

**3. ATTACHMENT (§ 44\*)—GROUNDS—FRAUDULENT CONVEYANCE—PREFERRING CREDITOR.**

In the absence of statutory provisions to the contrary, a debtor, though in failing circumstances, may prefer one or more of his creditors to the exclusion of the rest, and such preference is not in itself sufficient to sustain an attachment upon the ground that the defendant has disposed of his property with the intent to defraud, hinder, or delay his creditors.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 110; Dec. Dig. § 44.\*]

Error from District Court, Bryan County; *Summers Hardy*, Judge.

Action by the First State Bank of Durant against O. H. Hardin Smith. Judgment for defendant, and plaintiff brings error. Affirmed.

*Utterback, Hayes & MacDonald*, of Durant, and *Burwell, Crockett & Johnson*, of Oklahoma City, for plaintiff in error. *C. C. Hatchett*, of Durant, for defendant in error.

**KANE, J.** This was an action upon a promissory note, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below. Upon the commencement of the action the plaintiff caused a writ of attachment to be issued, which was levied upon certain real estate as the property of the defendant. The ground of attachment, as stated in the affidavit, is "that said defendant has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud, hinder, or delay his creditors."

There was no controversy over the defendant's liability on the note sued upon; but issue was joined on the attachment feature of the case by a motion to dissolve the same, upon the grounds: "(1) That the defendant denies that he has sold, or is about to sell, transfer, and dispose of, his property, or any

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

part thereof, with the intent to hinder, delay, and defeat his creditors in the collection of their claims against him, and denies each and every ground for attachment alleged by the plaintiff, and every part thereof. (2) Defendant says that since the filing of his first motion to dissolve the attachment sued out herein that he has ascertained that the plaintiff has had attached herein certain lands formerly owned by this defendant in Marshall county, Okl.; the same being described as follows: \* \* \* That said property is not properly attached. Defendant says that on the 28th day of April, 1910, prior to the date of the levy of said attachment that he, by warranty deed, for a valuable consideration, conveyed the said real estate to Mrs. M. E. Stevens, of Cooke county, Tex., and that at the date of the levy of the attachment herein he had no interest in the said real estate, and therefore the same is not subject to attachment for the debts of this defendant."

After the parties had introduced all of their testimony and rested, the court made the following findings of fact and conclusions of law:

"In this case the execution of the note set out in plaintiff's petition is admitted, and there is no controversy as to the amount due on said note; at the beginning of this suit plaintiff filed an affidavit for an attachment against the property of defendant, Smith, upon the ground that said defendant had assigned, removed, or disposed of or was about to dispose of his property, or a part thereof, with the intent to defraud, hinder, and delay his creditors.

"The proof shows that defendant, C. H. Hardin Smith, was president of the Durant State Bank of Durant, Okl., and that said bank was in a failing condition, and was in the hands of the state bank commissioner, and that defendant, Smith, was indebted to said bank in a sum in excess of \$35,000; that he was also indebted to the plaintiff in the amount sued for in this case, and was under liability to other persons. The proof also shows: That at said time the defendant was wholly insolvent, and was unable to pay off and discharge all of his indebtedness. That he had made promises at various times to the plaintiff in this case to pay the amount due, but had failed to make said payments according to his promise, and that on the 28th day of April, 1910, he executed a conveyance, transferring to Mrs. M. E. Stevens, who bears the relationship to said defendant of aunt by marriage, conveying to said aunt all of the real estate owned by the defendant in Bryan and Marshall counties in the state of Oklahoma. That there was an agreed value between the defendant and his said aunt of said property at \$10,000, which said defendant received, thereupon delivering the deed. The proof also shows that said aunt, in addition to the \$10,000, paid for the transfer of said real estate, paid in at the Okla-

homa State Bank or the said bank commissioner, to be applied on the liability of the defendant, the Oklahoma State Bank, and the sum of \$25,000 in money.

"The court finds from the testimony the facts just stated, and finds, further, that said deed was executed with the purpose and intent on the part of the defendant, Smith, to prefer the indebtedness due the Oklahoma State Bank, and to procure a payment thereof prior in time and ahead of the plaintiff and other creditors, and with the intent to delay the collection of plaintiff's claim until after the payment of the indebtedness due the Oklahoma State Bank. The attachment in this case issued on the 29th day of April, which was one day after the execution of the deed by Smith to his aunt, and said deed was not placed of record until the 30th day of April, 1910, at 3 o'clock p. m., which was subsequent to the levying of the written attachment herein.

"The court finds, as a matter of law, that the levy of the attachment only reached such interest as the defendant, Smith, had at the time of the levy, and at that time Mrs. Stevens, the aunt of said defendant, had purchased said property, paying for same by cash at the agreed price; and there is no evidence tending to show that the price agreed upon was any more or less than the actual value of said property. It is the judgment of said court that the levy of the attachment should be rendered in favor of the plaintiff for the amount sued for.

"There is no proof in the record of any other indebtedness except the claim of the plaintiff in this case, and that shown to be due the Oklahoma State Bank, and the court in his finding intended to find that the defendant, Smith, had sold his property for the purpose of delaying the collection of plaintiff's claim, and until after the Oklahoma State Bank had collected its indebtedness."

Whereupon this proceeding in error was commenced to review the action of the trial court in dissolving the attachment.

The contentions of counsel for plaintiff in error are to the effect (1) that, the ground for attachment set forth in the affidavit being sustained by the evidence and by the findings of the court, therefore it was error for the court to hold that the defendant could set up as a ground for discharging the attachment that the real estate upon which the order of attachment was levied was not his, but belonged to a third person; (2) the deed executed by the defendant, and which was recorded on the 30th day of April, 1910, took precedence and priority over the attachment which was levied on the 29th day of April, 1910, or one day prior to the recording of the deed.

[1-3] We cannot concede the premise of counsel that the ground of attachment set forth in the affidavit was sustained by the evidence and the findings of the court. As we view the evidence and the findings of the

court, the only inference that reasonably may be drawn from them is that the defendant made a transfer of his property with intent to prefer the Durant State Bank, of which he was or had been president, and to whom he owed a large sum of money, over his other creditors. It is not a fraudulent transfer justifying attachment for a debtor to prefer a creditor, whether this is done by way of absolute conveyance of property in liquidation of debt, by confessing a judgment in the creditor's favor, or by way of mortgage to secure payment; but the transfer will be fraudulent if the debtor intends to secure benefits to himself thereby. 4 Cyc. 424.

In the case of *Dunn v. Claunch et al.*, 13 Okl. 577, 76 Pac. 148, Mr. Justice Burwell, in discussing what constitutes fraud under the fifth subdivision of section 5701, Comp. Laws 1909 (section 4812, Rev. L. 1910), which provides for an attachment where the debtor "is about to remove his property, or a part thereof, out of the jurisdiction of the court, with intent to defraud his creditors," quotes approvingly from a Nebraska case (*Steele v. Dodd*, 14 Neb. 496, 16 N. W. 909) as follows: "The mere fact of a removal of property from the jurisdiction of a particular court, or from the state even, unless accompanied with an intent to defraud creditors, does not give the right of attachment under our law. The particular intent mentioned in the statute is essential to that right. Without such intent a debtor is at full liberty to change his place of abode and go with his effects whithersoever he wills, with all the freedom from lawful molestation of one not in debt." And the learned justice upon the same question further says: "And an intent to defraud is never presumed, but he who alleges such intent must prove it; and, while it may be proven by circumstance, still the mere act of removing property, when done openly and above board, is not sufficient, in the absence of other suspicious circumstances, to justify a finding of such fraudulent intent."

In the case of *Kemper, etc., Co. v. Fischel*, 4 Okl. 250, 44 Pac. 205, it was held that an offer by a debtor to make an assignment for the benefit of his creditors is no evidence of fraud, and constitutes no ground for attachment. Other cases to the same effect are: *Winfield National Bank v. Croco*, 46 Kan. 629, 26 Pac. 942; *Tootle, Hosea & Co. v. Coldwell*, 30 Kan. 125, 1 Pac. 329; *Abernathy Fur. Co. v. Armstrong*, 46 Kan. 270, 26 Pac. 693; *De Wolf & Son v. Armstrong*, 46 Kan. 523, 26 Pac. 1038; *Campbell v. Warner*, 22 Kan. 604.

As we are fully convinced that the evidence does not tend to show, and that the trial court did not find, any intent on the part of the defendant to defraud his creditors, but merely an intent to prefer one of them over the others in the order of pay-

ment, the other questions presented become immaterial.

The judgment of the court below is affirmed. All the Justices concur.

### EVERETT v. COMBS. (No. 8347.)

(Supreme Court of Oklahoma. April 14, 1914.)

#### (Syllabus by the Court.)

#### 1. BROKERS (§ 54\*)—RIGHT TO COMMISSION—PROCUREMENT OF PURCHASER.

A real estate agent, authorized to sell land for another for a stated price, for a certain compensation, is entitled to his commission when he produces a purchaser, ready, willing, and financially able to purchase the land upon the terms and conditions agreed upon.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

#### 2. APPEAL AND ERROR (§ 1001\*)—VERDICT—EVIDENCE.

Evidence of plaintiff in this case shows that he made an unconditional agreement with defendant to find him a purchaser for a certain tract of land at an agreed price, for which he was to receive a commission of \$100, and that he found such purchaser who was ready, willing, and financially able to purchase the land; and this issue was submitted to the jury under all the facts and circumstances, and a verdict returned in favor of plaintiff for the amount sued for. *Held*, the verdict is reasonably sustained by the evidence, and should not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

#### 3. COURTS (§ 163\*)—ACTION FOR COMMISSIONS—JURISDICTION.

Record examined, and fails to disclose that the title to the land over which the claim of plaintiff's commission arose was involved; hence the county court had jurisdiction in said cause.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 410, 411, 443, 479, 1294; Dec. Dig. § 163.\*]

Error from County Court, Creek County; Warren H. Brown, Judge.

Action brought in justice court by Andy Combs against L. H. Everett. Judgment for plaintiff on appeal to the county court, and defendant brings error. Affirmed.

Pryor, Rockwood & Lively, of Sapulpa, for plaintiff in error. Wm. L. Cheatham, of Bristow, for defendant in error.

RIDDLE, J. This suit was brought by Andy Combs, defendant in error, against L. H. Everett, plaintiff in error, in a justice court of Creek county. Judgment was rendered in favor of plaintiff, and an appeal was prosecuted to the county court, where trial was had to a jury, and a judgment again rendered in favor of plaintiff.

Briefly stated, the facts are as follows: Plaintiff, Combs, was engaged in the real estate business in the town of Bristow, Creek county. Plaintiff was employed by defendant to sell a certain tract of land, owned by defendant, situated in Creek county for the sum of \$2,900, and agreed to pay a commis-



sion for the services rendered of \$100. Plaintiff found a purchaser in the person of one Alfred Anderson. He showed Anderson the land and introduced him to defendant; whereupon said defendant and Anderson entered into a written contract of sale, defendant agreeing to furnish abstract showing good title. The purchaser deposited a forfeit of \$250 in a bank, to be delivered to defendant upon approval of title as part of the purchase price. No abstract was furnished; but Anderson's attorney made some examination as to the condition of the title to said tract of land and found some irregularity, which seems could have been cured and made satisfactory to the purchaser. Defendant, however, called the deal off and withdrew his deposit. Plaintiff had no notice of any defect in the title.

[1] Plaintiff in error bases his right of reversal in this court almost solely upon the proposition that the contract of sale on which the right to the commission claimed by plaintiff depended was conditional; that is, he says that the condition in the contract was that Everett, defendant in the court below, agreed to furnish a good title. It may well be presumed that this element may be involved in every contract made for the sale of real estate. We fail to find anything in the record, however, supporting the proposition that the right of plaintiff to his commission depended upon a condition of this kind. In fact the plaintiff testified that he made an unconditional contract with defendant whereby he was to furnish a buyer for the land in question at a price of \$2,900. The testimony shows that he did find such a purchaser, that an unconditional contract of purchase was made and entered into, and that the would-be purchaser was ready, willing, and able to take the land; and we gather from the record that, although some irregularity in the title was found, yet he was still willing to have the defect corrected and accept the title. Defendant testified that he made no contract with plaintiff for the sale of the land. This was purely an issue upon a controverted question, to be submitted to and determined by the jury. The rule is well settled that, where a broker has fully performed his undertaking by procuring a person ready, willing, and able to purchase his principal's property at the price and on the terms agreed, he is entitled to his commission. *Carson v. Vance*, 35 Okl. 584, 130 Pac. 946; *Reynolds v. Anderson*, 37 Okl. 368, 132 Pac. 322, 46 L. R. A. (N. S.) 144.

[2] The testimony is preponderant; in fact the great weight of the testimony is in favor of plaintiff, and in our judgment the verdict of the jury and the judgment of the court thereon is correct.

[3] The only other proposition raised by the plaintiff in error is that the county court had no jurisdiction over the subject-matter,

for the reason that it involves the question of title to land. We have examined the record and briefs of counsel, and find that there is no merit in this contention.

Finding no reversible error in the judgment of the trial court, the same is in all things affirmed. All the Justices concur.

VAN ARSDALE-OSBORNE BROKERAGE  
CO. v. WILEY. (No. 3375.)

(Supreme Court of Oklahoma. April 14, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 671\*)—CASE-MADE—EVIDENCE.

In the absence of a recital in the case-made that it contains all the evidence submitted or introduced on the trial, this court will not review any question depending upon the facts for its determination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

2. APPEAL AND ERROR (§ 671\*)—EVIDENCE—RECITAL OF CASE-MADE—SUFFICIENCY.

The case-made filed in this case contains the following: "This was all the evidence offered by plaintiff and defendant in this case, and the parties plaintiff and defendant rested their case." *Held*, that this is a substantial compliance with the rule laid down by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

3. TRIAL (§ 141\*)—DIRECTION OF VERDICT—EVIDENCE.

The only point in issue for the proper determination of the cause is as to whether a policy of insurance applied for had been issued and had become effective. The uncontradicted testimony shows that such policy had been issued and was in effect. *Held*, that it was prejudicial error for the court to deny a motion for a directed verdict in favor of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.\*]

Error from County Court, Texas County; W. C. Crow, Judge.

Action brought in justice court by the Van Arsdale-Osborne Brokerage Company against M. G. Wiley. Judgment for defendant on appeal to the county court, and plaintiff brings error. Reversed, with direction.

E. L. Foulke and C. A. Matson, both of Wichita, Kan., for plaintiff in error. William Edens, of Pocatello, Idaho, for defendant in error.

RIDDLE, J. Plaintiff in error, hereinafter referred to as plaintiff, brought this suit in a justice court of Texas county against M. G. Wiley, hereinafter referred to as defendant, to recover on a promissory note the sum of \$55, bearing 10 per cent. interest from date if not paid when due. The facts, briefly stated, are: The note was executed by defendant in favor of plaintiff in consideration for certain hail insurance, to be issued by Van Arsdale and Osborne, as general agents for the St. Paul Fire & Marine Insurance

Company. An appeal was prosecuted from the justice court to the county court of Texas county. In that court defendant filed his answer, containing: First, a general denial; second, admission of the execution of the note; and, third, a plea of failure of consideration, in that said note was executed under an express agreement with I. E. Cameron, who was the local agent for said insurance company, located at Guymon, Okla., that he would procure and have issued and delivered by the St. Paul Fire & Marine Insurance Company to said defendant an insurance policy against loss by hail on 155 acres of wheat located on certain lands in Texas county; that said defendant never at any time received said policy, and that no policy had ever been issued by plaintiff or by said insurance company in consideration for the note; that he had made demand upon said Cameron, as agent, and on plaintiff that they execute and deliver a policy to cover said wheat in consideration of said note, but that they refused to execute and deliver same; that said note was absolutely without any consideration, and was void. In substance, the testimony was that defendant signed two applications for insurance, the wheat being located on two different tracts of land; he then executed the note in question and delivered it to Cameron, the agent; that Cameron told defendant at the time the terms required by the company he represented was that, upon the execution of a note for \$55, he would procure a policy executed by the insurance company; that he went to Cameron, the agent, 15 or 20 days after he made the application and asked for his policy; that Cameron stated that he was pretty sure he had the policy, but was unable to find same, but stated he would look again, defendant stating that he was going away to be gone a month or two; that he never made any other attempt to get the policies. The applications contain the following: "Shall we send policy to you, or to the agent?" Ans. "Send the policy to the agent."

Van Arsdale testified on behalf of plaintiff that he and Osborne, of Wichita, Kan., were the general agents of the St. Paul Fire & Marine Insurance Company; that it was his duty to receive and approve the applications for hail insurance in behalf of his firm; that the applications which were introduced in evidence, marked Exhibits A and B, were received on May 25, 1910, and were approved on said day, and two policies issued, being numbered 68,296 and 68,297 respectively. He produced copies of the original policies, and testified that the originals were mailed to I. E. Cameron, Guymon, Okla.; that the original policies were not in possession of the said Van Arsdale Osborne Brokerage Company; that the premiums on said policies were paid to the St. Paul Fire & Marine Insurance Company on or about the 1st day of June by Van Arsdale and Osborne; that they had never received any notice from de-

fendant that the policies had not been received.

Cameron testified that he was local agent for said insurance company, and was also in the banking business at Guymon, Okla. He identified the note and the two applications introduced in evidence. The question was asked witness: "Send the policies to agent; was that in there before Wiley signed it (referring to the applications)?" Ans. "Yes, sir." He further testified that he received the policies from the general agents and mailed them to Mr. Wiley; that he put them in a mail box, addressed to Mr. Wiley, with sufficient postage; that the envelope contained a return card; but that same was never returned. At the close of the evidence, plaintiff moved for a directed verdict, which motion was overruled and exceptions taken. The issues were submitted to the jury, and a verdict returned in favor of the defendant. Motion for a new trial was filed, overruled, and exceptions taken.

Defendant in error, M. G. Wiley, died on the 11th day of December, 1913, and this cause has been revived in this court in the name of Elizabeth Wiley and Mary Elizabeth Wiley, heirs of M. G. Wiley, deceased; and said parties are substituted as defendants in error in said cause.

[1, 2] Defendant in error has filed a brief, contending that the case-made contains no statement showing that the same includes all the evidence introduced in the trial of said cause; and that, inasmuch as the only error complained of is that the verdict of the jury was not sustained by any evidence, and was manifestly given under the influence of passion and prejudice, cannot be considered in this court. This is the only ground discussed in the brief filed by defendant in error. The case-made on page 54, among other things, contains the following: "This is all the evidence offered by plaintiff and defendant in this cause, and the parties plaintiff and defendant rested their case."

If, as stated therein, the case-made includes all the evidence offered in the trial of said cause by both plaintiff and defendant, it would necessarily follow that it included all the evidence introduced on the trial, for evidence could not well be introduced and received by the court, unless it was offered. While we recognize the uniform rule of this court that, if the case-made fails to contain a statement showing that it includes all the evidence introduced in the trial of a cause, we are not authorized to examine into the sufficiency of the evidence to ascertain whether or not the judgment is sustained. We are of the opinion, however, that this statement above quoted substantially complies with the holdings of this court.

[3] From the foregoing facts, in our opinion, the only question for this court to determine is whether or not, under the undisputed testimony, the court committed prejudicial error in overruling the motion for a

directed verdict. The answer of defendant sets up a good defense to the note in question, and, had it been sustained by the evidence, or if the facts were controverted, and had a verdict of the jury been returned in favor of defendant under proper instructions, then the judgment of the court should not be disturbed on appeal. Defendant not only alleged that it was the agreement that the policy be issued and delivered to him, and that he never received any policies, but he further alleges that no such policies were ever issued by the insurance company. It is admitted that in his applications a written request was made on the company to send the policies to the agent at Guymon. The testimony is undisputed that the policies were issued and mailed to and received by Cameron, the person who was designated by defendant to receive the policies. The applications, signed by the defendant and introduced in evidence, provide that: "I, M. G. Wiley, of post office Guymon, in the county of Texas, in the state of Oklahoma, hereby makes application to the St. Paul & Marine Insurance Company for insurance upon growing grain against damage by hail only, for the season of 1910, to the amount of three hundred twenty-five dollars, *from the day this application is accepted and approved by Van Arsdale & Osborne general agents, at Wichita, Kansas, at 12 o'clock noon until September 15, 1910, at noon, standard time.*" (Italics ours.)

When the applications were approved and the policies delivered to Cameron, the person who had been designated by defendant to receive them, the contract was fully consummated; and, in our judgment, it is immaterial, so far as the right of plaintiff to recover in this case, whether or not the policies were personally delivered to defendant. Under this state of facts, had the crop covered by the insurance policies been destroyed by hail, and defendant had sued the insurance company upon the policies seeking a recovery, we feel that no court would be warranted in that case in denying a recovery solely by reason of the fact that, after the policies were issued and delivered to Cameron for delivery, they had not been personally delivered to defendant. To so hold would be to adhere to technicality and form, and to ignore substance and reason; and the same rule must be applied in determining the rights of plaintiff in this case. While it is true that, as a general rule, before an insurance policy becomes effective, a delivery must be made, whether or not a policy becomes effective before delivery is usually controlled by provisions of the contract. In this case it would appear that a reasonable construction of the applications in question would be to hold that, when they were approved by the general agent of the company, the insurance became effective. The policies were actually issued in favor of defendant

and delivered to the person designated by him, and the testimony showing this state of facts is uncontradicted. *Terry v. Creed*, 28 Okl. 857, 115 Pac. 1022; *Spaulding Mfg. Co. v. Holliday*, 32 Okl. 823, 124 Pac. 35; *Spaulding Mfg. Co. v. Cooksey*, 34 Okl. 790, 127 Pac. 414.

It is therefore our conclusion that the motion for a directed verdict should have been sustained by the trial court, and that the court, in denying said motion, committed prejudicial error, requiring a reversal of this case; and it is the order of the court that said cause be reversed, with direction to the trial court to set aside the verdict of the jury and proceed in accordance with this opinion. All the Justices concur.

GALER et al. v. BERRIAN et al. (No. 2992.)  
(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. TRIAL (§§ 370, 374\*)—CANCELLATION OF INSTRUMENTS—RIGHT TO JURY TRIAL—EQUITY.

In cases of equitable cognizance (except as otherwise provided by statute [Rev. Laws 1910, §§ 4993, 4994]; see *Brewer v. Martin*, 138 Pac. 166, opinion of this court by Justice Williams, recently decided, and not yet officially reported, and authorities therein cited), the judge may call a jury, or consent to one, for the purpose of advising him on the questions of fact, and he may adopt or reject their conclusions, as he sees fit, for that the whole matter must eventually be left to him to determine; and instructions offered by the parties furnish no ground of error on appeal. It is not only the right, but the duty, of the court, in such cases, to fully determine all questions of fact, as well as of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 881, 884, 885; Dec. Dig. §§ 370, 374.\*]

2. APPEAL AND ERROR (§ 1010\*)—FINDINGS—EVIDENCE.

The rule in this court is that, where the evidence reasonably tends to support the findings of a trial court or a jury in such court, the same will not be reviewed in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

Error from District Court, Nowata County; T. L. Brown, Judge.

Action by F. W. Galer and others against F. L. Berrian and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Tillotson & Elliott, of Nowata, W. H. Kornegay, of Vinita, and Glass & Weaver and A. C. Hough, all of Nowata, for plaintiffs in error. W. D. Humphrey, of Nowata, for defendants in error.

LOOFBOURROW, J. In January, 1910, the Northwestern Development Company was a corporation duly organized under the laws of the United States and doing a business in the county of Nowata, state of Oklahoma. At that time F. L. Berrian and others, defendants, were the owners of 185 shares of stock

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in said corporation, and the plaintiffs, F. W. Galer, J. K. Keenan, and George E. Woodward, purchased said shares of stock from said defendants for the purpose of obtaining the controlling interest in said Northwestern Development Company, said company having a certain 60-acre oil-bearing lease in Nowata county, the plaintiffs paying therefor the sum of \$4,255 in cash, the balance of \$2,771 being divided into four equal installments, each installment being represented by a promissory note; said installments falling due in 3, 6, 9, and 12 months from date. The notes were payable to cashier of State Bank & Trust Company, as trustee of defendants, and with the contract were deposited in escrow with said bank. The first note became due April 26, 1910, and was then paid. On July 13, 1910, plaintiffs brought this suit against the defendants, charging that the defendants did fraudulently and falsely represent unto the plaintiffs that well No. 5 upon said lease had been completed on the 17th day of November, 1909, and that the same had been completed through an oil-bearing sand, beginning at 637 feet from the top of the ground, and running to 655 feet from the top of the ground, and that said well had never been shot, and that overnight it had filled up with 350 feet of oil, and that at said time it stood full of oil, and there was no gas in said well; that, in truth and in fact, no oil had been found in said well; and, in truth and in fact, there was no oil-bearing strata of any kind encountered therein. Plaintiffs asked for a judgment against the defendants for the amount of money actually paid to them, for a surrender of the unpaid notes; that the judgment be declared a lien upon the stock, and the stock sold to satisfy said judgment; and for a personal judgment against each of the defendants. These charges were by the defendants denied, and, after issue joined, the case was tried in the district court; a jury being impaneled for the purpose of advising the court on questions of fact. The gist of this case is the question of the alleged fraud or misrepresentations on the part of the defendants in error at the time of or in the negotiations leading up to the sale.

At the conclusion of the trial, plaintiff requested six certain instructions, which were each refused. Thereupon the court charged the jury, to nine of which instructions plaintiffs excepted. The court submitted four interrogatories to the jury. No. 1 is as follows: "Was there fraud or misrepresentation used by the seller or sellers of the property in controversy at the time the sale was consummated, or in the negotiations leading up to the consummation of the sale of the property?" Which interrogatory the jury answered, "No." The other three interrogatories depended upon the answer to No. 1, and it is not necessary to consider them. Thereafter a journal entry was prepared, reciting the proceedings of the trial, and incorporated

therein were the special interrogatories and the answers thereto as returned by the jury, and the court reached the same conclusion as to the facts as shown by the interrogatories and answers of the jury.

The court found: " \* \* \* That there was no fraud or misrepresentation used by the defendants Berrian et al., in selling the 185 shares of stock involved in this case, either at the time the sale was consummated or in the negotiations leading up to the sale; that the plaintiffs were not induced to buy the stock by fraud or misrepresentation; that the plaintiffs have no right to rescind, and that the defendants are entitled to the full payment of the consideration bargained for and paid, or agreed to be paid by the plaintiffs; that the contract attacked by plaintiffs is good and valid; that the plaintiffs take nothing by this action. That the cashier of the State Bank & Trust Company, payee in the notes aforesaid and trustee for the defendants, have and recover of and from the plaintiffs the full amount due upon said notes." Exceptions were properly saved to the findings of fact and conclusions of law, and to the judgment of the court.

The errors assigned in this court are: "That the verdict and decision is contrary to the law, and is not sustained by sufficient evidence." "That the court erred in refusing to give instructions requested by the plaintiff." "That the court erred in giving instructions No. 5½, 7½, and 9, respectively."

[1] A suit for the rescission of a contract is one of equitable cognizance, invoking, as it does, an equitable remedy. In such cases the facts deduced from the evidence are ultimately determined by the court, and the court may either adopt or disregard the conclusions reached by the jury as to the facts established in the case. This identical question has frequently been before this court. See Barnes et al. v. Lynch et al., 9 Okl. 156, 59 Pac. 995; Richardson R. B. Dry Goods Co. v. Hockaday et al., 12 Okl. 546, 73 Pac. 957; Apache State Bank v. Daniels, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901; Wat-tah-noh-zhe et al. v. Moore, 36 Okl. 631, 129 Pac. 877; Watson v. Borah et al., 37 Okl. 357, 132 Pac. 347; Caldwell v. Brown, 56 Kan. 566, 44 Pac. 10.

[2] We have read all of the testimony. The record consists of more than 460 pages, and in such record there is sufficient evidence to support the findings of fact and the judgment in this case. Mr. Woodward, one of the plaintiffs, who made the trade, had been in the oil business for more than 25 years, and he personally examined this lease, and the negotiations extended over a period of about two months before they were finally consummated. Well No. 6 was drilled after plaintiffs purchased this property; thereafter well No. 5 was cleaned out, and was declared to be a nonproducer; and thereafter No. 7 was drilled. The court heard the witnesses testify, and, applying the rule of credibility in

such cases, reached the same conclusion as we have reached after reading the record. Contracts cannot be rescinded because one of the parties thereto may have made a bad bargain.

The judgment of the trial court is affirmed.  
All the Justices concur.

## FRISCO LUMBER CO. v. SPIVEY.

(No. 3335.)

(Supreme Court of Oklahoma. April 14, 1914.)

(Syllabus by the Court.)

### 1. MASTER AND SERVANT (§ 259\*)—INJURIES TO SERVANT—PETITION—SUFFICIENCY.

Petition examined, and *held* to state a cause of action.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 837-843; Dec. Dig. § 259.\*]

### 2. MASTER AND SERVANT (§ 106\*)—DEFECTIVE APPLIANCES—RESPONSIBILITY OF MASTER.

The responsibility to its servants of a lumber company operating a railroad is the same in respect to cars of other companies which the servants are compelled to handle as in respect to its own, especially where the defects are not latent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 198-199; Dec. Dig. § 106.\*]

### 3. MASTER AND SERVANT (§§ 101, 102\*)—DEFECTIVE APPLIANCES—RESPONSIBILITY OF MASTER.

Where a lumber company, in connection with its business, operates a railroad between its timber and mills and has its own men in charge of the engine and trains, it is bound to exercise ordinary care in providing its servants a reasonably safe place to work, reasonably safe tools, appliances, and machinery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

### 4. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—CONCURRING NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF MASTER.

Where an employé of a lumber company is engaged in checking lumber in a box car, without knowing that his fellow servants are engaged in switching other cars on the same track, and a drop switch is made, thereby "kicking" loaded cars which have broken brakes against the car in which the employé is at work, whereby he is injured, *held*, the lumber company is liable notwithstanding the fact that the accident was caused by the concurring negligence of the fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

### 5. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—LIABILITY OF MASTER.

Where a lumber company's foreman has under his charge one known to him to then be engaged in checking lumber in a box car, and without warning directs an engineer to make a drop switch of cars on a grade siding, which "kicks" loaded cars against the box car, pushing the ends of the lumber together, thereby crushing and injuring the "checker," the lumber company is liable, notwithstanding the fact that the engineer was a fellow servant of the person injured.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

### 6. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the master has a rule against employes working in cars when switching is being done on the same track, and an employé is checking lumber for the company in a car, and does not know that switching is being or about to be done on that track, and cars are "kicked" against the car in which such employé is working, and he is thereby injured, *held*, there is no assumption of risk on the part of the servant, whereby the master is relieved from liability for such injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

### 7. INSTRUCTIONS APPROVED.

Instructions given by the court examined, and *held* to properly state the law.

(Additional Syllabus by Editorial Staff.)

### 8. RAILROADS (§ 2\*)—TRAMROAD—"RAILROAD."

The term "railroad" will include a tramroad belonging to a lumber company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

### 9. TRIAL (§ 242\*)—INJURY TO SERVANT—INSTRUCTION.

In an employé's action for injuries before statehood, an instruction that certain chapters of the Arkansas law were applicable to the case, was misleading, and that the law in force at the time of the injury governed, and might cause the jury to speculate as to what the Arkansas law was, and was properly refused; it being the court's duty to state what the law was, regardless of its source.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

Error from District Court, McCurtain County; Summers Hardy, Judge.

Action by V. T. Spivey against the Frisco Lumber Company, a corporation, for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

Stewart & McDonald, of Hugo, for plaintiff in error. M. W. Gross, of Hugo, for defendant in error.

LOOFBOURROW, J. [1] V. T. Spivey, plaintiff below, filed an amended petition as follows: "Comes now the plaintiff, V. T. Spivey, and by leave of court files this amended petition, and for cause of action against the defendant, the Frisco Lumber Company, alleges and states: That this cause of action was filed before statehood in the Central district of the Indian Territory, Antlers Court division thereof, and this is an amended petition filed by leave and order of the court made on the 17th day of September, 1909; that the Frisco Lumber Company is a corporation doing business in the town of Bokhoma, Okl., in said county and state, as manufacturer and shipper of lumber, having a tramroad and engine or engines to be used in and for switching purposes and for hauling logs to its mill in said town, and had the same at the time that this cause of action arose, on the 20th day of September, 1906; that on the 20th day of September,

1906, plaintiff was in the employ of said defendant company as a lumber checker, and had been in its employ for some time prior thereto; that on the said date, while plaintiff was in a car checking lumber, as it was his duty to do, said car being then and there upon the side track at defendant's mill being loaded, without any warning to plaintiff some loaded cars were switched by defendant's engine in making a flying or drop switch and throwing three or four cars onto the side track where the car was in which plaintiff was at work checking lumber and struck three or four cars between the cars switched and the car in which plaintiff was working; that the cars so struck were without brakes on them, though heavily loaded and standing on a downgrade side track; that said cars because of the fact that they had no brakes on them, or the brakes were broken and were not turned on, ran down upon and into the car in which plaintiff was then and there engaged in the discharge of his duties to defendant, striking said car with such force as to drive the lumber from each end of the car together, catching plaintiff between the lumber, knocking him over, and catching one of his feet between the lumber, breaking and crushing and causing a severe fracture of the bone of the instep, and is enlarged, causing the leaders on top of said foot to become matted and bound together with surrounding tissues, and causing the tendons below the outer ankle bone to become also bound, and also causing a strain to joint of right hip between the hip bone and the sacrum, and straining the back, which will remain a lasting and permanent injury to plaintiff; that said injury was caused by the carelessness and negligence of the defendant in loading and using and leaving said cars upon the side track where plaintiff was at work without any brakes on them, and they on a downgrade toward where plaintiff was at work; that the brakes on said cars were broken and unsafe, and that said broken and unsafe condition of said brakes was known to defendant, or by the exercise of ordinary care and diligence could have been known to it, and was unknown to plaintiff, and could not have been known to him by the exercise of ordinary care and diligence; that had said brakes been in a safe condition and turned on said cars, it would have been impossible for said cars to have run into plaintiff's car; that before said injury, plaintiff was a strong young man, able to do carpenter work and earn \$2 per day; that since said injury plaintiff has not been strong, and has suffered untold pain and mental anguish, and his earning capacity has been reduced at least one-half, and said injury was caused by the negligence of defendant, and without fault upon the part of plaintiff. Wherefore plaintiff prays judgment against defendant in the sum of \$5,000, and costs of this suit, for the aforesaid injuries." To this petition the Frisco Lumber Company filed a demurrer, which was overruled and exceptions saved;

thereafter the defendant lumber company answered, which answer is, in substance, a general denial, with the specific admission that it is a corporation, as charged, engaged in the lumber business, having a tramroad and engine used for switching purposes and hauling logs to its mill, and alleging that the injury, if any, resulting to the plaintiff was caused by the acts of a fellow servant, and in a supplemental answer pleads contributory negligence on the part of the plaintiff. The plaintiff replied with a general denial, and alleged that the plaintiff was injured by the concurrent negligence of both the defendant and a fellow servant, the engineer; the case was tried to a jury and a verdict returned in favor of the plaintiff, Spivey, and against the defendant the Frisco Lumber Company, in the sum of \$1,500; from a judgment thereon the defendant appeals and assigns as error: First. The court erred in overruling the demurrer of the plaintiff in error to the amended petition of defendant in error. In support of this assignment, counsel contends that the petition shows that the injury resulted from the fault of a fellow servant, and that the master is not liable. Giving the language of the petition a fair construction, it states a cause of action, and charges concurring negligence on the part of the servant and the master.

The second assigns error in admitting evidence, etc., as shown by the case-made herein, and is too general in its character. See *Turner v. First National Bank* (No. 2593), 139 Pac. 703, decided at this term, but not yet officially reported.

[2, 3, 8] The third assigns error "In admitting evidence on the part of the defendant in error relative to plaintiff in error not having a car inspector to inspect cars received by it for the purpose of shipping lumber." This tramroad, which belonged to the lumber company, comes within the scope and definition of the term "railroad," and it is not disputed that it was a railroad. It is contended that because the cars loaded with ties did not belong to the lumber company, it was not responsible for their being out of repair. The rule seems to be that the responsibility of a railroad company to its servants is the same in respect to cars of other companies which the servants are compelled to handle as in respect to its own, especially where the defect is not latent. The evidence in this case shows that the two cars loaded with ties had been hauled over the tramroad, loaded by defendant and placed on the grade side track the day before the injury occurred; that the brake on one of the cars loaded with ties had a broken chain and the brake could not be operated, while the brake on the other car was without a ratchet, or some other appliance, which prevented the brake being set; that when these cars were set in motion an employé of the lumber company climbed upon them and tried to set both brakes, but could not do so. A casual inspection of either of these brakes would have disclosed their

condition, and the lumber company was bound to exercise ordinary care in furnishing cars in reasonably safe condition. See *Self v. Adell Lumber Co.*, 5 Ga. App. 846, 64 S. E. 113; *Ozan Lumber Co. v. Bryan*, 90 Ark. 223, 119 S. W. 73; *Mo. Pac. Ry. Co. v. Barber*, 44 Kan. 612, 24 Pac. 969; *Atchison, T. & S. F. Ry. Co. v. Penfold*, 57 Kan. 148; 45 Pac. 574; 26 Cyc. 1110, and numerous authorities cited in note 62. The testimony offered to which defendant objected tended to show that the defendant had no car inspector. While it may not have been necessary, nor are we aware that the law required the lumber company to have an inspector employed specially for that purpose, still it was the duty of the lumber company to have some of its employes examine the cars which it used, for the purpose of ascertaining whether or not such cars were reasonably safe and in proper condition, to avoid injury to those in its employ, and there was no substantial error in the admission of the testimony.

[4-6] The fourth error assigned is the overruling of the demurrer filed by the defendant to the evidence offered by the plaintiff on the trial. The plaintiff's evidence was sufficient to support the allegations of his petition, and on the trial of the case it was shown that the foreman of the defendant lumber company, the superior of both the engineer and the plaintiff, directed the engineer to make the drop switch, and that the foreman knew that the plaintiff was in the box car checking the lumber, and that he gave the plaintiff no notice of the fact that they were switching, or that the drop switch was to be made, and the plaintiff testified that he did not know when he was in the car checking the lumber that the company at that time were or would do any switching on that track. There was testimony offered tending to show that there was a rule of the company that the employes should not work in the cars while switching was being done; but the plaintiff would not be chargeable with contributory negligence or assumption of risk by reason of such rule, unless he knew that the switching was about to be done, or was being done, and this question of fact was submitted to the jury.

The plaintiff in error cites many authorities supporting the proposition that the master is not liable for injury resulting from the act of a fellow servant, without fault of the master, but those cases are not applicable to the case at bar. *Thompson on Negligence*, § 4858, states: "Where the master fails in his duty to the injured servant of furnishing safe premises, machinery, tools, or appliances, and this failure is a proximate cause of injury, the fact that the negligence of a fellow servant also commingles with it as a proximate or efficient cause will not exonerate the master from liability." See note with numerous authorities supporting the proposition.

It is conceded that because this action arose in the Indian Territory in 1906, when

certain laws of the state of Arkansas were in force, those laws control. The case of *St. L., I. M. & S. Ry. Co. v. Corman et al.*, 92 Ark. 102, 122 S. W. 116, is one very similar to the case at bar. Corman was a brakeman in the employ of the defendant railway company; was killed by the derailment of an engine on which he was riding in the discharge of his duties, in August, 1907, at Wagoner, Ind. T. The engine, pulling a freight train, was approaching Wagoner in the yard limits; Corman was on the running board of the engine, preparing to go down on the pilot for the purpose of operating a switch for the train to go in upon a siding; there was another track used as a passing and storage track, and a few minutes before Corman's engine reached the north end of the track some ballast cars, standing on this track, were struck and put in motion by other cars handled by the crew of another train; these cars rolled down the descending grade of the storage track and out upon the main track, and collided with Corman's engine, overturning the same and crushing him to death; there was no derailing device of any kind at the end of this storage track, and the brakes on the cars were not in working order; when they were put in motion a brakeman, who was a member of the other crew, mounted the ballast cars and tried to put on the brakes so as to stop them, but on account of the brakes not working he failed to accomplish this. The court held: "Where a railroad brakeman was injured because of the railroad company's negligence in failing to provide a derailer or other safety device at a dangerous switch, he was entitled to recover, though the negligence of his fellow servants concurred with that of the railroad company."

*M., K. & T. Ry. Co. v. Elliott*, 2 Ind. T. 407, 51 S. W. 1067, holding: "A train dispatcher and a fireman on a locomotive are not fellow servants so as to relieve a railway company from liability for injuries sustained by a fireman through negligence of a dispatcher."

*M., K. & T. Ry. Co. v. Wilhoit*, 6 Ind. T. 535, 98 S. W. 841, holding: "The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants, but the master owes to the servant certain duties, such as providing a reasonably safe place to work, reasonably safe tools, appliances, and machinery, and he must exercise proper diligence in the employment of reasonable and competent men to perform their respective duties. If the master be neglectful in any of these matters, he is liable. And if he employ another in the performance of these obligations for him, he is liable for the neglect of that other." See, also, *K. C., F. S. & M. R. Co. v. Becker*, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814, 77 Am. St. Rep. 78; *Sullivan-Sanford Lumber Co. v. Cooper et al.* (Tex. Civ. App.) 126 S. W. 35; *Marcum v. Three States*

Lumber Co., 88 Ark. 28, 113 S. W. 357; Grand Trunk Ry. Co., etc., v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Gila Valley, G. & N. R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276; Norfolk & W. R. Co. v. Nuckols, 91 Va. 193, 21 S. E. 342; Coppins v. New York C. & H. R. R. Co., 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523.

[9] The fifth assignment of error is the refusal of the trial court to give instructions Nos. 1 and 9, requested by defendant. There is no merit in this contention. Said requested instruction No. 1, if given would have told the jury that the cause of action accrued in September, 1906, and that certain chapters of the Arkansas law were applicable to that case, and "that the law to govern in this case will be the law that was in force at the time of the alleged injury." This instruction would have been misleading and confusing, and might have caused the jury to speculate upon what the Arkansas law was. It was the duty of the court, by its instructions, to state to the jury what the law was, regardless of its source. Each element of the ninth requested instruction is covered in the instructions given by the court, and the instruction in itself was not proper for the reason that, standing alone, certain elements were omitted, which were properly included in the charge given by the court.

[7] In the sixth assignment of error all of the instructions given by the court are set out, but counsel in their brief have failed to designate any portion of the same which is erroneous. The instructions fairly state the law as applied to the evidence in this case, and in them we find no substantial error.

The judgment of the trial court is affirmed. All of the Justices concur.

LASOYA OIL CO. v. ZULKEY. (No. 4083.) †  
(Supreme Court of Oklahoma. Jan. 18, 1914.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD (§ 70\*) — INVALID LEASE BY GUARDIAN — RATIFICATION BY WARD.

Where a corporation leases a minor's land from her guardian for oil and gas purposes, paying therefor to the guardian, for the use of his ward, \$40 per acre bonus and an eighth royalty, and at the same time, and as a part of the same consideration, pays to the guardian, for his own use and benefit, \$20 per acre for the improvements on the land, claimed by the guardian to be his property, when in fact such improvements were purchased with the money belonging to the ward, the ward may maintain an action against such corporation for a cancellation of the lease. But where such action is commenced by the ward after majority, and she sets out in her petition all of the facts relative to the fraudulent transaction between the corporation and her guardian, and verifies the same, and where such ward is a person of ordinary intelligence, if thereafter she voluntarily makes final settlement with her guardian, receiving from him valuable property and money, knowing said property and money to be the

proceeds of such lease, such settlement is a ratification of the lease.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 308-315; Dec. Dig. § 70.\*]

2. TENDER (§ 19\*)—BINDING EFFECT.

The party making a tender in the trial of a cause for the purpose of doing equity is bound by such tender.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 59-64, 67; Dec. Dig. § 19.\*]

Error from District Court, Rogers County; T. L. Brown, Judge.

Action by Ada A. Zulkey against the Lasoya Oil Company, a corporation. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

George S. Ramsey, of Muskogee, and W. E. Woodcock and Virgil Hicks, both of Sapulpa, and C. L. Thomas, of Muskogee, for plaintiff in error. Charles Richardson and E. R. Perry, both of Tulsa, and Stewart, Cruce & Gilbert, of Oklahoma City, for defendant in error.

LOOFBOURROW, J. In 1901 Ada, Minnie, Alexander, and Leroy Zulkey, minor children of Mark F. Zulkey, were the owners of four contiguous allotments in the Cherokee Nation. Mark F. Zulkey, the legal guardian of said minors, with the approval and under the direction of the United States District Court of the Northern District of the Indian Territory, leased said allotments to the Lasoya Oil Company for oil and gas purposes; the consideration stated in the lease being \$40 per acre bonus and an eighth royalty, said lease running for a period of 15 years. The said lease was negotiated by John P. and James H. Elkin, stockholders in said oil company, and as a part and parcel of the same transaction the said oil company agreed to pay Mark F. Zulkey the sum of \$20 per acre for his own use and benefit, he representing that the improvements on said allotments were placed there at his own expense and labor; but it is shown by the evidence that the improvements were, in fact, the property of the minor children. The Lasoya Oil Company paid to Mark F. Zulkey the \$40 per acre bonus for the children and the \$20 per acre bonus for his own use and benefit, and have drilled 22 wells upon the tract of land belonging to Ada A. Zulkey; 9 of these wells being dry holes, and the others small producers. A short time after Ada A. Zulkey became of age she commenced this action to cancel the lease, alleging that the same was obtained by fraud and collusion of said Oil Company and her guardian, and that the true consideration for the lease was \$60 per acre bonus and an eighth royalty, and that they had knowingly and fraudulently paid Mark F. Zulkey, her guardian, \$20 per acre for his own use and benefit. The petition sets out fully all of the facts relative to this transaction, and the same is verified by Ada

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied April 28, 1914.



A. Zulkey. The Lasoya Oil Company denies the alleged fraud, and alleges its own utmost good faith in obtaining the lease, and further alleges that Ada A. Zulkey has, by her acts and conduct, ratified said lease since she became of age. The case was tried to the court, who found that the lease was obtained by fraud, and that Ada A. Zulkey is entitled to the possession of the land and cancellation of the lease, and entered judgment accordingly. There are several assignments of error urged, but the question of ratification is the only one necessary to consider in this case.

[1] The evidence discloses that the money received by Mark F. Zulkey as guardian, under this lease, the bonus and royalty, were paid by said guardian, under the directions of the county court of Craig county, invested in property consisting of two lots and a ten-room house in the town of Chelsea; that after Ada A. Zulkey became of age, and after this suit was commenced, she voluntarily made a settlement with her guardian in the county court, receiving from him the said house and lots and about \$800 in money. She testified that she knew that this property and money were the proceeds of this lease at the time she made the settlement; that she accepted the same, signed a receipt therefor, and settled in full with her father as guardian.

The acts and conduct of said ward were a ratification of the lease. For authorities holding that where a ward, after attaining majority, accepts the proceeds and benefits arising from a voidable transaction with reference to her estate, such ward is estopped to deny the validity of the transaction, see the following cases:

In *Young v. Walker*, 70 Miss. 818, 12 South. 546, it is held: "Where a ward, after attaining her majority, compels her guardian to account for and pay to her the money received by him on a sale of land set apart to her in a partition suit, she is estopped to afterwards question the partition."

In *Handy v. Noonan*, 51 Miss. 166, it is held: "An acceptance by the heir or ward, after attaining majority, of the purchase money of land sold under a void decree, is a confirmation of the sale in the sense and to the extent of working an estoppel in equity against an assertion of the legal title."

In the case of *Huth v. Carondelet Marine Railway, etc.*, 56 Mo. 203, it is held: "Where one who has made a conveyance during infancy, after becoming of age, does some act which is totally inconsistent with an intention to disaffirm, as receiving rent on a lease made in his infancy after he becomes of age, an affirmation may be inferred from such act, without regard to the lapse of time which has intervened after majority."

In the case of *J. O'Conner v. Carver et al.*, 12 Helsk. (Tenn.) 436, it is held: "Where

land was sold to pay debts of an estate, under a decree of the county court upon a petition \* \* \* in the names of J. O'C., administrator, and the two heirs, minors, appearing by their next friend, J. O'C., held, that the sale was void as against the minors, their interest being antagonistic to that of the administrator, who had virtually assumed to act for them against himself." See cases cited therein. "But the survivor \* \* \* (who succeeded to the interest of the other) having, upon reaching her majority, advisedly settled with J. O'C. (also her guardian), and received, together with other money, the residue in his hands of the proceeds of the land, held, that her conduct under the circumstances amounted to a ratification of the sale."

In *Lacy v. Pixler*, 120 Mo. 388, 25 S. W. 207, the court said: "An affirmation may be inferred from an affirmative act of the infant, after reaching majority, which is inconsistent with an intention to disaffirm; as receiving rents on a lease, receiving a part of the purchase money, or conveying a part of the land received in consideration for the deed"—citing *Ferguson v. Bell*, 17 Mo. 347; *Thomas v. Pullis*, 56 Mo. 219; *Sims v. Everhardt*, 102 U. S. 312, 26 L. Ed. 87; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

In *Bevis v. Heflin*, 63 Ind. 129, a guardian, during his ward's minority, sold her estate. The law required him to sell for cash only, but he took, as a part payment from the purchaser, his own promissory note. It was held that the sale was invalid as against the ward; but it was further held that a recovery by the ward against the guardian and his sureties for the amount of such sale constitutes prima facie a ratification of the act of the guardian.

In the case of *Penn v. Helsey*, 19 Ill. 295, 68 Am. Dec. 597, a certain town lot belonging to an estate was sold under the authority of the laws of the state of Illinois by the guardian of infant children, but no report of the sale was made to the court, and no order entered confirming it. Such sales are void, and no title passes to the purchasers. The court found that the plaintiff established the fact that the proceeds of said void sale were used to purchase other lands, and the land so purchased by the guardian was sold for a large sum of money, and the heirs received the full benefit of such sale. The court said: "It is a principle that, though in general estoppels are odious, as preventing a party from stating the truth, yet they are favored when they promote equity. \* \* \* The application of this principle does not depend \* \* \* upon any supposed distinction between a void and a voidable sale. If the sale be the one or the other, receiving the money, or its proceeds in other valuable property, with a knowledge of the facts, touches the conscience of the party, and therefore es-

tablishes the right of the party claiming under such sale, in one case as well as in the other."

[2] After the Lasoya Oil Company closed its case, said company, by its attorney, tendered into court and offered to confess judgment in favor of Ada A. Zulkey, the amount which it had paid to Mark F. Zulkey for improvements on her lands, to wit, the sum of \$2,000, together with interest thereon from the date of the lease, and declared its willingness under all circumstances and under any aspect of the case to do plaintiff absolute justice and equity. It is bound by such tender. 38 Cyc. 163. A tender is ordinarily an admission of an amount due equal to the sum tendered. See numerous authorities cited in note 59.

The judgment of the trial court is reversed, and rendered in favor of Ada A. Zulkey in the sum of \$2,000, together with interest thereon from the date of the lease. All the Justices concur.

WALLACE v. KILLIAN. (No. 3075.)  
(Supreme Court of Oklahoma. April 14, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001\*) — VERDICT — EVIDENCE.

Record examined, and held to disclose no reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 171\*) — ISSUES — CHANGE OF THEORY.

Where the answer and reply join issues inconsistent with the petition, and the case is submitted without objection on such issues, and judgment is rendered on that theory, the parties are bound by such theory on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

Error from District Court, McClain County; R. McMillan, Judge.

Action by Clarence E. Wallace, a minor, by John Wallace, his legal guardian, against G. V. Killian. Judgment for defendant, and plaintiff brings error. Affirmed.

Rennie, Hocker & Moore, of Purcell, for plaintiff in error. J. F. Sharp, of Oklahoma City, and J. B. Dudley, of Norman, for defendant in error.

KANE, C. J. This was an action commenced in behalf of Clarence E. Wallace, a minor, by John Wallace, his legal guardian, plaintiff in error herein, plaintiff below, against G. V. Killian, defendant in error herein, defendant below, to recover possession of certain real estate, alleged to be the property of the minor, and for damages for its

detention. Thereafter the defendant filed an answer, admitting that the plaintiff was the owner of the real estate and premises described in his petition, but alleged that he was rightfully in possession thereof by virtue of the assignment to him of a certain lease therefor, the terms of which it is not necessary to notice. Prior to the time the cause came on for trial, the plaintiff by a written lease, which is conceded to be valid, let the premises in controversy to the defendant, and thereafter, by agreement of the parties, the cause proceeded to trial upon the sole question of whether the defendant paid the rental value of the premises to the plaintiff during the time he was in possession thereof prior to the execution of the admittedly valid lease. The trial court stated the issues in controversy as agreed upon by the parties as follows: "The only question for the jury to pass upon in this case is that of the rents and damages, if any, for the year 1910. The defendant alleges that he had the land rented, and that he has paid the rents for said year. \* \* \* The jury returned a verdict for the defendant, to reverse which this proceeding in error was commenced.

[1] There is evidence reasonably tending to support the verdict of the jury; and, as there is no other question in the case than the one presented to the jury by the trial court, the verdict and the judgment rendered thereon are conclusive.

[2] There are several questions presented by counsel for plaintiff in error in his brief which, on account of the narrowing of the issues by the action of the plaintiff in executing a valid lease to the defendant, and the subsequent agreement of the parties, it is not necessary to review. The cause seems to have been tried upon what purports to be an answer, filed during the trial, and a reply thereto, wherein the only issue joined was the one above mentioned, which was decided by the jury in favor of the defendant. While the answer was filed over the objection of the plaintiff, and the court overruled a demurrer thereto, the plaintiff finally by reply did traverse the allegation of fact therein contained, and, as stated by the trial judge, agreed upon the issue to be submitted to the jury. In *Border v. Carrabine*, 24 Okl. 609, 104 Pac. 906, it was held: "When the answer of the defendant and the reply of the plaintiff join issues inconsistent with the allegations of the petition, and the case is submitted to the court below without objection on the issues joined by the answer and reply, and judgment is rendered on that theory, the parties will not be permitted to change in this court a theory voluntarily adopted in the court below."

For the reason stated, the judgment of the court below is affirmed. All the Justices concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## COURTNEY v. STATE.

(Criminal Court of Appeals of Oklahoma. April 25, 1914.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW (§ 771\*)—INSTRUCTIONS—EVIDENCE.

The accused, in a criminal case, is entitled to instructions defining the law applicable to his theory and covering his defense, if there is competent evidence tending reasonably to substantiate such theory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1815; Dec. Dig. § 771.\*]

## 2. CRIMINAL LAW (§ 815\*)—INSTRUCTIONS—ALIBI—EVIDENCE.

When, in the trial of a criminal case, the only defense is that of alibi, and the proof tends clearly to establish such defense, it is the duty of the trial court to instruct on the law of alibi, and especially so when requested to give such instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

## 3. CRIMINAL LAW (§ 1186\*)—PRACTICE.

This court is not warranted in departing from well-established rules of law universally upheld by all the courts of last resort, and especially so when such rules work no hardship upon the state, but are easily understood and well defined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

## 4. RIGHTS OF ACCUSED.

The rights of the citizen are as much entitled to the protection of the courts as the rights of the people, and no unfair burden is imposed, when the courts elected by the people are required to follow plain, universal rules of law, which are fair alike to all concerned.

Appeal from County Court, Garfield County; Winfield Scott, Judge.

Laura Courtney was convicted of violating the prohibition law, and appeals. Reversed.

J. H. Sykes, of Tulsa, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Laura Courtney, was convicted at the January, 1913, term of the county court of Garfield county on a charge of selling intoxicating liquor, and her punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 60 days. The proof on behalf of the state was by two witnesses, who testified that at about 7:30 p. m. on the 14th day of January, 1913, they bought one-half pint of whisky from the plaintiff in error, at a certain rooming house in Enid, and paid 75 cents therefor. The court improperly sustained objections to certain questions asked on cross-examination of the principal witness. Two witnesses, in addition to the plaintiff in error, testified that she was not at the place where the prosecution contended, at the time contended, but was at their home some distance away, and was there from 10 o'clock in the morning until

about 11 o'clock at night. After the testimony was closed, and before instructions were delivered to the jury by the court, counsel for plaintiff in error requested instructions on the law of alibi as a defense, which instructions were refused by the court. No instruction was given covering the law of alibi. The usual instructions as to presumption of innocence, burden of proof, etc., were given.

[2] The only material question presented by this appeal is whether or not it was error for the trial court to refuse to give specific instructions covering the law of alibi as a defense, when properly requested so to do, when there is evidence in the record tending clearly to establish such defense, and when no other defense or testimony is offered. This specific question has never been presented to this court.

In Brock v. State, 6 Okl. Cr. 24, 115 Pac. 1027, we said: "The policy of the law is that all persons shall have a fair and impartial trial. It cannot be said that a fair and impartial trial has been had unless the jury has been properly instructed as to the law of the case, and, when the instructions do not fully present all the material issues raised, the judgment of conviction must be set aside."

And in Roberson v. U. S., 4 Okl. Cr. 336, 111 Pac. 984, we said: "Where an instruction requested by the defendant is not in proper form, but pertains to a material issue in the case as made by the evidence, the court should correct it and give it in proper form, if he has not otherwise instructed upon that issue."

[1] In Reed v. State, 3 Okl. Cr. 18, 103 Pac. 1071, 24 L. R. A. (N. S.) 268, we said: "The defendant is entitled to an instruction defining the law as applicable to his theory of the case covering his defense, if there is any competent evidence reasonably tending to substantiate that theory." See, also, the general rule stated in 12 Cyc. 619, and cases cited under note 1.

Under these authorities the failure of a trial court to instruct on the law of alibi, when requested so to do, and when the evidence clearly raises that issue, is prejudicial error, and in our judgment of necessity requires the reversal of a judgment of conviction. It appears to be practically the unanimous rule that where alibi is the sole defense, and there is material evidence in support of it, it is reversible error for the trial court to refuse to instruct on that question. See Ayres v. State, 21 Tex. App. 399, 17 S. W. 253.

[3] The Assistant Attorney General has filed a written brief urging this court to abandon or depart from the well-established doctrine of practically all courts on this question. We are unable to conclude that the position is tenable or that such departure on the part of this court would be warrant-

ed. It is just as important to the public that persons who are charged with crime be accorded a fair and impartial trial as it is that the law be enforced at all.

This court has gone as far as any court to aid in the enforcement of the law, but we do not feel called upon to overturn all established customs and usages for the purpose of upholding the judgment of careless or indifferent trial courts.

[4] The rights of the citizen should be protected as well as the rights of the public, and it is not imposing an unfair burden on the people to require the trial courts of Oklahoma to follow the rules of law which have been in force and universally upheld by all courts of last resort, and especially so when such rules are fair alike to all concerned.

The judgment is reversed, and the cause remanded.

DOYLE and FURMAN, JJ., concur.

**Ex parte WINTERS.**

(Criminal Court of Appeals of Oklahoma.  
April 27, 1914.)

(*Syllabus by the Court.*)

**1. BRIBERY (§ 3\*)—DEFENSE—WANT OF OFFICIAL AUTHORITY.**

A person who holds himself out as an officer under color of authority, and who solicits and accepts a bribe, has no right to defend and be discharged on the ground that, as a matter of law, he had no right to act as such officer.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 4; Dec. Dig. § 3.\*]

**2. BRIBERY (§ 3\*)—DEFENSE—WANT OF OFFICIAL AUTHORITY.**

One cannot hold himself out as an officer of the law and prostitute the public trusts and debauch the public conscience by soliciting and accepting bribes, and be exonerated by the courts of this state, on the ground that he had no legal right to act in the capacity he assumed. If he is officer enough to solicit and accept a bribe, he is also officer enough to be sent to the penitentiary for his conduct.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 4; Dec. Dig. § 3.\*]

Original action for writ of habeas corpus by George E. Winters. Writ denied.

Hargis & Conwell, of Pawhuska, for petitioner. C. J. Davenport, Asst. Atty. Gen., opposed.

**ARMSTRONG, P. J.** This is an original action begun in this court by George E. Winters for the writ of habeas corpus. The petition alleges that an information has been filed in the district court of Osage county by the county attorney of said county, charging petitioner with bribery. The information is as follows: "Comes now C. K. Templeton, the duly qualified and acting county attorney, in and for the county of Osage, state of Oklahoma, and in the name and

by the authority of the state of Oklahoma, informs the court that on or about the 14th day of September, 1911, in the said county of Osage, state of Oklahoma, the said defendant, George E. Winters, then and there being a duly and regularly appointed and acting deputy special state enforcement officer of the state of Oklahoma, did then and there wrongfully, unlawfully, and feloniously accept and receive the sum of \$15, good and lawful money of the United States for himself, for and in consideration of an agreement and understanding with one W. T. Crabtree, that he, the said W. T. Crabtree, should be permitted to violate the provisions of the prohibitory liquor laws of the state of Oklahoma, in this, to wit: To sell, barter, give away, and otherwise furnish intoxicating liquors at Avant, in said county and state, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Oklahoma."

The Assistant Attorney General filed a demurrer to the petition.

[1, 2] In our judgment the pleadings raise only one question which is entitled to our consideration in this proceeding; that is: Does a person who holds himself out as an officer under color of authority, and who solicits and accepts a bribe, and endeavors to and does corrupt other persons, have a right to defend and be discharged upon the contention that, as a matter of law, he had no right to act as such officer, therefore the accepting of a bribe was not a violation of the statute? It is not necessary for us to determine in this proceeding the right and power of the state enforcement officer, as that office existed at the time of the filing of this petition, and at the time he is alleged to have appointed the petitioner as a deputy enforcement officer, to lawfully make such appointment, nor is it necessary in our judgment to determine that persons so appointed were entitled to act as officers. It has been the policy of this court since its organization to assume every reasonable position possible, tenable with the view of aiding the enforcement of the law and the maintenance of good government in Oklahoma. As said by this court in *Ellington v. State*, 7 Okl. Cr. 252, 123 Pac. 186, which was an embezzlement case wherein a guardian was prosecuted for embezzling moneys of his ward, and who attempted to defend on the ground that the money embezzled by him did not legally belong to his ward, therefore it was no crime for him to embezzle it, that, "if he was agent enough to collect this money, he was agent enough to be punished for its embezzlement." The same might be said of the petitioner; if he was officer enough to solicit and accept a bribe, he was also officer enough to be sent to the penitentiary for so doing. Corruption and debauchery are not tolerated in civilized communities. It makes no difference for

the purpose of this prosecution whether the state enforcement officer had the right and power to appoint deputies, as a matter of law, or not; if he did make such appointments, and such appointees assumed to act and hold themselves out as officers of the law, they were amenable to the criminal statutes of this state for soliciting and accepting bribes, and the good of society demands that any such persons so accepting bribes be punished. In this position we are not wholly without support by the authorities.

In *State v. Duncan*, 153 Ind. 320, 54 N. E. 1067, the Supreme Court of Indiana, in considering a similar question, said: "Bribery is an offense against public justice. The essence of it is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience. If one admits the doing of the things that produce these results, shall he escape by saying he had no right to act at all? It would seem passing strange if the consequences of one breach of law might be evaded by showing another." In the Indiana case the accused was a gravel road engineer, and was prosecuted for accepting a bribe. His defense was based on the contention that there was no valid law authorizing his appointment. The Supreme Court of Indiana says that he could not thus prostitute the public trust and debase the public conscience and urges that, although he accepted the bribe, he had no authority to act as an officer. The petitioner was appointed as an officer; he assumed to act and exercise the duties of an officer; he will not now be permitted to say he had no authority in the premises.

The Supreme Court of Ohio, in *State v. Gardner*, 54 Ohio St. 24, 42 N. E. 999, 31 L. R. A. 660, promulgated a similar doctrine. In the Ohio case Gardner was prosecuted for offering a bribe to one purported to hold an office. His defense was that such office did not legally exist. The court held that he could not maintain any such defense.

In *Price v. State*, 10 Okl. Cr. —, 137 Pac. 736, we had under consideration a question involving the principle now under discussion. In that case Price was prosecuted for embezzling money as an attorney. He had moved from another state to Oklahoma, but had not been legally admitted to the bar in Oklahoma. His defense was based on the contention that, not having been legally admitted to the bar, he could not be charged with embezzlement as a lawyer. In determining that question, we said: "When a lawyer from another state moves into Oklahoma and, without securing admission to the bar of this state, holds himself out to the public as a lawyer, accepts business as such, and embezzles money collected by him as a lawyer, he cannot escape punishment upon the ground that he was never legally admitted

to the bar of Oklahoma. See, also, *Flores v. State*, 11 Tex. App. 102.

We are of opinion that the demurrer should be sustained, and the petition dismissed; and it is so ordered.

DOYLE and FURMAN, JJ., concur.

## GODDING v. HALL

(Supreme Court of Colorado. Jan. 12, 1914.  
Rehearing Denied April 6, 1914.)

### 1. BANKS AND BANKING (§ 77\*)—RECEIVERS—INSOLVENCY—COLLECTION OF ASSETS—ACTIONS.

In an action by the receiver of an insolvent state bank to recover property alleged to have been wrongfully purchased by defendant's husband, who was its president, with its funds, evidence held to sustain a finding that, when a house was constructed on one of the lots with assets of the bank, no legitimate debt was owing to defendant by her husband.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.\*]

### 2. BANKS AND BANKING (§ 77\*)—TRANSFER AS SECURITY—SUFFICIENCY OF EVIDENCE.

In an action by the receiver of an insolvent bank to recover property alleged to have been wrongfully purchased by defendant's husband, its president, with its funds, evidence held to show that an alleged transfer of land by the husband to the bank in payment of his overdraft was not an actual sale to the bank, but that the transfer was merely as a pretended security.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.\*]

### 3. BANKS AND BANKING (§ 77\*)—COLLECTION OF ASSETS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by the receiver of an insolvent bank to recover property alleged to have been wrongfully purchased by defendant's husband, its president, with the bank's funds, evidence held to sustain a finding that defendant's husband, at the time involved, had actual control of the bank and conducted its affairs in fraud of the rights of the depositors for his own benefit.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.\*]

### 4. BANKS AND BANKING (§ 77\*)—INSOLVENCY—COLLECTION OF ASSETS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by the receiver of an insolvent state bank to recover property alleged to have been wrongfully purchased by defendant's husband, its president, with the bank's funds, evidence held to sustain a finding that the president fraudulently used the bank's funds to construct a house upon the lot involved at a time when he was largely indebted to the bank.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.\*]

### 5. CONTRACTS (§ 128\*)—CONSIDERATION—LEGALITY—COMPOUNDING CRIME.

Defendant's husband had been president and principal owner of a bank and caused its insolvency by fraudulently appropriating its funds. Part of the funds misappropriated went into the construction of a house on one of the lots in defendant's name, and that and all of the other property held in her name was received by her as a gift from her husband. After

the bank had become insolvent, defendant executed a deed of trust in consideration of \$1 and other valuable consideration conveying the land to be sold within two years for distributing the proceeds among the bank's depositors. The deed recited as reasons for its execution that defendant "wife of G., one of the officers of the" bank, "being desirous of doing all in her power to liquidate the indebtedness of said bank," etc., and that "the time and attention of the late officers of said bank is required to assist in the realization of such assets, and it being the wish and desire of the undersigned that such officers shall not be hampered or delayed by trivial or other persecutions or prosecutions, and therefore the conveyance hereinafter made is upon the condition that their time and attention be left for such assistance," and further recited that "two years seem to be about the proper time for the trust to become operative," and that defendant was anxious and willing to place the property in trust for the payment of the balance of the indebtedness to the depositors "upon the condition above recited." *Held*, that the deed did not show that a part of the consideration to the grantor was that her husband should not be prosecuted for defalcations of the bank's funds.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 633-653; Dec. Dig. § 128.\*]

**6. DEEDS (§§ 151, 155\*)—ILLEGAL CONSIDERATION—CONDITIONS SUBSEQUENT.**

Even if the deed was executed in part consideration of an agreement not to prosecute defendant's husband for misappropriating the bank's funds, such agreement was a condition subsequent to the execution of the deed, so that the deed would be valid and binding upon defendant notwithstanding the invalidity of the condition.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 481, 488-495; Dec. Dig. §§ 151, 155.\*]

**7. DEEDS (§ 155\*)—"CONDITION SUBSEQUENT."**

If the act or condition required by a deed does not necessarily precede the vesting of the estate, but may as well accompany or follow it, or if, from the nature of the act and the time required for its performance, the parties evidently intended that the estate should vest and the grantee performs the act after taking possession, the condition is a "condition subsequent."

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1402-1405; vol. 8, p. 7610.]

**8. DEEDS (§ 151\*)—ILLEGAL CONDITIONS.**

Where a condition of a deed is illegal, indefinite, or uncertain, or unreasonable or repugnant to the estate to which it is annexed, it is void, leaving the estate granted absolute.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 481; Dec. Dig. § 151.\*]

**9. CONTRACTS (§ 138\*)—ILLEGALITY.**

The law leaves persons connected with an illegal contract or transaction where it finds them and will not enforce such contracts while executory or rescind them when executed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

Appeal from District Court, Otero County; W. R. Morris, Judge.

Action by G. M. Hall, receiver of court for the State Bank of Rocky Ford, against Emma A. Godding. From a judgment in part for plaintiff, defendant appeals, and plaintiff assigns cross-error to the sustaining of a demurrer to his second cause of action. Re-

versed, with instructions to overrule demurrer and for further proceedings.

Glenn & Gobin, of Rocky Ford, and J. H. Voorhees, of Pueblo, for appellant. Fred A. Sabin, of La Junta, for appellee.

SCOTT, J. John E. Godding, one of the defendants below, organized the State Bank of Rocky Ford in the town of Rocky Ford in this state, in the year 1887. He remained as president of the banking corporation and in control of said bank until the 2d day of January, 1908, when the bank commissioner of this state closed the doors of the bank and made application for the appointment of a receiver. G. M. Hall, the appellee, was appointed receiver of the bank, and has ever since acted as such receiver. Prior to the organization of the bank, Godding organized a town-site company corporation of which Godding was one of the principle stockholders, and which laid out and platted a certain portion of the present town of Rocky Ford. All of the real estate involved in this action was a part of the said town-site company's property. This consisted of lots 1, 2, 3, 4, 5, and 6 in block 9 of what is known as the second filing. Upon lots 5 and 6 there was a stable, and upon lots 1, 2, 3, and 4 of said block 9, there was erected a dwelling house by the said Godding. The legal title, at the time of this action, to the said real estate was in the name of the defendant Emma A. Godding, wife of the defendant John E. Godding. There is also involved lots 4 and 5 in block No. 3A., Rocky Ford second filing. At the commencement of this action the legal title to an undivided one-half interest in these lots was likewise in Emma A. Godding, and the legal title to the remaining undivided one-half interest in said lots was in Mrs. T. F. Godding, wife of the brother of John E. Godding. On these lots the defendant John E. Godding constructed the bank building occupied by the said State Bank of Rocky Ford.

The original complaint alleged, in addition to what has been above stated, that ever since the organization of the bank, and until the failure, it was under the immediate control, management, and direction of the defendant John E. Godding as president, and E. J. Smith as cashier; that no meetings of the board of directors of the bank or its stockholders were called or held as in manner provided by law; and that at no meeting of the board of directors or stockholders was any of the business of the bank transacted; that, at the time of the failure, the books of the bank showed deposits in the sum of \$442,418.39; and that its indebtedness to depositors and other creditors was \$523,021.93. It was then alleged that all the real estate above described was conveyed by J. E. Godding to his wife, Emma A. Godding, without any consideration, and that the premises

were purchased by Godding out of the funds of the bank. Further, that beginning in January, 1900, John E. Godding commenced the construction of the dwelling house on said premises; that he paid the entire expense of the construction of the said dwelling in the sum of \$8,500 by drawing his personal checks on the said bank in which he had no money at the time on deposit, and all of which constituted an overdraft; and that by collusive arrangement between Godding the president, and Smith the cashier, these payments were so made; that the dwelling was completed by the 2d day of July, 1900, and that at that time the overdraft of Godding was in the sum of \$7,609.85; that this sum was on said day placed to the credit of Godding and his account balanced upon the books of the bank; that in truth and in fact Godding paid no money to the bank, but there was placed in the safe a memorandum of this amount which was thereafter carried as a cash item; that none of these funds were ever paid or restored to the bank thereafter. The complaint further alleged that shortly after the failure of the bank, to wit, on the 17th day of January, 1908, the defendant Emma A. Godding executed her deed of trust to one Robert M. Pollock in which she conveyed to the said Pollock all of the premises above referred to, including her interest in the bank property, in trust for the use and benefit of the depositors of the bank, which trust deed will hereafter be more specifically referred to.

The prayer was for a judgment decreeing all of said property to be the property of the bank, and that the conveyance be adjudged and decreed to be one in trust for the creditors of the bank, and that the plaintiff, receiver, be substituted as trustee instead of the defendant Pollock. Possession of the premises was demanded, and likewise an accounting of the rents and profits of the real estate from the date of the said trust deed. Upon motion of the defendants Godding, the court required the plaintiff to separately state and number his several causes of action, whereupon the plaintiff filed his first amended complaint, in two counts. The first count apparently asking that the funds so used in the construction of the dwelling be declared a trust fund, and that such trust be impressed upon the real estate upon which the same was situated; the second count apparently claiming under the trust deed, so executed by Emma A. Godding. Demurrer to the second count was sustained by the court, and the plaintiff was denied the right to amend in that particular. The plaintiff then filed his second amended complaint, on the theory of the court that if the plaintiff was entitled to recover it must be upon the right to impress a trust upon the residence property for the amount of the funds used in the construction of the dwelling. The court found that the amount of money so withdrawn from the bank by Godding and used in the construction of the dwelling was \$5,546.23; that this

sum was wrongfully taken by Godding through the connivance of Smith from the bank without any expectation of returning the same, and was taken and used in fraud of the rights of the creditors and depositors of the bank; and that this sum of money in equity should have been held by Godding and preserved for the use of said creditors and depositors; and that it was thus fraudulently used and converted by Godding as the trustee of the creditors and depositors; and by the judgment charged and impressed the residence property with a trust to the extent of the said sum of \$5,546.23 and declared the same to be a lien upon the said premises, ordered the said lien foreclosed and the premises sold and the receipts therefrom to the extent of said sum, paid to the plaintiff receiver.

From these findings and this judgment of the court the defendant Emma A. Godding appeals, and the receiver likewise assigns as cross-error the refusal of the court to consider the deed as effective and binding upon the appellant Emma A. Godding.

The testimony does not establish that the funds of the bank were used by Godding in the purchase of any of the real estate described, but rather that the said residence lots in particular were bought and paid for from Godding's interest in the town-site company.

The testimony discloses that, at the time of the commencement of the erection of the residence, the bank was in an insolvent condition; that Godding was personally indebted to the bank in the sum of approximately \$40,000; that he had no money to his credit in the bank; and that the entire expense of the construction of the dwelling house was paid from the funds of the bank upon Godding's personal checks, all of which payments constituted an overdraft. The checks so drawn, and upon which such payments were made, were marked at the time and identified upon the trial of this case, to the extent of the sum found by the court and included in the judgment. It is contended by the appellant that this sum was afterward paid to the bank by Godding by means of a transfer to it of a certain tract of coal land situated in Weld county in this state.

The facts appear to be that the Godding overdraft on the 2d day of July, 1900, including the sums paid out for construction of the dwelling, amounted to \$7,609.85. On that day he was given credit for this full amount, and the book account balanced, simply by the memorandum aforesaid being placed in the safe, and by carrying this memorandum as a cash item until some time in June, 1904. Up to that time the bank had never received in fact any of this sum, and the carrying of the memorandum as a cash item was merely a fraud to permit the report of the bank to show such additional amount of cash on hand, rather than in the form of an overdraft, which in fact it was.

It appears that in December, 1903, Godding had an equity in 160 acres of coal land in Weld county, title to which had been placed in Earl M. Cranston as assignee, to secure a judgment against Godding. At that time settlement was made of this judgment as to Godding, upon condition of the payment of \$4,100 to Mr. Cranston. Godding caused the deed to the property to be made to the bank, and claims to have made a sale to the bank of this land for the sum of \$16,000, and that the payment therefor was made by the bank as follows: \$4,100 paid to Cranston; \$7,609.85 in payment of the Godding overdraft; and the remainder, \$4,290.15, placed to the personal credit of John E. Godding. It is contended by Emma A. Godding that the moneys used in the construction of the dwelling was in payment of money theretofore loaned John E. Godding, by her.

The testimony as to any alleged indebtedness of Godding to his wife at the time of the beginning of the erection of the dwelling is confined to that of these two witnesses. It is all oral, general, and uncertain. No account was kept between them, and not a single specific sum said to constitute any part of such alleged indebtedness is mentioned, nor the time nor place, nor manner in which any part thereof was created, except that after the construction of the bank building she was credited by the bank on her passbook with certain sums for rent, said to be for the rent of the bank building. These began in May, 1890, but were checked out chiefly by her husband, and about as paid in, so that there was not to her credit in the bank at any time any considerable sum. The last balance made in her passbook, prior to the commencement of the building, was June 1, 1899, and is in the sum of \$55.71. No passbook is in evidence showing any account of Mrs. Godding with the bank from that date until July 1, 1901, or for a period of more than two years, during which period the dwelling was erected. It is shown, however, that during the time the house was building there was received by Godding \$999.75, the proceeds of the sale of stock in a building and loan association and placed to his own credit. This stock was in the name of his wife, but the record shows that Godding paid for it, and likewise received the proceeds. In relation to this alleged indebtedness, Godding testifies that he entered a homestead near Lamar, prior to going to Rocky Ford, and at some indefinite time agreed to give his wife an interest in it. He says she had nothing prior to this alleged promise. No title to any part of this homestead appears ever to have been conveyed to her, and she received no money at the time or after its sale. Godding and his wife estimate that the debt of the former to the latter was from \$6,000 to \$8,000 based upon no other definite fact than such alleged promise.

[1] The court was fully justified in concluding that at the time the house was being constructed there was no legitimate existing debt upon the part of Godding to his wife.

[2] At the time of the alleged settlement of the overdraft theretofore carried as a cash item, by the transfer of the coal land whereby Godding secured an additional sum of more than \$4,000 in cash from the bank, beside the sum paid to Cranston for the release of the property, the deed was made direct to the bank; but the testimony indicates that this was not intended as an absolute transfer, but rather as security. Smith, the cashier, testifies upon this point as follows: "The credit was made to pay an overdraft preliminary to the semiannual statement of July. \* \* \* We carried it as a cash item. It ran as a cash item until the latter part of December, 1903. There was a subsequent item of \$4,100 which was sent away for the benefit of Mr. Godding on September 11, 1900, or December, 1900. It was sent to Mr. Cranston in settlement of some of Mr. Godding's indebtedness. There came back from Mr. Cranston a quitclaim deed to some coal land near Longmont, which deed was made straight to the bank. Q. Why was this quitclaim deed made to the bank? A. I do not know. In the settlement of December, 1903, Mr. Godding received the equity he was supposed to have in the property at that time. Q. The coal land was to become— A. A full asset of the bank. Q. Was he thereafter to have any right to redeem or to receive a conveyance of that back to him? A. Nothing was said specially about that proposition. I would suppose he was if he paid the amount due to the bank."

Godding testified as follows: "Q. Did you have any understanding with Mr. Smith at the time you got the \$4,100 draft as to what you were going to do with the coal land, or to whom it would be deeded by Cranston? A. We talked it over. Q. What did you agree to? A. I don't remember our conversation at that time. It is a long time ago. I know we talked it over and agreed how the transaction should be handled. Q. Did that property become the property of the State Bank of Rocky Ford at that time? A. The property was turned over to the State Bank of Rocky Ford as trustee, at that time practically; that was the agreement between Mr. Smith and I that it should be so held. Q. Why didn't you let this go to the bank absolutely at that time to satisfy your debt to the bank? A. Because we didn't handle it that way. Q. How long after that was it that the State Bank became the absolute owner of the coal land? A. I think in 1903. Q. December, 1903, you testified yesterday; wasn't it? A. I think that is the time we made the agreement. Q. The land was already in the assets of the bank at that time, wasn't it? A. I don't know in what manner the thing was carried at all. I had ab-



solutely no knowledge. Q. The deed had already been executed by Cranston to the bank, hadn't it? A. It had. Q. Did you make any change of any kind in reference to the title at that time or do anything to indicate that such an agreement had been entered into? A. I don't know of anything. Q. You didn't sign any such agreement, did you, with the bank? A. I don't know of any agreement covering the question. Q. There were no entries made on the books at that time? A. I don't know what entries may have been made on the books. I never had anything to do with the bookkeeping. Q. All there was to it was a private conversation between you and Mr. Smith? A. It was simply an agreement between us. Q. A verbal agreement, wasn't it? A. It was." In addition to this, Godding continued to treat the coal land thereafter as his own, and to the extent of entering into a personal contract for the development of the premises to the extent of \$2,500 of which a part was paid thereon by him, and not by the bank.

The conclusion is therefore irresistible that there was no actual sale of the premises to the bank, but that it was conveyed upon the direction of Godding, to the bank in his language, as "a trustee," and as pretended security for the payment of the sums included in the advance to Cranston, the overdraft, and the more than \$4,000 additional received by Godding at the time. Therefore under this view the overdraft created largely by the withdrawal of funds for the building of the house was never in fact paid, or in any legitimate way discharged. The allegation that the bank was not conducted as a corporation entity, but rather as Godding's private affair, is well sustained. The record discloses that the last directors' meeting was held October 1, 1892, or more than 15 years prior to the failure.

Smith testified: "Mr. Godding dictated the policy of bank. I acquiesced in his proposition of settlement. If he had not been indebted to bank, I would not have agreed to the proposition. Would have preferred cash settlement. I think he was making the best settlement he could. Did not discuss settlement with other directors. Am not sure whether they knew about it. I think Mr. Godding had been incurring this indebtedness over a period of seven or eight years." And again: "He proposed the settlement himself. I credited him with \$16,000 in taking up the cash items. He was director and officer. There were practically but two stockholders, he and myself, and whatever we agreed upon went. Senator Swink was a small stockholder, director, and vice president. Don't remember who were directors from 1896 to 1903. There were always five directors at times."

Smith also testified in relation to this matter as follows: "Q. Now, is it not a fact that

this whole transaction of Mr. Godding's \* \* \* was done and performed under his direction and strictly according to his orders from day to day, from month to month, and from year to year, and that you made whatever entries in the books of the bank you were asked to make by Mr. Godding in reference thereto? A. I always looked upon Mr. Godding as my superior officer. Q. And when he directed you, or asked you to make any of these entries touching his transactions, you made them, did you not? A. I did. Mr. Godding proposed the settlement himself, and I made the entries or caused them to be made, on the books. He was acting as a director and officer of the bank." From this, and from the record generally, it is clear that Smith was simply the creature and tool of Godding in the outrageous and criminal conduct of the bank, and at no time acted as an officer with independent thought and conduct.

The shameful conduct of the bank in the interest of Godding, and covering a period of many years prior to its failure, is shown by an extract from the testimony of F. J. Spencer, a certified public accountant as follows: "Exhibit Q, copied into record. Warrants, stocks and bonds account contains two items affecting solvency, \$20,000, December 31, 1903, and \$25,000 June 21, 1904. The first is a debit to the account and credit to Godding's account. Entry don't show what other items consist of. National Bank of Chicago was charged \$5,200 and cash items increased \$4,290.14, total \$34,420.14. Journal shows credit \$32,664.08, Godding's account credited \$1,836.06. The W. S. and B. account was credited December 30, 1907, \$45,000, surplus debited \$30,000, undivided profits charged \$15,000. Bank lost \$45,000 in this account. Bankers' National item of resources, \$40,120.84, began under caption Lincoln National Bank. December 30, 1893, State Bank charges Bankers' National \$1,600 as collection. Collection was not sent. J. E. Godding got credit for it. June 30, 1894, Bankers' National charged \$2,000 as remittance, which was not sent. January 3, 1898, Lincoln National charged with remittance \$15,200 loans and discounts credited \$14,800 by payment of Godding's notes and giving him \$400, making \$15,200. Remittance was never made. The three entries are false. April 16, 1901, Godding drew \$6,000 draft on Bankers' National which was paid and no credit given Bankers' National. Godding got the benefit without this being charged. July 1, 1901, Godding's note was discounted with Bankers' National for \$10,000 and placed to his credit. State Bank failed to charge it to Godding, also interest \$166.67 on same. June 21, 1904, Bankers' National charged \$5,200 never sent them. In these six transactions J. E. Godding received benefit of \$40,166 and State Bank lost the money. The statement is false to extent of \$40,000."

[3, 4] The court was justified in concluding from the evidence the following facts: (a) That at all times involved John E. Godding, husband of Emma A. Godding, appellant, was in actual control and direction of the bank; (b) that it was continually conducted during such period in fraud of its depositors, to the financial benefit of Godding; (c) that the residence premises upon which the court impressed the lien was at the commencement of the erection of the dwelling the property of Emma A. Godding; (d) that at such time Godding was not indebted to his wife, Emma A. Godding, in any sum of money whatsoever; (e) that Godding fraudulently withdrew from the depositors' money the sum named in the court's decree, and that this is directly traced into the construction of the house upon the premises therein involved; (f) that at the time of such withdrawal Godding had no money to his credit in the bank but, on the contrary, was indebted to the bank in a large sum of money which he could not then reasonably expect to pay, and which he has not since paid; (g) that no part of said sum so withdrawn for the erection of the dwelling has ever been paid and was not intended to be repaid at the time; (h) that Emma A. Godding did not know, at the time, of the financial condition of either Godding or the bank, or that the checks in payment were drawn or paid in the manner as now appears; (i) that John E. Godding personally had charge of the erection of the dwelling in question, and of all other business details whether claimed to be his property or that of his wife, and conducted the same in every respect as his own; (j) that John E. Godding and Emma A. Godding, as husband and wife, occupied the dwelling as their home from the time of its completion until after the bank failure.

The question raised by the appellant is as to the right of the court, under the law, to impress a lien upon the residence premises for the sum of money so traced to a use in the construction of the building. It is true that counsel do not agree that the conclusions of fact above stated are fairly deducible from the evidence, but we think otherwise. But we do not deem it necessary to pass upon the court's holding upon this question, for we are of the opinion that under the pleadings and evidence the appellee is in equity and justice entitled to relief in a greater degree and extent than that adjudged by the court.

This question is raised by the assignment of cross-error, and specifically upon the action of the court in sustaining the demurrer of the defendants to the second cause of action. In other words, was the appellee entitled to recover under the trust deed of Emma A. Godding to Pollock? This deed, in so far as it is necessary to quote, recites: "Whereas, the undersigned, Emma A. Godding, wife of John E. Godding, one of the officers of the State Bank of Rocky Ford,

being desirous of doing all in her power to liquidate the indebtedness of said bank, and feeling confident that the assets thereof will pay off such indebtedness in full. And whereas, the time and attention of the late officers of said bank is required to assist in the realization of such assets, and, it being the wish and desire of the undersigned that such officers shall not be hampered, or delayed by trivial or other persecutions or prosecutions, and therefore the conveyance hereinafter made is upon the condition that their time and attention be left for such assistance. And whereas, it is thought necessary that at least two crop seasons intervene before the assets can be turned into money, and the desire of the undersigned being to make the balance of the fund, if any, necessary to pay off such depositors, and as two years seems to be about the proper time for the trust hereinafter created to become operative. And whereas, the undersigned is the owner of the property hereinafter described, and anxious and willing to place the same in trust for the payment of such balance of indebtedness, if any, upon the condition above recited: Now therefore, this indenture, made this 17th day of January, A. D. 1908, between Emma A. Godding, of the county of Otero and state of Colorado, and Robert M. Pollock, trustee for the depositors of the State Bank of Rocky Ford, of the county of Otero and state of Colorado." The consideration is stated to be \$1 and other valuable consideration, the premises to be held for a period of two years and then sold and the proceeds distributed among the depositors of the bank according to the amount of their deposits, the remainder, if any, to be paid to the grantor. The deed was duly acknowledged and delivered to the trustee Pollock, accepted by him, and filed for record with the county clerk and recorder, on the 18th day of January, 1908.

The contention of the plaintiff in error is that, assuming the condition of the deed to be in effect that there should be no criminal prosecution of the officers of the bank, and particularly the husband, the deed is null and void as being contrary to public policy. This view was apparently accepted by the learned judge who tried the case, and who in sustaining the demurrer must have held the deed void on its face for such reason. This was error.

There is no contention that the deed was executed under duress, or that it was even at the suggestion of the trustee or any other person, but, on the contrary, it clearly appears to be the voluntary act of the grantor, and indeed the trustee hesitated to accept it until he had first counseled with the receiver.

Lomax v. Colo. Nat. Bank, 46 Colo. 223, 104 Pac. 85, was a case where the doctrine invoked here was likewise involved and fully discussed. The plaintiff in that case sued for the recovery of 85 shares of the capital

stock of the Flint-Lomax Electric & Manufacturing Company, which had been deposited as collateral security to secure her husband's note to the defendant bank, given under the following circumstances: Alfred Lomax, brother of plaintiff's husband, was an employé of the bank. He embezzled about \$5,000 of the bank's money. He and his wife besought the president of the bank not to prosecute, and who said that he had no disposition to do so, but if the amount was not paid Alfred would be turned over to the bonding company, and in any event the offense would have to be reported to the bank examiners. The brother of Alfred and husband of plaintiff, after several interviews with the officers of the bank, gave his note to the bank for the sum embezzled, secured by 65 shares of the stock of the manufacturing company. This stock was owned by the plaintiff, who permitted her husband to have the stock reissued in his name, for the purpose of using it as collateral security for what the husband represented to her to be a debt of the company, in which he was interested, and of which company he was an officer. The ground of the suit was that plaintiff received no consideration for the stock, that her husband was under duress at the time, and that the only consideration for the note was the illegal promise of the bank not to prosecute the defaulter. The case turned upon this point, and it was held that, if the husband's note was void because of duress or lack of consideration, the pledge of the stock was also void, and the plaintiff entitled to its return. The plaintiff's husband testified that the note and pledge were given upon the sole and only consideration of the bank's promise made to him, not to prosecute his brother. On the other hand, the president and vice president flatly denied that any such promise was given. The trial court found for the bank upon this disputed question of fact.

It will be noticed that, while the court found in that case that there was no actual promise, yet both the bank and the maker of the note had the clear understanding that, if the amount of the defalcation was not paid, there was reasonable certainty of the prosecution of the defaulter. Indeed, Mr. Justice Campbell, the writer of the opinion, in speaking of the motives that actuated the plaintiff, said: "Undoubtedly he was in mental distress and worried by the criminal act of his brother and wished to avoid the humiliation which publicity would bring to the family; but if his testimony tends to show that he gave his note to the bank because of a fear that if he did not his brother would be, and if he did his brother would not be, prosecuted, and that threats of a prosecution by the bank's officers overcame his will, their testimony is directly contrary to his. Again, while Fred's object may have been, in part, to avoid the disgrace of a criminal prosecution, the court, on substantial evi-

dence, found that he was not under duress. As an intelligent business man, probably he believed that, if he did not discharge Alfred's civil liability for his embezzlement, Alfred would be turned over to the bonding company, and the latter would, if required to pay, institute criminal proceedings. And rather than face such reasonable certainty, he chose to wipe out the obligation with his own secured note and take chances of a prosecution by the government officials when the crime was reported to the bank examiner along with notice of payment of the shortage."

The law upon the subject of such promise was there briefly stated to be as follows: "It is well-understood law that a promise to compound any criminal offense is itself a crime and affords no valid consideration for a contract. Our statute upon this subject (1 Mills' Ann. St. § 1293), while so providing, says: 'But no person shall be debarred from taking his goods or property from the thief or felon or receiving compensation for the private injury occasioned by the commission of any such criminal offense.' In *Giles v. De Cow*, 30 Colo. 412 [70 Pac. 681], it was said: 'A thief is under a legal, as well as a moral, duty to repay the person whose property he has stolen, and it is not in itself an illegal contract for him to give his own obligation therefor, or for a third party to agree to recompense the owner for the loss.' If therefore the consideration for Fred's note, in whole or in part, was an agreement by the bank not to prosecute, the note cannot be enforced, and the bank cannot retain the pledge; but if the note was given by Fred and received by the bank as compensation for the bank's private injury, in discharge of Alfred's civil liability, the note is enforceable and the pledge valid." Upon the question of consideration in such a case it was also said: "Plaintiff cites the case of *Currier v. Clark*, 15 Colo. App. 6 [60 Pac. 958], as decisive of this. We do not perceive its pertinency to the facts of this case as found by the trial court. There it was held that a note to pay the debt of another, not executed at the time of the original debt, must be based upon some new and valid consideration. Assuming that to be the law, it is inapplicable here, because, as we have already determined, Fred's note was given in payment and discharge of Alfred's pre-existing liability, and by the established law of this state this is a sufficient consideration. *Bank v. McClelland*, 9 Colo. 608 [13 Pac. 723]; *McMurtrie v. Riddell*, 9 Colo. 497 [13 Pac. 181]; *Knox et al. v. McFarra*, 4 Colo. 586; *Murphy, Receiver, etc. v. Gunmaer*, 12 Colo. App. 472 [55 Pac. 951]."

That case seems controlling in the case at bar. Under this authority the consideration in the deed of Mrs. Godding to Pollock, trustee for the depositors, was sufficient. Godding was the principal owner of the bank; he absolutely controlled it, and he alone was

responsible for its failure, and the consequent loss to the depositors. There was the relationship of wife and husband. There was naturally equal anxiety to relieve her husband from impending punishment and the consequent disgrace both to herself and to him by doing what she could to satisfy the debts of those whom he had so unjustly deprived of their property. All the property she held in her name, and included in the deed, she had received from him, and at best as a gift, however it may have been acquired. We cannot presume that she was not actuated through conscience as well as fear, when she declared in the deed that: "Whereas, the undersigned, Emma A. Godding, wife of John E. Godding, one of the officers of the State Bank of Rocky Ford, being desirous of doing all in her power to liquidate the indebtedness of said bank." And again when she recited her express desire that: "Whereas, the undersigned is the owner of the property hereinafter described, and anxious and willing to place the same in trust for the payment of such balance of indebtedness." From these expressions, and with knowledge of the facts which she must have then possessed, certainly her inducement and consideration was not less than is disclosed in the Lomax Case. It is clear that neither Pollock nor any one of the depositors verbally agreed to refrain from prosecution or to promise freedom from punishment, and we cannot so construe the deed. It is true that in the deed is expressed the opinion that the "assistance of the officers is required to assist in a realization of the assets," and likewise her wish that they "shall not be hampered by trivial or other persecutions or prosecutions"; but the condition upon which plaintiff in error relies is "that their time and attention be left for such assistance."

[5] This does not express an agreement to compound a crime. Hence we conclude that neither orally nor by the language of the instrument itself is there an agreement that plaintiff's husband should not be prosecuted for the commission of a crime. Indeed, such an agreement seems to have been expressly avoided in the deed, just as in the Lomax Case, where the president of the bank testified that he knew the law in such case, and refrained from making such an agreement.

[6] But if we were to give to the alleged condition the construction contended for by the appellant, still, under the authorities, we must hold the conveyance to be in full force and effect. There can be no question but that the condition relied on in this case was not a condition precedent, but subsequent, so that we are relieved from discussion upon that point. The deed was absolute, although the trustee was not, under its terms, to execute the trust until two years from its date. This was to give sufficient time to realize upon the assets of the bank whatever these might be, and thereafter the property was to

be sold by the trustee to meet the deficiency. The trust was clearly and definitely expressed and without power of revocation. Any assistance to be rendered by the officers of the bank was of necessity to be subsequent to the execution and delivery of the deed. It will be noted that this question of assistance, referred to as a condition, is of very uncertain meaning. Who was to be assisted? What was the time or duration of the period of such assistance? The nature or character of such assistance, or whether it was to consist of acts, advice, or what not, is all left to conjecture. The only certainty is that these officers were not to be in charge or control or to assume responsibility, for the bank was at the time in the custody of the court's receiver and therefore known by the parties to be beyond the power of the parties to contract.

[7] The rule of law as to whether a condition is precedent or subsequent is stated to be: "If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee performs the act after taking possession, then the condition is subsequent. Again, a condition, the breach of which is good ground in equity for canceling the conveyance of which it is a part, will be held to be a condition subsequent, unless there is something in the instrument showing a contrary intent. 13 Cyc. 691."

That where an estate is once vested with a condition subsequent, as in this case, courts will look upon the divesting of the same with disfavor, was held in the case of Chute v. Washburn, 44 Minn. 312, 46 N. W. 555, where the court said: "It is hardly necessary to add that conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates, and that a vigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable." And "a court of equity will never lend their aid to divest an estate for the breach of a condition subsequent."

[8] And where the condition is illegal, indefinite, or uncertain, unreasonable, or repugnant to the nature of the estate to which it is annexed, such condition is void, and renders the grantee's estate absolute, is stated to be the rule. 6 Am. & Eng. Enc. 506.

In Compton v. Bunker Hill Bank, 96 Ill. 301, 38 Am. Rep. 147, the plaintiff's husband, as cashier of the bank, was a defaulter in a large sum. The husband and a brother induced her to execute a deed for her property to the bank, on their representation that if she would do so the bank had agreed not to prosecute the husband. The action was based upon the alleged illegal agreement not

to prosecute. It was there held: "The gist of appellant's case is that her deed was executed in consideration of an agreement to compound a criminal offense, which is in contravention of law, and she has not realized therefrom the result that she anticipated. We said in *St. L. J. & C. R. R. Co. v. Mathers*, 71 Ill. 598 [22 Am. Rep. 122]: 'A court of equity will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the \* \* \* well-established principle of equity jurisprudence, and it was previously applied by this court in *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597, and *Liness v. Hesing*, 44 Ill. 113 [92 Am. Dec. 153].'" And in the opinion in that case it was further said: "Even, then, if appellant was induced by false representations of her husband and brother to execute the deed, since those representations were neither induced by, nor made of the knowledge of those representing the bank, the bank cannot be affected by them. *Spurgin v. Traub et al.*, 65 Ill. 170; *Marston v. Brittenham*, 76 Ill. 611."

It may be, and probably is, true that Mrs. Godding executed the trust deed in the hope and expectation that by so doing she would avoid the prosecution of her husband; but there was no such assurance or agreement upon the part of Pollock or the depositors for whom he held in trust.

[9] In *Treadwell v. Torbert*, 119 Ala. 279, 24 South. 54, 72 Am. St. Rep. 918, the plaintiff executed her deed to premises owned by her to one Torbert, who had caused the arrest of the husband, and who promised to stop the criminal prosecution in consideration of the deed. The suit was instituted to cancel the deed, and the Supreme Court held: "The general doctrine prevailing in courts of law and of equity is that the law leaves all who share in the guilt of an illegal or immoral transaction where it finds them. It will neither lend its aid to enforce contracts, while executory, forming part of the transaction; nor will it undo or rescind such contracts when executed. 3 Brick. Dig. pp. 144-147. The case made by the bill falls within this doctrine, and is in all respects strictly analogous to *Clark v. Colbert*, 67 Ala. 92. It may be a matter of regret now, with the complainant, that she parted with her land to procure the discharge of her husband from prosecution for the grave criminal charge preferred against him, and for which he was under arrest. The courts are bound to leave her where they find her. As was said in a kindred case: 'If men, in consummation of frauds, employ instruments binding and conclusive in their legal operation and effect, it is sound reason, good policy, sheer justice, to leave them where they have placed themselves, bound as they have bound themselves, without assistance from the courts to unloose them when it becomes their interest to be un-

loosed, encouraging them and others to commit similar frauds.' *William v. Higgins*, 69 Ala. 517." The doctrine thus declared is supported by *Moore v. Adams*, 8 Ohio, 372, 32 Am. Dec. 723; *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551; *Allison v. Hess*, 28 Iowa, 389; *Rock v. Mathews*, 35 W. Va. 531, 14 S. E. 137, 14 L. R. A. 508.

The judgment is reversed, with instructions to overrule the demurrer to the second cause of action, to permit the plaintiff to amend his complaint as he may be advised, and to proceed with the cause in conformity with the views herein expressed.

MUSSER, C. J., and GABBERT, J., concurring.

OSTLING, City Treasurer, et al. v. PEOPLE ex rel. BANTLEY.

(Supreme Court of Colorado. March 2, 1914. Rehearing Denied April 6, 1914.)

1. MANDAMUS (§ 187\*)—APPEAL—QUESTIONS CONSIDERED—NECESSITY OF DECISION.

If relator is not entitled to have city warrants paid out of revenue for the fiscal year beginning April, 1913, as he seeks to have done, the question of the validity of the warrants need not be determined on appeal.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 427-437; Dec. Dig. § 187.\*]

2. MUNICIPAL CORPORATIONS (§ 904\*)—PAYMENT OF WARRANTS.

Rev. St. 1908, § 6631, requires the city council, in the last quarter of each fiscal year, to pass an annual appropriation bill for the next fiscal year, and provides that no further appropriation shall be made at any other time unless such appropriation is approved by the legal voters, nor shall the total amount appropriated exceed the probable amount of revenue for the fiscal year; and sections 6632 and 6633 prohibit the authorities from adding to the expenditures of any one year any sum exceeding the amount fixed in the annual appropriation bill, and that no expenditure for an improvement out of the general fund shall exceed in any year the amount provided for such improvement in the annual appropriation bill, and that no expense shall be incurred unless an appropriation has been made to meet it. Section 6644 requires the city treasurer to keep a register of warrants showing the date of presentation, the fund upon which the warrant is drawn, etc. Section 6645 requires every fund to be disbursed on warrants drawn thereon in the order in which they are registered; and section 6647 requires the treasurer, when he has cash to the credit of a particular fund, to call in warrants payable out of such fund. *Held*, that the city could not be compelled to pay warrants issued and registered before the fiscal year beginning April, 1913, out of funds realized from the revenue for the fiscal year beginning April, 1913.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1889, 1890; Dec. Dig. § 904.\*]

3. MUNICIPAL CORPORATIONS (§ 905\*)—FISCAL POLICY.

An action cannot be maintained against a city on a warrant until a fund for its payment is collected, and the fact that the revenues for a particular year are inadequate to pay the warrants for that year does not make the city liable

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereon until an available fund can be legally raised.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1891-1893; Dec. Dig. § 905.\*]

**4. MUNICIPAL CORPORATIONS (§ 904\*)—FISCAL MANAGEMENT—CITY WARRANTS—RIGHTS OF PURCHASERS.**

Purchasers of city warrants take them subject to the mode of payment provided by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1889, 1890; Dec. Dig. § 904.\*]

En Banc. Error to District Court, Lake County; Charles Cavender, Judge.

Action by the People, on relation of Joseph H. Bantley, against Olive Ostling, as City Treasurer of the City of Leadville, Colo., and others. Judgment for relator, and defendants bring error. Reversed and remanded, with directions to dismiss.

Defendant in error, as relator, instituted an action in mandamus against plaintiff in error, treasurer of the city of Leadville, and others, as respondents, the purpose of which was to compel the treasurer to apply funds in her hands to the payment of city warrants held by relator. Judgment was rendered in favor of relator, and respondents have brought the case here for review on error.

In the alternative writ it was alleged that relator was the holder of legal warrants of the city which had been duly issued and registered. It set out a list of such warrants, 72 in number, giving date of issue and registration and the number and amount of each warrant, the number of the first being 8242, in the sum of \$304.25, dated December 9, 1908, and registered the following day; all aggregating over \$5,500, the last of which was dated August 3, 1912, and registered May 6, 1913. It stated that the total amount of unpaid warrants of the city, including those held by relator, approximated \$264,000, and that during the past 30 years the city, within the last quarter of each fiscal year, had passed an ordinance termed the "annual appropriation bill," in and by which such sums as were necessary to defray the expenses and liabilities of the city for such fiscal year were appropriated, and alleged that the city council never added to the corporate expenses in any one year any amount in excess of the annual appropriation; that, during all the times mentioned, the treasurer at the end of each month made a report to the council, of the balance in the treasury, as required by law; and that all the warrants held by relator were drawn upon the treasurer of the city, in which was stated the particular funds upon which they were drawn, and that during all the times mentioned in the writ, whenever the city treasurer had funds on hand to the amount of \$500 or over, such treasurer applied such funds to the redemption of an equal amount of such outstanding warrants as were entitled to preference as to payment according to

the order of time in which they had been registered. It was then alleged that the city treasurer had informed relator that she now had on hand funds to an amount of \$500 and over which should be applied to the redemption of warrants as provided by law, but stated that she would not issue calls for warrants for the reason that the city council had instructed her that they intended to apply the current revenue of the city to the payment of current expenses for the fiscal year beginning April 13, 1913. There is then set out the form of warrant adopted by the council, from which it appears, in connection with the resolution adopting such form, that it was the purpose of the city to issue warrants for current expenses thereafter incurred, payable out of the funds realized from taxes and all other sources of revenue for the fiscal year beginning in April, 1913. For return the respondent answered that the warrants held by relator were issued at a time when the indebtedness of the city was in excess of the amount which it could lawfully incur, and that therefore they were invalid, and alleged that no appropriation was made in 1913 for the payment of outstanding warrants issued prior to the fiscal year beginning that date. To this return relator replied, putting in issue the affirmative defenses of the respondents. The cause was submitted to the court on an agreed statement of facts, from which it appears that the relator was the owner of warrant No. 8242 and others, issued in the respective sums named in the alternative writ, and dated and registered as therein alleged, and, except for the institution of this action, the respondents would have used the funds in cash on hand in the city treasury for the payment of the immediate current expenses of the city, regardless of the outstanding unpaid, registered warrants; that No. 8242 was drawn on the street lighting fund for November, 1908; that the other warrants were issued at different dates, to different payees, for different amounts, and were drawn on different funds and registered at different times; that all were drawn during fiscal periods prior to the fiscal year beginning in 1913; and that the appropriation bill for 1913 was to defray the expenses of the city for the fiscal year beginning in April of that year. It was further stipulated that, during all the times mentioned in the alternative writ, the city had outstanding registered warrants amounting to approximately \$250,000 face value; that these warrants were issued for salaries and current expenses; and that the amount of such outstanding warrants during this period exceeded 3 per cent. of the assessed valuation of the taxable property in the city, such valuation being substantially the sum of \$2,100,000. In brief, from the pleadings and the stipulation of facts the city challenges the right of the relator to have the funds in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the hands of its treasurer, realized and to be realized from the revenues for the fiscal year beginning April, 1913, applied to the payment of such warrants, and claims the right to use such funds to discharge warrants drawn to meet current expenses for that period.

John M. Maxwell, of Denver, and R. D. McLeod, of Leadville, for plaintiffs in error. Hogan & Bonner, of Leadville, for defendant in error.

GABBERT, J. (after stating the facts as above). From the foregoing statement it appears that the object of the action instituted by relator is to compel the payment of outstanding registered warrants, in the order of registration, out of funds realized from the revenue for the fiscal year beginning in April, 1913; that all the warrants held by relator were issued and registered prior to the beginning of that fiscal year; that the appropriation of funds made by the city authorities for such year was to meet the current expenses of that period; and that no appropriation was made to discharge warrants issued during any previous period.

The argument of counsel has been mainly directed to the question of the validity of the warrants involved; it being contended by counsel for respondents that they are invalid because they represent indebtedness incurred in excess of the constitutional and statutory limitation which cities are authorized to contract, while on the part of the relator it is claimed that the pleadings and agreed statement of facts disclose that the limit of indebtedness had not been reached when such warrants were issued.

[1] If, as claimed by counsel for respondents, such warrants are invalid, for the reason assigned, relator cannot maintain his action; but should it appear that he is not entitled to have his warrants, even if valid, paid, out of the moneys appropriated and realized from the taxes and other sources of revenue for the fiscal year beginning in April, 1913, the question of their validity is of no moment in this case, and should not be determined.

[2] Section 6631 of the Revised Statutes of 1908 is as follows: "The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. The city council of cities and boards of trustees in towns shall within the last quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for

each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or town, either by a petition signed by them, or at a general or special election duly called therefor. Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year." By the two sections immediately following, the city authorities are inhibited from adding to the municipal expenditures of any one year anything over and above the amount provided for in the annual appropriation bill of that year; that no expenditure for an improvement to be paid out of the general fund shall exceed in any one year the amount provided for such improvement in the annual appropriation bill; and that no expense shall be incurred unless an appropriation has been made to meet it. There are certain exceptions which are not pertinent to any question involved in this case. The purpose of these statutes is to require municipal corporations to make provision whereby they will be enabled to adopt the policy, "Pay as you go," and to restrict the expenditures each fiscal year to the annual revenue for that period. This being the policy and purpose of the statute, it must necessarily follow that the annual funds are applicable to the annual expenses when appropriated in advance for that purpose, and that the funds of one year so set apart may not be applied to the expenses of any other year, until all the expenses of the year to which the funds belong have been satisfied. In other words, the object of these statutory provisions is to permit a city to appropriate and apply its current revenues to the discharge of its current expenses, a course absolutely necessary to the accomplishment of the purposes for which it was created.

It appears to be urged in the briefs that, because of the statutory provisions regarding the registration of warrants, the order in which they shall be paid, and calls for redemption, warrants must be paid in the order of registration whenever there is cash in the hands of the treasurer in the sum of \$500 or over to the credit of the funds upon which outstanding warrants are drawn, without regard to any particular revenue for any particular year from which such funds may have been derived. These provisions are to the effect that the treasurer of every city shall keep a register of warrants in which shall be entered the number and amount of each warrant, the date of presentation and name of the person presenting it, and the particular fund upon which it is drawn (section 6644, Revised Statutes of 1908); that every fund shall be disbursed in taking up warrants drawn thereon in the order registered (section 6645); and that the treasurer, when he has on hand cash in a specific sum,

or over, to the credit of any particular fund, shall call in warrants payable out of such fund in the order of their registration (section 6647). These statutory provisions, when considered in connection with section 6631, merely require that warrants drawn on the fund of a particular fiscal year must be paid in the order of registration out of the funds of that year applicable to that purpose. A contrary construction would lead to an anomalous result. In express terms section 6631, *supra*, requires municipal authorities to make in advance appropriations for each fiscal year to meet current expenses for that period. It further requires such authorities to specify the objects for which such appropriations are made and the amount appropriated for each object, and, should it be held that such appropriations must be applied to the payment of outstanding registered warrants of previous years, the municipal authorities in one breath are required to make an appropriation for a specified period and purposes, and in the next to apply the funds so appropriated to an entirely different purpose. All warrants held by relator were issued for expenses incurred by the city for fiscal periods prior to the fiscal year beginning in April, 1913, and we therefore conclude, in the circumstances of this case, that he is not entitled to have any of the funds realized from revenues for that fiscal year applied upon his warrants. In principle and by analogy we think the case of *Kephart v. People*, 28 Colo. 74, 62 Pac. 946, sustains this conclusion. In that case it was held that, to justify a mandamus against the state treasurer to pay a state warrant, it must affirmatively appear in the alternative writ that there is money in the hands of the treasurer belonging to the specific fund against which the warrant is drawn, and which came from the revenue of that particular year, and that there are no other warrants entitled to prior payment sufficient to exhaust such fund.

[3] As applicable to the facts of this case, the general rule is that a cause of action does not exist against a city on a warrant until a fund for its payment has been collected. *Forbes v. Grand County*, 23 Colo. 344, 47 Pac. 388. The fact that the revenues for a particular year are inadequate to meet the warrants for that year, payable out of such revenues, does not render the city liable thereon until a fund, which can be applied to their payment, is raised, or might have been, in the manner provided by law, *supra*.

[4] Persons purchasing such obligations take them subject to the mode of payment that the General Assembly has provided. *Stryker v. County Commissioners of Grand County*, 77 Fed. 567, 23 C. C. A. 286.

Our conclusion that relator is not entitled to have funds realized from the revenues for the fiscal year beginning in April, 1913, applied upon his warrants is in no sense in

conflict with any previous decision of this court. The authority of county commissioners to appropriate funds to the payment of current expenses of a particular year, to the exclusion of warrants issued in previous years, was involved in *People ex rel. v. Austin*, 11 Colo. 134, 17 Pac. 485. It was there held that section 637, General Statutes, which provided that county warrants should be entitled to a preference as to payment according to the order of time in which they were presented to the county treasurer, entered into and formed a part of such warrants, and therefore the county was bound to give precedence to the payment of all warrants as the statute provided. The warrants there involved, however, were issued when there was no law, as now (sections 1215, 1216, and 1217, Revised Statutes 1908), requiring county commissioners to make an appropriation for each fiscal year, limiting the annual expenditures to such appropriations, and providing that no liability should be created against a county except an appropriation had been made to meet it; consequently county warrants were not and could not be drawn on the revenues of any particular year, and hence were payable out of the funds in the hands of the treasurer belonging to the fund upon which they were drawn, without reference to the tax levy from which such funds had been derived. The difference between the statutory provisions with respect to county warrants, in existence at the time the *Austin Case* was decided, and the provisions on the subject of city warrants, to which we have referred, clearly distinguishes it from the case at bar, for the reason that by these latter provisions the holder of a valid warrant issued by a city for current expenses of a fiscal year is entitled to be paid out of the revenues of that year, appropriated for that purpose. This is a part of the contract by virtue of the statute, and to hold that his rights thus fixed would be subject to the payment of warrants issued in previous years would impair the obligation of his contract.

The real question in the case is whether relator is entitled to have the revenues for the fiscal year beginning in April, 1913, applied to the payment of his warrants. We have determined that he is not, for reasons to which counsel have given little or no attention in their briefs, and perhaps at variance with their views on the subject; but we think we are justified in deciding the case upon the grounds stated, without expressing any opinion on the validity of the outstanding warrants of the city issued prior to the fiscal year beginning in April, 1913, as that question is of such supreme importance to both the city and warrant holders that it should not be determined until it becomes absolutely necessary to do so.

The judgment of the district court is reversed, and the cause remanded, with direc-



tions to dismiss the action at the cost of relator.

Judgment reversed, and cause remanded, with directions to dismiss.

MUSSER, C. J., not participating.

**IRONSTONE DITCH CO. et al. v. ASHENFELTER et al.**

(Supreme Court of Colorado. April 6, 1914.)

**1. JUDGMENT (§ 725\*)—CONCLUSIVENESS—DETERMINATION OF PRIORITIES OF WATER RIGHTS.**

A general adjudication decree, determining the volume and the date of priorities to the use of water of a stream during the irrigation season, was res judicata as to all matters and questions that were necessary to constitute a complete appropriation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255-1257; Dec. Dig. § 725.\*]

**2. WATERS AND WATER COURSES (§ 145\*)—APPROPRIATION—PRIORITIES—NATURE AND EXTENT OF RIGHTS.**

A right to the use of water of a natural stream in no way depends upon the place of its application, and is not confined to the land upon which the right came into existence, but the point of diversion, the place of application, and the character of use may each and all be changed; the only limitation being the prohibition of any injurious effect upon the vested rights of others to the use of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 145.\*]

**3. WATERS AND WATER COURSES (§ 152\*)—CONVEYANCES AND CONTRACTS—REMEDIES OF PARTIES.**

In a proceeding by owners of water rights for permissions to change points of diversion under Rev. St. 1908, §§ 3226, 3227, requiring such an owner desiring a change to present a petition to the proper court to determine whether the proposed change will affect the vested rights of other owners, evidence held to show that accretions into the river above petitioners' headgates and below protestants' headgates did not supply petitioners' priorities.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**4. WATERS AND WATER COURSES (§ 156\*)—SALE AND TRANSFER OF PRIORITIES—EFFECT.**

The sale and transfer by riparian landowners of water rights did not preclude them from irrigating the land from which the rights were thus severed by other water or with rights other than the ones transferred; the sale not being a surrender of their junior rights, or the right to appropriate any unappropriated water, or of developing or procuring water from an independent source which otherwise would not reach the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.\*]

**5. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—SEEPAGE AND EXTRANE-  
OUS WATER.**

Where one of several owners of water rights in a stream, as settled by a general adjudication decree, constructed, at his own expense, a feeder ditch, by which seepage water, doing no one any good, and which otherwise would not have drained into the stream, was conveyed a mile up the river and emptied into the stream just above his headgate, he could

sell his water rights and irrigate his land with this extraneous water contributed by him, since this was an independent appropriation from extraneous sources, and not an accretion belonging to the river, and was independent of and disconnected with his priority as adjudicated by the decree.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**6. WATERS AND WATER COURSES (§ 152\*)—CONVEYANCES AND TRANSFERS—REMEDIES OF PARTIES.**

In a proceeding by an owner of a priority of right to the use of a volume of water from a stream for permission to change the point of diversion to a point 25 miles up the river, under Rev. St. 1908, §§ 3226, 3227, requiring such owner desiring a change to petition the proper court, so that it may be determined whether such proposed change would injuriously affect the vested rights of others, evidence held to sustain a finding that such change was a benefit, and not an injury, to vested rights of owners whose headgates intervened between the old and new points of diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

Appeal from District Court, Montrose County; Sprigg Shackelford, Judge.

Petition by John Ashenfelter and others for permission to change the points of diversion of priorities to the use of water of a stream, in which the Ironstone Ditch Company and others were protestants. From a decree allowing the change, protestants appeal. Affirmed.

T. J. Black and S. S. Sherman, both of Montrose, and Milton R. Welch, of Delta, for appellants. Bell, Catlin, Blake & Mothersill, of Montrose, Story & Story, of Salt Lake City, Utah, John Gray, of Montrose, and Millard Fairlamb, of Delta, for appellees.

GARRIGUES, J. This case involves a transfer on the Uncompahgre river of early priorities from ditches located down the stream in the neighborhood of Delta up the stream above the city of Montrose into the Montrose & Delta canal, called the Montrose canal, and is the sequel of Ashenfelter v. Carpenter, 37 Colo. 534, 87 Pac. 800, and Gutshall v. Carpenter, 37 Colo. 536, 87 Pac. 801 (Nos. 4834 and 4862). The court entered a permissive decree allowing the change, and protestants bring the case here on appeal.

1. November, 1888, the general adjudication decree entered in the district court at Montrose settled the priorities of all the ditches in water district No. 41, involved in this controversy, diverting water for irrigation from the Uncompahgre river. This decree awarded the Boles & Manney ditch No. 1½, priority No. 3 for 3.22, the Eggleston No. 2, priority No. 2 for 6, the Uncompahgre No. 3, priority No. 8 for 12, the Homestake No. 4, priority No. 4 for 11, and the Delta No. 11, priority No. 11 for 15 cubic feet per second. There is no ditch or priority No. 1. The headgates of these early ditches are

located down the stream near its junction with the Gunnison river, while the headgate of the Montrose canal is located upstream some 25 or 30 miles. The headgate of the Uncompahgre ditch No. 3, taken for illustration, as an initial point, is on the east side of the river, and about 3 miles above the junction; Eggleston No. 2 is on the west side, and about a quarter of a mile above No. 3; Homestake No. 4 is some 6 or 7 miles above No. 3, near Olathe; Boles & Manney No. 1½ is about a quarter of a mile above No. 2; the Rustler is about 4½ miles above No. 2; Delta No. 11 is about three-quarters of a mile below No. 3. These ditches and priorities are referred to in the briefs and evidence, and seem to be known better locally by their numbers than their names, as 1½, 2, 3, 4, 11, etc. For convenience, the diverse applications to change the points of diversion will be arranged into three groups: First, those made by persons desiring to change 2 and 3 priorities from 2 and 3 headgates into the Montrose canal; second, the application of Gutshall to change .6 of a foot from No. 2, and 5¼ feet from No. 11 into the Rustler ditch about 4½ miles above No. 2; and, third, the application of John and Jesse Bell to change 3.3 feet from No. 4 (Homestake) into the Montrose canal. The headgates of the Eggleston and Uncompahgre ditches (priorities 2 and 3, for 6 and 12 feet respectively) are about 1½ or 2 miles above the town of Delta, and very close together. The storm center of this litigation is around the transfer of these 2 and 3 priorities, and, while the transfer of Homestake priority No. 4 water by the Bells into the Montrose canal and the transfer of Delta No. 11 water by Gutshall into the Rustler are involved, our attention will be directed to the transfers of 2 and 3, as the determination of the right to make these changes is controlling of the whole controversy involved not only in this, but also in the Moore Case ([No. 5891] 140 Pac. 183), as well. The priorities of the protesting ditches are ahead of the Montrose canal, but are junior to 2 and 3, and they are located principally below the city of Montrose and above the headgates of 2 and 3; that is, protestants' headgates are located between the old and new points of diversion, and are so situated that their ditches consume all the accretions above 2 and 3.

The Uncompahgre river heads in Ouray county, in the East Elk or Saw Tooth range of mountains, where it is fed by melting snow, and, running northerly from Ouray, empties into the Gunnison just below the town of Delta. During the June flood, all the ditches have a sufficient supply without observing the decrees, and water runs to waste; but later in the season the normal flow is so low that water for irrigation is scarce, and it becomes necessary for the officials to enforce the decreed priorities. The Montrose canal crosses the bottom, and reaches the top of Spring Creek mesa on the west side,

where it irrigates extensive farms and fruit orchards. The original owners of the early ditch priorities held their rights to the use of the water in severalty. During 1896 and 1898, most of the 18 feet decreed to 2 and 3 was purchased from the divers individual owners by farmers and horticulturists, who caused it to be transferred from 2 and 3 to the Montrose canal, for their use on Spring Creek mesa. These changes in the point of diversion were perfected at the time of the sale of the water rights, and the state engineer, the irrigation division engineer of the water division, and the water commissioner of district No. 41 assisted in making the transfers, and delivered the water into the Montrose canal until 1904, when the water commissioner refused longer to recognize the transfers, until the decree authorizing and permitting the change in the point of diversion required by the statute had been obtained. The purchasers of this water contended that the statute regarding the transfer of decreed rights (Laws of 1903, p. 278) was prospective, and not retrospective, and did not apply to them, and in 1904 brought an injunction suit against the water commissioner of 41 to restrain him from taking the transferred water out of the Montrose canal, or from refusing to divert it into the canal headgate. This injunction suit was decided against them on demurrer, and they appealed the case to this court. Some time during the happening of these events or at least about this time, Thomas M. Moore and others, who had purchased from the original owners some of this early priority water, filed petitions in the district court to change its point of diversion into the Montrose canal. While the Moore Case was pending, and after the demurrer to the injunction suit was sustained and judgment entered against them below, appellees in this case filed in the district court at Montrose petitions asking to change the point of diversion of the water. They had theretofore purchased, or to confirm the transfers already made. These petitions were consolidated for hearing, and tried with the Moore proceeding; but, before any action was taken thereon, they obtained an order permitting them to withdraw from the Moore Case, dismissed their petitions therein in the district court, and appealed the original injunction suit, which had been decided against them on demurrer, to this court. See 37 Colo. 534-536, 87 Pac. 800, 801. The Moore Case was tried, the applications therein to change the point of diversion were denied, and they appealed that case, which is No. 5891, to this court. The injunction suit was affirmed by us, but without prejudice to the right of appellees to bring and maintain subsequent proceedings under the statute to change the point of diversion. Thereupon appellees, as petitioners, began another proceeding in the district court at Montrose in April, 1907, asking the court to permit a change in the point of diversion,

or to confirm the change already perfected. A referee was appointed, who took the evidence and reported his findings. By stipulation the bill of exceptions, which preserved the evidence in the Moore Case, was received in evidence in this case, together with such additional testimony as the parties saw fit to introduce. The referee found appellees owned the transferred water; that they purchased it between April, 1896, and November, 1898, from the original priority owners, and immediately thereafter changed the point of diversion from the headgates where it was originally decreed to the headgate of the Montrose canal, where it has since been continuously used by them in connection with the cultivation of their lands; that the change was not only without injury to protestants and all others on the river, but beneficial to them; and found petitioners were entitled to a decree permitting the change, which findings the court approved, and entered a decree accordingly.

Spring creek mesa, upon which the water is used, consists of about 8,000 acres of table land at an elevation of some 80 to 100 feet above the river bottom. The soil is a light, fertile loam, underlain with a bed of gravel resting upon an impervious shale. Numerous ravines and draws, which drain into the river, traverse the mesa, and Spring creek, skirting its western boundary, empties into the river some 5 or 6 miles below Montrose. Water spread upon the mesa in irrigation sinks rapidly through the loam and gravel until it is stopped by the shale, and the gravel bed, filling with water, becomes a large underground reservoir. It then breaks out in springs along Spring creek, and in the draws, gulleys, and ravines, and is carried back into the river. Also at places above the mouth of Spring creek the river runs in against the bluffs or cliffs of the mesa, and the seepage water is carried along the floor of the shale directly into the river. It is estimated that a great percentage of the water spread upon the mesa in irrigation is in this way returned to the river between the river bridge west of Montrose and the mouth of Spring creek, a distance of some 5 or 6 miles. During times of scarcity late in the season, the normal flow of the river past the Montrose headgate was about 40 or 50 feet, and most of this disappeared in the sand between the headgate and Montrose; the greatest loss occurring at what the witnesses designate the "dry bar," about 2 miles above the city, where the water was lost, with no visible indications that it reappeared further down the river. On the east side there is no available seepage into the river, and below the mouth of Spring creek on the west side—that is, between the mouth of Spring creek and the head gates of 2 and 3, a distance of some 10 or 15 miles—there is no seepage into the river. While there is some seepage between the Montrose canal headgate and the bridge west of Montrose, it is principally lost by sinking. What-

ever seepage arises from irrigation under 2, 3, and 11 drains into the Gunnison or Uncompahgre rivers below the ditches. The available accretions or return waters to the river from irrigation on Spring creek mesa enter along the river between the bridge west of Montrose and the mouth of Spring creek, a distance of 5 or 6 miles. No claim is made that these irrigation rights settled by the adjudication decree were ever abandoned. The evidence shows the owners exhausted every legitimate means within their power to get this water down the river past protestants' headgates for use in their own ditches, and most of them became impoverished by the loss of their crops and expense of litigation in these attempts. At their request, the county officials placed numerous patrolmen on the river, but they were unable to keep the gates above closed down. In some instances the deputies were thrown into the river, in others they were fired upon, the gates were raised, and the water taken by ditches that were not entitled to it. Finally the state engineer, the division engineer, and the water commissioner of district 41 gave up trying to force this early priority water down to 2 and 3 headgates in times of scarcity when the decrees had to be enforced. After personally investigating the conditions on the river, they saw the impracticability of trying to bring so small a stream over so large a river bed with so great a loss, for the purpose of delivering 18 feet of early priority water at the headgates of 2 and 3. They were convinced that it would be a benefit to every one on the river, and an injury to none, to have this early water transferred into the Montrose canal. They suggested the transfers as a solution of the problem, and assisted in finding purchasers, and it was through their influence, assistance, co-operation, and direction that the water rights were sold, and these officials gave evidence on the trial of cogent and convincing character why the transfers should be permitted.

In 1890 and 1891 the owners of No. 8 (the Uncompahgre ditch), whose water had been taken from them by the ditches above, protesting ditches in this case, being unable to obtain their priority river water, constructed what is termed in the evidence the feeder ditch. They went over upon the west side of the river, around the point of Ash mesa, where seepage had broken out and was flowing into the river below the ditches, or being wasted in bogs and marshes, and constructed this feeder ditch, and, by taking advantage of the elevation and the side of the mesa, conducted this water up the river and dropped it into the stream above their headgate. It was water which had not reached the river above their headgates, and would not have done so except for their labor in constructing the feeder ditch and carrying it up there. The feeder ditch is flumed across No. 2, which sometimes uses the feeder water. Also seepage water arising on the lands of the

No. 2 owners was permitted to flow into the ditch, and used when they could not get their priority water late in the season. During flood time, when there was plenty of water in the river and no occasion for enforcing the decrees, the lands under 2 and 3 were irrigated from the river through 2 and 3 headgates; but, during times of scarcity, when the priorities are enforced, they have not, since they sold these rights, used 2 and 3 priorities, but have relied on the feeder ditch and the seepage water coming into No. 2 ditch below its headgate. Priorities 2 and 3 since the transfers have been taken out into the Montrose canal and used there, and nowhere else.

The alleged double use of these priorities, occasioned by the change in the point of diversion, is the substance of the matter complained of as injuriously affecting the vested rights of protestants in and to the use of the water of the river; that is, priorities 2 and 3 have been sold and transferred up the river into the Montrose canal, they say, and still are supplied by the accretions, and used at the original points of diversion down the river below protestants' headgates; that, to the extent these priorities can be supplied by seepage at the original point of diversion, they are injuriously affected by depleting the river above their headgates. Whether the feeder ditch is an independent right separate from the original decree, developed since the adjudication, or whether it is controlled by the decree is the principal question involved. The grievance of protestants is that these priorities are being used at the new and old points of diversion at the same time, because the seepage constitutes a part of the decreed priorities. Ditches 2 and 3, since the sale, have made no demand for the priority water, and protestants are not trying to force down this early water to 2 and 3 headgates. They are trying to prevent the purchasers from diverting it into the Montrose canal, so they can use it themselves, upon the theory that 2 and 3 do not need this water because they are supplied by the accretions below protestants' headgates. The Boles & Manney ditch, a quarter of a mile above No. 2, takes all the water at its headgate, and the seepage into the river between it and No. 2 headgate is very small, fluctuating, and uncertain. The water below protestants' headgates used by 2 and 3 in times of scarcity, since the sale, is that arising either on the property of the landowners under No. 2, or which is supplied by the feeder ditch. All the accretions into the river above the Boles & Manney ditch that do not sink and disappear are taken up and used by the protesting ditches, and it is only the use of the seepage between 1½ and 2 and 3 of which they complain.

[1, 2] 2. The adjudication decree settled all matters and questions that were necessary to constitute a complete appropriation. *O'Brien v. King*, 41 Colo. 487, 92 Pac. 945;

*P. V. I. Co. v. Central Co.*, 32 Colo. 102, 75 Pac. 891; *Water Co. v. Irrigation Co.*, 24 Colo. 322, 51 Pac. 496, 46 L. R. A. 322; *Ditch Co. v. Ditch Co.*, 22 Colo. 115, 43 Pac. 540. The owners and claimants of the protesting ditches participated in this proceeding, and obtained decrees settling the priorities of their ditches, and are bound by the decree awarding for irrigation use this early priority water to the Eggleston and Uncompahgre ditches. The decree determined the volume and the date of the priorities for use during the irrigating season. This right to use, in times of scarcity, a definite volume of water in a fixed order of priority from the natural streams is one of the most valuable property rights known to the law of this state, which in no way depends on the place of its application, and is not confined to the land upon which the right came into existence, but may be sold separate from the land, and changed from one place to another. Only a few of the many cases need be cited to show that we are committed to the doctrine that the point of diversion, the conduit, the place of application, and character of use may each and all be changed. *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. 313, 25 Am. St. Rep. 245; *City of Telluride v. Davis*, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101; *Wadsworth D. Co. v. Brown*, 39 Colo. 62, 80 Pac. 1060; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. 854; *Irrigating Co. v. Reservoir Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123; *King v. Ackroyd*, 28 Colo. 495, 66 Pac. 906; *Seven Lakes Co. v. Irrigation Co.*, 40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329. The only limitation placed upon the right is the injurious effect that the change may have upon the vested rights of others in and to the use of the water of the stream.

In *Strickler v. Colorado Springs*, supra, the conduit was changed from an irrigating ditch to a city pipe line; the point of diversion was changed from the headgate of the irrigating ditch into the intake of the pipe line; the character of the use was changed from irrigation to general city use; and the place of application was changed from an irrigated farm to the city hydrants. In *Irrigating Co. v. Reservoir Co.*, 25 Colo. 148, 53 Pac. 320, 71 Am. St. Rep. 123, where the conclusion reached in the *Strickler* Case was attacked as unsound, we say, in reference to that case: "Much of the argument might be pertinent were the doctrine of that case an open question, but, not only in this state, but in all others in which the system of appropriation prevails, the same result has been reached, where the question has been raised. With the conclusion reached in that case we are content." In *City of Telluride v. Davis*, supra, the water right came into existence on the mining placer location, and was afterwards transferred to a ranch and used for irrigation. The owner of the ranch thereafter sold the right to the city of Tel-

luride, which changed the point of diversion into its pipe line, and the nature of the use to city purposes. Here we have three changes in the character of the use, three in the place of application, and at least two in the point of diversion, all in the same water right.

Petitioners purchased from, and the owners conveyed to, them this valuable property right in and to the use of the water, and they became the owners of the priorities that had ripened on the land and attached to the ditches. The right became their right, and they could transfer it into the Montrose canal upon a compliance with the statute. The statute provides, in substance, that every person desiring to change the point of diversion of his right to use water from any of the streams shall present a petition to the proper court praying that the change be granted, and the court, after hearing the evidence, shall determine whether the proposed change will injuriously affect the vested rights of others in and to the use of the water, and, unless it so appears, it shall enter a decree permitting the change as prayed. Sections 3228, 3227, R. S. 1908. So the only question involved in the case is whether the proposed change will injuriously affect the vested rights of others in and to the use of the water of the stream.

[3] 3. The injurious effect, if any, upon the vested rights of others in and to the use of the water of the stream, occasioned by changing the point of diversion, will be considered along two lines or branches of the case: First, whether the accretions into the river above the Eggleston and Uncompahgre headgates and below the Boles & Manney headgate supply 2 and 3 priorities at the old point of diversion; second, whether the findings of the court that the changes were a benefit, and not an injury, to the vested rights of others in and to the use of the water, is sustained by the evidence.

It will be remembered that the headgates of the senior ditches, 2 and 3, from which the changes were made, are located down the river; that the headgate of the junior ditch, the Montrose canal, into which the transfers were made, is located 25 or 30 miles up the river, and that the headgates of protesting ditches, having intervening priorities, are located between the new and old points of diversion. Protestants claim that these senior rights, as long as they are retained at the old points of diversion, are or could be supplied by the return waters into the river below protestants' headgates; therefore, when used at the old point of diversion, although senior in priority, they do not deplete the river above protestants' headgates, who are not required to allow any water to pass their headgates to supply them; but that it depletes the river above protestants' headgates to supply these priorities into the Montrose canal, and, to that extent, deprives them of the use of water theretofore enjoined, and

that this constitutes a change in the physical conditions on the river which injuriously affects their vested rights into and to the use of the water.

There is no return water into the river between the Boles & Manney and 2 and 3 headgates, or, if there is, it is very small and insignificant. It is the feeder ditch and the seepage water into No. 2 below its headgate that protestants term the accretions supplying these priorities below their headgates, of which they complain.

[4] The sale and transfer of these early rights into the Montrose canal did not preclude the land upon which they ripened and from which they were severed, being irrigated by other water, or with rights other than the ones transferred. It was no surrender of the junior rights of the landowners, or the right to appropriate any unappropriated water, or of developing or procuring water from an independent source, which otherwise would not reach the stream.

[5] It must not be forgotten that No. 3 consumers constructed at their own labor and expense the feeder ditch by which the seepage water around the rim of Ash mesa, doing no one any good, was conveyed a mile up the river and emptied in the stream just above their headgate. This was an independent appropriation from extraneous sources, which they could make under the seepage act of 1889 (section 3177, R. S. 1908), and was not included in, covered or controlled by, the general adjudication decree. If, by their efforts, they lawfully contributed water to the stream, which otherwise would not have reached it above their headgate, it was theirs, independent of the original adjudication decree, and because, by their labor, they contributed extraneous water to the normal flow is no reason why they may not sell their priorities and irrigate their land with the independent water. The right to protect and preserve their individual ownership in property authorized them, when their priorities were taken from them, and they were threatened with the loss of their ranches and crops, to procure water from any independent source, and because they were put to this additional labor and expense to save themselves is no reason why they should suffer the further loss of their priorities. The result of such a construction would be disastrous to individual enterprise and activity. Suppose an enterprising ranchman takes stock in a company constructing a mutual reservoir, and finds, when it is completed, that it supplies him with sufficient water to irrigate his farm. May he not sell his priority, or must he pay a penalty for being public spirited, and lose his water rights? Suppose, under the seepage statute, one drains part of his own lands and develops water sufficient to irrigate the remainder, may he not sell his water right and use the developed water, or must he, as a penalty for reclaiming his land, lose his water right?

In *Strickler v. Colorado Springs*, supra, the court said that, if the soil of one's farm should wash away so he had no further use for the water, this was no reason why he should also suffer the loss of his priority of right in and to the use of the water, and that he could sell the water right to be used elsewhere. It has also been held that where one has lost the use of his land from seepage, that that is no reason why he should also lose his water right, and that he could change it to other lands himself, or sell it to another, who would have the right to change it to other lands.

In *King v. Ackroyd*, supra, King's land became so seeped that it had no further need of irrigation; but we held that she did not thereby lose her water right, but could sell the water that was used on the seeped land to other parties to be used on their lands. If the Eggleston and the feeder ditch had not been built, the seepage they collected never could have become a part of the river above 2 and 3 ditches. This water was not an accretion that had entered the river subject to the decree to supply all the priorities in their numerical order, but was independent water procured from an extraneous source, and belonged to the owners who produced it and put it into the river. *Ripley v. Park*, 40 Colo. 129, 90 Pac. 75; *Platte Valley Co. v. Buckers*, 25 Colo. 77, 53 Pac. 334.

In the *Buckers Case*, supra, it is held, where a party by his own efforts and expenditures has increased the flow of water in a natural stream, he is entitled to use the water to the extent of the increase. The same principle is again announced in the *Ripley Case*, supra, where the court, through Mr. Justice Campbell, in speaking of the doctrine announced in the *Buckers Case*, says: "We have held that such contributions to a natural stream belong to the one who made them."

Protestants may have acquired a vested right in and to the water of the stream that any seepage into the river below the *Boles & Manney* headgate should continue to supply priorities 2 and 3 at the old point of diversion; but they did not acquire a vested right in and to the water of the stream that a subsequently acquired independent water right which augmented the normal flow should become a part of the original decree and supply 2 and 3 priorities. Neither did they acquire a vested right in and to the water of the stream that the senior priority owners would not subsequently acquire water from some extraneous source and sell their priorities.

The seepage used by No. 2 was of the same character, except, instead of emptying it into the river above its headgate, it was turned into the ditch some distance below its headgate. There was no use of putting the water into the river to get it into No. 2, as No. 3 had done, because the Eggleston was on

the west side and No. 3 was on the east side of the river.

[8] 4. Does the evidence sustain the finding of the court that the change was a benefit, and not an injury, to the vested rights of others in and to the use of the water of the stream? A. The evidence on this point is too voluminous to more than state its general effect. The testimony of the water officials who had investigated and studied the conditions on the river for a number of years was to the effect that in times of scarcity this 18 feet of early priority water could only be delivered to 2 and 3 headgates by sacrificing a great portion of the 40 or 50 feet passing the Montrose canal, as well as the accretions into the river below Montrose. In fact, when they attempted to do so by keeping closed all the headgates, it practically consumed the accretions below Montrose. With the water transferred into the Montrose canal, this loss by sinking and evaporation is saved to the river. The priority of the Montrose canal is so late, and the chances of getting water in times of scarcity so uncertain, that the business of farming and fruit raising on the mesa was retarded and precarious; but the transfer of this early water into the canal increased the irrigated acreage and the use of flood waters. Of the water used on the mesa, it is estimated from 60 to 70 per cent. returned to the river below the dry bar and above the mouth of Spring creek, and was used by the protesting ditches, and none of it was permitted to reach 2 and 3 headgates. In other words, the protesting ditches had the use of all the increased accretions into the river, which were greatly augmented by these transfers. As a result, priorities 1½, 4, 5, 6, 7, and 8 are supplied by the return waters largely produced from the effect of the transfers, and No. 9, above the dry bar, is supplied by the saving to the river on account of the change in the point of diversion. There is evidence that it would take 60 to 70 feet of river water at the Montrose canal headgate and consume the accretions below Spring creek to deliver this 18 feet into 2 and 3 headgates. Whether this statement is true or not, we think the evidence clearly shows that the change in the point of diversion is a benefit to every one. Whatever accretions there may be, if any, into the river between the *Boles & Manney* and No. 2 headgates are so small that they are more than offset by the general benefit.

*Crippen v. Glasgow*, 38 Colo. 105, 87 Pac. 1073, was a proceeding to change the point of diversion of 4 feet of priority water to a point further up the stream. The lower court found it would require a flow of 14 feet in the bed of the river to deliver 4 feet down the stream into the headgate at the original point of diversion, while it would only require 4 feet from the river to deliver the 4 feet up the stream into the canal at

the new point of diversion; that this saving to the river of 11 feet, together with the additional accretions from seepage caused by applying the transferred water to the lands under the ditch at the new point of diversion, was beneficial, and more than compensated any loss to the landowners between the two points of diversion. For this reason, it held that any vested right of intervening appropriators in and to the use of water between the new and old points of diversion would not be injuriously affected on account of the change, and the finding was sustained by this court.

The protestants say they have no intention of causing this waste by forcing these early priorities down to 2 and 8; they do not want the water to go there; they want it themselves. Viewed from this aspect of the case, why should protestants, who do not own the water, be given it in preference, to prevent waste, to those who own it and have transferred it into the Montrose canal, which prevents the waste? If preferences are to be shown or given to any one to prevent waste, it would seem the use, if it is practicable, should be given to the owner.

We are of the opinion that the finding of the court is right, and is sustained by the evidence.

**Affirmed.**

MUSSER, C. J., and GABBERT, J., concur.

# MOORE et al. v. IRONSTONE DITCH CO. et al.

(Supreme Court of Colorado. April 6, 1914.)  
WATERS AND WATER COURSES (§ 152\*)—PRIORITIES—SEEPAGE WATER—JUDGMENT.

Where the owner of a priority in the use of a volume of water of a stream, as settled by an adjudication decree, diverted extraneous and seepage water into the stream above his headgate which otherwise would not have reached the stream, such water belonged to such owner individually, and was not an accretion belonging to the river and controlled by the decree, and hence such owner could sell his priority and irrigate with such extraneous water, without interfering with the vested rights of other owners of priorities.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

Appeal from District Court, Montrose County; Theron Stevens, Judge.

Petition by Thomas M. Moore and others for permission to change the points of diversion of priorities to the use of water of a stream, in which the Ironstone Ditch Company and others were protestants. From a decree denying the petition, petitioners appeal. Reversed, with directions.

M. Fairlamb, of Delta, F. W. Heath, of Los Angeles, Cal., and Bell, Catlin & Blake, of Montrose, for appellants. S. S. Sherman, of Montrose, and Milton R. Welch and R. M. Logan, both of Delta, for appellees.

GARRIGUES, J. For a statement of the facts, see *Ironstone Ditch Co. v. Ashenfelter* (No. 6438) 140 Pac. 177, decided at this term.

This case is identical with *Ironstone Ditch Co. v. Ashenfelter* (No. 6438). It was tried upon practically the same evidence, but before another district judge, who found exactly opposite to the determination in No. 6438, and refused to permit the change in the point of diversion of the same priority water from the same ditches into the same canal. It is manifest the court in this case misapprehended or misconceived the law. It found the feeder ditch and the seepage water collected by No. 2 below its headgate were accretions belonging to the river, and were controlled by the decree, and not independent water rights belonging to the persons who owned and were using them. It also overruled the finding of the referee determining the right and interest of each petitioner in and to the priority water which he sought to transfer, and refused to partition the water decreed these ditches, or to make any finding of the respective rights of the petitioners therein. This was error. *Hallet v. Carpenter*, 37 Colo. 30, 86 Pac. 317.

For the reasons given in *Ironstone Ditch Co. v. Ashenfelter*, supra, the case will be reversed and remanded, with directions to the lower court to determine the respective rights, if any, of each petitioner in and to the water sought to be transferred, which may be done upon the evidence already taken, together with such additional evidence as the parties may see fit to introduce, and to then enter a decree permitting the change in the point of diversion as prayed, in compliance with the law as announced in the opinion in No. 6438, supra.

**Reversed.**

MUSSER, C. J., and GABBERT, J., concur.

# STRAUSS v. BRIER.

(Supreme Court of Colorado. April 6, 1914.)

1. PATENTS (§ 203\*)—CONTRACTS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for the balance due under a written agreement to sell an interest in a patent right, evidence held not to show that plaintiff ever had an assignment of or interest in any patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 290-294; Dec. Dig. § 203.\*]

2. PATENTS (§ 199\*)—ASSIGNMENTS.

An agreement to convey rights, etc., held in a patent required a conveyance of the patent rights, which, to be valid, must be made and recorded pursuant to Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387).

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 279; Dec. Dig. § 199.\*]

3. PATENTS (§ 203\*)—CONTRACTS—PERFORMANCE—SALES.

One party to a contract cannot be required to perform and the other party left to perform at his option, so that one suing for the balance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

due under an agreement for the sale of patent rights must show a tender of a conveyance of the rights as agreed in order to recover.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 290-294; Dec. Dig. § 203.\*]

#### 4. PATENTS (§ 196\*)—ASSIGNMENT—OPTION.

An instrument providing that, in consideration of the payment of a certain sum by the party of the second part to the party of the first part, the party of the first part "hereby agrees" to deliver to the second party all of his rights to the use of a certain patent, and "does hereby grant and convey" such rights, was a mere option; the second party not expressly or impliedly agreeing to buy or pay for the patent rights.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 275-280; Dec. Dig. § 196.\*]

#### 5. CONTRACTS (§ 10\*)—MUTUALITY OF OBLIGATION.

To make a contract of sale enforceable, the obligations must be mutual, and the covenant to convey and the covenant to pay are dependent obligations.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Paine Brier against I. A. Strauss. Judgment for plaintiff, and defendant brings error. Reversed, with directions to enter judgment for plaintiff for a less amount.

B. C. Hilliard and J. R. Alphin, both of Denver, for plaintiff in error. Gail Laughlin, of Denver, for defendant in error.

SCOTT, J. The complaint in this case alleged, as a first cause of action, a balance due on a written agreement for the sale of an interest in a patent right, covering the territory of the state of Colorado. It seems necessary, to a proper understanding of this matter, that this agreement should be set out in full, and it is as follows: "Witnesseth, that, for and in consideration of the sum of ten (\$10.00) dollars paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, and for the payment of one thousand nine hundred and ninety (\$1,990.00) dollars, to be paid to the party of the first part as follows: nine hundred and ninety (\$990.00) dollars on or before three months from the date of this contract, and the balance of one thousand (\$1,000.00) dollars on or before six (6) months from the date of this contract, the party of the first part hereby agrees to deliver to the party of the second part, free and clear of all incumbrance whatsoever, all of the right, title, and interest in and to the state of Colorado, for the use of the Day's Resilient Tire Filler, and does hereby grant and convey to the party of the second part his rights, privileges, and benefits which he, the party of the first part, now holds, and the party of the first part hereby guarantees and warrants unto the party of the second part that he will defend the party of the second part in his rights to the state in every way against all persons legally claiming, or to claim, the

same, and the said party of the first part hereby agrees to deliver over to the said party of the second part all the rights, benefits, titles, and grants, and conveyances in and to the said state for the use and control of the said party of the second part, the Day's Resilient Tire Filler upon the final payment of the amount stated in this contract, on or before the time specified; that time shall be the essence of this contract, and, in case the party of the second part fails to make payment as above stated, then this contract shall be null and void. This contract is made in duplicate, each party holding a copy of the same. Party of the first part certifies that he has full right to sell the above, and this contract shall be binding upon the heirs, executors, administrators, assigns, and successors of and to the parties hereto."

The complaint further claims, under a second and third cause of action, respectively, the amount of \$45 for merchandise and \$36 for rent. A demurrer to the first cause was overruled, and the defendant answered, denying generally the allegations of the complaint, except the execution of the contract and the payments made thereunder, and denying that the allegations in the first cause of action were sufficient in law to constitute a cause of action against defendant. The answer further alleges that the written agreement had been modified on the 28th day of November, 1910, by a reduction in the amount to be paid thereunder, and at a time prior to the maturity of the alleged obligation under the written agreement, and which will hereinafter be more particularly referred to.

The court found for the plaintiff, and rendered judgment in the sum of \$705.50. This included the sum of \$27 found to be due for merchandise, and the sum of \$36 for rent, under the second and third causes of action.

It appears that on the 28th day of November, 1910, there had been paid by the defendant below, on the written agreement, the sum of \$1,000, leaving a balance unpaid in the sum of \$1,000, which, under the agreement, was payable on the 6th day of January, 1911, following. On the former date, Brier, the plaintiff, being pressed for money for immediate use, proposed that, if Strauss, the defendant, would pay him \$600 in cash, and pay a certain account which Brier owed to the firm of Strauss, then estimated to be about \$100, he would settle the matter in full. It was finally agreed between them that Strauss should pay \$300 in cash, which he then did, and should pay the remaining \$300 later, and that he should, in addition, settle the Brier account with the firm of Strauss. Brier contends that the additional \$300 was to be paid the following week; while Strauss, corroborated by other witnesses, says he was to pay the additional \$300 just as soon as he possibly could, which he was to try to do by the 25th of December following. It further appears that Strauss

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



went to California some time after this, and returned on the 3d day of February, 1911, and on that day paid Brier an additional \$100. This was credited to Brier on the written contract, but it was clearly intended by Strauss to be paid on the later agreement. Later on, and before this suit was instituted, Strauss tendered to Brier \$200, together with a satisfaction of the Brier account with the Strauss firm, as full satisfaction of their differences, and repeated the tender on the 18th day of February, before the suit was instituted, and which was both times refused.

The contention of counsel for Brier is that, Strauss having failed to pay the additional \$300 within the time he says it was agreed to be paid, such agreement is now void, and the written agreement is in full force and effect, and that therefore Brier is entitled to recover the amount named in the latter. However, under the view we take of the written agreement and of the later agreement, Brier is not entitled to recover upon either; therefore it is not necessary to consider the matter of the later agreement. Nothing is plainer than that the parties entered into an agreement in this respect, and that one of the considerations therefor was an immediate cash payment, at a time when no payments were due. That Strauss acted in entire good faith in his efforts to comply with the terms of the later agreement, as he and his witnesses testify, is clear. It is likewise plain that this action is brought in a spirit of bad faith, is sought to be sustained upon technicality, and, if it may be sustained at all, must rest upon the testimony of plaintiff, overwhelmingly outweighed by that of other witnesses. Defendant denies the right of the plaintiff below to recover under the first cause of action; that is to say, under the written contract, either in its original form, or as amended by the change in the time and amounts by the subsequent agreement. This question was raised in the court below by a motion for judgment on the pleadings as to such cause of action, and also by a motion for nonsuit.

It appears that the thing agreed to be sold under the contract, and referred to therein as "Day's Resilient Tire Filler," was an alleged right, under United States patent, for some sort of process to be used in connection with auto tires. The plaintiff, Brier, testified that, at the time of the agreement, one Day, who lived in the state of Texas, had applied to the government for a patent on this process; that, at the time of the agreement here involved, he had some sort of a written contract with Day, to the effect that, in case Day should be granted a patent, he would sell to Brier the rights thereunder for the state of Colorado, with immediate permission to Brier to use the process, which he was then using, within this state. He further testified that he had not delivered or assigned this agreement to de-

fendant, Strauss; also that he had lost it about a year before the trial; did not know where it was; had not requested either a new agreement or a copy of the original from Day; further, that Day had written him to the effect that a patent had been granted, but he had not made to Brier an assignment of any rights under any such patent, and that he (Brier) had no *personal* knowledge of the issuance of a patent.

[1] It is clear from Brier's testimony that, neither at the time of the agreement sued on, nor at any time since, has he ever had an assignment of any such patent, and that the letter from Day was his only information that a patent had been granted. Hence at no time has he ever been in a position to deliver to Strauss an assignment of a patent for the process, which is the very thing he contracted to sell. Nor has he ever made the slightest effort to comply with the agreement upon which he has now received \$1,400 in money, and recovered judgment in this case for \$600 additional, with interest thereon. The value of a patent for an invention rests solely on the right of the inventor to exclude others from making, using, or selling his invention. To protect the inventor and those holding under him, Congress has enacted a statute providing for an exclusive method for making assignments of patents, or any interests therein. Section 4898, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3387), provides: "Every patent or any interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof."

It does not appear in this case that Brier has ever had a written assignment of patent; or that any such written assignment to him has ever been made or recorded, as provided by the statute; or that he is in a position to secure and deliver to Strauss a valid assignment; or that he has made any effort to secure, deliver, or tender to Strauss such assignment, which he clearly contracted to deliver, free and clear of incumbrance, and which he warranted to defend as against the legal claims of all other persons. So that, in fact, Strauss is not in possession of any legal or valuable right in connection with such alleged patent that may not actually belong to any other person. Nor does it appear that it is possible, by action at law or otherwise, for Strauss to compel a performance of the contract.

[2] Counsel for defendant in error contends that, by the clause in the agreement "and does hereby grant and convey to the

party of the second part his rights, privileges, and benefits which he \* \* \* now holds" constitutes the only conveyance contemplated. If Brier had any rights, benefits, or privileges at the time, it was only the personal permission of Day to use the unpatented process, and an agreement to assign an interest in the patent in the event of its issue, covering the state of Colorado. If this language be said to refer to a government patent, then the assignment, to be valid, must be made and recorded as provided by the statute. The contract to sell, in question, clearly required a valid conveyance, and a valid conveyance in such case must necessarily be in writing. There can be no valid existing conveyance until it is recorded in the patent office. It is therefore the clear duty, and in this case a necessary prerequisite to the bringing of the suit, if the action might otherwise be maintained, that the plaintiff should have tendered such a conveyance.

[3] The defendant cannot be required to perform his part, and the plaintiff be permitted to perform or not, at his own will. In *Gilpin v. Watts*, 1 Colo. 479, it was said (pages 482, 483): "It is true that the bill contains an offer to produce, subject to the order of the court, the conveyance which, it is averred, complainant had before tendered to the defendant; but there is nothing to show that such conveyance was, in fact, ever brought into court or delivered to any officer of court; and, the original cause being determined by the final decree, it appears to us doubtful whether the defendant has any remedy to compel its production. The decree ought to be a final determination of the whole controversy, so far as the case-made warrants. The purchaser ought not to be required to pay the purchase money, and then resort to his motion or bill of review, or other process, if there be any effectual to this end, to secure a conveyance."

[4] But the contract at best is a mere option. It contains no express or implied agreement on the part of Strauss to buy, nor to pay for, the patent right.

[5] To make a contract of sale enforceable, there must be mutual obligations, and in such a case the covenant to convey and the covenant to pay are dependent obligations; each is a condition precedent to the other. *Hoagland v. Murray*, 53 Colo. 50, 123 Pac. 664.

In this case, and for these reasons, the plaintiff is not entitled to recover under the agreement as originally made or as amended. The record discloses no equities in favor of the defendant in error. Indeed, the transaction upon his part may well be characterized in harsher terms. The judgment upon the two items under the second and third causes of action was upon different and independent transactions.

The judgment is reversed, with instructions to enter a judgment in favor of the

plaintiff below in the sum of \$63, the amount found to be due for merchandise and rent, and to tax the costs of the proceeding to the plaintiff.

MUSSER, C. J., and GARRIGUES, J., concurring.

### BROMLEY v. HALLOCK.

(Supreme Court of Colorado. April 6, 1914.)

ELECTIONS (§ 180\*)—BALLOTS—EXPRESSION OF CHOICE.

Under Rev. St. 1908, § 2236, providing that when the name of a party is written in the blank space at the head of a ballot, in the form "I hereby vote a straight \* \* \* ticket, except where I have marked opposite the name of some other candidate," it shall be counted for all the nominees on said ticket, except for any office where a mark has been made opposite the name of a candidate of another party therefor, there being on the ballot the tickets of the "Democratic," "Republican," "Progressive," "Roosevelt," and "Bull Moose" parties, a ballot, on which in said blank space is written either "Progressive, Bull Moose," "Progressive, Roosevelt, Bull Moose," "Progressive, Roosevelt," or "Roosevelt, Progressive," is to be counted for a candidate on the "Progressive" ticket for an office for which there is no candidate on the "Roosevelt" or "Bull Moose" tickets; there being no mark against the name of any other candidate for the office.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.\*]

En Banc. Error to Chaffee County Court: Joseph Newitt, Judge.

Election contest by J. W. Hallock against Frederick A. Bromley. Judgment for contestant, and contestee brings error. Reversed and remanded, with instructions.

Gilbert A. Walker, of Buena Vista, and George D. Williams, of Salda, for plaintiff in error. Wallace Schoolfield, of Salda, for defendant in error.

HILL, J. At the November, 1912, election, the parties to this action were rival candidates for the office of county clerk and recorder of Chaffee county. Mr. Hallock was the regular Democratic nominee. Mr. Bromley was the regular nominee of the Republican party, also of the Progressive party. On the face of the returns Mr. Bromley was elected by a majority of 13. Mr. Hallock instituted this contest. Issues were joined, and upon final trial a decree was entered awarding the office to Mr. Hallock. The court, on recount, declared his majority to be 26. Mr. Bromley prosecutes this writ of error.

In addition to the Democratic, Republican, and Progressive parties, who had candidates for presidential electors, United States senators, congressmen, state, district and local county offices, except the Progressive party had no candidate for representative for Chaffee county, or for county treasurer, county judge, or county surveyor, the ballots disclose that there were also thereon the nom-

inees of what was called the Roosevelt and the Bull Moose parties, each of which had candidates for presidential electors, United States senators, congressmen, and state offices, but which parties had no district or local county candidates upon the ballot, also that the Bull Moose had no candidate for Congress for the second district. Otherwise, the candidates of the Bull Moose party, as well as those upon the Roosevelt ticket for United States senator, congressmen, and state offices, were identical with the candidates for those offices on the Progressive ticket, so that in so far as the Roosevelt and Bull Moose parties had candidates for any office, they were identical with each other, and were also identical with the candidates of the Progressive party for such offices. Stated differently, every candidate for any office upon the Bull Moose ticket was also a candidate for the same office on the Roosevelt and Progressive party tickets, and every Roosevelt party candidate on the ticket was also a candidate for the same office on the Bull Moose and Progressive tickets, excepting only that one McLain was the nominee of the Progressive and Roosevelt party for congressman from the second district, but was not the nominee of the Bull Moose party for such office; it having no candidate for Congress for the second district.

Upon recount the court found, which finding is sustained by the evidence, that in the blank space provided for the writing in of the name of a political party, there were 9 ballots which had the words written in this space "Progressive, Bull Moose," 15 with the words "Progressive, Roosevelt, Bull Moose," 7 "Progressive, Roosevelt," and 2 "Roosevelt, Progressive," and that none of these ballots had any cross mark, defective or otherwise, opposite or near the name of any candidate for the office of county clerk and recorder. Upon this finding the court held that these ballots did not disclose any intentment by either or any of the electors casting them to vote for the contestee, and declined to count them for him. In this the trial court erred.

Mr. Bromley was the candidate upon the Progressive ticket. Wherever there were any candidates upon the Bull Moose or Roosevelt tickets for any office, they were the same as on the Progressive; the only difference being that while the Progressive party had candidates for all national and state, and nearly all district and local county offices, the other two did not have any candidates for district or local county offices, or the Bull Moose a candidate for congressman in the second district.

Section 2236, Revised Statutes 1908, in part reads: "That across the head of the ballot, and just above the lists of nominations, shall be printed the words: 'I hereby vote a straight \* \* \* ticket, except where I have marked opposite the name of some other candidate,' and any voter desiring to vote a straight ticket may write within the blank

space above provided for, the name of the party whose ticket he may wish to vote, and any ballot so cast shall be counted for all the nominees upon said ticket, except when the voter has marked opposite the name or names of any individual candidate of some other party, which individual marks opposite such individual candidate shall count for them, and shall not be counted for the candidates for the same office upon the ticket whose party name the voter has so filled in the blank at the head of the ticket."

Section 2285 in part reads: "If a voter marks in ink more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the choice of any voter for any office to be filled, his ballot shall not be counted for such office. Provided, however, a defective or an incomplete cross marked on any ballot in ink, in a proper place, shall be counted if there be no other mark or cross in ink on such ballot indicating an intention to vote for some person or persons or set of nominations, other than those indicated by the first mentioned defective cross or mark, and where a cross is marked in ink against a device indicating a vote for the entire set of candidates, and also another cross in ink against one or more names in another list, such ballot shall only be held invalid as to any office so doubly marked."

Section 2286 following reads: "If an imperfect cross or mark be found near the name of a candidate in ink, which mark appears to have been made with intent to designate the candidate so marked as the one voted for, such ballot shall not be rejected, if the intent of the voter to designate the person for whom he intended to vote can be reasonably gathered therefrom; provided, that if marks placed opposite the names of individual candidates shall work to a complete exclusion of the candidates of the party, the designation of which has been written in at the top of the ballot, and the intention of the voter is clear, it shall not be necessary to strike out the names of the candidates against whom it is desired to vote."

These sections were all in force at the time of this election and contain the only express provisions in our election laws as to what constitutes a defective ballot so that the same shall not be counted. They do not include one like those under consideration. 'Tis true that an elector, in order to properly express his choice, must do so substantially in the manner provided by statute. *Young v. Simpson*, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254; *Helskell v. Landrum*, 23 Colo. 65, 46 Pac. 120; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814; *Wiley v. McDowell*, 133 Pac. 757; *Whittam v. Zaborik*, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317; *Vallier v. Brakke*, 7 S. D. 343, 64 N. W. 180. It appears to us that this requirement was complied with by the electors casting these ballots. The plaintiff in error was the candidate upon

the Progressive ticket; he was also upon the Republican ticket. When these voters wrote in the word "Progressive," they indicated their intention to vote for all the candidates upon that ticket, unless they performed some act otherwise which tended to defeat or neutralize such intention. The way provided by statute to have annulled this expressed intention, as against any candidate for whom they did not desire to vote, was to make a cross mark opposite the name of his opponent, and if two or more were running for offices of the same name, to run a line through the name of the party for whom they did not desire to vote; neither was done. Other methods which might have this effect need not be considered; they are not involved. The fact that the electors in some instances followed and in others preceded Mr. Bromley's party name with the insertion of the words "Bull Moose" or "Roosevelt," or either or both of them, did not, under the circumstances above disclosed, in any manner tend to contradict or neutralize the intention of the voter in voting for Mr. Bromley. This is readily apparent for the reason, among others, that if these ballots were counted for all the candidates whose party names were written in at the top, it would not disclose any intention to vote for any one not on the Progressive ticket, as there was no one on either of the other tickets who was not on the Progressive. The voter having substantially complied with the law, and his intention thus given not being in conflict with any other expression to be gathered from the ballot, it must be given effect as expressed; and, when thus applied, Mr. Bromley is entitled to these votes, as he was the only candidate for this office on any of these tickets, and the only one for whom they could have been intended.

In *Nicholls v. Barrick*, 27 Colo. 432, 62 Pac. 202, Mr. Nicholls was the candidate of the Republican party for sheriff, and Mr. Barrick was the candidate of the People's, Silver Republican, Teller Silver Republican, Democratic, and Populist parties. It was shown that these last-named several political parties had united upon the same ticket, each filling the ticket under its distinctive party name; that the ticket was generally spoken of by newspapers and the people as the fusion ticket, and that the only opposition ticket was the Republican. On 43 ballots each voter had written in the blank space provided the word "Fusion." When thus filled out they read, "I hereby vote a straight Fusion ticket." It was held that these ballots clearly showed the intent of the voter, and should be counted for the candidate on the combined tickets of these several parties; that they were substantially marked as the law requires sufficient to justify their being counted. The principles there announced are specially applicable to the facts

here. The electors casting these ballots come much nearer in complying literally with the statute than those whose ballots were under consideration in the former case, and their intention, not having been neutralized in any respect, when applied to this office, must be given effect as expressed.

The case of *Wiley v. McDowell*, supra, does not support the position of the defendant in error; to the contrary, its record discloses that McDowell was the candidate upon the Republican and Progressive tickets only, and that he was given the benefit of all ballots which had either of these party names written in at the head. He also contended that there should be counted for him the ballots which had the words "Bull Moose" or "Roosevelt" only written in at the head of the ticket, although he was not on either of such tickets, but relied solely upon evidence allunde to establish that they were intended for him. This court refused to adopt his theory for the reasons stated in the opinion.

When those 33 ballots are added to Mr. Bromley's total, it gives him a majority, even though all other contentions were decided against him; this makes it unnecessary to consider them.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action at the costs of the defendant in error.

Reversed, with instructions.

SCOTT, J., not participating.

## ERBAUGH v. PEOPLE.

(Supreme Court of Colorado. April 6, 1914.)

### 1. CRIMINAL LAW (§ 1150\*)—APPEAL—REVIEW—REFUSAL OF CHANGE OF VENUE—PREJUDICE OF INHABITANTS.

The question of prejudice of the inhabitants, on which change of venue is asked, being triable to the court, and resting in its discretion, its denial will not be disturbed, except for abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3044; Dec. Dig. § 1150.\*]

### 2. CRIMINAL LAW (§ 137\*)—CHANGE OF VENUE—PREJUDICE OF JUDGE—HEARING AND DETERMINATION.

The questions of law, on application of a defendant in a criminal case for change of venue for prejudice of the judge, going to the sufficiency of the complaint against the judge and the affidavits in support thereof, in form and substance, the judge has jurisdiction to hear and determine; but, these being sufficient, he cannot try the question of fact, of his prejudice, but has jurisdiction only to grant the change; Rev. St. 1908, §§ 6963, 6964, relative thereto, being mandatory.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 253; Dec. Dig. § 137.\*]

### 3. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTION—WAIVER OF OBJECTIONS.

Objections that the petition for change of venue was not filed till the morning of the trial, and that the district attorney was not served with notice, will be presumed waived; the record, showing that he appeared and participated

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the argument of the petition, not showing the contrary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

**4. CRIMINAL LAW (§ 137\*)—CHANGE OF VENUE—PREJUDICE OF JUDGE—HEARING AND DETERMINATION.**

Objection to time of filing petition for change of venue for prejudice of the judge, and that the district attorney was not served with notice, being waived, and the petition and supporting affidavits not being questioned, but treated as sufficient, as to form and substance, it was error to decide that the alleged prejudice was not true in fact, and for this reason alone to refuse the change.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 137.\*]

Gabbert and Bailey, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

C. O. Erbaugh was convicted, and brings error. Reversed and remanded.

Chas. R. Bosworth, Thos. E. McIntyre, William E. Foley, and Charles O. Erbaugh, all of Denver, for plaintiff in error. John T. Barnett, Atty. Gen., James G. Rogers, Asst. Atty. Gen., Benjamin Griffith, Atty. Gen., Philip W. Mothersill, Asst. Atty. Gen., Fred Farrar, Atty. Gen., and Frank C. West, Asst. Atty. Gen., for the People.

GARRIGUES, J. November 29, 1909, defendant was placed on trial for forgery, under an information filed June 4, 1909, convicted and sentenced to the penitentiary. He brings the case here on error.

The first count charges him with making, and the second count with uttering, the following check: "Denver, Colo., May 3rd, 1909. Colorado National Bank. Pay to the Order of C. O. Erbaugh \$3.60 three and 60/100 Dollars. [Signed] A. J. Brower." Indorsed: "C. O. Erbaugh, 1275 Josephine." A third count, charging him with making and passing a fictitious check, was withdrawn from the jury. The statute provides, in substance: Every person who shall forge any check for the payment of money with intent to damage or defraud any person, or who shall utter, as true and genuine, any forged check, knowing the same to be forged, with intent to prejudice, damage, or defraud any person, or shall pass, with intent to defraud any person, any fictitious check purporting to be the check of any individual for the payment of money when in fact there is no such individual, knowing the check to be fictitious, shall be deemed guilty of the crime of forgery. Sections 1704, 1711, R. S. 1908.

2. Defendant filed a petition, verified by his affidavit, asking for a change of venue upon the ground that he feared and believed he could not obtain a fair and impartial trial before the presiding judge, on account of prejudice against him entertained by such judge, because, he says, in May, 1905, the

judge, then acting in the capacity of deputy district attorney, prosecuted him upon the charge of embezzlement, in which, while addressing the jury in that case, he expressed his belief in defendant's guilt, and said that he (defendant) deserved to receive the severest punishment, and that the same belief is still entertained by him as presiding judge, for which reason he fears he cannot have a fair and impartial trial before him. Three separate affidavits were filed in support of the petition, in which each affiant states, among other things, that "he has read the petition for change of venue, in support of which this affidavit is made, and knows the contents thereof, and that he believes the matter and things therein stated to be true, and that the said defendant could not have a fair and impartial trial before said court."

[1] The petition also asked for a change of venue from the county on account of the prejudice of the inhabitants thereof, but this will not be further considered because that was a question of fact, triable to the court, and resting clearly within its discretion, will not be disturbed unless abused. *Power v. People*, 17 Colo. 178, 28 Pac. 1121; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Doll v. Stewart*, 30 Colo. 320, 70 Pac. 326; *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; *Kerr v. Burns*, 42 Colo. 285, 93 Pac. 1120.

3. The chapter allowing and regulating changes of venue in criminal cases provides: "Section 1. In any criminal cause pending in any court of record of competent jurisdiction, the judge of said court shall be deemed incompetent to hear or try said cause in either of the following cases: \* \* \* Third. When the judge is in any wise interested or prejudiced, \* \* \* such prejudice of the judge must be shown by the affidavit of at least two credible persons not related to the defendant." R. S. 1908, § 6963. The statute further provides, in substance, in case the judge shall be incompetent to sit for any of the causes mentioned, he may change the venue to some other court of competent jurisdiction in the same county, or in some other county, or he may set the case down for trial and request the judge of some other court of competent jurisdiction to try it. The application must be made at the earliest possible moment after the cause for the change becomes known to the defendant. Under the statute he is entitled to but one change.

[2] 4. Two questions arise in considering a petition and affidavits for a change of venue in a criminal case based upon the ground of the prejudice of the presiding judge: Questions of law and questions of fact. The first go to the sufficiency of the complaint against the judge and affidavits in support thereof in form and substance. *Young v. People*, 54 Colo. 293, 130 Pac. 1011. The second is a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

question of whether the judge is in fact prejudiced against the defendant. The first, under the prior decisions of this court, he has jurisdiction to hear and determine; but the second, the question of fact, is not tried. It seems the Legislature purposely omitted counter affidavits, or evidence of any kind as to the prejudice of the judge, to relieve him, or any one else, from trying the question. If the application is properly made and supported, as the statute requires, the question of the judge's prejudice will not be considered. The petition and affidavits are conditions imposed by statute, upon a compliance with which, if they are legally sufficient, the defendant is entitled to a change. In such a case the judge loses jurisdiction except to grant the change, without any inquiry into the facts. The petition and affidavit must be proper and sufficient, and the facts must be shown disclosing the prejudice of the judge. While he may pass upon the question of law involving the sufficiency of these matters, the question of the truth of the allegation is never tried. In this state, when a defendant brings himself properly within the provisions of the statute, the judge loses jurisdiction, except to grant the change, the statute relative to which is mandatory and imperative. *Bernhamer v. State*, 123 Ind. 577, 24 N. E. 509; *Duggins v. State*, 66 Ind. 350; *Manly v. State*, 52 Ind. 215; *Mershon v. State*, 44 Ind. 598; *Smith v. State*, 1 Kan. 365; *Ex parte Justus*, 3 Okl. Cr. 111, 104 Pac. 933, 25 L. R. A. (N. S.) 483; *State v. Witherspoon*, 231 Mo. 706, 133 S. W. 323; *State v. Spivey*, 191 Mo. 87, 90 S. W. 81; *State v. Sanders*, 106 Mo. 188, 17 S. W. 223; *State v. Shipman*, 93 Mo. 147, 6 S. W. 97; *State v. Henning*, 3 S. D. 492, 54 N. W. 536; *State v. Palmer*, 4 S. D. 543, 57 N. W. 490; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; *Cantwell v. People*, 138 Ill. 602, 28 N. E. 964; *People v. Knight*, 155 Ill. App. 92.

[3, 4] 5. The petition for a change of venue was not filed until the morning of the trial, about six months after the information was filed, and the district attorney was not served with notice; the record, however, shows that he appeared and participated in the argument of the petition. It will therefore be presumed, in the absence of the record showing the contrary, that he waived these matters. *State v. Spivey*, supra, 191 Mo. 104, 90 S. W. 86. No question was considered, or even raised or suggested in the lower court, that the affidavits were not sufficient. They were treated as sufficient in form and substance, no objection was made upon this ground, and the record shows the judge decided that the petition, on the ground of his prejudice, was not true in fact, and for this reason alone overruled the motion. This was error.

Reversed and remanded.

GABBERT and BAILEY, JJ., dissent.

## COLORADO MIDLAND RY. CO. v. EDWARDS.

(Supreme Court of Colorado. April 6, 1914.)  
COURTS (§ 213\*)—ERROR FROM SUPREME COURT TO COURT OF APPEALS—AMOUNT OF JUDGMENT.

A judgment for \$5,000, being merely affirmed by Court of Appeals, is still only for \$5,000, within Laws 1911, pp. 268, 269, §§ 5, 6, limiting rehearing by the Supreme Court, on error, from it to the Court of Appeals to a case where the decision relates to a judgment for more than \$5,000; the interest on a judgment, accruing under Rev. St. 1903, § 3162, not becoming part of it, but remaining incident to it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 517-519, 522-526; Dec. Dig. § 213.\*]

En Banc. Error to Court of Appeals.

Action by James A. Edwards against the Colorado Midland Railway Company. Judgment for plaintiff was affirmed by the Court of Appeals (24 Colo. App. 350, 134 Pac. 248), and plaintiff brings error. Dismissed.

Rogers, Ellis & Johnson, of Denver, for plaintiff in error. McKesson & Turner, of Colorado Springs, for defendant in error.

WHITE, J. Upon a trial of this cause in the district court of El Paso county, a judgment in damages for personal injuries in the sum of \$5,000, together with costs, was awarded and entered in favor of James A. Edwards against the Colorado Midland Railway Company. Thereupon the judgment debtor appealed the case to this court, and it was afterwards, by statute, transferred to the Court of Appeals, where the judgment was affirmed, and an order entered remanding the cause for execution of the judgment. Before the order became effective under the rules prescribed, a writ of error was sued out of this court, directed to the Court of Appeals, the transcript of the record of the case lodged here, and an application made for a supersedeas. The judgment creditor thereupon questioned the jurisdiction of this court in the premises, and interposed a motion to dismiss the writ of error. He contends that, as sections 5 and 6 (S. L. 1911, pp. 266, 268) of the act creating the Court of Appeals limits the jurisdiction of this court to rehear cases on writ of error to that court to those wherein the decision necessarily involves the construction of a provision of the federal or state Constitution, or relates to a franchise or freehold, or a judgment for more than \$5,000, exclusive of costs, and the judgment in question was for just \$5,000, exclusive of costs, the writ of error will not lie.

The judgment debtor, on the other hand, maintains that, as section 3162, R. S., allows interest at the rate of 8 per cent. per annum on any judgment recovered before any court or magistrate authorized to enter up the same from the date of its entry until satisfaction be made, the judgment of the district

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court was, by force of law, a judgment for more than \$5,000, exclusive of costs, and, when affirmed by the decision of the Court of Appeals, is within the jurisdiction of this court to rehear on error. We think the contention of the judgment creditor is correct, and the motion to dismiss the writ of error must be sustained. The Court of Appeals neither increased nor diminished the judgment of the trial court, but simply affirmed it. The interest accruing subsequent to the entry of the judgment in the district court did not therefore become a part of that judgment, but remained an incident thereto. The judgment, when entered, could have been settled, exclusive of costs for exactly \$5,000, and that necessarily measures the amount of the judgment. Interest arises, not as a part of the judgment, but as a consequence of withholding its payment, and is therefore an incident or mere sequence thereof.

While it is true that, by the decision of affirmance, the amount in controversy was augmented by the interest accruing since the entry of the judgment in the trial court, the judgment in the case, to which the decision of the Court of Appeals relates, remains the same, and it is that judgment, not the matter in dispute when the case was lodged here, that measures the jurisdiction of this court. Therefore cases relied upon by the judgment debtor, under statutes giving appellate courts jurisdiction where the sum or amount in dispute, not the judgment to which the decision relates, exceeds designated sums, are not in point. The purposes and language of the act creating the Court of Appeals, transferring, and permitting the transference of, certain causes from the docket of this court to that, defining its jurisdiction in the premises, and authorizing the rehearing of certain cases in this court by writs of error to that force these conclusions. The Court of Appeals is to exist for only four years from the date of its creation. The cases it is expressly authorized to determine must come to it from the docket of this court, not from that of the trial court. In the limited cases where its decisions are not final, the act expressly provides that "such cases may be reheard in the Supreme Court by a writ of error from the latter court under rules to be adopted by it." Clearly this means a rehearing in this court of the case as first presented to the appellate tribunal under such rules as may be adopted by this court. In other words, it is like unto a de novo hearing of alleged errors having for its purpose the annulment, correction, modification, or affirmance of the judgment of the trial court, irrespective of the judgment of the Court of Appeals. The fact that, under the rule adopted by this court, errors assigned in such reheard cases are limited to those raised by the aggrieved party in his petition for a rehearing in the Court of Appeals in no sense militates against this view. The

principle underlying the rule is that of abandonment, and in no sense changes the character of the hearing in this court.

The motion interposed by the judgment creditor is therefore sustained, and the writ of error dismissed.

# KEELER v. HOYT.

(Supreme Court of Colorado. April 6, 1914.)

## 1. EVIDENCE (§ 332\*)—PUBLIC RECORDS—COURT DECISION—OFFICIAL REPORT.

In an action to recover an attorney's fee which was contingent upon securing a decision of the Supreme Court sustaining the validity of certain municipal bonds, the published official report of the court's opinion is admissible to show the holding, without the production of the record or a certified copy thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246; Dec. Dig. § 832.\*]

## 2. ATTORNEY AND CLIENT (§ 149\*)—ATTORNEY'S COMPENSATION—CONTINGENT FEE—PERFORMANCE OF CONTRACT.

Where an attorney's contract made his fee dependent upon the decision of the Supreme Court sustaining the validity of certain bonds, and it was admitted that he acted as attorney in the trial of the case in the district court, and thereafter secured a favorable decision from the Supreme Court, it was immaterial what disposition was made of the case in the district court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 351-357; Dec. Dig. § 149.\*]

## 3. ATTORNEY AND CLIENT (§ 166\*)—ATTORNEY'S COMPENSATION—CONTINGENT FEE—PERFORMANCE OF CONTRACT—EVIDENCE.

Where the opinion of the Supreme Court in an action to restrain the issuance of municipal bonds held that the three objections made to the bonds were not well taken, the opinion is at least prima facie evidence that the Supreme Court had upheld the validity of the bonds within the meaning of the attorney's contract, which made his fee dependent upon such action by the court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. § 166.\*]

## 4. ATTORNEY AND CLIENT (§ 166\*)—ATTORNEY'S COMPENSATION—CONTINGENT FEE—PERFORMANCE OF CONTRACT—EVIDENCE.

Such prima facie case was not rebutted by testimony by the client that he himself, and perhaps some other persons, had raised certain other objections to the bonds which had not been passed upon, but without any showing that the facts existed upon which the objections were based.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. § 166.\*]

## 5. WITNESSES (§ 139\*)—TRANSACTION WITH DECEASED PERSON—PARTY OF RECORD.

In an action against a client by the executrix of the attorney to recover the fee, the defendant could not himself testify, under the statute, as to the facts which he claimed rendered the bonds invalid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

Error to District Court, City and County of Denver.

Action by Katherine P. Hoyt as executrix of the last will and testament of Lucius W.

brings error. Affirmed.

Arthur Ponsford and Chas. F. Carnine, both of Denver, for plaintiff in error.

MUSSER, C. J. Lucius W. Hoyt, an attorney at law, entered into a contract with the plaintiff in error, wherein Mr. Hoyt agreed to act as attorney in a suit, about to be instituted, to test the validity of an issue of \$350,000 of Pueblo county refunding bonds, theretofore authorized at an election in that county, and as stated in the contract, "only in the event that the Supreme Court upholds the validity of said bonds, then in consideration of said services of said Hoyt, said Keeler agrees to pay said Hoyt the sum of one thousand dollars (\$1,000.00), provided further; if said Keeler sells said bonds on a 4.20% basis or better, then said Hoyt is to receive from said Keeler an additional \$250.00 or \$1,250.00 in all, further provided; if said Keeler sells said bonds on a 4½% basis or better, then said Hoyt is to receive from said Keeler an additional \$250.00 or \$1,500.00 in all; it being first understood that if Pueblo county at any time after November 2, 1909, cancels the sale of said bonds to said Keeler, before a decision is rendered by the said Supreme Court, then said Hoyt is to receive nothing except costs disbursed and expenses." After Mr. Hoyt's death, the executrix brought an action against the plaintiff in error to recover for the services rendered by Mr. Hoyt under the contract, and obtained a judgment for \$1,190, which was the \$1,000 provided for and the accumulated interest. But two questions are discussed in the brief.

[1] 1. For the purpose of proving the result in the Supreme Court in the suit mentioned in the contract, there was offered and admitted as testimony for the executrix the reported decision of the case of Manly v. Board of County Commissioners of Pueblo County, reported in 46 Colo. 491, 104 Pac. 1045, which was the suit referred to in the contract as about to be instituted. This was objected to on the ground that it was not the proper way to prove the action of this court. It is claimed that the record of the court, or a certified copy thereof, should have been introduced. The reports of the Supreme Court of this state are published, by the authority and at the command of law, as the official opinions of the court. As the contract specified that the attorney should receive pay for his services only in the event that the Supreme Court upheld the validity of the bonds, there was no better proof of what that court did hold than the reported official opinion published as commanded by law.

[2] Some comment is made that there was a failure to show anything with reference to the proceedings in the district court more than that the suit was brought from the dis-

trict court. There was no charge made in the answer, or anywhere else, that the attorney neglected his duty, or in any manner failed to carry out his contract as to the case in the district court. In the absence of any such neglect or dereliction on the part of the attorney, it was immaterial what disposition was made of the case in the district court, for the fee was to be paid only in the event that the Supreme Court upheld the validity of the bonds. The very fact that it reached the Supreme Court and was determined there is proof that it was instituted and prosecuted to final judgment in the district court, and that was ample, inasmuch as no claim was made that the attorney neglected the case, or was guilty of wrong or failure in any way.

[3] 2. It is next claimed that the evidence failed to show that Mr. Hoyt had complied with the contract. The opinion in 46 Colo. states that three objections were raised in this court as to the validity of the bonds, and, after a discussion of those objections, it was held that each of them was untenable, and the judgment of the district court, which had refused to enjoin the issuance of the bonds, was affirmed. It is claimed that holding bonds valid against three objections does not uphold their validity as against other objections which might have been raised, and which this court did not dispose of. It is true that an attorney should be held to a strict compliance with any contract of employment he may make with a client, and that such a contract should be construed most favorably to the interests of the client, as stated in the authorities cited in the brief. But to hold in this case that the contract was not complied with would be carrying the rule beyond the limit of reason and beyond any of the cases cited. There is no bad faith, neglect, wrong, or dereliction on the part of the attorney, or of any one connected with the suit, charged or claimed. It is not charged or claimed that any other objections could have been raised against the bond issue than were raised, in view of the facts present in the case. It is not to be presumed that an attorney would raise an objection that in the light of the facts would be wholly and plainly untenable or frivolous, or that, through neglect, bad faith, or incompetence, he would fail to raise one that was worthy of being raised. So that when the case was presented to and determined by this court, as it was, the reported opinion in the case was at least prima facie evidence, if not more, that the Supreme Court had upheld the validity of the bonds.

[4] To rebut this prima facie case, all that was attempted was to show, by the plaintiff in error, that the latter had himself, after the decision in this court, raised certain objections to the bonds that had not been passed upon. That was clearly incompetent. The



record is not quite clear, but it may be that there was an attempt to show that some one else had raised some of these objections also. This was incompetent. Objections could have been easily raised by any one. The raising of objections would not prove the invalidity of the bonds, nor that this court had not upheld their validity. A party to such a contract cannot defeat it in such a self-serving way as raising objections and claiming that these objections had not been passed upon by the court. As we read the record, it was only attempted to show that the objections had been raised by the plaintiff in error, and perhaps by some other person, and it was not attempted to show that the facts existed upon which the objections were supposed to be based.

[5] If it be claimed that this is what was attempted, the answer is that because those facts occurred and existed before the death of Mr. Hoyt, the plaintiff in error, by reason of the statute, was not a competent witness to prove them, for he was the defendant in the case brought against him by the executrix. The action mentioned in the contract as about to be instituted was brought by Mr. Manly to restrain the county commissioners from issuing the bonds. Mr. Hoyt represented the defendants. He was employed for that purpose. He did the work he was employed to do. He defended the bond issue against the assaults made upon it, and the validity of the bonds was upheld in this court. No charge was made, nor proof offered that there were any reasons kept from the court which would have made the bonds invalid, or even render their validity questionable. Under these circumstances, we think the judgment should be affirmed; and it is so ordered.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

# ROGERS v. ROGERS.

(Supreme Court of Colorado. April 6, 1914.)

## 1. DIVORCE (§ 93\*)—COMPLAINT—SEPARATION—CAUSES.

Where wife's complaint for divorce alleged that she and her husband were living apart, and that on several occasions he had left her without just cause, and been absent from the state for many months without making any provision for the support of his family, and that on account of his failure to make reasonable provision for the support of herself and their minor child, she was compelled to work for others, and charged his failure to reasonably provide for them as ground for a divorce, the complaint sufficiently justified the separation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292-307; Dec. Dig. § 93.\*]

## 2. DIVORCE (§ 98\*)—GROUNDS—FAILURE TO SUPPORT.

A wife, in support of a ground for divorce that her husband, being in good health, has failed to make reasonable provision for the support of his family for the space of one year,

may show that the period of nonsupport has been greater than that specified in the statute, and hence it is not improper for her to so plead.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292-307; Dec. Dig. § 93.\*]

## 3. DIVORCE (§ 104\*)—PROCEEDINGS—CROSS-COMPLAINT—AUTHORITY TO FILE.

A supplemental cross-complaint in an action for divorce filed ex parte may be properly stricken.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 28, 328-339; Dec. Dig. § 104.\*]

## 4. DIVORCE (§ 104\*)—CROSS-COMPLAINT—AMENDMENT—REFUSAL TO FILE—DISREPUTATION.

Suit for divorce was instituted by a wife for nonsupport, May 24, 1911, and on November 21st the husband filed his original answer and cross-complaint, charging the wife with willful desertion. On December 11th following she filed a replication and answer to the cross-complaint, and on January 12, 1912, he requested leave to file a supplemental and amended cross-complaint, charging her with adultery, supported only by an unverified statement of defendant's counsel that defendant did not have evidence sufficient to sustain the charge of adultery when he filed his original answer. *Held*, that such showing was insufficient to establish abuse of the trial court's discretion in refusing to grant leave to file such supplemental cross-complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 28, 328-339; Dec. Dig. § 104.\*]

## 5. CONTINUANCE (§ 46\*)—ABSENCE OF WITNESS—DILIGENCE—SHOWING.

Defendant applied for a continuance for absence of a witness, supported by an affidavit that defendant had been endeavoring to ascertain the whereabouts of the witness for two weeks prior to the application. No excuse, however, was offered for his failure to attempt to learn the whereabouts of the witness prior to that time. Defendant deposed that he had a letter from a person whom he had employed to locate the witness, but he did not produce the letter, nor offer any excuse for its nonproduction, nor did he disclose the name of the person so employed, nor offer his affidavit of the steps he had taken to ascertain the location of the witness. *Held*, that a denial of the application was not an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 132-140; Dec. Dig. § 46.\*]

## 6. APPEAL AND ERROR (§ 928\*)—REFUSAL OF INSTRUCTION—PRESUMPTION AS TO EVIDENCE.

Where the testimony is not preserved by bill of exceptions, it will be assumed on appeal that a requested instruction, which was refused, was not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.\*]

## 7. APPEAL AND ERROR (§ 215\*)—REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where defendant did not object to the instructions at the time they were given, and did not request the court to define "reasonable cause" and what "constituted desertion," he could not object on appeal to the instructions given, for the court's omission to define such terms.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.\*]

En Banc. Error to District Court, City and County of Denver; Geo. W. Allen, Judge.

Action by Harriet M. Rogers against Frank

H. Rogers. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter M. Duff, of Denver, for plaintiff in error. Perry D. Rose, of Denver, for defendant in error.

GABBERT, J. Action for divorce. Verdict and decree for plaintiff. Defendant brings the case here for review on error, and assigns the following in support of his contention that the judgment of the district court should be reversed: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) the refusal of the court to grant his motion to strike from the complaint; (3) striking his supplemental cross-complaint from the files; (4) refusal to grant his motion to refile the supplemental cross-complaint; (5) refusing to grant his motion for a continuance; (6) refusing to give the jury an instruction offered by him; (7) error in instructions given.

[1] 1. The ground for divorce alleged in the complaint was the failure of the defendant to make reasonable provision for the support of plaintiff and their minor child. She alleged that she and her husband were living apart, and it is contended that it was incumbent upon her to have alleged the cause of separation in order to show that she was justified in living apart from her husband and entitled to his support. She alleged that on account of the failure of the defendant to make reasonable provision for the support of herself and their minor child she had been compelled to work, as a milliner, and to perform at times manual labor other than her household duties, in order to support herself and child, and that on various occasions defendant had left her without just cause or excuse, and absented himself from the state for periods of nine or ten months at a time, without making any provision for the support of his family during his absence. Clearly she was justified in living separate and apart from her husband when this course was necessary in order to earn money with which to provide the support which it was the duty of the defendant to make provision for.

[2] 2. In her complaint the plaintiff charged that defendant, being an able-bodied man in good health, had failed and refused to make any reasonable provision for the support of plaintiff and their child for more than one year next preceding the beginning of this action. The defendant moved to strike from the complaint the words, "more than," which was denied. It is contended that this motion should have been sustained because by the words, "more than one year," the defendant would be compelled to plead to and defend against any number of years. One of the grounds of divorce specified in the statute is the failure of the husband, being in good bodily health, to make reasonable provision for the support of his family for

the space of one year. In support of this ground the plaintiff may show that the period of nonsupport which will entitle her to a divorce is greater than that specified in the statute, and it is not error to so plead.

[3] 3. It appears that defendant's supplemental cross-complaint was filed ex parte, and it was not error for the court to sustain the motion to strike it from the files in these circumstances.

[4] 4. In his original answer and cross-complaint the defendant denied that he had failed to support his family, and alleged that plaintiff had willfully deserted and absented herself from him without reasonable cause for the period of one year next preceding the date of filing this pleading, which was filed November 21, 1911. December 11th following the plaintiff filed her replication and answer to the cross-complaint. January 12, 1912, defendant requested leave to refile his supplemental and amended cross-complaint, which, among other averments, charged that the plaintiff had been guilty of adultery. The cause was commenced May 24, 1911. It was at issue for more than two months prior to the date defendant requested leave to amend his pleadings by refiling his supplemental cross-complaint. The Code provides that the court may, upon affidavit showing good cause therefor after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading. The refusal of the court to permit an amendment to a pleading rests in its sound discretion, and will not be reversed, except it appears that such discretion has been abused. In this case no affidavit was filed setting forth any reasons why the defendant should be permitted to refile his cross-complaint at the time it was tendered. The showing merely consists of an unverified statement, signed by counsel for defendant, to the effect that defendant did not have the evidence sufficient to sustain the charges of adultery as set forth therein at the time he filed his original answer. On such a showing it cannot be said the court abused its discretion in refusing defendant leave to refile his cross-complaint.

[5] 5. March 13, 1912, the defendant interposed a motion for a continuance on account of the absence of a witness. Large discretion is vested in trial courts with reference to a continuance, and unless it is shown that such discretion was abused it will not be reversed. The showing in support of such a motion must be upon affidavit, from which it appears that the moving party has used due diligence to procure the attendance of the witness whose testimony it is claimed is material. From the record it appears that the case was set for trial on the date the motion for a continuance was interposed. The affidavit of defendant stated that he had been endeavoring to ascertain the whereabouts of the witness for two weeks previous to the date the application was made. No excuse is offered

why he did not attempt to learn this previous to the time he says he did commence efforts for this purpose. He deposes that he had a letter from a person whom he had employed to locate the witness, wherein it was stated that she was either in Loveland, Ft. Collins, or Greeley, but does not produce the letter, nor offer any excuse for its nonproduction. He does not disclose the name of the person he employed, nor offer his affidavit stating the steps he had taken to ascertain the whereabouts of the witness. In these circumstances we think the court did not abuse its discretion in refusing his application for a continuance.

[6] 6. The defendant requested an instruction to the effect that plaintiff admitted she had absented herself from her husband for more than one year; that such absence would not be justified except for reasonable cause, and that if it appeared that at the time she left the defendant he was making reasonable provision for the support of his family consistent with his means and ability, then her absence from defendant was not with reasonable cause, which was refused. Presumptively this instruction is based upon the averments of the cross-complaint to the effect that plaintiff had deserted the defendant. The testimony is not before us, not having been preserved by a bill of exceptions. It was not error to refuse the instruction unless there was testimony to support the theory upon which it was based. In the absence of the testimony we must assume that the action of the court in refusing the instruction was proper.

[7] 7. The objections urged to the instructions given are to the effect that the court did not explain the words, "reasonable cause" and what "constituted desertion." Defendant did not object to the instructions at the time they were given. Neither did he request to have the expressions in the instructions to which he refers defined.

The judgment of the district court is affirmed.

Judgment affirmed.

# TROWBRIDGE v. BOARD OF COM'RS OF EL PASO COUNTY.

(Supreme Court of Colorado. April 6, 1914.)

DISTRICT AND PROSECUTING ATTORNEYS (§ 3\*) — DEPUTY DISTRICT ATTORNEYS — EXPENSES.

Under Laws 1907, p. 371, §§ 1, 2, providing that the district attorney of each judicial district and his assistants shall be entitled to expenses necessarily incurred in the discharge of their official duties, and that the district attorney shall be entitled to collect from each county in his district the necessary expenses of maintaining an office for the transaction of his official business, a deputy district attorney is not entitled to recover expenses incurred in maintaining an office; the act contemplating but one such office in each county, and the dis-

trict attorney alone being entitled to recover the necessary expenses for its maintenance.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. § 3.\*]

Error to District Court, El Paso County; W. S. Morris, Judge.

Action by Henry Trowbridge against the Board of Commissioners of El Paso County. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Henry Trowbridge, of Denver, pro se. Clarence M. Hawkins, of Colorado Springs, for defendant in error.

BAILEY, J. Complaint was filed in the district court of El Paso County March 12th, 1909. It alleges, in substance, that the plaintiff, Trowbridge, was during the times therein mentioned the duly appointed, qualified and acting assistant district attorney for the fourth judicial district, which includes the county of El Paso; that for the purpose of performing the duties of such office imposed by law, for the benefit of that county, he was obliged to and did keep and maintain therein an office and telephone; that he necessarily incurred expenses for office rent, lighting, telephone, etc., aggregating \$513.33; that upon presentation of such claim duly verified to the defendant, The Board of County Commissioners of El Paso County, the same was disallowed; that no part of such claim and demand has been paid. To this complaint a general demurrer was sustained, plaintiff elected to stand by his cause as thus made, the complaint was thereupon dismissed and judgment was entered for the board of commissioners for costs. Plaintiff brings the case here for review.

The act of 1907, concerning expenses of district attorneys, is involved. Laws 1907, p. 371. Sections 1 and 2, respectively, read as follows:

"Except as otherwise specifically provided, the district attorney of each judicial district in the State of Colorado, and each of his assistants and deputies, shall be allowed to collect and receive from each of the counties in his district the expenses necessarily incurred in the discharge of his official duties for the benefit of such county.

"Except as otherwise specifically provided, the district attorney of each judicial district in the State of Colorado shall be entitled to collect and receive at the end of each year, of and from each of the respective counties in his judicial district the necessary expenses of maintaining an office for the transaction of his official business, which expenses shall be borne by the various counties in his judicial district, each in proportion to the fees earned by said district attorney in such county during such year."

Section 2 specifically provides for proportional payment by each county in a judicial district of the necessary expense of mainte-

nance of an office by the district attorney for the transaction of official business therein. The provisions of section 1 relate generally to expenses necessarily incurred by the district attorney, his assistant and deputies, in the discharge of official duties.

The complaint affirmatively shows that liability for the account sued upon was incurred in keeping an office where the official business of plaintiff, as an assistant district attorney, was transacted. The act contemplates the support of but one such office in each county, and the district attorney alone is thereby empowered to contract and recover the expenses necessarily attached to and attending it. This is the plain meaning of the statute. It would be unreasonable to hold that the act contemplates that the district attorney, his assistant and deputies may each maintain separate offices, as such officers, in each county of a judicial district, upon the claim that the expense is necessarily incurred in the performance of official duties imposed by law, and such would be the effect of conceding plaintiff's contention. There is no law requiring, and therefore no duty imposed upon, an assistant district attorney to have and keep an office in his official capacity, nor is there any provision which warrants him in doing so at the expense of the county on the ground that it is a necessary expense incurred in the performance of official duties. No case has been cited by plaintiff which is in point, or of the slightest assistance in construing the statute under consideration. We have no manner of doubt about the impropriety and invalidity of plaintiff's claim. The demurrer to his complaint was properly sustained.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

#### SAYRE v. LEONARD.

(Supreme Court of Colorado. April 6, 1914.)

##### 1. BILLS AND NOTES (§ 64\*) — CONDITIONAL DELIVERY—DEFENSE.

Under Rev. St. 1908, § 4479, providing that, as between the immediate parties, the delivery of a negotiable instrument may be shown to have been conditional, the maker's answer, alleging that the note sued on by the payee was delivered on condition that it should not be obligatory if a certain condition be met, and that such condition was met, stated a sufficient defense, if proven.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 104; Dec. Dig. § 64.\*]

##### 2. APPEAL AND ERROR (§ 1011\*)—REVIEW — FINDINGS OF COURT — CONFLICTING EVIDENCE.

Where there was abundant evidence to support defendant's defense, the finding of the court in favor of such defense is controlling upon review, though there was also contrary evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Error to District Court, Gilpin County; Charles McCall, Judge.

Action by Robert H. Sayre against S. E. Leonard. From a judgment for defendant, plaintiff brings error. Affirmed.

L. J. Williams, of Central City, for plaintiff in error. Harry E. Kelly and Charles H. Haines, both of Denver, for defendant in error.

BAILEY, J. [1] This action was commenced in the county court of Gilpin county, by plaintiff Sayre, against defendant Leonard, on the following promissory note:

"\$530. Denver, Colorado, Apl. 6, 1910.

"Fifteen days after date I promise to pay to the order of Robert H. Sayre Five Hundred Thirty Dollars at the Rocky Mountain National Bank of Central City, Colorado, with interest at six per cent. per year from date until paid.

"Value received.

[Signed] S. E. Leonard.

"No. 15541.

"Due 21st day of Apl., 1910."

The defendant admits the execution of the note, and that plaintiff had possession of it at the time the suit was begun; but alleges, as a defense, that the note was delivered to the plaintiff conditionally, and was to become binding only upon the happening of a certain possible future event, which did not occur, and that consequently the note never in fact became effective. The condition which it is claimed was attached to the note was that if one Wingo, a silent owner with Leonard in a certain leasing partnership, in which Sayre also had an interest, should repudiate a transfer of their holdings therein, which Leonard undertook to make to Sayre without consulting Wingo, then the note should become obligatory as representing Leonard's share of the expense of operating the lease, but that if Wingo should ratify and approve the transfer, then the note should be canceled and returned. It is further alleged that Wingo did in fact ratify and approve the transfer before the note matured; that defendant notified Sayre of that fact; and that the note should thereupon have been returned for cancellation as a void instrument; but that Sayre, in violation of the agreement, thereafter took advantage of his possession of the instrument and brought suit to enforce it. A motion to strike portions of the amended answer, directed against the allegations of conditional delivery, was interposed and overruled. Issue was thereupon joined on that defense. Plaintiff recovered judgment in the county court. Defendant appealed the cause to the district court, where it was tried to a jury, which disagreed, and on stipulation the case was submitted to the court to be decided as though tried before the court without a jury.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There the defendant succeeded, and plaintiff brings this writ of error to review the judgment of the district court.

The contention is that the defendant has not pleaded or proved a conditional delivery good in law. The rule of conditional delivery of commercial paper is generally acknowledged. 7 Cyc. 688, and cases cited; *Westman v. Krumwelde*, 30 Minn. 313, 15 N. W. 255; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 406, 1 Am. St. Rep. 111; *Benton v. Martin*, 52 N. Y. 570; *Ewell et al. v. Turney*, 39 Wash. 615, 81 Pac. 1047; *Watkins v. Bowers*, 119 Mass. 388. Moreover, section 16 of the negotiable instrument law (section 4479, R. S. 1908) contains a specific provision on conditional delivery in the following language:

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In a recent case decided by this court, *Norman v. McCarthy*, 138 Pac. 28, we had under consideration a question closely analogous to the present one, involving the conditional delivery of a check, and upon that proposition, among other things, this was said:

"Now the action on the check in the present instance was between the immediate parties, the payee and the drawer, and the further answer alleged that the check was delivered to the payee upon the condition that it was to be paid only in the event that it was determined that the drawer was not entitled to hold the property as against the attachment, which property he kept in his possession. And it was further alleged in effect that the course of events in the attachment suit was such that the drawer was entitled to retain the property, and that the condition upon which the delivery of the check was to become absolute was not fulfilled and could not be. This conditional delivery alleged was certainly, within the contemplation of the statute, one which may be shown as between immediate parties, and the further allegations showed that the delivery required by the statute to complete the contract express-

ed on the check was never made, and on that account the check was not a completed contract. The further answer, therefore, was sufficient to constitute a defense."

[2] So here, the action on the note is between the immediate parties, the payee and drawer, and the further answer alleges that the note was delivered upon condition that it was to become effective only if Wingo declined to ratify the transfer of his interest in the leasing partnership, which Leonard had undertaken to make to Sayra. The sole matter then is whether the delivery of the note was attended by a condition which if fulfilled would defeat its enforcement. That the allegations of the further answer, if established by competent proof, constituted a complete defense, such as the statute contemplates, seems certain. Whether the note was so conditionally delivered became purely a question of fact. There was abundant testimony to support the allegations of this defense, and although there was contrary evidence, the specific finding of the court that such was the character of the delivery is controlling upon review.

In the foregoing view of the case it becomes unnecessary to consider the error assigned on the overruling by the county court of the motion to strike portions of the amended answer, if that is properly here. The district court not having passed specifically on such motion, the question raised is whether that assignment may be properly presented on the record before us from that court. This motion went to the vital allegations of conditional delivery, and inasmuch as upon the whole record we hold that a good defense was pleaded and proved, that matter need not be more particularly noticed.

The judgment is affirmed.

MUSSER, C. J., and WHITE, J., concur.

#### LANE v. LYON.

(Supreme Court of Colorado. April 6, 1914.)

ATTORNEY AND CLIENT (§ 190\*)—ATTORNEYS' LIEN—ENFORCEMENT—PROCEEDINGS.

Where plaintiff's attorneys contracted to prosecute a suit for specific performance for a contingent fee, and, after suing out a writ of error to review a judgment of dismissal, plaintiff made a settlement with defendant without the attorneys' consent and requested that the action be dismissed, the Supreme Court had no jurisdiction at the instance of the attorneys to establish their lien on the property involved in the action and permit them to prosecute the suit therefor; their right to a lien, if any, being only enforceable in an appropriate action instituted by them in a court of competent jurisdiction.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

Error to District Court, Routt County; John T. Shumate, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Suit by John W. Lane against Elbert J. Lyon. From a judgment for defendant, plaintiff brought error, which at plaintiff's request was dismissed at his cost, whereupon his attorneys filed a petition to establish their lien for fees on the property involved in the action, and for leave to prosecute the same to judgment. Denied.

James E. Jewel, of Ft. Morgan, and Albert G. Craig, of Denver, for plaintiff in error. Edward C. Stimson and Page M. Brereton, both of Denver, for defendant in error. A. M. Gooding and Arthur L. Wessels, both of Steamboat Springs, pro se.

GABBERT, J. Lane and Lyon entered into a written contract for the trade and sale of certain real estate and personal property. Afterwards Lane commenced an action against Lyon to enforce the specific performance of this contract and for damages and other relief. Gooding & Wessels were Lane's attorneys, and had a written agreement with him whereby they were to receive a contingent fee of \$2,000 on the termination of the cause in his favor. It appears that this fee was to be paid by a conveyance of the real estate involved. After the issues were joined, defendant moved for judgment on the pleadings, which was sustained and the action dismissed. Plaintiff, by his counsel, Gooding & Wessels, then sued out a writ of error from this court and lodged the record with the clerk. After the writ of error was sued out, Lane and Lyon, without the knowledge or consent of Gooding & Wessels, settled the controversy and filed a written request that the action be dismissed at the cost of the plaintiff. Gooding & Wessels then filed a notice of attorney's lien, and a petition in this court to make their claim for attorney's fees a lien on all the property involved in the action, that the proceeding be not dismissed, and that they be allowed to prosecute it to judgment. Both plaintiff and defendant resist this petition, by motion to strike it from the files. Gooding & Wessels' claim for lien is predicated upon their contract and the provisions of section 242 of the Revised Statutes of 1908.

We do not deem it necessary to undertake to determine what the rights of counsel may be under this section, as, in our opinion, the only question is whether we have authority to entertain their petition. There is no judgment here, and whatever Gooding & Wessels' rights may be by virtue of their contract entered into with Lane, and the provisions of the statute to which we have referred, must be determined in an appropriate action instituted by them in a court of competent jurisdiction. We are without original jurisdiction to entertain any such a proceeding.

The motion to strike the petition is sus-

tained, without prejudice, and the proceeding dismissed, at cost of plaintiff in error.

Motion sustained, and proceeding dismissed.

MUSSEY, C. J., and HILL, J., concur.

## ANDERSON v. WOODWARD.

(Supreme Court of Colorado. April 6, 1914.)

### 1. COURTS (§ 489\*)—JURISDICTION OF STATE COURT—PATENT FOR LAND—WRONGFUL ISSUE—VACATION.

Where, pending appeal by a desert entryman of public land to the Commissioner of the General Land Office, and to the Secretary of the Interior, from an order of the local land office rejecting his application, a patent was issued to another under a homestead entry, the state court had jurisdiction of a suit to set aside the patent as wrongfully issued.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1824-1830, 1838-1841, 1872-1874; Dec. Dig. § 489.\*]

### 2. PUBLIC LANDS (§ 104\*)—PATENTS—ISSUANCE PENDING APPEALS.

Where, pending appeal from a decision of the local land office rejecting a desert land entry, the land was patented to a homestead entryman, the patent was void as issued for land previously appropriated.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 300; Dec. Dig. § 104.\*]

### 3. PUBLIC LANDS (§ 114\*)—DISPOSITION—ISSUANCE OF PATENT—EFFECT.

On the issuance of a patent to public land, the land department's authority and control over the title is terminated, though the issuance of the patent was erroneous; and the authority of the department does not again attach until the patent has been set aside by the courts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314-322; Dec. Dig. § 114.\*]

Appeal from Morgan County Court; M. M. House, Judge.

Action by Harry H. Anderson against Q. A. Woodward. Judgment for defendant, and plaintiff appealed. Reversed and remanded.

Anderson brought suit in the county court against Woodward, the object of which was to cancel a patent to a designated tract of land. In his complaint plaintiff alleged that the subject-matter in controversy did not exceed in value the sum of \$2,000; that he had applied to the local land office at Sterling to enter the land embraced in the patent as a desert entry; that his application was made as provided by the rules and regulations of the government relative to desert entries; that the officers of the local land office rejected his application and permitted the defendant to make a homestead entry of the land; that thereafter he appealed from this decision, both to the Commissioner of the General Land Office and the Secretary of the Interior; that the latter annulled, canceled, and held for naught the rejection by the local land office of his application for desert entry, and also held for naught the homestead application of defendant, and ordered that defendant be required to show

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

why his entry should not be canceled, and the application of plaintiff to make desert entry should not be allowed; that this order is in full force and effect; that the hearing so ordered has not been had. He further alleged that pending his appeal the local land office permitted defendant to make pretended final proof by commutation upon the land involved, and delivered to defendant a patent therefor without notice to plaintiff; the officials and defendant well knowing that plaintiff's appeal was pending and that his rights were then being adjudicated in the General Land Office and before the Interior Department. He also alleged that his application for desert entry was made when the tract involved was vacant government land and subject to desert entry, and prior to the time when defendant was permitted to contest his application.

The defendant demurred, upon the ground that the court did not have jurisdiction over the subject-matter of controversy, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff having elected to stand by his complaint, his action was dismissed. Plaintiff brings the cause here for review by appeal.

McConley & Hinkley, of Sterling, for appellant. Taylor & Pendell, of Ft. Morgan, for appellee.

GABBERT, J. (after stating the facts as above). [1] The court had jurisdiction of the cause, and the only question involved relates to the sufficiency of the complaint to state a cause of action. The facts are undisputed, and the proposition is whether on these facts the land department was authorized by law to issue a patent to the defendant.

[2] It has frequently been decided by the Supreme Court of the United States that patents for lands which have been previously granted, reserved from sale, or appropriated, are void, and that actions may be maintained to annul such patents. *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639; *Burfenning v. Chicago, St. P. M. & O. R. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175. These decisions are based upon the ground that the action of the officials of the land department beyond the scope of their authority is void. We think this declaration of the law is applicable here. The local land office had rendered judgment, from which plaintiff appealed to the Commissioner of the General Land Office and the Secretary of the Interior. Pending the disposition of this appeal, which was subsequently decided in favor of plaintiff, the local land office entertained the application of defendant for patent and granted him title. This was beyond their authority, for the reason that pending the disposition of the appeal the judgment of the local

officials stood suspended, and they were without authority to entertain the application of either party for title.

[3] This being the situation, and plaintiff being a claimant of the premises, he may maintain an action to annul the patent procured by the defendant; otherwise the action of the land department, which was without authority, deprives plaintiff of all remedy. The Secretary of the Interior ordered a rehearing before the local land office. Before this order defendant secured title, which cannot be annulled by the land department, for after issuance of patent its authority and control over the title has passed. *Moore v. Robbins*, 90 U. S. 530, 24 L. Ed. 848. Consequently his only redress is in the courts to have the patent canceled, which, if ordered, will place the parties in the position to have their rights to the land in controversy determined by the land department in accordance with the order of the Secretary of the Interior.

The judgment of the county court is reversed, and the cause remanded, with directions to overrule the demurrer, and for further proceedings according to law.

Judgment reversed and cause remanded.

MUSSER, C. J., and WHITE, J., concur.

NATIONAL SURETY CO. v. SCHAFER et al.  
(Supreme Court of Colorado. April 6, 1914.)

1. APPEAL AND ERROR (§ 1232\*)—LIABILITY ON APPEAL BOND.

Civ. Code, § 397, provides that the dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error; but, unless another appeal or supersedeas be taken or allowed within 30 days after such dismissal, the dismissal of an appeal or writ of error shall operate as an affirmation of the trial court's judgment, so as to make the sureties upon appellant's undertaking liable thereon. Section 388, as it was amended by Laws 1907, p. 278 (Code Civ. Proc. 1903, § 422), provides that, if the appeal be from a money judgment, the appeal bond shall provide that, if appellant does not make payment of the judgment within 30 days after the filing of the remittitur from the Supreme Court, on motion of the obligee, judgment shall be rendered in the trial court in his favor against the sureties for the amount awarded appellant on appeal. Section 401 prohibits a writ of error from being brought after the expiration of three years from the rendition of judgment, and section 402 provides that no such writ shall operate as a supersedeas, except upon order of the court or judge, nor until a bond be filed as in case of appeal. Held that, where an appeal bond was filed in the circuit court on February 27th, and the appeal was dismissed on June 3d, and remittitur issued, and the record was entered in the Supreme Court as upon writ of error on August 8th, and a supersedeas allowed, it was error to render judgment against the sureties on the appeal bond on October 14th for the amount of the judgment originally appealed from; liability on the appeal bond not maturing until the judgment was affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4753-4757; Dec. Dig. § 1232.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. STATUTES (§ 181\*)—CONSTRUCTION—RESULTS.

In case of doubt as to the meaning of a statute, the court should consider the results of the construction urged; it being presumed that the Legislature intended a reasonable operation of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

## 3. STATUTES (§ 183\*)—CONSTRUCTION—SPIRIT OF STATUTE.

A matter apparently within the letter of a statute is not deemed within the statute, unless it appears that the Legislature so intended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.\*]

## 4. STATUTES (§ 205\*)—CONSTRUCTION AS A WHOLE.

The Legislature's intention must be deduced from a construction of the whole statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.\*]

## 5. STATUTES (§ 184\*)—CONSTRUCTION—PURPOSE.

The occasion and necessity of a statute and the mischief to be remedied should be considered in determining the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.\*]

## 6. APPEAL AND ERROR (§ 1231\*)—LIABILITY ON APPEAL BOND—APPLICATION OF STATUTE.

Code Civ. Proc. § 422, providing that, if the appeal be from a judgment directing the payment of money, the appeal bond shall provide that, if appellant does not make payment of judgment within 30 days after filing of remittitur from the Supreme Court, judgment shall be entered in the trial court, on motion in favor of the obligee in the bond, against the sureties for the amount of the judgment, does not apply where the appeal was dismissed without prejudice, but only where judgment is expressly affirmed by the appellate court, or its action is in effect a final affirmation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4751, 4752; Dec. Dig. § 1231.\*]

## 7. APPEAL AND ERROR (§ 793\*)—DISMISSAL OF APPEAL—DISMISSAL WITHOUT PREJUDICE.

Civ. Code, § 397, providing that the dismissal of an appeal by order of court may be made without prejudice to another appeal, is permissive, and not mandatory, and the discretion of the Supreme Court to refuse to enter such order is as absolute as it was before the section was enacted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 793.\*]

Error to District Court, Lincoln County; J. W. Sheafor, Judge.

Proceeding by George Schafer and others against the National Surety Company. Judgment for plaintiffs, and defendant brings error. Reversed.

O'Donnell, Graham & O'Donnell, of Denver, for plaintiff in error. Henry Trowbridge, of Denver, for defendants in error.

SCOTT, J. [1] The defendants in error, on the 21st day of February, 1911, obtained a judgment in the district court of Lincoln county against the Denver Horse Importing Company in the sum of \$4,400, and for costs of suit. From this judgment an appeal was

prayed and allowed to this court. The appeal bond required by order of the district court was filed in that court on the 27th day of February, 1911, with the plaintiff in error, the National Surety Company, as surety. June 3, 1911, upon a short transcript, the appeal was dismissed, and the remittitur issued. On the 8th day of August, 1911, the record was entered here as upon error, and a supersedeas allowed. After this, and after the remittitur had been lodged in the district court, and on the 14th day of October, 1911, upon motion of the defendants in error here, the district court rendered judgment upon the appeal bond in the sum of \$4,780.75, being the amount of the said judgment theretofore rendered, together with interest and costs. The plaintiff in error was duly notified of such motion, and was present by counsel in court, and objected to the rendition of such judgment. The objection urged was that, under the state of facts presented, the court was without jurisdiction to enter the judgment at that time. Section 397 of the Civil Code provides: "The dismissal of an appeal may, by order of the court, be made without prejudice to another appeal or writ of error; but unless another appeal or supersedeas be taken or allowed within thirty days after such dismissal, the dismissal of an appeal or writ of error shall operate as an affirmation of the judgment of the trial court, so as to make the sureties upon the undertaking given by the appellant or plaintiff in error, liable on such undertaking."

By the act of 1907 section 388 of the Civil Code (now section 422 of Code of 1908) was amended so as to include the following provision: "If the appeal be from a judgment or decree directing the payment of money, the appeal bond shall also provide that if the appellant does not make payment of said judgment or decree and the interest and costs within thirty days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, on motion of the obligee in said bond, judgment shall be entered in the court from which the appeal is taken, in his favor, against the sureties for such amount as may be awarded against the appellant on appeal. No execution shall issue, on such judgment against the sureties, however, until a writ of scire facias shall issue and be served on such sureties, in the manner in which summons may be served, requiring them to show cause before the court, by a day to be therein named, not less than five days after the service of said writ, why execution should not be issued against them, and no appeal by said sureties from the judgment of the court thereon shall lie."

Section 401 of the Civil Code provides that a writ of error shall not be brought after the expiration of three years from the rendition of the judgment complained of. Section

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



402 provides that no writ of error shall operate as a supersedeas, except, upon order of the court or judge, the writ be made a supersedeas, nor until a bond be filed as in case of appeals. These sections of the statute were in effect at the time, and are controlling in this case. The contention of the plaintiff in error is, in substance, that section 397, when construed in connection with other sections of the Code related thereto, must be construed as intending that, when an appeal has been dismissed and a new obligation for the judgment entered into upon order granting a supersedeas within 30 days after the dismissal, the surety upon the new bond thus given shall be liable; but that, if more than 30 days elapse, as in this case, between the time of dismissal and that of giving the supersedeas bond, then the appeal bond shall remain effective, and, in such event, the holder of the judgment can, if the judgment be finally affirmed, have recourse upon either or both sets of sureties, being restricted to one satisfaction of the judgment. That is to say, that, while the defendant in error is liable upon its appeal bond, such liability does not mature until the judgment is affirmed, admitting, however, that if the writ of error had not been made a supersedeas, the liability upon the appeal bond would immediately accrue.

On the other hand, as we understand it, the defendants in error contend that, inasmuch as the supersedeas was not allowed until more than 30 days had elapsed from the date of dismissal, the dismissal acted as an affirmation of the judgment, and that they are entitled to immediate judgment on the bond, and to execution thereon, regardless of the fate of the judgment in this court. This was the view of the district court. The question here presented has not been determined by this court. All cases involving the rights of judgment creditors under section 397 of the Code of Civil Procedure, in so far as hitherto determined, have involved an appeal bond wherein the appeal had for some reason been dismissed, and wherein this court has not again assumed jurisdiction by a new appeal, or by writ of error, either within or after 30 days from the date of dismissal. In the case at bar, after the appeal had been dismissed, this court had again assumed jurisdiction by the issuance of its writ of error, and had superseded the judgment for which the appeal bond had been given, though not within the 30 days provided by the statute. It must be conceded that the statutes allowing writs of error to be brought within three years from the date of judgment, the causing of such writs to act as supersedeas, together with the power given to this court to re-enter dismissed appeal cases as on error, are all effective in this particular case, and must be construed together and in connection with the other statutes under consideration. The power of the court to

suspend the execution of the original judgment, by granting the supersedeas in this case, cannot be questioned, and that case is before us for review and final determination, as in any other case on error wherein the judgment has been superseded. It cannot be said that this power and authority was intended to be limited by the provisions of section 397 of the Civil Code. Then the judgment, to satisfy which the appeal bond involved in this action was given, is suspended by this court pending review and determination, and as effectively so as if the former appeal had never been taken.

[2-4] It is a rule of statutory construction, approved by the appellate courts of this state, that, where there is ground for dispute as to the intent of the Legislature and meaning of the statutes, we should consider the results of any such construction, and it is always presumed that the Legislature, in the enactment of a statute, seeks to obtain reasonable results and practical objects; further, that it is always true that a thing apparently within the letter of the act is not within the statute, unless it be likewise within the evident intention of the Legislature; that an intention must always be deduced from a construction of the whole and every part of the statute.

[5] The occasion and necessity of the law and the mischief to be remedied and the object in view are always to be taken into account in determining the intention. It cannot be assumed that the Legislature intended to impose farcical proceedings upon this court, or upon litigants, particularly where these may result in great injustice; for this might well be the result in this case. The Legislature has conferred the unequivocal right upon the Horse Importing Company to have the judgment against it reviewed and determined by this court; and, before the present judgment upon the appeal bond was rendered, that company had in a lawful way elected to exercise that right, and the court had assumed the burden imposed by the statute to determine the rights of the parties. The whole matter was therefore, at the time, pending in this court, with the rights of the judgment creditors duly safeguarded by the supersedeas bond, as provided by the statute. Then, if this court shall find its duty to be to reverse and vacate the judgment which the appeal bond was given to protect, the appeal bond and the supersedeas bond, by their very terms, have served their purpose, and there can be no longer a liability thereunder. In such a case, can it be said that the Legislature intended that the surety should pay the judgment, regardless of its fate in this court? Such would be the limit in absurdity.

It is well to consider the relation of an appeal or a supersedeas bond to the judgment suspended by either, or, as in this case, both of them. In the case of *Rockwell v.*

District Court, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265, it was said: "An appeal bond is in no sense a substitute for the judgment appealed from. It operates to suspend the enforcement of the judgment for a limited time; but it does not take the place of nor nullify the judgment. On the contrary, notwithstanding the appeal bond, the judgment may be affirmed, and thus all barriers to its enforcement may be removed. In that case does the appeal bond become void and without force or effect? Clearly not; it then becomes for the first time an available security for the payment of the judgment. While the enforcement of the judgment is suspended by the appeal, the bond is but a contingent security, and appellee can have no remedy upon it. It is only when the original judgment becomes enforceable by affirmance, or by the failure of the appeal, that appellee can resort to his action upon the bond. Thus it is apparent that the appeal bond is not a substitute for the original judgment. Its vitality depends upon the survival of the judgment. Its fate is inseparably linked with the judgment. If the judgment be reversed, the obligation of the appeal bond becomes void; if the judgment be affirmed, the obligation remains in full force and effect. Such, in substance, is the language, such is the legal tenor and effect of the bond."

Surely the judgment creditors, by reason of the supersedeas and action pending in this court, could not have enforced the execution of the former judgment at the time the court allowed the judgment on the appeal bond. It would be a singular state of the law, and contrary to every sense of reason and justice, that judgment and execution on the appeal bond might be allowed at a time when the judgment itself was superseded, for, as this court has declared in *Rockwell v. District Court*, *supra*, while the enforcement of the judgment is suspended by the appeal, the bond is but a contingent security, and appellees can have no remedy upon it. The defendants in error claim, and can claim, only under section 397 of the Civil Code. This section clearly creates nothing greater than a liability, the enforcement of which must be by action at law, as in case of other liability. This section does not authorize the judgment and execution against the sureties on the bond in the main case, as in case of final determination by this court. The language of this section is that the dismissal of an appeal or writ of error shall operate as an affirmance of the judgment, so as to make the sureties upon the undertaking given by the appellant or plaintiff in error liable on such undertaking, not to authorize the lower court to render judgment and issue execution upon motion as was done here. The section is clearly intended to permit the dismissal of the appeal without prejudice, and to fix the liability of the sureties in certain cases and at a particular time,

and there can be no serious question but that the plaintiff in error is liable upon the bond upon which the judgment in this case was ordered; but such liability is a contingent one, and may become effective only in case of the affirmance by this court of the judgment pending, or where the dismissal is equivalent to a final disposition of the case. The defendants in error have cited, to sustain their contention, the following cases: *McMichael v. Groves*, 14 Colo. 540, 23 Pac. 1006; *Long v. Sullivan*, 21 Colo. 109, 40 Pac. 359; *Mueller v. Kelly*, 8 Colo. App. 527, 47 Pac. 72; *Wilson v. Welch*, 8 Colo. App. 210, 46 Pac. 106; *Callbreath v. Coyne*, 48 Colo. 199, 109 Pac. 428; *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61; *Rockwell v. District Court*, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265. We have carefully considered all these cases, but find nothing in conflict with the conclusion we have reached in this case. The tenor of them may be epitomized in the statement in the opinion of Mr. Justice Elliott in *Rockwell v. District Court*, *supra*: "In case of a breach of the condition of the bond, the statute authorizes the obligee to *maintain an action* thereon—not merely to bring an action, but to maintain it—that is, to recover judgment upon it." In other words, these cases simply confirm the statute in fixing the liability of the surety, if a new appeal or writ of error is not prosecuted within 30 days after the dismissal of the first appeal.

Clearly it was not intended by this court to say that the liability should be enforced while the judgment itself was suspended by this court, pending a review and determination; for to so conclude would be to deny the aggrieved party the right to pursue his remedy allowed by the statute, and to deny to this court the power to re-enter on error appealed cases, which right carries with it the duty to fully consider and determine the same. To impose such a burden on sureties to an appeal bond is clearly such an injustice as was never contemplated by the statute. It is true that in the case of *McMichael v. Groves*, *supra*, there is language used in the opinion which would seem to indicate the contrary of the view herein expressed, but the question we are considering was not involved in that case, and such language must therefore be regarded as mere obiter dictum. That case was one where the appeal was dismissed, but without an order that the same should be without prejudice. The question was upon a motion to dismiss a writ of error, allowed after the expiration of 30 days after the dismissal of the appealed case, and the court held that the writ should be dismissed, but for the sole reason that the appeal, having been dismissed without the saving clause, was a final disposition of the case. This was the only question before the court. It was, however, in that case distinctly held that, if the appeal had been

dismissed without prejudice, the writ of error might be allowed at any time within three years from the rendition of the judgment.

[8] We are of the opinion that the procedure under section 422, Rev. St. 1908, is not applicable, and was not intended to apply in the case of an appeal bond, in which the appeal has been dismissed without prejudice, but only in a case where the judgment has been expressly affirmed by the appellate court, or where the action of the court is, in effect, a final affirmance of the judgment; as in the case of *Rockwell v. District Court*, *supra*, where the order of dismissal was not without prejudice, and, by reason of which, a writ of error could not thereafter lie. This is made manifest by the last clause of said section, wherein an appeal from such judgment by the sureties is prohibited.

[7] The right of the appellate court, under section 397 of the Civil Code, to dismiss an appeal without prejudice is permissive, and not mandatory, and the power of this court, in its discretion, to decline to enter such an order is as absolute as before the enactment of the statute. Prior to the enactment of this section of the Civil Code, the dismissal of a writ of error or an appeal, without express affirmance of the judgment, operated absolutely, regardless of the ground relied on, as a nonsuit in the former instance, and as a discontinuance of the particular appellate proceeding in the latter. *McMichael v. Groves*, 14 Colo. 540, 23 Pac. 1006; *Freas v. Engelbrecht*, 3 Colo. 377; *Monti v. Bishop*, 3 Colo. 605. But by said section 397 the appellate court was empowered, by order duly entered, to permit another appeal or writ of error, either of which, when duly perfected, must be held to stay execution of the judgment as effectually as in case of the original appeal.

The views herein expressed would seem to reasonably protect all parties in interest, and to give to each of the sections of the statute considered an effective and harmonious purpose. We must not be understood as holding that, if at the time of the issuance of an execution to enforce a judgment upon an appeal bond the judgment appealed from has not been suspended by order of this court, that judgment may not be rendered, or that execution may not issue; but, rather, that in a case where the judgment has been suspended by the appellate court, execution must not go against the sureties on the appeal bond until the judgment has become final, by action of this court; and, when such action is had, then the judgment creditor may rely on either the appeal bond or the supersedeas bond, or both, but limited to the extent of the judgment.

The judgment is reversed.

MUSSER, C. J., and GABBERT, J., concur.

HARRISON v. PEOPLE ex rel. WHATLEY,  
Dist. Atty., et al.

(Supreme Court of Colorado. April 6, 1914.)

1. EVIDENCE (§ 383\*)—AMENDMENT TO CONSTITUTION—PRIMA FACIE VALIDITY.

As by legislative enactment *Mills' Annotated Statutes* of 1891 and of 1912 have been made prima facie evidence, in all courts, of the originals, and as both the General Statutes of 1893 and the Revised Statutes of 1908 were required to contain the Constitution and all laws of the state, a constitutional amendment contained in the several statutes may be accepted as prima facie valid, though it did not appear in other authorized statutes, and the certification of the General Statutes of 1893 was defective, and the records of the secretary of state were insufficient to show its adoption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

2. EVIDENCE (§ 388\*)—REVISED STATUTES—PRIMA FACIE VALIDITY.

Legislative enactments, declaring that *Mills' Annotated Statutes* of 1891 and of 1912 shall be prima facie evidence in all courts of the originals, extends to the state Constitution contained therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

3. EVIDENCE (§ 388\*)—REVISED STATUTES—VALIDITY.

A note reciting that there was no record of a vote showing its adoption which followed the amendment of 1878 to Const. art. 6, § 29, found in the Revised Statutes of 1908, does not destroy the prima facie presumption of validity arising because of the presence of the article in the statute, which by law the secretary of state was required to compare with the originals and to certify as correct.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

4. EVIDENCE (§§ 28, 52\*)—JUDICIAL NOTICE.

The courts will take judicial notice of a law and will not even accept the admission of parties that a supposed law is invalid or their agreement as to facts rendering it so.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 36, 43; Dec. Dig. § 28, 52.\*]

5. EVIDENCE (§ 51\*)—JUDICIAL NOTICE—MODE OF ASCERTAINING FACTS TO BE NOTICED.

Amendment of 1878 to Const. art. 6, § 29, appeared in some of the authorized statutes but not in others, and there was no record in the office of the secretary of state showing its adoption. Held that, while the Supreme Court takes judicial notice of all laws, it may investigate the facts to refresh its judicial recollection; and hence, where replies to inquiries to the several county clerks showed that they had on file abstracts showing the adoption of the amendment, the Supreme Court may take judicial notice of its adoption, in view of the fact that it was acquiesced in and treated as valid shortly after the time of its supposed adoption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 72; Dec. Dig. § 51.\*]

6. EVIDENCE (§ 51\*)—JUDICIAL NOTICE.

While the courts may investigate the facts concerning the adoption of a law, they may accept a certificate of some officer showing its adoption, where it is sufficient to convince the judicial mind.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 72; Dec. Dig. § 51.\*]

En Banc. Error to District Court, Lake County; Chas. Cavender, Judge.

Action by the People, on the relation of

Barney L. Whitley, District Attorney, against William H. Harrison and John P. Allan. There was a judgment for the last-named defendant, and the first brings error. Affirmed.

John A. Ewing and Frazer Arnold, both of Denver, for plaintiff in error. Jos. W. Clarke, of Leadville, for defendant in error Allan.

WHITE, J. The question involved in this suit is whether William H. Harrison or John P. Allan is entitled to the office of judge of the county court of Lake county. The suit was instituted in the district court, upon the relation of the district attorney, against Harrison and Allan, each of whom claimed to be entitled to the office. The judgment was in favor of Allan, and Harrison brings the cause here for review.

At the general election in November, 1908, Harrison was elected to the office for the four-year term commencing January 12, 1909, and thereafter, in due time, qualified and entered upon the discharge of the duties thereof, and so continued until the judgment of ouster here under review. At the general election in November, 1912, one Duncan J. McLean was elected to the office for the four-year term, commencing January 14, 1913. He, however, died on January 2d, without having filed a bond or taken the oath of office. When the term for which he was elected arrived, the board of county commissioners, by resolution, declared a vacancy to exist, and appointed John P. Allan to fill the same, who thereupon qualified and demanded the office.

It is claimed by Harrison that (original) section 29 of article 6 of the Constitution, as adopted in 1876, is now in force, and by virtue thereof the vacancy in the unexpired term, occasioned by reason of McLean's failure to qualify, could be filled only by an election, and, being the incumbent of the office, he was entitled to hold over, under the provisions of section 1, article 12, of the Constitution. Allan contends that section 29 of article 6 of the Constitution, as adopted in 1876, was amended at the general election in 1878, as proposed by chapter 17 of the General Laws of 1877, p. 132, and is, as that section now appears, in the body of the Constitution, in General Laws 1883, Mills' Ann. Stat. 1891, Rev. Stat. 1908, and Mills' Ann. Stat. 1912.

It is conceded that, if the proposed amendment is in fact a part of the Constitution, the judgment in favor of Allan is right; otherwise it is wrong. The amendment was proposed under the provisions of section 2 of article 19 of the Constitution, as adopted in 1876. The section required the secretary of state to publish the amendment in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the

General Assembly. It also declared that "at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon, shall become part of this Constitution." The Constitution was silent as to the procedure in submitting proposed amendments to a vote of the qualified electors and ascertaining the result of such vote. The act proposing the amendment, however, made provision therefor. Section 2 required the elector to deposit in the ballot box a ticket whereon should be written or printed "For the amendment" or the words "Against the amendment." And section 3 declared that the votes cast for the adoption or rejection of the amendment should "be canvassed, and the result determined in the manner provided by the laws of the state, for the canvass of votes for representatives in Congress." At that time the mode of procedure in that regard was prescribed by chapter 30 of the General Laws of 1877. From a consideration of these provisions, it is disclosed that an abstract of the votes cast, and the result thereof, in each county was required to be made, filed, and recorded in a book kept for that purpose in the office of such county clerk and a certified copy delivered or transmitted to the office of the secretary of state for the state board of canvassers (sections 53, 54, 56, c. 30, Gen. Laws 1877); that, from such certified copies of the abstracts of votes cast in the different counties, the state board of canvassers were required to ascertain and determine the result of the election, and make statement thereof, and of the whole number of votes cast at such election on the proposition in question, and to certify and deliver the same to the secretary of state, who was required to record it in a book kept for that purpose and to cause a copy of the certified statement to be published in a newspaper published at the seat of government (sections 60 and 62, c. 30, Gen. Laws 1877).

[1-3] Harrison relied upon original section 29 of article 6 of the Constitution, and a legislative resolution (S. L. 1887, p. 476), wherein the secretary of state was directed to publish with the laws enacted that session all amendments to the Constitution adopted since the original Constitution, and, though certain constitutional amendments are therewith published, the amendment in question is not, and no reference is made thereto (S. L. 1887, pp. 481, 484). He also introduced in evidence a certificate of the secretary of state, dated the 6th day of February, 1913, showing that the act of the General Assembly proposing the constitutional amendment in question was on file in the records of his office; and that, after a careful research of the records of that department, he failed to find therein any record of the submission of the amendment to a vote of the people, or any record that the several

county clerks certified abstracts of the votes cast thereon in their respective counties, or that the same was canvassed or a certificate of determination thereon issued by the state board of canvassers. By declaration of S. L. 1911, p. 281, this certificate established *prima facie* the nonexistence of any facts certified to as not existing in the records of such department which were, by law, required to be kept or recorded in that department.

By an act of the General Assembly, approved February 28, 1883 (pages 5-7, G. L. 1883), provision was made for the printing, *inter alia*, of the Constitution, together with all the general laws of the state, and the secretary of state required to certify "to the correctness of said laws and other matters so printed"; and the act declared that the laws and other matters so printed and certified shall be *prima facie* evidence of the original in all courts and tribunals of this state. In the Constitution so printed, section 29, art. 6, appears as amended, followed by a reference to the legislative act proposing the amendment. However, the certificate of the secretary of state to the volume so published (Gen. Stat. 1883), though reciting the title of the act authorizing the compilation, and certification thereto, and making the laws and matters so certified *prima facie* evidence of the original, does not include the Constitution, but extends only to the general laws of the state and the Code of Civil Procedure. An act of the General Assembly (S. L. 1907, p. 93) provided for the compilation, publication, and distribution, *inter alia*, of the Constitution and all the general statutes of the state of Colorado, including the Code of Civil Procedure, in one volume. The act also required the secretary of state to copyright the publication and prepare a certificate to the effect "that the volume contains all the general laws of the state, the Constitution of the state of Colorado, and the Code of Civil Procedure, that he has carefully compared the same with the original manuscripts, and that the compilation and revision is complete, true, and correct," and declared that the laws and other matters so printed and certified should be *prima facie* evidence of the originals in all courts and tribunals of this state. In the body of the Constitution therein printed, the section, as amended, appears, followed, however, by a note in small type that, while there is no record of a vote on this amendment, it is supposed to have been adopted October 1, 1878, together with a recitation of the original section.

It is conceded that the certificate of the secretary of state to this volume, taken alone, covers the section as amended and makes it *prima facie* a part of the Constitution, but it is insisted that the certificate must be read and considered in connection with the explanation contained in the note, and, when so considered, its effect, in that

regard, is destroyed thereby; and that this, coupled with the failure of a previous secretary of state to embody the alleged constitutional amendment in the Session Laws of 1887, when obeying the legislative mandate to embody therein all amendments to the Constitution adopted since the original Constitution, removes any presumption as to its validity that might otherwise maintain. In the body of the Constitution, as printed in Mills' Ann. Stat. 1891 and Mills' Ann. Stat. 1912, appears the section as amended, followed by the same note appearing, as hereinbefore stated, after the section in Rev. Stat. 1908. By legislative enactments these editions, by name, were made *prima facie* evidence of the originals in all courts and proceedings in this state. S. L. 1891, p. 367, as to the former edition, and S. L. 1913, p. 406, as to the latter edition. The claim is made, however, that the effect of these legislative enactments, making the contents of such books *prima facie* evidence, extends no further than the statutory law of the state, notwithstanding there is embodied therein that which purports to be the Constitution, including the amendment in question.

We do not concur in these views. The volumes of Mills' Annotated Statutes are designated by name, and those volumes, whatever they contain, are declared to be *prima facie* evidence of the originals. Moreover, while the certificate of the secretary of state, to the General Statutes of 1883, is unquestionably defective, the publication of the volumes was nevertheless authorized by legislative authority, and the Constitution of the state directed to be published therein; so the instrument found therein as the Constitution may be accepted *prima facie* by the courts as such instrument, notwithstanding the defective certificate. Nor do we think that the note following the section of the Constitution here in question, as the same appears in the body of that instrument as found in R. S. 1908, in any wise affects the *prima facie* character to be ascribed to that amendment by virtue of the certificate of the secretary of state. As a public official he was commanded, *inter alia*, to place the Constitution in that volume and to certify thereto. This was the extent of his official duty in the premises. It devolved upon him to do this act, and the effect thereof is not destroyed because he set forth in a note certain matters that might cast some doubt upon the correctness of his conclusions.

[4-6] However, should we be mistaken in these views, it would not require a reversal of this judgment. The facts here involved are facts of "law," and may be noticed judicially, to the end that we be satisfied what the law is that we are called upon to apply. As said in *Nesbit v. People*, 19 Colo. 441, 450, 36 Pac. 221, 224: "Every court must determine for itself what the law is upon a given subject whenever it becomes necessary to apply the same in the discharge of its judicial

functions. It is a matter of every day experience that the court must decide what the common law is, and what the construction of statutes shall be; so, also, the court must decide as to the existence or validity of a statute whenever the same is in dispute; and, as a general rule, the same principle applies to a dispute respecting the existence or non-existence of constitutional provisions. Such dispute may become a question of fact; yet the court must determine it, and, in doing so, may resort to other evidences than the session laws of the state published by authority. It may seem paradoxical, but it is nevertheless true, that a question of fact respecting the existence or nonexistence of a law is a question of law; it is a question to be determined by the court whenever it arises in the course of litigation, and not a question to be referred to some other tribunal for decision. *Town of Ottawa v. Perkins*, 94 U. S. 260 [24 L. Ed. 154]."

Indeed, we will not accept the admission of parties that a supposed law is invalid, or their agreement as to the existence or nonexistence of facts rendering it so. *Peckham v. People*, 32 Colo. 140, 75 Pac. 422; *Anderson v. Grand Val. Irr. Dist. Co.*, 35 Colo. 525, 85 Pac. 313.

Whenever it becomes necessary to apply the law in the discharge of our judicial functions, we must know what it is, and to that end may resort to that which is proper and essential to satisfy our minds in that regard. As said in *Wigmore on Evidence*, § 2572: "A court may be expected to dispense with evidence of the law of its own sovereignty, for it must be credited with a knowledge of it, or at least with the most competent knowledge where to search for it. No evidence of it need therefore be offered; and the counsel's reference during a trial to the text, or a copy, of the statute, for informing the judge, must be regarded as a judicial license to counsel to employ that evidence which the judge (*ante*, § 2569) would in theory seek for himself."

Mr. Justice Miller tersely states the rule in *Gardner v. Collector*, 6 Wall. 499, 511 (18 L. Ed. 890), as follows: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges, who are called upon to decide it, have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which, in its nature, is most appropriate, unless the positive law has enacted a different rule."

That we may forego our own investigation and accept a certificate of some officer as sufficient proof of facts to be judicially determined is well established. As said in *Wig-*

*more on Evidence*, § 1353: "That a court may do this, when it believes the result to be a more likely approach to truth than its own investigations could obtain, cannot be doubted. But in such a case the court acts voluntarily and exercises its choice. Being charged constitutionally with the exclusive function of determining facts in controversy, it believes this duty to be best carried out by accepting a certain person's statement as the most satisfactory source of reliance in reaching that determination." And further in the same section: "It is one thing for the judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function." This rule has long been recognized in the courts of this jurisdiction by declining to examine, *sua sponte*, the journals of the General Assembly on the mere assertion of counsel that an enrolled bill, which has been duly certified and signed by the proper officers and deposited with the secretary of state, is invalid because of noncompliance with some requirements in its passage, but requiring the party seeking to question its validity to present the facts upon which he relies to the trial court, and, if he desires to have the decision of that court reviewed, to make such proof a part of the record by bill of exceptions. In other words, we have invariably taken judicial notice of all the acts of the General Assembly, signed by the proper officials, and found in the office of the secretary of state, because they are *prima facie* the law, and we are content with that proof. Whosoever contends otherwise has the burden of informing us, and, in doing so, must follow the prescribed rules by which parties bring matters before judicial tribunals for determination. And as this court is the final arbiter as to what the law is, the rule is likewise binding upon inferior tribunals. We are satisfied that this is the true principle involved, and that no decision of this court, when properly understood, is in conflict therewith. Judicial notice does not depend upon the actual knowledge of the judges. "Courts notice without proof all, whether fact or law, that is necessarily or justly to be imputed to them, by way of general outfit for the proper discharge of the judicial function." *Thayer's Prel. Evi.* p. 301. When facts of law are involved, they may investigate and may refresh their judicial recollections by resorting to any means which they may deem safe and proper.

*Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200; *Gardner v. Collector*, *supra*.

The validity of the amendment depends upon whether it received a majority of all the votes cast thereon at the election. The Constitution itself so declares. Therefore its validity cannot depend on the subsequent omission of the state board of canvassers to determine the result or of the failure of the secretary of state to record a certificate thereof. The votes actually cast are the effective facts, and the certificate, as to the result of that vote, is evidences only of such facts. Moreover, as the certificate of determination made by the state board of canvassers and required to be recorded in the office of the secretary of state was to be compiled from the certificates of the several county boards of canvassers of the votes cast, it would seem that the records, as found in the office of the several county clerks, would as likely show the truth in that regard as would the certificate of the state board of canvassers, had one been made. The court would unquestionably, in the first instance, look to the certificate of the state board of canvassers to ascertain the result of the vote, but since there appears to be no record as to what that board did in the premises, if anything, we have resorted to the election records, returns, and canvass in the offices of the several county clerks of the state, which seems to us the next best means of advising ourselves of the true facts of law here involved. As said in *State v. Stearns*, 72 Minn. 200, 219, 220, 75 N. W. 210, 215: "The validity of this law depends upon whether it received a majority of all the votes cast at the election, not on the subsequent act or omission of the state canvassing board, or of any other officers. For the purpose of determining this fact, the court will take judicial notice of the election records, returns, and canvass thereof by the state board in the office of the secretary of state, and, if necessary, of the election returns and canvass in the offices of the several county auditors of the state."

While we have not received certified copies of the vote cast from the office of every county clerk of the counties existing at the time the amendment in question was submitted to a vote of the people, we have from many, and are convinced, beyond a question of doubt, that the amendment was submitted to a vote of the electors and received, for its adoption, practically a unanimous vote of those voting thereon. We are also convinced of this fact by reason of early decisions of this court at a time when the matter must have been of common knowledge, and yet, without question, the amendment was accepted as valid. In *People v. Boughton*, 5 Colo. 487, 490, decided at the December term, 1880, involving the right to the office of judge of the county court of Larimer county under facts almost identical with those here involved, the fact

of the adoption of this constitutional amendment is stated, and it is held that, by virtue thereof, the Constitution and the statute authorize the county commissioners to fill a vacancy in the office of county judge without regard to the duration of the unexpired term. At the same term of this court, and in the same volume (pages 455, 457), in *People v. Rucker*, the fact of the amendment is again stated, and a portion of the section, as amended, is quoted. Again, in *People v. Wright*, 6 Colo. 92, 93, decided at the December term, 1881, this court, after stating that the right to an office, as between the parties to that suit, depended upon the construction to be given to section 29 of article 6 of the Constitution, quotes the section as amended, and says: "This section is an amendment framed and submitted by the Legislature, and adopted by the people, in lieu of section 29, art. 6, of the Constitution, as originally adopted." And in *Re Election of District Judges*, 11 Colo. 373, 376, 18 Pac. 282, 283, it is said: "It is clear, under the provisions of section 29 as originally adopted, that, in case of a vacancy and an election to fill it, the election would be for an unexpired term. Such is the express language of the section. The first Legislature, however, submitted for adoption an amendment to section 29 of this article, which was adopted in 1878," etc.

The effect of the judgment of the lower court was to sustain the amendment; and it is therefore affirmed.

Judgment affirmed.

MUSSER, C. J., concurs in the result.  
SCOTT, J., not participating.

# NEWSOM v. DE FORD. (No. 3800.)

(Court of Appeals of Colorado. April 13, 1914.)

1. ADVERSE POSSESSION (§ 93\*)—COLOR OF TITLE—TAX DEED—PAYMENT OF TAXES—TERM. Rev. St. 1908, § 4090, Mills' Ann. St. 1912, § 4656, provides that whenever a person, having color of title, made in good faith, to vacant land, shall pay all taxes legally assessed thereon for seven successive years, he shall be deemed to be the legal owner to the extent and according to the purport of his or her paper title to the land, provided that if any person having a better paper title to the land shall, during the term of seven years, pay the taxes assessed for any one or more years during the term of seven years, than the person seeking title under claim of taxes paid shall not be entitled to the benefits of the section. *Held*, that in order to toll the statute in favor of one claiming under color of title and payment of taxes for seven years, the payment of taxes by one having a better paper title must be for one or more of the years comprised within the seven-year term from and after the date the color of title was acquired, so that, where defendant acquired color of title to vacant land February 6, 1901, by recording a tax deed, and thereafter paid the taxes on the land successively in 1902 and subsequent years, including 1908 for the taxes assessed in 1907, his right to the land became absolute, and was not affected

ed by the plaintiff's payment of the taxes in 1909 and 1910, which were assessed for the years 1908 and 1909, respectively.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 525-527; Dec. Dig. § 93.\*]

**2. ADVERSE POSSESSION (§ 45\*)—COLOR OF TITLE—PAYMENT OF TAXES—TOLLING LIMITATIONS.**

The only way the statute can be arrested after color of title has been acquired and there has been payment of taxes for seven years, is by the commencement of a suit within seven years from the time the first payment under color was made.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232-254; Dec. Dig. § 45.\*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by H. G. Newsom against John H. De Ford. Judgment for defendant, and plaintiff appeals. Affirmed.

Isaac Pelton, of Akron, for appellant. William H. Wadley, of Denver, for appellee.

**KING, J.** [1] The defendant, in an action to quiet title to the southwest quarter of section 27, township 2 north, of range 49 west, in Washington county, Colo., pleaded as his defense the payment by him of all taxes legally assessed upon said land for seven successive years after he acquired title, and that during all such time the land was vacant and unoccupied. The defendant acquired color of title to said land February 6, 1901, by recording his tax deed. Thereafter the following payments of taxes were made by the defendant under such color of title: On February 4, 1902, the taxes assessed in 1901. On March 3, 1903, the taxes assessed in 1902. On February 26, 1904, the taxes assessed in 1903. On May 13, 1905, the taxes assessed in 1904. On September 6, 1906, the taxes assessed in 1905. On February 20, 1907, the taxes assessed in 1906. On February 27, 1908, the taxes assessed in 1907. During all of said time, and thereafter until the beginning of suit, the land was vacant and unoccupied. Plaintiff, having a better paper title to said land than was evidenced by defendant's tax deed, made the following payments of taxes: On January 6, 1909, the taxes assessed in 1908. On January 3, 1910, the taxes assessed in 1909.

[2] This suit was commenced February 3, 1910, about nine years after defendant acquired color of title, and one day less than eight years after the first payment of taxes by defendant under such color. The question for determination is whether, under such showing, the payment by plaintiff, on

January 6, 1909, of the taxes assessed in 1908, after the defendant had paid all taxes legally assessed on said vacant and unoccupied land for the term of seven years after he had acquired color of title to said vacant and unoccupied land, arrested the running of the statute of limitations, notwithstanding the fact that suit was not instituted until more than seven full years after the first payment of taxes by defendant. Our conclusion is that such payment of taxes, alone, by plaintiff did not toll the statute. Section 4090, Revised Statutes 1908, section 4656 Mills' Annotated Statutes 1912, provides: "Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. \* \* \* Provided, however, If any person, having a better paper title to said vacant and unoccupied land, shall during the said term of seven years, pay the taxes assessed on said land for any one or more years during the said term of seven years, then and in that case such person seeking title under claim of taxes paid, his heirs and assigns, shall not be entitled to the benefit of this section." The evident meaning of the statute is that, in order to toll the statute by the payment of taxes, such payment must be of the taxes assessed on said land for one or more of the years comprised within "the said term of seven years" from and after the date color of title was acquired. Plaintiff did not make such payment. Defendant, under his color of title, had made seven successive payments, constituting the payment of all taxes legally assessed for the term of seven full years after he acquired such color. It was not necessary for him to pay in 1909 the taxes of 1908 in order to establish the bar, as that would be requiring eight years' payment of taxes instead of seven. *McConnel v. Konepel*, 46 Ill. 519; *Meacham v. Winstanley*, 77 Ill. 269; *Hurlbut v. Bradford*, 109 Ill. 397. Under the rulings of this court and of the Supreme Court in *Empire R. & C. Co. v. Howell*, 22 Colo. App. 585, 126 Pac. 1096, and *Marks v. Morris*, 54 Colo. 186, 129 Pac. 828, the only way the statute can be arrested, after color of title has been acquired and payment of taxes for a term of seven years thereunder has been made, is by the commencement of suit within seven years from the time the first payment under said color was made.

The judgment is affirmed.  
Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**LANDERS v. JOERGER et al.**  
(Nos. 1827, 1846.)

(Supreme Court of Arizona. April 27, 1914.)

**1. APPEAL AND ERROR (§ 784\*)—APPEAL FROM JUDGMENT—DISMISSAL—REVIEW.**

An appeal from a judgment alone will not be dismissed on the ground that the appeal was not taken from the order denying a new trial, but the right of review will be restricted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 784.\*]

**2. APPEAL AND ERROR (§ 13\*)—APPEAL—WRIT OF ERROR—DISMISSAL.**

While a valid, subsisting appeal is pending in the Supreme Court a writ of error cannot be prosecuted, and, if prosecuted, will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 47, 1895; Dec. Dig. § 13.\*]

**3. APPEAL AND ERROR (§ 731\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS—SUFFICIENCY.**

Under Civ. Code 1901, par. 1586, as amended by Laws 1907, c. 74, § 21, providing that the brief of appellant must plainly state the errors complained of, and Supreme Court rule 8, subd. 1 (126 Pac. xi), requiring assignments of error to distinctly specify each ground of error relied on and the particular ruling complained of, an assignment that the court erred in its judgment need not be considered, though an examination of appellant's argument may ascertain that the assignment is directed at the insufficiency of the evidence, though, on a proper assignment of error, the court must examine the evidence to determine its sufficiency to support the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.\*]

**4. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—ABANDONMENT—QUESTION FOR JURY.**

Whether an appropriator of water has abandoned the water, ditch, canal, or other works depends on the facts of each particular case, and is for the jury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**5. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—ABANDONMENT—QUESTION FOR JURY.**

Where a squatter appropriated water for irrigation, and the owner obtained a judgment of ouster against him, and he then moved from the premises and took with him all his personal effects and dismantled the house in which he had lived, the question whether, in leaving the premises, he did so with the intention of abandoning his water right and the water, ditches, and other works was one of fact, and a finding of the court will not be disturbed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

Cunningham, J., dissenting in part.

Appeal and Error from Superior Court, Cochise County; Fred Sutter, Judge.

Action between J. A. Landers and Frank Joerger and others. There was a judgment for the latter, and the former appeals and brings error. Writ of error dismissed, and judgment on appeal affirmed.

Kibbey, Bennett & Bennett, of Phoenix, and J. T. Kingsbury, of Tombstone, for appellant and plaintiff in error. Doan & Doan, of Douglas, for appellees and defendants in error.

ROSS, J. The proceeding in this court is being prosecuted in two ways at the same time. The first record came here on appeal from the judgment. Subsequently it was brought here by writ of error.

[1] The appeal is asked to be dismissed for the reason that it is not taken from the order overruling the motion for a new trial. The motion to dismiss for that reason is not tenable. In no case has this court decided or intimated that an appeal from the order overruling motion for a new trial was necessary to confer jurisdiction of the case in this court. On the contrary, the court has always taken jurisdiction of the case on appeal from the judgment only. The extent of our holding has been that an appeal from the judgment only limited or restricted our right of review.

The motion to dismiss the appeal is overruled.

There is also a motion to dismiss the writ of error proceeding, based upon various grounds.

[2] The right to have the case reviewed by this court upon one or the other proceeding is evident. But, as we understand the law, while a valid, subsisting appeal is pending in this court no other proceeding in the nature of an appeal or writ of error can be prosecuted. 2 Cyc. 523.

It is our opinion that the writ of error proceeding should be dismissed.

[3] We will consider the case as upon appeal. The appeal is, as before said, from the judgment only. The appellant has filed two briefs in each case. They are identical, except in the number they bear. In the first brief there is no assignment of error whatever, but a general discussion of the facts and the law deemed applicable to the facts. In the second brief, which is denominated an "amended and supplemental brief for appellant and plaintiff in error," there appears what was intended as an assignment, which is as follows: "The court erred in holding that the defendant, Landers, ever abandoned the use of the waters of the Barbacomari creek for irrigation of the lands occupied by him within the Barbacomari grant, and in holding that the right of the defendant [plaintiffs] to the use of the waters of said Barbacomari creek is prior and superior to the right of the defendant, Landers."

Now this general statement, when reduced to its final analysis, simply means that the court gave the wrong judgment. There is an entire absence of any suggestion as to why it was not a correct judgment. Taking this assignment as a premise, it could be argued

that the court was without jurisdiction of the subject-matter or parties; or that the complaint failed to state facts sufficient to constitute a cause of action; or that improper evidence was admitted or competent evidence rejected; or that the evidence fails to support the findings of fact; or that the findings of fact fail to support the judgment; or that the judgment is outside the issues. One of these is as definitely indicated by the assignment as any other error that might be named or imagined resulting in an erroneous judgment. It is really no such assignment of error as is required by the law and the rules of this court. By the rules of this court it is provided: "All assignments of error must *distinctly specify each ground of error* relied upon, and the particular ruling complained of." Rule 8, subd. 1, rules of Supreme Court (126 Pac. xi).

Paragraph 1586, Revised Statutes of Arizona 1901, as amended by section 21, c. 74, Laws of 1907, provides that the brief and argument of appellant "must plainly state the errors complained of by him." It is only by an examination of the appellant's argument that we ascertain that his assignment is directed at the insufficiency of the evidence to support the judgment.

While, under the law as it formerly stood, and as held by this court in *Miami Copper Co. v. Strohl*, 14 Ariz. 410, 130 Pac. 605, and *Arizona Eastern R. R. Co. v. Globe Hardware Co.*, 14 Ariz. 397, 129 Pac. 1104, the appellant, in appealing from the judgment only, as in this case, invoked a review by this court of the judgment roll alone and certain intermediate orders, and rulings affecting the merits of the case when properly preserved in the record, in the more recent case of *Steinfeld v. Nielsen*, 139 Pac. 879 (not yet officially reported), it was held that the Legislature had extended the scope of review upon an appeal from the judgment only to an order overruling a motion for a new trial. We think the status of this case brings it within the rule laid down in *Steinfeld v. Nielsen*, and, upon a proper assignment of error, it would be our duty to examine the evidence to determine if it supports the judgment. Neither the order overruling the motion for a new trial, nor any of the grounds set forth in the motion, is assigned by appellant as error.

Under these circumstances, we think we should confine ourselves principally to an examination of the issues and the findings of fact, and, if the judgment follows the one, and is supported by the other, affirm it.

[4] The contest, as shown by the pleadings, was over the ownership of certain waters of Barbacomari creek. The appellant's first appropriation was made in 1894, the appellees' in 1906 and 1908, as pleaded and found by the court. It is also found by the court that appellant, in 1908, abandoned the land he had theretofore occupied and irrigated, and

ceased to use the waters, except in small and insignificant quantities until in 1912, when he attempted (not in pursuance of his former use and occupancy) to initiate a new and different appropriation of said waters.

Appellant was not the owner of the land that he had been irrigating on the Barbacomari grant. He was a mere "squatter" on the grant, and in 1908 the owners thereof obtained a judgment of ouster against him. In June of that year he moved from the place, and took with him all his personal effects and dismantled the house in which he had been living, leaving only the parts of it that could not be used again upon a homestead that he had taken up off the grant. In fact, he removed everything from the grant that was of practical use in his new home; even transplanted some of the fruit trees.

The question as to whether appellant had abandoned the waters or not is peculiarly one for a jury, or the court sitting as a jury. Kinney on Irrigation and Water Rights, § 1116, vol. 2, says: "As to whether or not a water right, the water itself, the ditch, canal, or other works have actually been abandoned or not depends upon the facts and circumstances surrounding each particular case, tending to prove the essential elements of an abandonment, namely, the intent and the acts of the party charged with abandoning such a right. In other words, it is a question of fact, to be determined by the jury, or by the court, sitting as such."

[5] The purpose of the owners of the grant in prosecuting their suit against appellant was to have it adjudged that he was occupying and cultivating their lands without legal right. The court, by its judgment, so found. He immediately removed his family from the premises and located on other lands some miles distant. It was for the trial court to say whether, in leaving the premises, he did so with the intention of abandoning his water right, the water itself, the ditches, and other works.

Our labors in this case have been greatly augmented by reason of the failure of appellees to file any brief whatever on the merits.

Writ of error dismissed.

Judgment on appeal affirmed.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (specially concurring). The controlling question discussed in the briefs and at the bar is whether the defendant had abandoned his claim of water right in 1908, and attempted to re-establish his claim in 1911, after the plaintiff's adverse rights had accrued. The assignments of error are not very definite, but the appeal is from the final judgment, after appellant's motion for a new trial had been made and denied, and paragraph 1231, Civil Code Ariz. 1913, became effective October 1, 1913, before this appeal was submitted on January

23, 1914, so that said paragraph 1231, Civil Code Ariz. 1913, authorizes this court to review the action of the lower court in denying the said motion. One of the grounds assigned for a new trial is: "That the facts found by the court are not supported by the evidence in the case." Paragraph 588, Civil Code Ariz. 1913, provides: "When findings of fact have been made upon the general ground (motion for a new trial) that the evidence is insufficient to sustain the findings of fact, the (trial) court shall review the sufficiency of the evidence to sustain such findings without the particular findings being specified in the motion." The court filed findings of fact, the ninth paragraph of which is: "That the attempted acts of said defendant, Landers, in April, 1912, set forth in the complaint, were not in pursuance of his former occupancy or use of said water, but were done in pursuance of a new and different object and plan of irrigation arranged for and agreed with the owners in fee of said lands." The motion for a new trial required the trial court to review the sufficiency of the evidence to sustain this finding. Paragraph 588, Civil Code Ariz. 1913. When the motion was made and denied, this court is required on appeal from the final judgment, to review the action of the court below in denying the motion. Paragraph 1231, Civil Code Ariz. 1913. We are therefore authorized to review the sufficiency of the evidence to sustain this finding of fact. Defendant's witness McWhorter testified that he entered into an agreement with defendant, Landers, in February, 1912, to put in (plant in crops) a portion of the grant. Defendant admitted he remained upon the land after 1908, by permission of the owners of the grant, and the owners testified they gave him permission to remain on the land after that date. The evidence is fairly convincing that Landers remained upon the land and used the water under a very different claim from that asserted by him prior to a judgment of ouster entered against him on May 18, 1907, in favor of the owners of the grant. Plaintiffs Joerger and McLane initiated their water rights in 1906, and enlarged them each year for a number of years. Plaintiff John Rock initiated his water rights in 1908. So, when defendant, Landers, was ousted from the possession of the land and water by the judgment of ouster of 1907, all his rights to prior appropriation were extinguished by the said judgment. He returned to reclaim such rights in 1908, and thereafter, by permission of the owners, and in 1912, made some special arrangement to cultivate a larger area of the grant lands. The rights of the plaintiffs had accrued as against the claims of rights of defendant prior to 1908. The defendant admits that the basis of his claim was changed from one in his own right prior to 1907 to one of permission from 1908.

Without any doubt the evidence of defendant and his witnesses establishes the fact that defendant did abandon all his claim of water rights after the said judgment of ouster was rendered against him.

The evidence fully sustains the finding of fact, and supports the judgment.

For these reasons, I concur in the order affirming the judgment.

# OTIS v. NELSON. (No. 1342.)†

(Supreme Court of Arizona. April 27, 1914.)

## 1. ATTACHMENT (§ 302\*)—CLAIM BY THIRD PERSON—STATUTORY PROCEEDINGS.

To authorize the statutory proceeding known as the trial of the right of property which is attached, etc., claimant must bring himself within the terms of the statute providing such remedy (Civ. Code 1901, pars. 4128-4152).

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1073-1082; Dec. Dig. § 302.\*]

## 2. ATTACHMENT (§ 298\*)—CLAIM BY THIRD PERSON—BOND—SUFFICIENCY.

Civ. Code 1901, par. 4128, provides that, whenever any officer shall levy attachment upon personalty which is claimed by any person not a party to the writ, such person may make oath in writing before a proper officer that the claim is made in good faith, and present such oath to the officer making the levy, and paragraph 4129 requires such person to also execute and deliver to the levying officer his bond, with sureties, payable to the plaintiff in the writ, or double the value of the property claimed. Laws 1909, c. 11, § 1, provides that, whenever, "in any civil or criminal matter or proceeding," bond is required of any party thereto, instead of giving the bond, the party may deposit "with the court in which the matter or proceeding is pending" money in the sum required in the bond, which shall be accepted in lieu of the bond. Held, that a deposit could not be made under chapter 11 to take the place of the bond required by title 71, c. 3.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1062-1067; Dec. Dig. § 298.\*]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Action by William I. Nelson against T. W. Otis. From a judgment for plaintiff, defendant appeals. Judgment vacated, and cause remanded, with directions to dismiss proceedings.

James Loy, of Prescott, for appellant. J. E. Russell, E. S. Clark and J. Ralph Tascher, all of Prescott, for appellee.

CUNNINGHAM, J. The purpose of this action was to try the rights of property attached by the sheriff of Yavapai county by the command of a writ of attachment issued out of the superior court of said county in an action wherein T. W. Otis was plaintiff, and William Nelson was defendant. The writ of attachment was issued February 5, 1913, and, under the authority of said writ, on February 11, 1913, the sheriff levied upon certain personal property found at Nelson's wood camp at or near Prairie, in Yavapai county, as the property of the defendant in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 4, 1914.

the writ. The sum claimed in the complaint and recited in the writ is \$1,924.15.

William I. Nelson, son of the defendant in the writ, notified the sheriff of his claim of ownership of the property attached, and on February 12, 1913, he filed with the sheriff the following claim under oath: "State of Arizona, County of Yavapai—ss.: William I. Nelson, being first duly sworn, deposes and says that he is the owner of and claims as his property the following specifically described personal property levied upon and attached by Chas. C. Keeler, sheriff of Yavapai county, Arizona, on February 11th, 1913, in the case of T. W. Otis v. William Nelson: [Describing the property.] Deponent says that the above claim is made in good faith under the provisions of chapter 3, title 71, Revised Statutes of Arizona 1901."

The sheriff returned the writ of attachment with the sworn claim, and, as his return, certified as follows: "I hereby certify that William I. Nelson claims as his property the following heretofore, on to wit, February 11th, 1913, duly levied upon and attached by me in the case of T. W. Otis v. Wm. Nelson, by virtue of the annexed writ of attachment: [Describing the property.] And said William I. Nelson, claimant of said property above described, did on the 12th day of February, 1913, deliver to me his oath in writing and a cash bond in the sum of four thousand (\$4,000.00) dollars, being double the amount of the property so claimed, as aforesaid, was assessed by me, which said oath and bond were in due form of law, and were given under the provisions of title 71, chapter 3, of the Revised Statutes of Arizona 1901, and which said cash bond was substituted for the statutory form of bond in such cases as provided in chapter 11, Session Laws of the Twenty-Fifth Legislative Assembly of the territory of Arizona. I further certify that after receiving said oath and bond I did, on the 12th day of February, A. D. 1913, release from said attachment and turn over to said William I. Nelson all the property hereinbefore described."

Upon filing of this return of the sheriff, with the annexed papers of claim, in the office of the clerk of the superior court of Yavapai county, the clerk docketed the cause in the name of T. W. Otis, as plaintiff, and William I. Nelson, the claimant, as defendant. Thereafter the court made an order fixing the date March 8, 1913, as the day for making up the issues for trial. On March 7, 1913, plaintiff filed his complaint setting forth the issuance of the writ of attachment, the levy of the attachment upon the personal property, describing the property, the fact that William I. Nelson made claim under oath that he was the owner of the property so attached, and alleges:

That the claimant "gave his bond in the sum of \$4,000, the same being a cash bond, to said sheriff, conditioned that said property

would be forthcoming, and be returned to said sheriff, or his successors, in as good condition as he received it, and that he would pay the reasonable value of the use, hire, increase, and fruits thereof, from the date of said bond, or, in case he fails so to return said property, and pay for the use of the same, he would pay plaintiff the value of said property, which was assessed by the sheriff at \$2,000, with legal interest thereon from the date of the bond in case he fails to establish his right and title to said property herein described.

"III. That the said William I. Nelson is not the owner of said property nor any part thereof; that said property was at all times and now is the property of said William Nelson, the father of said William I. Nelson; that no transfer of title or possession of the said property has ever passed from William Nelson to William I. Nelson; that, if any conveyance has ever been made by William Nelson to William I. Nelson, it is false, fraudulent, and without consideration, and done with the intent to hinder, delay, and defraud this plaintiff—all of which was well known to the said William I. Nelson."

The claimant's tender of issue, filed the same day, alleges:

"That defendant is the owner of, in the possession of, and lawfully entitled to the possession of the following described personal property, to wit: [Describing the property under attachment.]

"III. That defendant bases his title upon an actual and bona fide purchase of the said property from one William Nelson, which said purchase was made on or about the 10th day of January, 1913; that defendant has paid to said William Nelson a good and valuable consideration for said described property, and said consideration was equal to and was the reasonable value of said described property at the time of its purchase.

"IV. Denies all the allegations of paragraph III of plaintiff's complaint or tender of issue."

The trial of the cause, a jury sitting, was had on May 21, 1913, upon the issues as made by the said papers in the cause on file. The plaintiff assumed the burden of proceeding. At the close of the evidence, the court instructed the jury to return a verdict for the defendant, claimant. Upon the coming in of such verdict, the court rendered judgment for the defendant in accordance with the verdict, and established the defendant's title to the property in question, and for costs. A motion for a new trial was made and denied. From the judgment and from the order denying a new trial, the plaintiff has appealed.

The plaintiff assigns as error the instruction of the court directing a verdict; also, "upon an appeal from a final judgment, the Supreme Court may review any intermediate order involving the merits and necessarily af-

fecting the judgment." Paragraph 1230, Civil Code Ariz. 1913.

[1] Before the court is authorized to entertain the statutory proceeding known as the trial of the rights of property, the claimant of the property attached must bring himself within the terms of the statute providing such remedy. The officer must have levied "a writ of execution, attachment, claim and delivery or other like writ upon \* \* \* personal property, and such property, or any part thereof," must have been "claimed by a person who is not a party to such writ." "Such person, his agent or attorney, may make oath, in writing, before any officer authorized to administer oaths, that such claim is made in good faith, and present such oath in writing to the officer who made such levy." Paragraph 4128, Rev. St. Ariz. 1901. "He shall also execute and deliver to the officer who made such levy his bond, with two or more good and sufficient sureties, to be approved by such officer, payable to the plaintiff in such writ, for an amount equal to double the value of the property so claimed to be assessed by such officer." Paragraph 4129, Rev. St. Ariz. 1901.

The bond must be conditioned as required by paragraph 4130, Rev. St. Ariz. 1901. Whereupon "it shall be the duty of the officer receiving such oath and bond to deliver the property so claimed to the person so claiming it." Paragraph 4131, Rev. St. Ariz. 1901.

"When personal property is attached the same shall remain in the hands of the officer attaching until final judgment, unless a claim be made thereto and bond be given to try the right to the same, or unless," etc. Paragraph 347, Rev. St. Ariz. 1901.

"Whenever any person shall claim property and shall make the oath and give bond, as provided for in this title (title 71), if the writ under which such levy was made was issued by any \* \* \* court of the county where such levy was made, the sheriff or other officer receiving such oath and bond shall indorse on the writ that such claim has been made and oath and bond given, stating by whom, and shall indorse on such bond the value of the property as assessed by himself, and shall forthwith return such bond and oath to the proper justice or court having jurisdiction to try such claim, as hereinafter provided." Paragraph 4132, Rev. St. Ariz. 1901.

Paragraph 4133, Rev. St. Ariz. 1901, prescribes the form of the bond, and paragraph 4134 provides that: "Any other form of bond which shall substantially comply with the requirements of the preceding section [paragraph 4133 (section 30)] shall be sufficient."

Paragraph 4136, Rev. St. Ariz. 1901, provides: "The sheriff or other officer taking said bond shall also indorse on the original writ that such claim has been made and oath and bond given, stating by whom, the names of the sureties, and to what justice or court

the bond has been returned and he shall forthwith return such original writ to the justice or court from which it is issued."

Paragraph 4138, Rev. St. Ariz. 1901, provides: "Whenever any oath and bond, for the trial of the right of property, shall be returned as provided in this title, it shall be the duty of the clerk of the court, \* \* \* to docket the same in the name of the plaintiff in the writ, as the plaintiff, and the claimant of the property as defendant."

Paragraph 4139, Rev. St. Ariz. 1901, requires the court to set a time for forming the issues for trial, and paragraph 4140, Id., specifies of what the issues shall consist, viz.: "A brief statement of the authority and right by which the plaintiff seeks to subject the property levied on to his execution [attachment] and of the nature of the claim of defendant thereto."

In this case the claimant in his tender of issue makes no pretense of stating the nature of his claim to the property that he has furnished any bond to the sheriff, and perhaps he is not required to so state. The plaintiff in the case, in his statement of the authority and right by which he seeks to subject the property levied on to his attachment, alleges that the property belongs to the defendant, William Nelson; that a writ of attachment was levied, at plaintiff's instance, thereon; and that claimant has made a sworn claim thereto, and, in lieu of a bond, has placed \$4,000 cash in the hands of the sheriff. These facts are established by the sheriff's return of the matter.

The trial coming on on May 21, 1913, the plaintiff assumed the burden of procedure, and, in support of his cause, offered the oral evidence of the sheriff; to which offer the claimant objected, because the evidence, being oral, was not the best evidence; that the return of the sheriff was the best evidence of his acts in the premises; and a further objection was interposed to the taking of any evidence by the plaintiff, for the reason "that issue tendered by the plaintiff is wholly insufficient in law." An exception was reserved by the claimant, but no ruling appears upon the objections. To obviate these objections, plaintiff introduced the sheriff's return, with said exhibits.

[2] If an oath and a bond are not required by chapter 3 of title 71 in order to authorize the trial court to entertain this proceeding, then plaintiff's tender of issue and proof, consisting of the sheriff's said return, is conclusive upon plaintiff, and he has failed to maintain the allegations of his authority and right to subject the property to his attachment. He has failed to show by evidence that a bond has been given as alleged by him, and he has failed to show title or possession in the attachment defendant at the time of the levy. If such oath and bond are required of claimant, in order to give the trial court authority to entertain this mat-

ter, then plaintiff's tender of issue and proof is conclusive upon the rights of the defendant to a trial of his claim—a trial of the rights of property given him by the statute. The claimant has failed to bring himself within the terms of chapter 3 of title 71.

The claimant must rely upon the cash deposit mentioned in plaintiff's tender of issue and in the sheriff's certificate of return, as a sufficient compliance with the statute, else he would not be here contending that the judgment is valid. The sheriff certifies that the claimant delivered to him his claim under oath in writing "and a cash bond in the sum of four thousand dollars, being double the amount of the property so claimed as aforesaid was assessed by me \* \* \* and which said cash bond was substituted for the statutory form of bond in such cases as provided in chapter 11, Session Laws of the Twenty-Fifth Legislative Assembly of the territory of Arizona." What was the condition of this "cash bond"? The conditions must have been the conditions of the statutory form of bond for which the cash bond was substituted. Chapter 11 of the Laws of 1909 provides what bonds may be furnished by a deposit of cash in lieu of the form of written bond, as follows, to wit: "Section 1. That wherever in the statutes of the territory of Arizona and amendments thereto, in *any civil or criminal matter, or proceeding*, bond is required of any party thereto, instead of giving such bond the said party may deposit with *the court in which the matter or proceeding is pending*; lawful money of the United States in the sum required in the bond, and the same shall be accepted in lieu of such bond."

It is clear that the making of a sworn claim to attached property by one who is not a party to the attachment suit is not either a civil or criminal matter or proceeding. Neither is the leaving of money with the sheriff, under such circumstances as shown by the sheriff's certificate, a "deposit with the court in which the matter or proceeding is pending." The sheriff is not a court in any sense of the word. Neither for the purpose of receiving a deposit of cash in lieu of a bond, nor is a matter of claim filed with the sheriff looking to a trial of the right of attached property a matter pending in court. Such matter is not pending in court until the sheriff has attached the property, received the claim under the oath of the claimant that his claim is bona fide, and has received and approved the bond of the claimant in form substantially complying with the requirements of paragraph 4133, Rev. St. Ariz. 1901, and files and returns such sworn claim and bond with the assessed value of the property indorsed on the bond with the original writ. "Whereupon the oath and bond for the trial of the right of property shall be returned as provided in this title;" then the clerk shall docket

the cause, and the matter is pending in the court to which the oath and bond are returned, but not before. Chapter 11 of the Laws of 1909 has no application to bonds that a claimant of personal property which has been attached is required by title 71 to give the sheriff in order to initiate the right to try the rights of property provided by chapter 3 of said title 71.

The plaintiff alleged that the claimant furnished to the sheriff a cash bond, and sets forth the conditions of that bond. The conditions are, to all intents and purposes, the conditions required to be incorporated in bonds of claimants of property attached, but such allegations, in the first place, were unnecessary to plaintiff's tender of issue, and are surplusage, and in the second place these allegations setting forth the conditions of the bond were not sustained by plaintiff's evidence—viz., the sheriff's return and certificate—and the claimant objected to other proof of any facts. It must be conceded that the claimant furnished to the sheriff no bond payable to the plaintiff in the writ, and for that reason, the fact appearing to the court, the court had no matter before it for adjudication. The cause was improperly upon the docket. In order that the court have jurisdiction to try the right of property attached, the matter must be presented to the court by means of the oath in writing of the claimant that such claim is made in good faith, and accompany such claim with a bond for an amount equal to double the value of the property so claimed, and the bond must be payable to the plaintiff in the writ of attachment. After receipt of such claim and approval of such bond, they, with the writ of attachment, must be returned to the proper court. Thereupon the court may try the right of property, but under no other circumstances. The claimant must bring himself within the statute by doing the things required by the statute before he asserts his title to the property in such manner as to call forth the jurisdiction of the court in such statutory proceeding, known to our law as the trial of the right of property. *Hall & Brown, etc., Co. v. Haley, etc., Co.*, 174 Ala. 190, 56 South. 726; *Carter v. Carter*, 36 Tex. 693; *Graham v. Hughes*, 77 Ala. 590; *Mobile L. Ins. Co. v. Teague*, 78 Ala. 147; *Walker v. Ivey*, 74 Ala. 475; *House v. West*, 108 Ala. 355, 19 South. 913.

Without authority to proceed further with the trial of the right of property, the court should have dismissed the jury, and the cause as well. The court erred in directing a verdict for that reason. The judgment is contrary to law, because the lower court had no matter before it of which it could try other than dismiss. The lower court having acquired no jurisdiction of the subject, the appeal gives this court no jurisdiction other than to order the judgment vacated, and the matter dismissed.

The judgment appealed from is vacated, the cause remanded to the lower court, with instructions to that court to dismiss the proceedings.

FRANKLIN, C. J., and ROSS, J., concur.



**MARLEY et al. v. STATE. (Cr. 331.)**

(Supreme Court of Arizona. April 27, 1914.)

**1. LARCENY (§ 34\*)—ALLEGATIONS OF INDICTMENT—WANT OF CONSENT.**

Under Pen. Code 1901, § 441, defining larceny as a felonious stealing, taking, carrying, or driving away of the personal property of another, the indictment need not expressly allege that the property was taken against the owner's consent.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 61, 94, 95; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4008; vol. 8, p. 7701.]

**2. LARCENY (§ 47\*)—ADMISSION OF EVIDENCE—OWNERSHIP BY ACCUSED.**

In a prosecution for larceny by stealing a steer, in which the state did not prove the recording of the brand found on the animal, defendants could show that they took the steer believing it to bear a certain brand, and that all steers of its age bearing that brand running on the ranch where the particular steer was found were claimed by them.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 139; Dec. Dig. § 47.\*]

**3. LARCENY (§ 3\*)—DEFENSES.**

One is not guilty of larceny who takes the property under a bona fide claim of ownership.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3-10; Dec. Dig. § 3.\*]

Appeal from Superior Court, Navajo County; Sidney Sapp, Judge.

J. W. Marley and others were convicted of larceny, and appeal from a judgment of conviction and an order denying a new trial. Reversed and remanded.

The appellants were indicted, charged with the larceny of a steer. The indictment, omitting the formal parts, is as follows: "The said J. W. Marley, R. S. Marley, A. C. Marley, and G. D. Marley on or about the 8th day of February, 1911, and before the finding of this indictment, in Navajo county of the then territory of Arizona, and now Navajo county of the state of Arizona, did willfully, unlawfully, and feloniously take, steal, and carry away one steer that was then and there the property of Luther Hart, J. G. Verkamp, and Mary Babbitt, contrary," etc. The defendants were jointly tried and convicted as charged. From the judgment of conviction and from the order refusing a new trial, the defendants have appealed.

B. F. Adams, of Albuquerque, Henry F. Ashurst, of Prescott, and J. E. Jones, of Flagstaff, for appellants. G. P. Bullard, Atty. Gen., Leslie Hardy, Asst. Atty. Gen., and J. E. Crosby, Co. Atty., of Holbrook (Reese M. Ling, of Phoenix, and E. S. Clark, of Prescott, of counsel), for the State.

CUNNINGHAM, J. The appellants have specified 27 grounds of error, and these have been grouped by appellants under three heads for the treatment on this appeal, to wit: First, the insufficiency of the indictment; second, rulings of the court admitting and rejecting evidence; third, errors in giving, modifying, and refusing instructions.

The abstract of the record furnished fails to disclose the demurrer to the indictment as filed, and for that reason we will only consider the indictment with regard to the sufficiency of the facts stated to constitute a public offense. Counsel insist only upon the failure of the indictment to allege that the taking was without the consent of the owners, and with the intent to deprive the owners of the value of their property.

Larceny is defined as "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Section 441, Penal Code of Arizona, 1901.

"The indictment is sufficient, if it can be understood therefrom: \* \* \*

"6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

Subd. 6 of section 833, Penal Code of Arizona, 1901.

[1] Under the Penal Code of this state at the date of the alleged offense, and when the indictment was returned, it was not necessary to allege in the indictment or information that the property was taken against the consent of the owner. There is nothing found in the statutory definition of larceny (section 441, Penal Code Ariz. 1901) to that effect. "But such consent is, at the common law, matter simply of defense, and the absence of it does not enter into a prima facie case. Hence nonconsent is not averred in the indictment, and it need not be proved." Bish. Cr. Prac. § 752a. So the Supreme Court of California, in *People v. Davis*, 31 Pac. 1109, 97 Cal. 194, says. We have the same worded definition of larceny with California and hold to the same view.

The charging part of the indictment, "did willfully, unlawfully, and feloniously take, steal, and carry away," etc., is a sufficient statement of the intent with which the taking was done under our statute. *People v. Brown*, 27 Cal. 500.

The indictment sets forth the act charged as the offense clearly and distinctly in ordinary and concise language, and in such manner as to enable a person of common understanding to know that the defendants are charged thereby with the larceny of a steer, and that is all the statute requires the indictment to contain in respect to alleging the intent. The statutes of Texas in charging this offense require more than is required by the statutes of California, which we have

adopted, and therefore the Texas cases cited by appellants' counsel are not authority here upon the sufficiency of the indictment in respect to the questions under consideration.

The appellants complain that the court refused to permit them to prove the ownership of the animal, alleged to have been stolen, in Heck Marley, one of the defendants, and therefore refused to them the right to establish their defense and right to slaughter the animal. Defendants admit they had the animal in their cattle corral and slaughtered it at the time and place shown by the evidence of the prosecution. The evidence that Luther Hart, J. G. Verkamp, and Mary Babbitt were the true owners of the X lazy S brand and the owners of the range cattle bearing that brand was not denied by defendants; but defendants say that one of their number, Heck Marley, owned certain cattle on the range that bore the brand 7 bar T on the left ribs and X on the left hip, and that the animal in question was so branded, or defendants believed it was so branded, and slaughtered it believing the animal belonged to Heck Marley. The court first admitted evidence tending to prove that Young Marley owned cattle in the brand mentioned, and shipped them from Texas to Arizona and released them upon the open range without any change of brand. That afterwards Young Marley sold six or eight head of said steers bearing 7 bar T on the ribs and X on the left hip to Heck Marley, one of the defendants. A witness, Les Hughes, testified that he was working for the Marleys in 1905 and was present at Folsom dam near Winslow when, during that year, six, seven, or eight head of yearling steers arrived with a shipment of cattle from Texas. They each bore the said 7 bar T brand. They were received as belonging to Young Marley, and turned out on the range at Folsom dam in the care of these appellants. Witness while at work on the range at subsequent times saw some of the steers. Then the witness was asked this question: "Q. Mr. Hughes, I omitted to ask you the full brand which I aimed to ask you. I aimed to ask you whether or not you know who is the owner or purported owner of the 7 bar T on the left side with X on the left hip." To which the state objected, but, before a ruling from the court was had, the witness answered, "Heck Marley." The objection was made that this was "an attempt to show title in some one else against the lawful claim of title already in evidence here, against positive claim of title made in the regular way; that is to say, we have shown brand tax and payment of brand. Now then, for a mere claim of ownership to prevail against that would be, of course, contrary to all rules of evidence. There must be positive proof of ownership of such strength that it would overthrow the claim made by the state before it can be admitted."

The court said in ruling: "You cannot

prove ownership, but, however, will let the witness answer that question. You cannot prove ownership by that. He has already answered the question. \* \* \* There will be no more of it. You will not proceed any further with it." The prosecution moved to strike the answer. The court stated: "The court has ruled that this testimony is not proper." Appellants then offered further evidence along that line in these words: "We now tender and offer to prove by other witnesses that they know that these animals were brought from Texas, and that Heck Marley—that it is generally reputed that Heck Marley always claimed some steers in this brand." Without a formal objection, but in answer to a question from counsel as to what the former ruling of the court had been, the court stated: "The court tells you not to go any further with this line of testimony." Upon cross-examination the witness was examined closely about the steers, from whence and how they came to Arizona, about other cattle in the same shipment and brands appearing on the cattle, the number of different brands in the shipment, where the cattle of the shipment were turned loose. He was cross-examined closely about the 7 bar T brand, where he had seen it, and if he had seen other cattle on the range bearing that brand.

When counsel had finished the cross-examination a juror by permission of the court asked the witness the question: "Can you tell me who claimed the 7 bar T with X on the left hip when they were shipped to this country?" The witness, answering, said: "Yes, sir. I answered that question directly. As I told Mr. Ling they was owned by Young Marley individually."

Question by Mr. Ling: "You said in your direct examination that they were owned by Heck Marley. A. They are at present. Q. How do you know they are? A. Well, sir, I heard the trade between Young Marley and his brother when he left here and went to Texas. He turned his cattle over to him." The prosecution again objected because no bill of sale was made conveying the cattle. The court said in ruling: "They cannot prove ownership that way. The court was allowing you to explain the similarity of brands. That was the only thing the court was allowing. The court would not permit you to prove ownership. Not that way. \* \* \* The court will not permit them to prove ownership. The court has said so."

"Mr. Ling: But a claim of ownership, the effect is probably the same."

"The Court: The court will not permit any more of it, and will take the motion to strike under advisement. \* \* \* The court has not ruled on the motion to strike. \* \* \* The court will not permit any more testimony of this kind."

"The court has not ruled on this yet. The court will do so after a while. The court is



of the opinion that the testimony is wrong, improper testimony, but will take the motion to strike under advisement."

Counsel signified their intention to wait until a ruling on the motion was had. The court then ordered the evidence stricken. At a subsequent stage of the trial the state was permitted to introduce as rebutting evidence testimony tending to contradict this evidence of defendants stricken: this is, the state offered evidence tending to show that no such cattle as the steers described had ever been seen by stockmen at their round-ups of the range adjacent to Folsom Dam. This record as made is not very definite as to the exact evidence stricken, when considered alone, but when we refer to the instructions, no doubt exists as to the evidence intended to be stricken and rejected.

The court instructed the jury in part in these words:

"I charge you that the defendants do not deny the killing of the animal mentioned in the indictment, but claim that it bore a brand claimed by one of the defendants, and the said animal had ranged upon the range claimed or used by the defendants since the year 1905. I charge you that before you can consider any evidence tending to support this claim there must be evidence before you that the brand so claimed was the recorded brand of the defendant claiming same, and that it was duly recorded prior to the time of the alleged larceny, in the brand book required to be kept by the live stock sanitary board. In the absence of this proof, you have no right to give any consideration to the defendant's claim of said brand.

"I further charge you that when persons charged with the larceny of an animal are residents of Arizona at the time of said offense, and such persons base their claim of ownership of the animal alleged to have been stolen upon the brand claimed by the accused to be upon said animal, the only proof that the accused owned said brand at the time of the larceny that you may properly consider is proof that said brand so claimed by the accused to have been on said animal was recorded in the brand book required to be kept by the live stock sanitary board of Arizona. \* \* \*

[2] These two instructions are urged as erroneous in the motion for a new trial. The effect of the rulings in regard to rejecting and striking the evidence of defendants' claim of ownership and in the foregoing instructions withdrawing all evidence of the claim of ownership by defendant, is to deny to the defendant, charged with the larceny of a range animal, the right to show that he made a bona fide claim of title to such animal. Evidence establishing his ownership and record of the brand found on such animal is made the only competent evidence of his claim of ownership; such proof is required to be made by the certificate of the

live stock sanitary board certifying the contents of the brand book, thereby showing a legal title to the recorded brand, and no other evidence is made competent for that purpose.

The Live Stock Sanitary Law, chapter 51 of the Laws of 1905, made no such requirement. In order to establish prima facie the ownership of a range animal, proof of the ownership and due record of the brand on the animal, with proof that the brand tax was paid, was all the evidence required to make out a prima facie title to the animal bearing the brand. The evidence required to establish the ownership and recording of the brand is a certificate of the secretary of the live stock sanitary board of the entry upon the brand book, made in conformity to the requirements of the provisions of that law in respect to recording the brand. The fact of the right to use the brand prima facie was provable by the brand tax receipt. Such evidence, the certificate of the record of the brand and the brand tax receipt in the possession of a person named therein, was made evidence of a compliance with the law in respect to those matters required by such law, and was made prima facie evidence in all the courts that the animal bearing such brand, if an old brand, is the property of the owner of such brand. Section 66 required the payment of the brand tax as a condition precedent to the continued right to use the brand, and made the brand tax receipt prima facie evidence of such right. Section 67 made it unlawful to use a brand not recorded, and upon which the brand tax had not been paid, and made cattle bearing such brand, if freshly branded, subject to seizure.

[3] Sections 66 and 67 were repealed without a saving clause by chapter 4, page 13, First and Special Session Laws of 1912. By such repeal, when the ownership of a range animal is to be established, the party claiming ownership may make out a prima facie title by procuring the certified copy made by the secretary of the live stock sanitary board, of the entry of the record of the brand made in the brand book relating to the brand borne by the animal, and such certified copy of such brand is required to be taken in all the courts of the state as prima facie evidence of the rights of the person therein named (or of his assignor upon proper proof of the assignment) to use said brand for branding his animals, that the owner of such brand has complied with the provisions of said law, and that the brand shall be taken in all the courts of the state as prima facie evidence that the animal bearing the brand is the property of the owner of such recorded certified brand, except when the brand is borne by an animal seized under another provision of the act. No such facts have been shown to exist in this case. No proof of the recording of the brand found on the animal was introduced by the state. The only proof of ownership of the brand introduced was oral

evidence to the effect that Luther Hart, J. G. Verkamp, and Mary Babbitt owned the X lazy S brand, and claimed the range cattle bearing that brand. Other witnesses testified to the fact that said parties were the reputed owners of that brand and claimed the range animals bearing that brand. The appellants made no attempt to dispute such facts; such evidence with the evidence of Luther Hart, to the effect that about four years prior to the trial he and his co-owners of the brand purchased some cattle from one Dick Gibbons, a cattle raiser running cattle on the range in Apache county. Such cattle so purchased when received were branded 7 bar T, and their brand X lazy S was also placed upon those cattle, and the cattle were released upon the open range bearing both of said brands. That the steer in question bore both brands. Other evidence was introduced tending to prove that the steer bore both said brands, and that cattle on the range had been observed bearing both brands. This was the state of the evidence of the prosecution upon the question of ownership of the animal that the defendants were called upon to meet, when the foregoing record was made. It was this case thus made by the prosecution that the appellants were attempting to meet and overcome. The evidence offered by them and rejected or stricken by the court, and of which the jury was forbidden to consider by the direct instructions of the court, was parol evidence of ownership of the animal in question. Such evidence was admissible by the same rule that rightly admitted the parol evidence of ownership when introduced by the state. The evidence offered by the defendants would tend to explain their act, and throw light upon the transaction. The defendants claim they took and slaughtered the animal in question because they believed it bore the 7 bar T with X on left hip brand, and that all steers of the apparent age of the animal in question bearing that brand, running on the range in the vicinity of Winslow, were claimed as the property of Heck Marley, one of the defendants, and that Heck Marley killed this animal. If these facts were established and the claim was bona fide, this was a good defense.

The well-settled law of larceny is that: "Since one who takes what he believes to be his has not the intent of a thief, a bona fide claim of right to take is incompatible with the intent to steal; and one who takes under a bona fide claim of right to do so is not guilty of larceny. So one who takes goods under the authority of another, in the bona fide belief that he is authorized, or that his principal is entitled, is not guilty of larceny, although such belief is mistaken. \* \* \* It is necessary, however, in all cases that the claim of right be a bona fide one. Whether the claim is honest is a question for the jury.

And if the jury are in doubt they must acquit." 25 Cyc. 49, 50, 51.

The refusal of the court to receive parol evidence of the claim of ownership of the steer in Heck Marley and the instructions of the court mentioned above, withdrawing from consideration of the jury all evidence of claim of such ownership deprived the appellants of a right to establish their defense of a bona fide claim of right to take the property, deprived the appellants of the right to have the jury pass upon the intent with which they claimed to have taken the property, and therefore the appellants were not awarded a fair and impartial trial by a jury, as guaranteed to them by law. The court erred in rejecting the evidence and in instructing the jury as to the law governing the case, in the particulars indicated.

The other errors that are assigned will not be now referred to, as the judgment must be reversed; we will not consider such for the reason, if errors were committed, upon a retrial of this cause we presume they will not again occur, and rest content to pass upon such other questions in such cases as require their consideration.

Judgment reversed and remanded.

FRANKLIN, C. J., and LAINE, Superior Judge, concur.

N. B. Judge ROSS being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. F. B. LAINE, Judge of the Superior Court of Greenlee County, to sit with them in the hearing of this cause.

STATE v. MORGAN, District Judge.  
(No. 2568.)

(Supreme Court of Utah. Feb. 25, 1914.)

JUSTICES OF THE PEACE (§ 141\*)—TRANSFER TO ANOTHER JUSTICE—EFFECT OF AFFIDAVIT OF PREJUDICE.

Under Comp. Laws 1907, § 5132, relative to criminal cases before justices, providing that, where a defendant files an affidavit that he cannot have a fair trial before the justice, because of his bias or prejudice, the case must be transferred to another justice, the filing of a sufficient affidavit does not deprive the justice of jurisdiction, but his refusal of the change and proceeding with the trial is only error; so that, on appeal, the district court has jurisdiction, and, under sections 5165, 5167, should try the case de novo.†

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476; Dec. Dig. § 141.\*]

Mandamus by the State against A. B. Morgan, District Judge. Writ issued.

J. H. McDonald, Dist. Atty., and Grant C. Bagley, Co. Atty., both of Provo, for the State. Jacob Evans, of Provo, for defendant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† State ex rel. Gallagher v. District Court, 36 Utah, 68, 104 Pac. 750.

STRAUP, J. The Fourth judicial district court, on the alleged ground of want of jurisdiction, refuses to hear and try a case appealed to it from a justice court. We are asked by mandamus to direct him to hear it.

A complaint in a case wherein the state of Utah was plaintiff and one Dart defendant, charging him with a misdemeanor, was filed in a justice court of Utah county. He appeared in the action for arraignment, and stood mute. Upon the justice's direction, a plea of not guilty was entered for him. Then the defendant filed an affidavit for a change of venue on the ground of prejudice and bias of the justice, and demanded the case be transferred to another justice of the county. The justice overruled the motion, and set the case for trial. The state put in its evidence and rested. The defendant offered none. The case was thereupon submitted for decision. The justice found the defendant guilty as charged in the complaint, and adjudged him to pay a fine of \$150. From that judgment, the defendant prosecuted an appeal to the district court. The record was transmitted to that court, the case docketed, and the defendant there called for arraignment. He again stood mute. Again a plea of not guilty was entered for him. The case was set, and, when called for trial, the defendant moved a dismissal of the action on the ground that the justice had lost jurisdiction by the filing of the affidavit for a change of venue, and was without jurisdiction to thereafter hear the case and render a judgment; hence the district court acquired no jurisdiction by the appeal. The district court, holding with the defendant, refused to hear the case, dismissed the appeal, and remanded the case to the justice, with directions to transfer the case to another justice. So the state is here seeking by mandamus to compel the district court to take jurisdiction and try the case on merits.

It is conceded the justice had jurisdiction of the offense charged and of the person of the defendant. The claim made is that he lost or was ousted of jurisdiction by the filing of the affidavit. The statute (Comp. Laws 1907, § 5132) provides: "A change of the place of trial may be had at any time before the trial commences: (1) When the defendant files an affidavit in writing, stating that he has reason to believe, and does believe, that he cannot have a fair and impartial trial of the action before the justice about to try the same, by reason of the bias or prejudice of such justice, the action must be transferred to a justice of the county agreed upon by the parties, or, if there is no agreement, to the nearest justice within the county to which such objection does not apply."

The affidavit was merely in the language of the statute. Let it be conceded that that was all that was necessary. And let it fur-

ther be conceded, as is also urged, that, when the affidavit was filed, it was the duty of the justice to transfer the case. Still the question is: Did his ruling refusing to transfer it constitute mere error, or did the filing of the affidavit oust the court of jurisdiction to further proceed? The case of *State ex rel. Gallagher v. District Court*, 36 Utah, 68, 104 Pac. 750, is cited to support the latter contention, and it is claimed the ruling of the district court refusing to take jurisdiction was largely based upon that case. Different statutes (R. S. 1898, § 3669, as amended by Laws 1905, c. 92, § 1, and section 3672) were involved in the *Gallagher* Case. They relate to a change of venue in civil actions before justice courts, and provide that, when an affidavit is filed as by that statute provided, the justice "must change the place of trial without motion being made therefor and his jurisdiction over such action shall cease upon the filing of such affidavit for all purposes," except to transfer the case. We think the statutes are dissimilar. By the statutes involved in the *Gallagher* Case the Legislature expressly declared that, upon the filing of the affidavit, the jurisdiction of the justice "over such action shall cease for all purposes," except to transfer the case; and because of such express declaration was it held in that case that the filing of the affidavit ousted the justice of jurisdiction. The statute here under consideration contains no such declaration; but it is urged it nevertheless is mandatory, and that the filing of the affidavit thereunder had the same effect to oust the court of jurisdiction. To support that *Ex parte Justus*, 3 Okl. Cr. 111, 104 Pac. 933, 25 L. R. A. (N. S.) 483, is cited. That case so holds. It proceeds on the theory that a constitutional right was there denied the defendant. But on the same statute and in the same case a contrary conclusion was reached by the Kansas court. In *re Justus*, 65 Kan. 547, 70 Pac. 354. Said that court: The claim made "is that, as the statute directs that the change of venue *must* be granted when the application is made in the form as therein indicated, upon the making of such application, the court lost jurisdiction of the case, and all acts of the court thereafter were wholly without warrant in law and void. We are not able to give our assent to this proposition. Undoubtedly it was error on the part of the district court of Kay county not to grant the change of venue as asked for; the application being in accordance with the requirements of the statute. For its refusal to do so the order would, beyond question, have been reversed upon proper proceedings to the higher court. Such refusal, however, was but error, and did not defeat or oust the court of jurisdiction."

There are cases supporting the view of the Oklahoma court; notably from the Missouri courts (*State v. Shipman*, 93 Mo. 147, 6 S. W. 97) and other courts. But we believe the

greater number of cases and the weight of authority support the Kansas court. State of Iowa v. Heacock, 106 Iowa, 191, 76 N. W. 654; City of Ottumwa v. Schaub, 52 Iowa, 515, 3 N. W. 529; Peters v. Koeppe, 156 Ind. 35, 59 N. E. 33; Turner, Sheriff, v. Conkey, 132 Ind. 248, 31 N. E. 777, 17 L. R. A. 509, 32 Am. St. Rep. 251; Carrow v. People, 113 Ill. 550; Cantwell v. People, 138 Ill. 602, 28 N. E. 964; Jahnke v. State, 68 Neb. 154, 94 N. W. 153, 104 N. W. 154; State v. Hawkins, 23 Wash. 289, 63 Pac. 258; Ex parte Wright, 119 Cal. 401, 51 Pac. 639; Lowrey v. Hogue, 85 Cal. 600, 24 Pac. 995; Miles v. Justice Court, 13 Cal. App. 454, 110 Pac. 349. True, the statute in some of those states, especially the California statute, somewhat differs from ours. The California statute is: "When it appears from the affidavit of the defendant that he has reasons to believe and does believe," etc. Ours: "When the defendant files an affidavit in writing stating he has reason to believe and does believe," etc. But both provide that, upon the affidavit, "the case must be transferred to another justice;" that is, both statutes provide that, when *the proper affidavit under the statute is filed*, "the case must be transferred to another justice." So, the provision requiring a transfer of the cause when the proper affidavit under the statute is made and filed is just as mandatory under the one as under the other statute. Nor does the California statute make the question of bias or prejudice of the justice issuable any more than does our statute. That question under both statutes must be determined "from the affidavit"; and, when a proper affidavit under the statute is made and filed—under the one "when it appears from the affidavit of the defendant that he has reason to believe and does believe," etc., under the other "when the defendant files an affidavit in writing stating that he has reason to believe and does believe," etc.—we do not see wherein the justice has any more discretion in the one than in the other to refuse to transfer the case, since both say he "must transfer the case." It is said that, under the California statute, the justice is required to determine the sufficiency of the affidavit and whether it is in compliance with the statute, something involving judicial discretion. As well say that of the Utah statute. If, under either, the applicant, by his affidavit, clearly establishes his ground, the justice has as much license in the one as in the other to declare the affidavit insufficient and not in compliance with the statute—to call white black and black white.

The truth is these statutes are mere venue statutes, and do not involve jurisdiction. When that is kept in mind, all is clear. Departing from it leads to confusion. Brown, in his work on Jurisdiction (2d Ed.) § 25, puts the proposition right: "These various matters mentioned above (disqualification of

the judge, etc.) affect not the jurisdiction of the court, but incapacitates the court from disposing of the action differently. The better view of the matter is this, that when a court acquires jurisdiction of the subject-matter, and the parties to an action in a lawful manner, the jurisdiction cannot be ousted or lost by the erroneous exercise of the power conferred, and its judgment is not void." And in section 97: "The reader must discriminate between a simple erroneous construction of a statute, the erroneous admission of testimony, the erroneous instruction of a jury or the erroneous ruling on a demurrer, from the erroneous construction of a constitutional right and erroneous assumption of jurisdiction; the former being simply errors of law, the latter being jurisdictional. In the one case, the acts of the court are simply voidable; in the other, the error goes to the power of the court itself."

So does Mr. Justice Elliott, in Turner, Sheriff, v. Conkey, supra. He says: "The statute invests justices of the peace with general authority to conduct preliminary examinations and to recognize accused persons to the court clothed with criminal jurisdiction. The authority is extended over a general subject, and in this instance the assumption of jurisdiction was legal, and there was no judgment beyond that jurisdiction; that is, there was no excess of jurisdiction. \* \* \* As the sufficiency of an affidavit for a change of venue, as well as the question as to the time of filing and the like, are questions of procedure, it seems clear that such questions must be decided by the tribunal which rightfully entered upon the hearing of the case, and that whether such questions are rightly or wrongly decided does not affect the question of jurisdiction. A wrong decision may constitute error, but it does not destroy jurisdiction. It is quite clear that the refusal of a judge of a superior court to call in another judge does not destroy jurisdiction, although it may be a palpable wrong entitling the injured party to relief in a direct attack. There is no valid reason why the same rule should not apply to an inferior tribunal invested with authority over the general class of cases of which the particular case is a member. Mischievous consequences must necessarily result from the doctrine that a refusal to grant a change of justices, or of venue, takes away all jurisdiction and makes the proceeding void." That is also the view taken by Chief Justice Beatty in Ex parte Wright, supra.

When a court of competent jurisdiction has legally acquired jurisdiction of subject-matter and of the parties, we never did take kindly to the proposition that its jurisdiction may be ousted by a flexible conscience of a suitor or retained by his wish. The justice here confessedly had jurisdiction of subject-matter—of the offense charged—and of the parties. After he acquired such juris-

diction, he was asked to transfer the case. He ought to have transferred it. He refused. In so ruling, he either misconceived or disregarded the statute under which the change was asked. Still, when a justice has legally acquired jurisdiction of subject-matter and of the parties, his jurisdiction, nevertheless, is not affected every time he thereafter misconstrues, misconceives, or misapplies a statute not involving subject-matter, jurisdiction, or parties, but mere procedure. The profession frequently has seen most ludicrous constructions and applications of statutes by justices in reaching conclusions in a case, and in some instances even a manifest disregard of law or evidence or both. Still the justice was within his jurisdiction. When a justice so acts, what is the remedy? Appeal. What, under the statute, is the scope of the appeal? A trial de novo. Comp. Laws 1907, §§ 5165, 5167. And, since the justice here had jurisdiction of subject-matter and of the parties, jurisdiction to render the judgment which was rendered by him, the appeal conferred jurisdiction on the district court, not merely to review and correct errors, but to try the case de novo. That here is the district court's duty. The ruling which it made involved jurisdiction. It refused to assume or take jurisdiction when clearly the appeal conferred jurisdiction upon it.

So let the writ issue directing the district court to vacate the order of dismissal, to reinstate the case, set it for trial, and try it de novo. No costs.

MCCARTY, C. J., and FRICK, J., concur.

UNION SAVINGS & INVESTMENT CO. v.  
DISTRICT COURT OF SALT LAKE  
COUNTY. (No. 2650.)

(Supreme Court of Utah. April 30, 1914.)

1. EVIDENCE (§ 83\*)—PRESUMPTION—OFFICIAL ACTION.

Where a complaint for the appointment of a receiver for a building and loan association did not allege that the officers of the association or the Secretary of State had failed to perform the duties imposed upon them by Comp. Laws 1907, §§ 392-402, regulating such associations, it must be presumed that the officers have performed their statutory duties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

2. CORPORATIONS (§ 609\*)—DISSOLUTION—POWER OF COURTS.

The power to wind up the affairs of a corporation and to dissolve it is not one which inheres in the courts, but exists only when conferred by statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2420-2423; Dec. Dig. § 609.\*]

3. EVIDENCE (§ 20\*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE—BUILDING AND LOAN ASSOCIATIONS.

The court can take judicial notice of the general purpose and method of doing business of building and loan associations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.\*]

4. BUILDING AND LOAN ASSOCIATIONS (§ 2\*)—REGULATIONS—POLICE POWER.

In view of the purpose of building and loan associations to enable a large number of persons who are without ready means to build homes which are paid for in small installments, and the benefit to the community derived from such associations, the state may, under its police power, exercise rights of supervision and inspection over such associations greater than over ordinary business associations.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 2; Dec. Dig. § 2.\*]

5. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)—MORTGAGES—PAYMENT—DISSOLUTION OF ASSOCIATION.

Whenever a building and loan association is declared insolvent, its right to collect the installments payable by its members ceases, and the mortgages of borrowing members at once become due and payable, and may be foreclosed.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

6. BUILDING AND LOAN ASSOCIATIONS (§ 45\*)—DISSOLUTION—STATUTORY REMEDIES.

The remedy given by Comp. Laws 1907, § 400, which provides that when a domestic building and loan association is, in the opinion of the Secretary of State, conducting its affairs illegally, or is unsafe, he shall notify the directors, and if the objections be not immediately remedied, shall advise the Attorney General, who shall take the necessary steps to wind up its affairs, is exclusive, and the courts cannot appoint a receiver to wind up the affairs of the association at the request of one or more of the shareholders.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 110; Dec. Dig. § 45.\*]

7. CONSTITUTIONAL LAW (§ 328\*)—OPEN COURTS—DISSOLUTION OF BUILDING AND LOAN ASSOCIATION.

Const. art. 1, § 11, requiring the courts to be open to all alike, does not prevent the state from reserving to itself the sole right to bring actions for the dissolution of building and loan associations, since that section is a limitation, not a grant of power, prohibiting any restrictions upon the common-law right of access to the court, but not enlarging that right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 950-963; Dec. Dig. § 328.\*]

8. BUILDING AND LOAN ASSOCIATIONS (§ 45\*)—DISSOLUTION—RIGHT OF ACTION.

The right to dissolve a corporation and wind up its affairs for any cause against its consent belongs to the sovereign state alone, and, in the absence of an express statute to that effect, the courts have no power to dissolve such corporation at the instance of an individual suitor.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 66, 89-91; Dec. Dig. § 45.\*]

9. BUILDING AND LOAN ASSOCIATIONS (§ 45\*)—ACTIONS—DISSOLUTION.

An action by a shareholder to secure the appointment of a receiver to wind up the business of a building and loan association, while not technically an action to dissolve the association, has practically that effect, and cannot be entertained by the courts.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 66, 89-91; Dec. Dig. § 45.\*]

**10. BUILDING AND LOAN ASSOCIATIONS (§ 45\*)**  
**—DISSOLUTION—FAILURE OF STATE OFFICER TO ACT.**

The danger that a shareholder in a building and loan association may suffer irreparable injury through the failure of the Attorney General to wind up the affairs of the association, as required by Comp. Laws 1907, § 400, does not authorize an action for that purpose by the shareholder, since it is presumed that every officer will do his duty, and if the duty is clear the Attorney General may be required by the courts to perform it.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 66, 89-91; Dec. Dig. § 45.\*]

**11. BUILDING AND LOAN ASSOCIATIONS (§ 6\*)**  
**—ACTIONS BY SHAREHOLDERS.**

An individual shareholder in a building and loan association may maintain an action to prevent its officers from doing some forbidden act, or from continuing a course of mismanagement of its affairs, or to require the association to obey the statute, or for the purpose of obtaining a judgment against the association.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 7-9; Dec. Dig. § 6.\*]

**12. BUILDING AND LOAN ASSOCIATIONS (§ 45\*)**  
**— ACTIONS FOR DISSOLUTION — STATUTORY PROVISIONS—CONDITIONS PRECEDENT.**

Before an action for the dissolution of a building and loan association is brought under Comp. Laws 1907, § 400, the association should be given an opportunity to correct any abuses in its management, unless its affairs are such that, in the opinion of the Secretary of State or Attorney General, they cannot be corrected.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 66, 89-91; Dec. Dig. § 45.\*]

**13. BUILDING AND LOAN ASSOCIATIONS (§ 45\*)**  
**— ACTIONS FOR DISSOLUTION — STATUTORY PROVISIONS—DUTY OF ATTORNEY GENERAL.**

Under Comp. Laws 1907, § 400, providing that if the Secretary of State is of the opinion that a building and loan association is violating the law or is unsafe, he shall advise the Attorney General, who must bring an action to dissolve the association, if the Secretary of State refuses to perform his duty, it nevertheless is the duty of the Attorney General to bring the action, if it is made to appear to him by any shareholder that the association is not complying with the law.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 66, 89-91; Dec. Dig. § 45.\*]

Original proceedings in the Supreme Court by the Union Savings & Investment Company for prohibition against the District Court of Salt Lake County, Utah. Writ of prohibition issued.

N. V. Jones and B. J. Stewart, both of Salt Lake City, for plaintiff. C. S. Patterson and J. D. Skeen, both of Salt Lake City, for defendant.

FRICK, J. The plaintiff, an incorporated building and loan association of Utah, commenced this proceeding in this court against the district court of Salt Lake county to prohibit that court from passing upon an application for, and from appointing a receiver in a certain action commenced against, the plaintiff in said court.

This proceeding is based upon the following facts: One Albert C. Fisher, as a member or shareholder of the plaintiff, commenced an action in the district court aforesaid to recover the withdrawal value of his shares, stating specifically the value thereof. While said action was pending in said court a number of other shareholders of plaintiff intervened therein for the purpose of recovering from it the withdrawal value of their shares. After said shareholders had intervened Fisher dismissed his complaint, and he is no longer interested in the action. The interveners, in their complaints in intervention, in substance alleged that the affairs of the plaintiff have been grossly mismanaged; that it is about to wrongfully divert certain property and assets to another corporation to the detriment and prejudice of its shareholders, including the interveners, and that it has been guilty of gross extravagance in paying salaries, and is insolvent and unable to further conduct its business as a building and loan association. The interveners, therefore, prayed judgment for the withdrawal value of their shares, and in their complaints further prayed "that an immediate order be issued directing and requiring the defendant corporation [plaintiff] to appear \* \* \* to show cause \* \* \* why a receiver \* \* \* should not be appointed to take charge of the assets of the defendant corporation and to wind up its business, and that at such hearing the court do appoint some suitable and discreet person to take charge of all the assets of said corporation, to convert the same into money and under the direction of the court to distribute the same among those found to be lawfully entitled thereto, and to do all things usual, necessary, and proper to be done in matters of receivership." The plaintiff appeared in the action, and by demurrer challenged the sufficiency of the complaints in intervention, and, in view of our statute, also challenged the power of the district court to hear the application for the appointment of a receiver, or to appoint one. The district court overruled the demurrer, whereupon the plaintiff invoked the aid of this court upon an application duly made, wherein it asks us to prohibit the district court from appointing a receiver for the purposes prayed for by the interveners in their complaints.

All the parties in interest appeared in this court, and, in a most commendable spirit fully submitted the whole matter of whether, under the statute, the district court upon the application of a shareholder has the power to appoint a receiver for the purposes prayed for by the interveners. It was conceded at the hearing that those who are seeking for the receiver constitute about 4 or 5 per cent. of the entire number of shareholders or members of the plaintiff. The sole question which we are called on to determine in this proceeding is whether, under our statute, the district

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court at the instance of a shareholder may, over the objection of the plaintiff, and without its consent, appoint a receiver to take charge of its assets, convert them into cash, and distribute them among its shareholders and thus terminate and wind up its business affairs. The powers conferred and duties imposed on building and loan associations, domestic and foreign, are found in Comp. Laws 1907, §§ 392 to 402, inclusive. Under section 392 building and loan associations may be incorporated as are other corporations for profit, and, except as otherwise provided in the sections just referred to, are governed by the general statute relating to such incorporations. What we are now specifically concerned with are the provisions of the statute which specially relate to domestic building and loan associations. Section 397 provides that before doing any business in this state all foreign building and loan associations must make out and file with the Secretary of State a verified statement, containing the matters specified in the statute, and, if such statement is in all respects satisfactory to the Secretary of State, and is in compliance with the statute, he is required to issue a certificate authorizing such building and loan association to do business in this state. Section 398 provides that on or before the 1st day of March in each year every building and loan association, whether domestic or foreign, shall file with the Secretary of State the statement required in section 397, and shall cause a copy thereof to be published at least four times in some newspaper published and having a general circulation in this state. Such publication must be completed on or before the 1st day of May, and proof of publication must be filed with the Secretary of State.

Section 399 provides: "If any domestic building and loan association shall refuse to submit to examination by the bank examiner, the Secretary of State shall advise the Attorney General, who shall proceed to wind up its affairs; and if any foreign association refuse, the Secretary of State shall revoke its certificate of authority."

Section 400 reads as follows: "When, in the opinion of the Secretary of State, any such corporation is conducting its business illegally, or in violation of its articles of incorporation or by-laws, or is practicing deception upon its members \* \* \* or if he is satisfied that its affairs are in an unsafe condition, he shall notify its directors or managers, and if it shall not immediately amend its course or put its affairs upon a safe basis, he shall in the case of a domestic corporation advise the Attorney General thereof, who shall take the necessary steps to wind up its affairs, and in the case of a foreign corporation he shall revoke its certificate of authority."

Section 401 is not material here.

Section 402 makes a failure to comply with the provisions of sections 397, 398, and 399,

supra, a misdemeanor, and punishable as such.

[1, 2] There is no allegation in the complaints in intervention that the provisions of our statutes have not been fully complied with, and hence counsel for plaintiff insist that we must indulge the presumption that both the officers of plaintiff and the Secretary of State have performed the duties imposed by statute. Such, in the absence of any allegation to the contrary, is no doubt the law. It is contended by plaintiff's counsel that in view of the foregoing statutes the district court has no power to entertain an application made by a shareholder or member of the plaintiff, for the purpose of winding up the affairs of the association, without alleging that he has applied to the Secretary of State to have that officer notify and demand from the plaintiff that it comply with the requirements of the Secretary of State and with the provisions of section 400. It is further contended that in case the Secretary of State shall find that the conditions specified in section 400 exist, and the building and loan association shall fail to comply with that officer's request, it is his duty to forthwith advise the Attorney General of the state of that fact, and that it is then the duty of the Attorney General to commence an action to wind up the affairs of the plaintiff, and that the district court cannot appoint a receiver for the purposes aforesaid except upon the application of the Attorney General. Upon the other hand, counsel for the interveners contend that the remedy provided by the statute is not exclusive, and that any one or more of the shareholders, if they have sufficient cause therefor, may commence an action to appoint a receiver and wind up the affairs of the association and to distribute its assets among those to whom they should be legally distributed. It is settled law that the power to wind up the affairs of a corporation and to dissolve it is not one which inheres in the courts. It is therefore contended by plaintiff's counsel that where a statute prescribes how and by whom an action to wind up the affairs of a business corporation and to dissolve it shall be brought, such a statute is exclusive. We have no statute authorizing our courts to dissolve a corporation without its consent; that is, without the consent of its duly authorized officers, although we have a statute authorizing such to be done upon the application of the officers of the corporation. Comp. Laws 1907, §§ 3661 to 3667, inclusive. We also have a statute in case a corporation has been dissolved or is insolvent, or has forfeited its corporate rights, which authorizes the court to appoint a receiver for such defunct corporation. The only statute, therefore, that we have which in terms authorizes a court to dissolve a corporation without its consent, that is, to "wind up its affairs," is section 400, supra. There is therefore, much force to the contention of plaintiff's counsel that the

method provided by the statute, where one is provided, to dissolve a corporation is exclusive.

[3] There are, however, other cogent reasons why the provisions of our statutes relating to building and loan associations should be followed. While the particular methods followed by the plaintiff in its transactions with its members are not set forth, yet we may take judicial notice of the general purpose of such associations, and, in a general way at least, are charged with knowledge of their methods of conducting business. We, therefore, judicially know that such associations, as a general thing, have a large membership, that is, a large number of shareholders; that in becoming a shareholder the applicant usually is required to pay only a very small amount, and that by making a large number of monthly or weekly payments, as the case may be, the member, after a series of years, pays up his stock; that when his shares are thus fully paid up he can draw the par or actual value thereof, or he may borrow from the association in advance of such payments an amount equal, or nearly so, to the par value of his stock; that the money is usually borrowed for the purpose of building a home, which home, together with the borrower's stock, may be mortgaged and pledged as security for the payment of the loan, and that such loans are usually paid off in monthly or weekly payments as aforesaid; that provisions are also usually made for the withdrawal by members under certain conditions, and when this is the case a member may withdraw and receive the accrued value of his shares at the time of such withdrawal.

[4] The general scheme and purpose of such associations, therefore, is to permit persons without either ready or large means to obtain sufficient money to build homes and to pay for them in small payments at stated intervals of time. A building and loan association honestly, efficiently, and safely conducted may therefore be of great benefit to any community, and more particularly to one where there are a large number of wage-earners. The state, under its police power, may thus assert the right to exercise some rights of inspection and supervision over building and loan associations, as well as over banks, which it may not deem necessary with respect to corporations organized for profit generally. In view, therefore, that as a general thing there are a considerable number of persons who are without means, or, at least, without ready means, who become members of such associations, and that they do so for the purpose of building moderate and inexpensive homes, the state may well, for their benefit and protection, throw some safeguards around such associations, and require one or more state officers to perform some special duty or duties with regard to them. In this, like in a number of other states, therefore, there are statutes requiring such

associations to file with a certain state officer and publish periodical statements showing their financial condition; that certain officers may at any time examine into their financial affairs, and, if found in an unsatisfactory or unsafe condition, may require such associations to remedy any defects and to comply with the statutes, and upon failure to do so a particular officer named shall go into court and wind up their affairs and collect the assets for the use and benefit of those who may perhaps be financially or otherwise unable to protect their own interests, which individually may not be great.

[5] In this connection it should also be remembered that the moment one of those building and loan associations is declared insolvent, that moment its right to collect the monthly or weekly payments from its members ceases, and the mortgages of the borrowing members at once become due and payable and may be foreclosed. In such event the entire purpose of the association fails, and thus results in a dissolution of the existing contractual relations between the association and its members except for the purpose of liquidating its affairs. Upon these propositions, so far as we know, there is no diversity of opinion. See *Weir v. Granite, etc.*, Ass'n, 56 N. J. Eq. 234, 38 Atl. 643; *Curtis v. Granite, etc.*, Ass'n, 69 Conn. 6, 36 Atl. 1023, 61 Am. St. Rep. 17; *Strauss v. Carolina, etc.*, Ass'n, 117 N. C. 308, 23 S. E. 450, 30 L. R. A. 693, 53 Am. St. Rep. 535; and *Endlich on B. & L. Ass'ns*, § 523. A number of cases are cited in the foregoing cases and by Mr. Endlich, to which we need not specially refer. To declare a building and loan association insolvent, therefore, usually results in requiring a large number of borrowing members who may have paid but a small part of their loans to forthwith pay the full amount of their mortgages. Such being the unavoidable result, the state may well make some special effort for the purpose of inducing building and loan associations to conduct their business prudently, honestly, and safely; that in case such is not done some official with authority to investigate their affairs may detect any wrongdoing, and may thus require speedy action on the part of the association to correct such wrongs, and again place its business affairs upon a safe basis; that if this cannot be done, then that such officers go into the proper court and wind up the affairs of the corporation and distribute its assets among its members and other creditors, if it has any, and finally to prevent needless and expensive litigation on the part of perhaps only one or a small number of dissatisfied nonborrowing shareholders to the detriment of a much larger number of borrowing members whose interests should not be jeopardized by unnecessary litigation. It requires no argument to demonstrate that such protection on the part of the state must result in adding both confidence in and stability to such associations. In one sense,



therefore, a large portion of the public may be both interested and benefited either directly or indirectly by the protection that the state affords.

[6] While the cases upon the proposition of whether the right to bring an action for the purpose of winding up the affairs of the association under a statute like ours is exclusively vested in the Attorney General are not numerous, yet there are at least two that are squarely in point, and in which it is held that for the reasons we have given, and perhaps others, the right to bring an action for the purpose aforesaid, in the first instance at least, is exclusively vested in the official named in the statute. See *Ulmer v. Loan & Bldg. Ass'n*, 93 Me. 302, 45 Atl. 32; *Huntington, etc., Ass'n, v. Fulk*, 158 Ind. 113, 63 N. E. 123. The doctrine is also recognized, under a somewhat different statute in *Falls v. Building & Loan Ass'n*, 105 Tenn. 18, 58 S. W. 325. The same is true in Illinois. The precise question was, however, not passed on by the court of that state. See *Broadwell v. Homestead Ass'n*, 161 Ill. 327, 43 N. E. 1067, and *Illinois, etc., Ass'n, v. People*, 173 Ill. 638, 50 N. E. 1007. In all of the foregoing cases, except those from Maine and Indiana, it is in effect held that the association may waive the right and may consent to have a receiver appointed in an action commenced by a shareholder. That question was neither presented nor considered in either the Maine or Indiana cases. Counsel for the interveners frankly conceded at the hearing that they were unable to find any cases in which the question was squarely presented, and in which the ruling in the Maine and Indiana cases were disapproved, nor have we been unable to find any. There are some cases cited by counsel for the interveners, however, where such actions were brought by a shareholder, or a number of them, but the question now under consideration was neither presented nor decided in those cases. Indeed, in *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016, which is one of the cases cited, the Justices of the New York Court of Appeals were divided, and for that reason the question was left undecided. What authority there is upon the point raised by plaintiff's demurrer is therefore against the contention of the interveners.

[7] But it is contended that under article 1, § 11, of our Constitution the courts must always be open to all alike. It is now too well settled to require further elucidation that state Constitutions are not intended as grants but merely as limitations of powers. What is said, therefore, in the section just referred to about courts having to be open to all is merely a reiteration of the pre-existing common-law right with a limitation preventing the Legislature from in any way impairing or curtailing that right. It was not intended, by adopting that and similar sections usually found in Constitutions, to change the law with respect to certain rights which are

vested in the state, which alone can exercise sovereign powers. For instance, an individual may not sustain an action and assail the right of a corporation, which is a creature of the state, to continue its business, although such corporation may transcend its corporate powers or rights. Such matters are still left in the hands of the sovereign state to be dealt with as may seem best to it, and the state may not be interfered with by any dissatisfied stockholder except to arrest or prevent a wrong done or contemplated by the corporation in the courts.

[8] The right to dissolve a corporation and wind up its affairs for any cause against its consent belongs to the sovereign state alone, and in the absence of an express statute to that effect the courts have no power to bring about that result at the instance of an individual suitor.

[9] To dissolve the plaintiff corporation is precisely what the interveners are attempting to do in the action pending in the district court. It is true that in attempting to meet that contention counsel for the interveners insisted at the hearing that to appoint a receiver to wind up the affairs of the corporation does not necessarily dissolve it. Let it be conceded that technically this contention may ordinarily be true, yet where a corporation like a building and loan association has no capital except such as is derived from its members, and where all of its affairs must necessarily cease and its membership necessarily be released from all of their obligations to the association, and thus logically must also cease to continue as members except for the purposes of liquidation, the result of appointing a receiver for the purposes prayed for by the interveners is manifestly nothing short of a complete dissolution of the corporation. It is useless, therefore, to seek to disguise the fact by the mere use of words. It may be conceded that if the facts stated in the complaints of the interveners are found to be true, then there can be but one ultimate result, and that is the winding up of the affairs of the plaintiff association, and the distribution of its assets among its members and other creditors, if there are any such. But the question we must decide cannot be controlled, not even influenced, by what the ultimate result respecting plaintiff's continuing in business must or may be. The question is a much broader one. The question we must decide is whether every dissatisfied shareholder may go into a court at any time and ask that court to wind up the affairs of a building and loan association so that he may at once, or as soon as the business affairs of the association can be wound up, obtain the withdrawal value of his shares, and in so doing arrest and frustrate the entire scheme and purpose of the association and, as we have seen, dissolve all of the existing contractual relations between the association and its members except for the purpose of liquidation, without giving the associ-

ation the opportunity contemplated by the statute to correct any evils or wrongs that may exist in managing its affairs. If this may be done, then any shareholder may jeopardize the welfare of the association and its members at any time and without adequate cause. We cannot escape the responsibility of determining the meaning of the statute, and whether it is intended to protect the rights of all such associations and their members rather than, without complying with the statute, to vindicate the alleged rights of a few members of but one association.

[10] Nor is the contention sound that the shareholder may suffer irreparable injury because the Attorney General, or some other state officer, may refuse to act, or may act tardily. We must presume that every officer will do his duty. Moreover, where the duty is clear and the right is equally so, the courts can, without any delay whatever, require any officer to act. Again, there is nothing in the statute which prevents any shareholder, or any number of them, from joining hands with the Attorney General and assisting him in any way, even in the conduct of an action once pending. The only purpose of the statute is to prevent hasty and ill-considered action in the courts by a party without giving the association any opportunity whatever to first correct any wrongs that may exist in its management or business affairs, and which, if corrected, may be for the best interests of a great majority of the shareholders without injury or prejudice to any. This is clearly pointed out in the Illinois cases to which we have referred. Further, we think any shareholder may at any time call the attention of the Secretary of State to any wrongs that are being perpetrated, or are about to be, or are in contemplation by any building and loan association which do or may affect his rights or interests.

[11] We are also of the opinion, and so hold, that where the purpose of the action is not to wind up the affairs, but is merely to prevent it from doing some forbidden act, or from continuing the mismanagement of its affairs, or to require it to follow the provisions of the statute and cognate matters, or for the purpose of obtaining a judgment against the association, and, in short, any offensive or prohibitive action which is not intended to destroy the existence of the association, such action may be brought by any shareholder at any time in any court of competent jurisdiction. Where, however, as here, the manifest purpose, and the only possible result, of the action is to wind up all of the business affairs of the association, and the effect is necessarily to dissolve its corporate existence, the action should be commenced by the Attorney General as pointed out in the statute.

[12] We further hold that before such action is brought the association should be given an opportunity to place its business af-

fairs upon a safe basis, to correct any abuses in its management, and in all things comply with the law, unless, in the opinion of the Secretary of State and the Attorney General, the business affairs are such that they cannot be remedied or corrected. If such should be the case, it would be useless to require from the association, and to give it time to do, that which was manifestly impossible. The facts in that regard, however, could easily be alleged by the Attorney General, and the court could permit the action to proceed, although no time or opportunity had been given the association to correct the evils that it is clear it could not correct.

[13] We are also of the opinion that in case the Secretary of State fails or refuses to comply with the provisions of the statute it nevertheless is the duty of the Attorney General to bring an action as herein stated when it is made to appear to him by any shareholder that any building and loan association has failed or refused, and continues to fail or refuse, to comply with any of the provisions of the statutes to which reference has been made herein. We think such a course is contemplated by the statute for the reason that any other course would permit the Secretary of State to prevent an action against any such association.

We are of the opinion that a peremptory writ as prayed for by the plaintiff should issue. Such is the order.

MCCARTY, C. J., and STRAUP, J., concur.

In re GRANT. (No. 2621.)

(Supreme Court of Utah. April 24, 1914.)

1. INTOXICATING LIQUORS (§ 108\*)—LICENSE —REVOCATION—APPEAL—STAY.

A judgment revoking a liquor license being self-executing, an appeal therefrom does not suspend it, or stay its force, at least where a supersedeas bond is not given under Comp. Laws 1907, § 3314.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 116-118; Dec. Dig. § 106.\*]

2. INTOXICATING LIQUORS (§ 108\*)—LICENSES —REVOCATION—APPEAL.

The power of the district court under Laws 1911, c. 106, § 10, to revoke liquor licenses in cities of the first and second classes, as is its power under section 3 to order their issuance therein, is administrative, so that, in the absence of provision in the statute therefor, appeal does not lie from its order, ruling, or judgment revoking a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 116-118; Dec. Dig. § 106.\*]

Original contempt proceedings against B. F. Grant. Dismissed.

On March 6, 1914, a citation was issued by this court to B. F. Grant, chief of police of Salt Lake City, to show cause, if any he has, why he should not be punished for contempt for an alleged interference by him with a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

certain cause pending in this court on appeal from the district court of Salt Lake county, entitled "In the Matter of Revocation of Retail Liquor Dealer's License Issued to E. W. Allen for Use at Basement of 180 South Main Street, Salt Lake City, Utah." The affidavit upon which the citation was issued, among other things, recites: "That on the 1st day of April, 1913, by order of the district court \* \* \* a retail liquor license was issued to affiant (E. W. Allen); that on the 15th day of January, 1914, Hon. B. F. Grant, chief of police of Salt Lake City, Utah, on behalf of himself, petitioned to the court for a revocation of said license, a copy of which petition is hereto attached and made a part of this affidavit. \* \* \* On the 28th day of January, 1914, affiant duly filed his answer to said petition, a copy of which answer is hereto attached and made a part of this affidavit. That on the — day of February, 1914, the issues were duly tried by the said district court, and on the 17th day of February, 1914, the court made its findings of fact and conclusions of law and judgment, a copy of which is hereto attached and made a part of this affidavit." It is further recited that after an appeal to this court was taken and perfected, and an appeal bond filed with the clerk as provided by law, the licensee "on Saturday, February 28, 1914, between the hours of 7 o'clock a. m. and 12 o'clock p. m., proceeded to sell and did sell intoxicating liquors under said license aforesaid at the place designated; \* \* \* that thereupon \* \* \* B. F. Grant, chief of police of Salt Lake City, Utah, in violation of the rights of affiant and in violation of the stay bond filed as aforesaid, \* \* \* interfered and arrested and caused to be imprisoned the employés of affiant [naming them] for alleged violations of the liquor law, by reason of the revocation of said liquor license, and upon the ground that affiant's license to sell liquor at retail had been revoked as aforesaid."

The findings of fact made by the court in the proceedings had on this petition for revocation of the liquor license mentioned and the answer filed thereto are within and responsive to the issues, and, so far as material here, are as follows: That a retail liquor license was duly issued to E. W. Allen "for use at basement of 180 South Main street. \* \* \* That a retail liquor business has been conducted, engaged in, and carried on by said E. W. Allen at the premises designated \* \* \* under the name of 'Portola Café,' from and since April 1, 1913, to and including the 15th day of January, 1914. \* \* \* That said licensee, E. W. Allen, on each and every day, except Sundays, from September 1, 1913, up to January 15, 1914, had willfully failed and neglected to close said licensed premises at the hour of 12 o'clock, midnight, and he has willfully and unlawfully permitted said place of business

to remain open to the public, and allowed and permitted patrons of said place to remain in and upon said premises, after the hour of 12 o'clock, midnight, of each and every day aforesaid, and to be and remain in and upon said premises between the hours of 12 o'clock midnight, and 6 o'clock a. m. of said days, contrary to the provisions of chapter 106, Laws of Utah 1911. \* \* \* That said licensee, E. W. Allen, on each and every day (aforesaid) except Sunday, \* \* \* has willfully and unlawfully allowed and permitted certain forms of amusement, commonly known as cabaret show, including singing, dancing, piano and violin playing, in and upon said premises licensed for the sale of intoxicating liquors at retail, contrary," etc. "That said licensee \* \* \* from September 1, 1913, to January 15, 1914, has willfully and unlawfully permitted and allowed a certain female to act as cashier of said retail liquor business conducted upon the premises aforesaid, and has allowed said female to remain in and upon said premises at all times when the same was open to the public, and to be and remain in the room where intoxicating liquors are sold at retail and served to patrons of said place, contrary to chapter 106, Laws of Utah 1911. That said licensee, E. W. Allen, from September 1, 1913, to January 15, 1914, had willfully and unlawfully permitted and allowed said licensed premises wherein said retail liquor business was carried on \* \* \* to be frequented and resorted to by lewd and disorderly women and intoxicated persons, and has \* \* \* permitted and allowed said premises to be and become a resort for lewd women, prostitutes, and intoxicated persons, contrary," etc. "That the obtaining of a restaurant license as aforesaid, and in the operating of said licensed premises under the name of 'Portola Café,' is a sham and subterfuge carried on and practiced by said licensee for the purpose of evading the provisions of the law wherein women are prohibited from entering premises licensed for the sale of intoxicating liquors at retail, prohibiting the use of tables, chairs, and benches in such licensed premises, prohibiting music, entertainment, or any form of amusement, or the dispensing of free lunch, or lunch for which money is paid, in the room where a retail liquor business is carried on."

As a conclusion of law the court held that the license of E. W. Allen "should be revoked and canceled." A decree was entered, which, among other things, recites "that the retail liquor dealer's license heretofore issued \* \* \* to E. W. Allen for use at basement of 180 South Main street, etc., for a period of one year commencing April 1, 1913, \* \* \* is hereby canceled and revoked, which said order of revocation shall be effective at 12 o'clock, midnight, Saturday, February 7, A. D. 1914."

Section 25 of chapter 106, Laws Utah 1911, among other things, provides that in cities of the first and second class "It shall be lawful, unless otherwise provided by ordinance in such cities, for such places of business (retail liquor business) to remain open between the hours of 6 o'clock a. m. and 12 o'clock, midnight, and it shall be unlawful for any such licensee to sell, barter, give away or otherwise furnish intoxicating liquors within the hours during which the place of business of such licensee is herein required to be closed."

Section 26 provides that "it shall be unlawful for any licensed retail [liquor] dealer by himself, agent or servant, to permit any one to remain in the saloon after the hour of closing, as provided in the preceding section, but at the time when such saloon should be closed, he shall require all persons to at once vacate the premises and see that the doors are securely closed and locked."

Section 28 provides, in part, as follows: "The licensed premises shall be conducted in a quiet, orderly manner; there shall be no gambling, \* \* \* nor any music, phonograph, or other form of amusement or entertainment, or free lunch, nor lunch for which money is paid, in the room where said business is carried on; \* \* \* no female shall be employed in the place; no woman, minor, drunkard or intoxicated person shall be allowed in the room; there shall be no chairs, benches, nor any other furniture in the room, except behind the bar, and only such behind the bar as is necessary for the attendants."

Section 29, among other things, provides: "It shall be unlawful for any dealer in intoxicating liquors \* \* \* to permit the room wherein he is licensed to sell liquor to be in any way connected with any room wherein or connected with which any prostitution, \* \* \* or wherein any prostitutes are permitted to visit for any purpose, or wherein any women are permitted for any unlawful purpose."

J. J. Whitaker, of Salt Lake City, for plaintiff. H. J. Dininny, Aaron Meyers, and W. H. Folland, all of Salt Lake City, for defendant.

MCCARTY, C. J. (after stating the facts as above). [1] Counsel for petitioner, E. W. Allen, concede at the threshold of their discussion of the case that "it was for the Legislature to say that in small communities the city council have the right to grant and revoke license without appeal," and that "it was especially their right that where in great communities, when large establishments are built up under a liquor license, that district courts grant, and upon a trial and judgment, have the power to revoke." The important question, therefore, is: Does the appeal suspend, or, more correctly speak-

ing, temporarily vacate, the judgment of the district court, and operate as a bar to the prosecution of the licensee, his agents and employes, for the selling of liquors during the pendency of the appeal? The great weight of authority seems to be that where, as in the case at bar, the judgment is self-executing, and no act of a ministerial officer is necessary to make it effective, an appeal does not suspend or otherwise stay the force and effect of the judgment.

In 20 Ency. Pl. & Pr. 1244, it is said: "Under the statutes regulating the filing of supersedeas bonds, it is held that as a supersedeas has the effect of merely staying proceedings, without destroying the force and effect of the judgment, and leaves the proceedings in the condition in which it finds them, and as a self-executing judgment requires no proceeding for its enforcement, there is nothing upon which a stay bond can operate in the case of such a judgment."

In Elliott, App. Pro. § 392, it is said: "Where a judgment or decree executes itself, that is, where no act of a ministerial officer is necessary to put it into effect, the supersedeas does not alter the state of things created by the judgment from which the appeal is prosecuted. This doctrine is strikingly illustrated by the case wherein it was held that a judgment suspending an attorney from practice executes itself, except as to costs, and the granting of a supersedeas only suspends the right to enforce collection of costs, and does not allow the attorney to practice pending the appeal." Citing *Walls v. Palmer*, 64 Ind. 493.

The cited case involved the question of whether an attorney, who had been disbarred and his license revoked by the circuit court, was entitled to practice his profession during the time the cause was pending on appeal in the Supreme Court. In the course of the opinion the court said: "But it is urged that the appeal and supersedeas, \* \* \* by staying the judgment of suspension, has the effect of restoring the petitioner to his rights as an attorney and counselor during the pendency of the appeal. \* \* \* To give them that effect, and grant the prayer of the petitioner, would be to reverse the judgment of the suspension by a writ of mandate before the appeal is judicially decided. The effect of the appeal and supersedeas is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner. It does not reverse, suspend, or supersede the force of the judgment. That remains in all respects the same. The judgment itself requires no further execution than its own terms; it executes itself, except as to the collection of costs, which is stayed by the appeal and supersedeas."

In *Black on Intoxicating Liquors*, § 196, the author says: "The revocation of a license, under due proceedings, absolutely ex-

tinguishes the license; and certiorari taken to such action is no bar to a prosecution for sales made either during the pendency of the writ, or of an appeal from a judgment affirming the action of the board." 1 Woollen & Thornton, Intox. Liq. § 456.

Padgett v. State, 98 Ind. 396, is a case in which the board of commissioners denied Padgett a license to sell liquor. He prosecuted an appeal to the district court, and succeeded in obtaining judgment that he was a fit person to receive a license. The remonstrators appealed from the judgment of the circuit court, and filed the proper appeal bond. It was there contended, as in the case at bar, that the judgment was ineffective and inoperative during the pendency of the appeal. The court said: "The statute \* \* \* provides that, 'when an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings,' and if the act of taking out a license is a proceeding on the judgment, then the appeal stayed the appellant from obtaining the license. We do not regard the issuing of the license as a proceeding on the judgment within the meaning of the statute. One reason for this conclusion is that the judgment is self-executing. The entry of the judgment entitles the applicant to his license without any other proceedings on the judgment. \* \* \* There is, indeed, no provision for enforcing obedience to the judgment by process, and none is needed, for the judgment enforces itself. \* \* \* There is no necessity for any process; there is no property to be seized by it; no wrongdoer is to be ejected from an office, or from property, or anything of that kind; all that can possibly be accomplished is effected by the judgment itself."

This question was involved in the case of Neuman v. State, 76 Wis. 112, 45 N. W. 80. In the course of the opinion the court says: "The more serious question is whether the pendency of the writ of certiorari, and the subsequent appeal from the judgment thereon to this court, operated as a bar to the prosecution of Neuman for selling during the time which would have been justified by the license, had it not been so revoked." The court, after discussing the question, says: "It follows, from what has been said, that neither the pendency of the certiorari, nor the appeal from the judgment affirming the order of the village board, and quashing the writ, operated as a bar to the prosecution for the several offenses of which Neuman was convicted in this action."

The authorities seem to quite uniformly hold that in the granting and refusing of licenses to sell liquors much is left to the discretion of the court or board charged with that duty, and in most jurisdictions the law does not require the same strictness as to proof and procedure that obtains in actions or special proceedings generally. The

object being the revocation of a privilege rather than punishment, the authority or tribunal vested with this power "are not required to take the formal proceedings essential to form a basis of a judicial decision affecting liberty, or property," but the proceedings may be summary, Black, Intox. Liq. § 194.

Section 10, c. 106, Laws Utah 1911, among other things, provides: "The district courts of the several counties in which cities of the first and second class may be situated, city councils of cities of the third class, board of trustees or board of county commissioners, for violation of any of the provisions of this act or any ordinance, or *for any other good cause*, \* \* \* may revoke a license granted within the city, town or county, as the case may be. For the purpose of carrying out the provisions of this section, the district court, city council, board of trustees or board of county commissioners, as the case may be, shall have power to issue or cause to be issued subpoenas and to compel the attendance of witness and to administer oaths. \* \* \* The district courts of the several counties wherein are situated cities of the first and second class shall make and enforce rules of procedure and practice upon application for license, hearing of protests upon applications, and the revocation of licenses so that *such matters may be speedily tried and determined in accordance with justice and right.*" (Italics ours.)

It will thus be seen that the Legislature, by this enactment, intended to give and has given the legally constituted authorities whose duty it is to grant, and in proper cases revoke, licenses a broad discretion in such matters. A copy of the findings of fact made by the court, and which form the basis of the judgment revoking the license in question, is attached to and made a part of the affidavit upon which the citation under consideration was issued. Excerpts from the findings of fact are set forth in the foregoing statement of the case. These findings, which are presumed to be supported by the evidence, furnish a good illustration of the wholesomeness of the rule giving the court, board, or city or town authorities a broad discretion in matters pertaining to the liquor traffic. The record presented by affiant E. W. Allen in the affidavit upon which the citation herein was issued shows that he, during the time he was engaged in the sale of intoxicating liquors under his license, persistently and continuously violated the statute regulating and restricting the sale of intoxicating liquors. By thus referring to the portions of the record of the main case which are incorporated in and made a part of the affidavit under consideration, we do not wish to be understood as expressing an opinion respecting the merits of the cause or any question presented by the appeal. Our only purpose in inviting attention to these

matters is that they furnish the strongest possible argument that can be made in support of the doctrine holding that an appeal from a judgment revoking a liquor license does not destroy the force and effect of the judgment pending the appeal.

As stated by counsel for B. F. Grant, chief of police, to whom the citation in question was issued, in their brief filed herein: "If counsel's theory is correct, that the appeal operates in such a manner as to permit the licensee, Allen, to continue the sale of liquors under his license, then it must be upon the theory that such license is reinstated and has its full force and effect. It takes no argument to show that this in effect nullifies and makes of no effect the judgment of court revoking the license. At least this would be true during the time when said case is on appeal." In other words, the appeal would have the effect of temporarily vacating the judgment. As we have pointed out, the great weight of authority is to the effect that a judgment in this class of cases is self-executing. Therefore, when the district court rendered the judgment under consideration, affiant's license to sell liquor was canceled and extinguished, and the taking of an appeal to this court could not, and did not, revive or reinstate the license. Assuming, for the sake of argument, but not conceding, that the giving of an undertaking (supersedeas bond) as required by Comp. Laws 1907, § 3314, would suspend the force and effect of the judgment, and in effect reinstate the license revoked and canceled by the judgment, and that affiant would thereby be entitled to sell liquor under and in pursuance of the license during the pendency of the appeal, no such bond or undertaking was given in the court below, and affiant has not applied to this court for permission to file such undertaking. Therefore the judgment, under affiant's theory of the law, has not been and is not suspended.

For the reasons stated, the order citing B. F. Grant, chief of police, to show cause why he should not be punished for contempt, is set aside, and the proceeding dismissed.

STRAUP, J. [2] I concur in the rulings of the Chief Justice; but I am further of the opinion that the order, or so-called judgment, of revocation is not appealable. This for the reason that the power conferred on district courts by section 3, c. 106, Laws 1911, to direct or order city councils of cities of the first and second class to issue liquor licenses, and by section 10 to revoke such licenses, is special, summary, administrative, and inseparable from the sovereignty of the state—a power conferred on the district court as a mere agent of the state, exercising police powers of the state. That I think evident, not only from the nature of the power conferred, but also from the language of the act conferring and delegating the power. The statute itself does not provide

for an appeal from an order or ruling granting or refusing a license, or revoking or refusing to revoke it.

The claim made is that such a ruling or order is "a judgment," a final judgment; and since the Constitution grants the right of an appeal from all final judgments of the district court, an appeal lies from this order or so-called judgment of revocation. I do not think the claim well founded. Liquor licenses or permits are neither contracts nor rights of property. They are mere permits, issued or granted in the exercise of the police power of the state, to do what otherwise would be unlawful. The same tribunal authorized to direct or grant the issuance of a license is also authorized to revoke it. There is no difference as to the nature of the power exercised in granting a license and in revoking it. In both the court acts in an administrative capacity and as the mere agent of the state. The state itself may grant or withhold liquor licenses or permits, or revoke them, as it may think proper. It may likewise delegate that power to others. As to cities of the first and second class the power has been delegated to district courts; as to cities of the third class, towns, and counties, to boards of trustees, commissioners, and city councils. Now, I see no difference as to the nature and character of the power, whether exercised by a district court, or a board of trustees, or commissioners, or a city council. If an appeal lies from an order or ruling of the district court granting or refusing a license, or revoking or refusing to revoke it, then it would seem an appeal would also lie from similar action by a board of trustees or commissioners, or a city council. To say that an appeal lies when the power is exercised by a district court, but not when exercised by a board or city council, is to look, not to the substance of the power conferred and exercised, but to the mere instrumentality to which it is delegated and through which it is exercised. Of course, the Legislature could have provided for an appeal, as is the case in some jurisdictions; but that was not done. I therefore think the order unappealable, and that the case is not legally pending in this court; and hence the party complained of has committed no offense in this court. We are thus, on a proceeding by appeal, without jurisdiction to inquire into or adjudge the alleged matters presented by the petitioner.

If, however, I am wrong in this, and if the judgment is appealable and the action legally pending before us, then am I of the opinion, for the reasons given by the Chief Justice, that the order or judgment of the court below is self-executing, and that the execution of it was not stayed by the appeal.

FRICK, J. I concur with the conclusions of the Chief Justice. I am, however, further of the opinion that the order revoking

the license is not appealable, and with regard to that question I also fully concur with the views expressed by Justice STRAUP in his concurring opinion.

**WILLOBURN RANCH CO. v. YEGEN et al.**  
(No. 3370.)

(Supreme Court of Montana. April 11, 1914.)

**1. PLEADING (§ 205\*)—RECONVEYANCE OF TRUST PROPERTY TO SETTLOR—GENERAL DEMURRER.**

In an action by the assignee of the settlor of a trust to compel a reconveyance of the trust property on the ground that the purposes of the trust had been fully accomplished, petition held to allege facts from which it was fairly inferable that the trustee had been fully reimbursed for all advancements he had made on the account of the settlor, and hence, though perhaps vulnerable to a special demurrer because indefinite and ambiguous, was sufficient as against a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 496, 498, 498-510; Dec. Dig. § 205.\*]

**2. PLEADING (§ 36\*)—PLEA OR ANSWER—INCONSISTENT DEFENSES.**

Where, in an action to compel a reconveyance of certain trust property on the ground that the purposes of the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid, but set up title to the property by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because not in writing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

**3. CORPORATIONS (§ 518\*)—GENERAL DENIAL—ALLEGATION NOT PUT IN ISSUE.**

A general denial of all the allegations of the complaint not specifically admitted or denied does not put in issue the corporate capacity of plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2028, 2086, 2087; Dec. Dig. § 518.\*]

**4. TRUSTS (§ 371\*)—VARIANCE BETWEEN ALLEGATIONS AND PROOF.**

In an action against a trustee to compel a reconveyance of certain trust property, where the complaint alleged that plaintiff was the owner of the property, etc., and made the conveyance to the trustee, but the proof showed that the property was in the name of plaintiff's brother, etc., who conveyed to the trustee, the variances were immaterial; there being further proof that plaintiff was the real and beneficial owner.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588-599; Dec. Dig. § 371.\*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by the Willoburn Ranch Company against Christian Yegen and Peter Yegen. From a judgment for plaintiff, defendants appeal. Affirmed.

F. B. Reynolds, of Billings, for appellants.  
M. J. Lamb, of Billings, for respondent.

BRANTLY, C. J. This cause was heretofore before this court on appeals from a judgment by default against the defendant

Peter Yegen, and from an order denying a motion to set aside the default. Willoburn Ranch Co. v. Yegen, 45 Mont. 254, 122 Pac. 915. The judgment and order were reversed on the ground that the complaint was insufficient, in that it did not set forth that the purpose for which the trust was created had been accomplished. The plaintiff thereupon filed an amended complaint to supply the omission suggested, and also to make more definite and specific the allegations showing the amount of money received and paid out by defendant Christian Yegen from rents and profits of the property in his hands, or from the proceeds of sales thereof, and what amounts had been advanced by him from his own funds.

The facts alleged in the amended complaint may be summarized as follows: On or about April 1, 1899, one G. W. Connick entered into a contract with E. G. Bailey, by the terms of which he agreed to purchase from Bailey a section of land in Yellowstone county, together with 90 shares of stock in the High Line Ditch Company, agreeing to pay therefor \$7,680, as follows: \$100 in cash upon the execution of the contract, and the balance in installments of \$1,000, payable on April 1st of each year from 1901 to 1906, inclusive, and \$1,580 on or before April 1, 1907, each of the installments to bear interest at the rate of 7 per cent. per annum. Bailey was required to deposit in escrow in the First National Bank of Billings a warranty deed conveying the land and stock to Connick when the purchase price should be fully paid. This Bailey did. The capital stock of the High Line Ditch Company was thereafter doubled, and the number of shares covered by the contract was thus increased to 192. On June 22, 1900, Connick subscribed for 128 shares of stock in the Big Ditch Company, agreeing to pay for it \$10 per share, in payments to be made as follows: \$256 in cash, and the balance in installments of \$256 each, payable on December 22d of each year thereafter, from 1901 to 1904, inclusive. Each of these installments was to bear interest at the rate of 8 per cent. per annum. At that time all of the stock of this company was in the possession of the First National Bank of Billings, and held by it as security for moneys advanced to the Big Ditch Company under an arrangement by which each subscriber was to receive the shares subscribed for, upon full payment of the subscription price. On December 26, 1902, Connick, not being able to meet his payments as they came due under his contract with Bailey, or the installments due upon his subscription for the stock, made an agreement with Christian Yegen by which he transferred to Yegen his interest under the Bailey contract and in the stock of the Big Ditch Company, Yegen undertaking to meet the installments of the purchase price and stock subscriptions from time to time as they fell due. Connick was by the

terms of this agreement to remain in possession of the land and cultivate it, but was to yield to Yegen the profits derived from it, to be used by the latter in reimbursing himself pro tanto for the funds advanced to discharge Connick's obligations. Upon such sums as were advanced by Yegen, he was to be allowed compound interest at the rate of 12 per cent. per annum until he had been fully repaid by Connick. This agreement covered also all the personal property on the land, including work stock, farming implements, etc. When Yegen had been fully repaid he was to convey to Connick all of the property remaining in his hands. When the agreement was made, Bailey substituted, in place of the deed theretofore deposited with the bank, another running to Yegen. On May 5, 1906, at the request of Connick, Yegen conveyed 320 acres of the land to Daniel Pratt and I. D. O'Donnell, together with 56 shares of stock in the Big Ditch Company, and 100 shares of stock in the High Line Ditch Company, for the sum of \$14,400. All of this sum was retained by Yegen, and was used by him to carry out the purposes of the trust. The result of this transaction was that the amounts due from Connick upon his contract with Bailey, and upon his subscription for the stock of the Big Ditch Company, with interest thereon, was fully paid off and discharged by Yegen. The Bailey deed was delivered to Yegen, and also certificates for 72 shares of stock in the Big Ditch Company. On October 30, 1907, at Connick's request Yegen transferred to Robert Connick and others 140 acres of the land, together with 20 shares of the stock in the Big Ditch Company, and 46 shares of the stock in the High Line Ditch Company. On December 1, 1907, Connick sold and transferred to the plaintiff his entire interest in the property held by Yegen, with all his rights of action, etc., including his interest in the remaining shares of stock in the Big Ditch Company. At the time this transaction took place the plaintiff demanded an accounting by Yegen of the amounts received and disbursed by him, but failed to secure it until on or about September 14, 1908, when a partial settlement was had. Plaintiff then paid to Yegen \$4,174.50. Thereupon Yegen conveyed to it all the residue of the property remaining in his hands, except the 20 shares of stock in the Big Ditch Company, which are the subject of this action. The total of the sums advanced by Yegen from 1903 to 1908, inclusive, amounted to \$14,025.08. For compound interest on the various items making up this sum he was, under the terms of his agreement with Connick, allowed \$5,043.87. It is alleged that on or about December 4, 1907, Yegen, without knowledge of G. W. Connick or the plaintiff, fraudulently assigned and delivered to his codefendant, Peter Yegen, the 20 shares of stock in the Big Ditch Company retained by him, without consideration; that Peter Yegen knew that

this stock was a part of the trust estate belonging to Connick, and knew that Christian Yegen had no authority to transfer the same; that neither plaintiff nor Connick knew of the transfer until some time in the month of June, 1911; and that though repeated demands have been made by plaintiff upon both defendants for the transfer to it of the stock, they have failed and refused to comply. It is further alleged that the stock has at all times been of the value of \$100 per share; that each share represents a statutory inch of water; that the defendants own land which can be irrigated by the water which the owner of the stock is entitled to use; that they have been using this water for the irrigation of their land since May 1, 1907; and that the reasonable value of the use of the stock so made by them has been and is \$200 per year. Plaintiff prays for a decree declaring the defendants trustees for its benefit of the 20 shares of stock, that they be required to transfer it to the plaintiff, and that they be adjudged to pay to the plaintiff, by way of damages for the use of the stock, the sum of \$200 per year from May 1, 1907.

The answer denies that the assignment and transfer was made by Connick to Yegen, as alleged in the complaint. It denies the allegations touching the subscription by Connick for the shares of stock in the Big Ditch Company, and the value of the use of it by defendants. It admits substantially all the other facts as alleged. It then alleges the following as special defenses: (1) That by the terms of the agreement by which Connick transferred to Christian Yegen his interest under the Bailey contract, he stipulated that he would repay to this defendant all sums of money advanced by the latter during the life of the agreement; that on or about October 30, 1907, being unable to meet his obligations in this behalf, Connick was in default; that in consideration of a waiver of this default by the defendant, it was agreed by Connick that this defendant should have the stock in question as and for his individual property, and that thereupon this defendant appropriated the stock to his own use and assigned it to his codefendant, Peter Yegen; (2) that on September 28, 1908, defendant Christian Yegen conveyed to the plaintiff all the property acquired by him by transfer from Connick which still remained in his hands, except the 20 shares of stock in question, and that the plaintiff accepted the conveyance, and thereupon released all claim to the stock, consenting that the same should be held by this defendant as his own. There was issue by reply.

Special issues were submitted to a jury, which returned findings thereon in favor of the plaintiff. The court adopted these findings and made others, sustaining all the allegations of the complaint. It found that by the payment by the plaintiff to Yegen of \$4,174.50 on September 14, 1908, full and com-



plete settlement and discharge was made of all claims due Yegen, including compound interest upon all sums advanced by him; that thereupon Yegen fully accounted to the plaintiff for all property acquired by him from Connick, except the 20 shares of stock; that Connick did not at any time agree that Yegen should retain the stock in consideration of an extension of time by Yegen to enable Connick to reimburse Yegen; and that the plaintiff did not, when it accepted the conveyance from Yegen, or at any other time, release its right to the stock, or agree that Yegen might retain it as his own. It found, also, that Peter Yegen took the transfer of the stock with knowledge that Christian Yegen held it in trust for Connick. The court made and entered a decree directing Peter Yegen to transfer the stock to the plaintiff, and adjudging that the defendants pay to the plaintiff \$200 for the use of it, with interest from the date of the decree, together with costs of the action. Defendants have appealed from the decree and an order denying their motion for a new trial.

[1] Counsel for defendants contend that the complaint does not allege facts sufficient to show that the purpose of the trust has been fully accomplished, and hence does not state a cause of action. It is apparent that Connick had never been vested with the legal title to any of the property, and that the transfer was made to Yegen to serve these purposes: (1) That he might discharge Connick's indebtedness as the installments fell due; (2) that he might have security for such sums as he agreed, and it became necessary for him, to advance to meet the installments, including compound interest at the stipulated rate, to compensate him for his services; and (3) that Connick should have the title conveyed to him when the other purposes had been fully accomplished. It is therefore clear, as was held on the former appeals, that Yegen could not be divested of the title until it was made to appear that he had been fully reimbursed for such advancements as he had made, together with interest at the stipulated rate. The obligations assumed by the parties being mutual, Connick could not demand a transfer to himself without having fully acquitted himself of his obligation to Yegen. The plaintiff, his assignee, stands upon no higher ground. While the complaint is not a model, in that it does not specifically allege that Yegen had been fully reimbursed for his advancements, it is fairly inferable from the facts alleged that this had been done when the action was brought; for upon summing up the amounts advanced by him as alleged, with interest, and deducting therefrom the sums received by him from the sale made to Pratt and O'Donnell, and the amount paid him by the plaintiff at the time of the transfer to it in September, 1908, it is apparent that nothing is due him. The pleading would have been open to seasonable attack by a special demurrer, on the ground that it is in-

definite and perhaps ambiguous, but under the liberal rule "that whatever is necessarily implied in or is reasonably to be inferred from an allegation is to be taken as directly averred" (Phillips on Code Pleading, § 352), we think that it is sufficient to withstand attack by a general demurrer, or by a general objection to the introduction of evidence, which was the mode adopted by defendants in this case. At the trial it was not controverted that Yegen had been fully reimbursed. The only issues in the evidence were upon the questions whether Connick had agreed that Yegen might retain the 20 shares of stock in consideration of the indulgence accorded by him to Connick after the latter was in default, and whether, at the time the conveyance was made to plaintiff, it released to Yegen its claim to the stock. Under this condition of the case we should be disposed, if it were necessary to support the judgment, to deem the complaint amended so as to obviate counsel's objection.

[2] Under the Bailey contract, the evidence discloses, Hosea Connick, a brother of G. W. Connick, was the ostensible purchaser. The real purchaser was G. W. Connick. He was in possession of the land, and was understood by Yegen to be the purchaser and responsible for the payment of the purchase price. When the contract was made with Yegen, Hosea Connick assigned to Yegen in writing his apparent interest under it. Thereupon Bailey, at the instance of G. W. Connick, substituted for the deed to Hosea Connick, which was on deposit in the bank, one in which Yegen was named as the grantee. A written contract was entered into by G. W. Connick and Yegen on December 27, 1902, the terms of which were substantially the terms of the contract alleged in the complaint, except that Connick was to reimburse Yegen for advancements made by him, with interest, on or before the expiration of one year from the date thereof. In this contract no mention is made of the shares of stock in the Big Ditch Company. Connick was permitted to testify, over objection by counsel for defendants, that the contract between him and Yegen was as alleged in the complaint, but was wholly verbal; that it was carried out by Yegen according to its terms, except that he did not account for and deliver up to the plaintiff the 20 shares of stock in controversy. He stated that the written contract which was dated December 27, 1902, never became operative because it did not express correctly the terms which had been agreed to, that it was abandoned, and that the whole arrangement was left to rest entirely in parol. Counsel contend that, inasmuch as the complaint declares upon a contract creating an express trust in relation to real property, and the answer denies its existence, it was incumbent upon plaintiff to establish it by competent evidence, viz., by a written instrument embodying all of its terms; otherwise, under the express provi-

sions of the statute (Rev. Codes, § 4537), no trust was created. The result is, it is said, that since the contract is alleged as an entirety and is void as to the land, it is void as to the shares of stock—the personality—also, and hence plaintiff cannot recover. Counsel for both parties discuss in their briefs the question whether the evidence discloses that the intention of the parties was to create an express trust in favor of Connick, or whether the transaction created between them the relation of mortgagor and mortgagee, and a trust resulted in favor of the plaintiff as Connick's assignee, when by its payment of \$4,174.50 on September 14, 1908, it fully reimbursed Yegen for his advancements. We incline to the view that the relation sustained by the parties was that of mortgagor and mortgagee; but, as we regard the case, it is not necessary to determine what the relation of the parties was. Yegen, after having recognized the contract as valid and having carried it out according to its terms, except to account for the shares of stock in question, now claims that he acquired them as a part of the trust estate, and that they became his own by virtue of an agreement with Connick and a release by the plaintiff. But for the original contract with Connick he never would have been vested with the title to the shares. Now that he alleges and seeks to establish his personal right to them under a subsequent agreement with Connick and a release by the plaintiff, it does not lie in his mouth to say that neither had any right to them. He must prevail by virtue of this claim, or not at all. To declare the original contract void and permit him to retain the stock, and deny plaintiff relief, would be to enable him to consummate a fraud, to prevent which a court of equity will always interpose its power. *Lynch v. Herrig*, 32 Mont. 267, 80 Pac. 240. If we accept Yegen's own testimony as to the arrangement by which he acquired the stock, the result would be the same. Connick had already paid three installments of the subscription price. Yegen obtained it by a verbal agreement with Connick, separate and independent of the agreement by which Connick's interest in the Bailey contract was transferred to him, by which he paid the balance of the subscription price with the understanding that Connick was to have it upon reimbursing him in the amounts paid, with compound interest.

Stripping the case, therefore, of all matters relating to the Bailey contract, we have left the simple question whether Yegen became legally bound to hold the shares in trust for Connick and transfer them to him when the purpose of the trust had been accomplished. Of this there can be no doubt; for the statute declares: "A transfer may be made without writing, in every case in which a writing is not expressly required by statute." Rev. Codes, § 4594. Therefore, whether Yegen became the trustee of an express trust

or a mortgagee, when the purpose of the agreement had been accomplished he was bound to transfer the shares of stock to the real owner.

[3] In order to show the legal capacity of the plaintiff, its counsel offered in evidence a certificate of the Secretary of State that a copy of its articles of incorporation had been filed in his office. By oversight the Secretary of State had omitted to attach his name to the certificate. The court admitted it, but required counsel to procure a properly authenticated copy and file it in the case after it had been submitted, and this was done. This action is assigned as error. There is no merit in the assignment. While the answer contains a general denial of all the allegations of the complaint not specifically admitted or denied, this was not sufficient to put in issue the corporate capacity of the plaintiff. *O'Donnell v. City of Butte*, 44 Mont. 97, 119 Pac. 281; *First Nat. Bank of Iowa City v. Smith*, 44 Mont. 305, 119 Pac. 784. The capacity of the plaintiff was not in issue. Therefore, assuming that the evidence would have been competent, if an issue as to the capacity of plaintiff had been presented, no prejudice was wrought by the ruling.

[4] Contention is made that there are material variances between the evidence and the allegations of the complaint, and hence that the evidence is insufficient to sustain the findings. For illustration: It is said that while it is alleged that G. W. Connick had contracted with Bailey for the purchase of the land, the evidence shows that he was not a party to the contract, and therefore had no interest under it. It is true that he was apparently not a party to the contract, but it appears that while it ran to his brother Hosea as the ostensible purchaser, it was made for G. W. Connick's benefit; that after Yegen became the assignee of Hosea's apparent rights he recognized G. W. Connick as the real party in interest, and that he made disposition of the land and shares of stock in the High Line Ditch Company as directed by G. W. Connick and for his benefit. From a technical point of view, the evidence does not show that the assignment was made exactly as alleged. Yet it does show what in legal effect was the same thing, viz., that though made by Hosea Connick, it was made for the benefit of G. W. Connick, the real party in interest, and who was recognized as such by Yegen. As already pointed out, however, if we adopt defendant's theory of the transaction touching the shares of the Big Ditch Company stock, it is wholly immaterial as to who were the parties to the Bailey contract or how it was assigned. The fact remains that Yegen acquired Connick's equity in the stock under an agreement that Connick was to have the legal title transferred to him when Yegen had been reimbursed for his outlay in securing it. Again, counsel say that the evidence discloses that Connick did not in fact subscribe for the stock, but that the

subscription was made by I. D. O'Donnell; hence the plaintiff's claim through Connick's assignment is without foundation. The evidence shows that the subscription was made by O'Donnell, but with the understanding with Connick that the latter could pay the subscription price and take the stock; that subsequently Connick paid three of the installments as they fell due, and that it was fully understood between the bank authorities and Yegen that Connick was to have the stock when the price had been fully paid. Indeed, the subscription list held by the bank indicated that Connick was the person to whom the bank looked for payment of the subscription price. The contentions of counsel are too excessively technical to require serious notice. The trial court properly treated the variances as immaterial. Rev. Codes, § 6585. Several other contentions made by counsel are equally without merit.

The judgment and order are affirmed.  
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

# McINNESS v. REPUBLIC COAL CO. et al. (No. 3368.)

(Supreme Court of Montana. April 13, 1914.)

## 1. MASTER AND SERVANT (§ 124\*)—INJURY TO SERVANT—"WORKING PLACE"—INSPECTION.

The "working place" of a coal miner engaged in drilling and blasting and loading coal on cars, within Coal Mining Code (Laws 1911, c. 120, § 83), imposing on miners the duty to inspect and keep safe their "working place," is, while loading, at the point where the coal is loaded on cars, and, while drilling and blasting, at the face of the entry, and where a miner had removed the coal from a tunnel, and the work had been measured up and paid for and turned over to the mining company, and was thereafter a passageway, the portion of the tunnel so completed was not a "working place," though the miner had to pass through it while carrying on his work, but the duty to inspect it was imposed on the company's foreman by section 71

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

## 2. MASTER AND SERVANT (§ 219\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The risk arising from the failure of an employer to exercise reasonable care to make a place safe for an employé, and so maintain it is not assumed by the employé, unless the danger is obvious, and unless the employé, with knowledge of the danger and appreciation of the risk, continues at work without any assurance from the employer that the defect will be remedied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

## 3. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a coal company failed to exercise reasonable care to make a tunnel reasonably safe for use by a coal miner in carrying on his work, and the only method of detecting danger was by soundings, thereby detecting the existence of overhanging loose rock, the mere fact

that the miner made a visual examination of the way and found it safe did not show that he assumed the risk of danger by falling rock.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

## 4. MASTER AND SERVANT (§ 127\*)—INJURY TO SERVANT—NEGLIGENCE—REPAIRS.

Where a mining company, its superintendent, and assistant foreman know of loose rock in a tunnel used by miners in carrying on their work long enough to have made proper examination and repairs, but they failed to do so and a miner was injured by falling rock, the company, superintendent, and assistant foreman were liable under Coal Mining Code (Laws 1911, c. 120, § 73), providing for a mine foreman, and requiring him to see that each unsafe place is placed in a safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 252; Dec. Dig. § 127.\*]

## 5. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—SUBMITTING ISSUES TO JURY.

The error in failing to direct the finding on an issue and submitting it was harmless, where the jury found correctly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

## 6. MASTER AND SERVANT (§ 5\*)—EXISTENCE OF RELATION—INDEPENDENT CONTRACTOR.

A miner employed by a coal company, and paid according to a wage scale agreed on by mine operators and representatives of the miners of the district, is an employé of the company, and not an independent contractor, and he may recover for a personal injury caused by the negligence of the company and its superintendent and assistant foreman and face boss.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 5; Dec. Dig. § 5.\*]

Appeal from District Court, Musselshell County; Geo. W. Pierson, Judge.

Action by Dan McInness against the Republic Coal Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Thos. J. Mathews, of Roundup, and Fred J. Furman, George F. Shelton, and A. J. Verheyen, all of Butte, for appellants. Alexander Mackel, of Butte, for respondent.

HOLLOWAY, J. This action was brought to recover damages for personal injuries suffered by the plaintiff while engaged as a coal miner at Klein, Mont., in the "northeast main entry of mine No. 2," a mine owned and operated by the defendant Republic Coal Company. The defendant Griffin was superintendent in charge of the mine, and defendant Beever, assistant foreman and face boss. From a judgment in favor of plaintiff and from an order denying a new trial, the defendants appealed.

There are not any conflicts in the evidence upon material matters. The plaintiff was employed by the defendant coal company, and paid according to a wage scale agreed upon by the mine operators and representatives of the miners of that district. His business was running an entry or tunnel some 12 feet wide through a blanket vein

of coal. In height the tunnel was measured by the thickness of the vein—about five feet nine inches. This tunnel had been driven for a considerable distance, and every two weeks or thereabouts the work was measured up and paid for by the company, at the rate of "73 cents per ton, and \$3.25 per yard." In the course of the work of driving this tunnel, a pothole in the roof was passed. So much of the rock in the hole as was loose at the time was taken down, but no timbering or other precautionary measures were resorted to for the purpose of securing it. The roof of the tunnel was considered to be self-supporting, and timbering was not generally employed. At the time of this accident the tunnel had been driven about 70 feet beyond the pothole, and plaintiff had been paid for the work of excavating and mining at that point at least three weeks before the time of the accident. In addition to the work of blasting down the coal, the plaintiff and his co-worker were required to load, and the empty cars were usually set out for them at a slant, 90 feet or more from the face of the entry, and the powder for blasting was kept back of the face a distance of about 300 feet, so that to get empty cars or powder, plaintiff was required to pass out through the entry and under the pothole. On the morning of December 9, 1911, after he had loaded one car, and while he was passing out to the slant for an empty car, a large rock fell upon him from the pothole, causing the injuries of which complaint is made.

[1] 1. The first and principal contention of appellants is that they are not responsible for the injury to the plaintiff because the place where he was injured was a part of his "working place," within the meaning of the Coal Mining Code (chapter 120, Laws 1911). In *Kallio v. Northwestern Imp. Co.*, 47 Mont. 314, 132 Pac. 419, we considered somewhat the provisions of that statute, and particularly section 83, which imposes upon the miner the duty to inspect and keep safe his working place; and we held that for an injury received in his working place the miner could not recover if it resulted from his failure to perform the duty imposed by section 83. Respecting the "working place" we said: "We do not know of any precedent or principle by which the working place of a coal miner, which at common law he must keep safe, is precisely defined. \* \* \* The plain meaning of section 83, as it seems to us, is that before he goes to work the miner must examine the place where his work is to be done; if he is about to mine, he must examine the place where his mining is to occur; if he is about to load, he must examine that part of the workings throughout which the duty of loading is to be performed. While he is at work he must keep safe the place where he is working, and whenever he finds it unsafe, whether as the result of his operations or otherwise, he must make it

safe, or, if he cannot do that, he must quit the work and report. It is thus apparent that the 'working place' which the miner must under the statute examine and keep safe is a varying area, and that the duty imposed is a positive one." The pertinency of that language is greatly emphasized when we consider it in the light of the facts of that particular case. Kallio was loading coal which had been thrown back 70 or 75 feet from the face by the force of the blast. He commenced the work of loading at the farthest point, and while thus engaged was injured. Necessarily his working place while loading would change as his work progressed until all the coal knocked down by the blast had been removed, when his working place would be at the face of the entry. In the present instance we are not informed by the record how far back in the tunnel the coal was thrown by a blast, but it is wholly immaterial, for the undisputed evidence is that the place where plaintiff was loading the coal into the cars was from 65 to 70 feet from the pothole where he was injured. In the *Kallio Case* a liberal construction was given to the language of the Coal Mining Code, to the end that its several provisions might be harmonized and the obvious purpose of the Legislature carried out; but nothing said in that case justifies the assumption of these appellants that the language of section 83 above is sufficiently elastic to cover the case presented by their appeals. The tunnel at the pothole, and for many feet in front of and beyond that point, was completed, and the work paid for some time before this accident occurred. It is true that plaintiff was required to make use of that portion of the tunnel to get empty cars, powder, and other appliances; but equally was he required to use it in order to get to and from the face where he was actually engaged at his work. To construe the language of section 83 to include, in and as a part of the miner's working place, not only the place where he works, but as well the entry ways through which he must pass to and from his work, or for the purpose of getting supplies, would be nothing short of judicial legislation. The term "working place" is not defined by the act; but a construction in harmony with appellants' view would impose a burden upon the miner which in many instances would require all his time to discharge and prevent his employment being of any profit to himself, or any use to his employer. If the pothole 70 feet from the place where he was loading was within plaintiff's working place because he had to pass that point to secure empty cars and other supplies, then the whole 300 feet between the face and the magazine was likewise within and a part of his working place, because he had to pass through it to secure powder. Such a construction would result in a perversion of the language of the act and impose upon the miner a duty incompatible with his work, and one clearly never

within the contemplation of the Legislature. It is sufficient for the purposes of this case to say that on December 9, 1911, plaintiff's working place while he was loading was at the point where the coal was actually put upon the cars, and while drilling and blasting, it was at the face of the entry.

When the plaintiff had removed the coal from the tunnel at the pothole and the work had been measured up and paid for, that portion became complete, was turned over to the company, and thereafter was a passage or travelling way, the duty of inspection of which was devolved by the act upon the company's foreman by section 71. As to the miner, this travelingway was an appliance for his use, but not a part of his working place. 3 Labatt on Master & Servant (2d Ed.) § 890.

[2-4] 2. With this principal question solved, the contention that the plaintiff failed to make out a cause of actionable negligence requires very little consideration. The rules defining the master's common-law duty and the extent of the risk assumed by the servant, have been iterated and reiterated so often since the decision of *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273, that further repetition is unnecessary. Indeed, counsel for these respective parties do not disagree at all with reference to them, but only as to their application to the facts of this case. Since it was the master's duty to exercise reasonable care to make of this traveling way a reasonably safe place and to maintain it in that condition, the risk arising from his failure to discharge that duty is not one of the risks which the servant assumed unless the danger was obvious and the servant, with knowledge of the danger and appreciation of the risk attending it, and without any assurance from the master that it would be remedied, continued to use the way. It is true that plaintiff testified that on the morning of the accident as he went in to his work, he made a visual examination of the pothole and found it safe. But his judgment upon the matter, based upon that casual examination, was not conclusive. The evidence is that sounding should be resorted to, to detect the looseness of large rocks in such situations, or, as in this instance, to determine with any reasonable degree of certainty whether the rock in this pothole had become loose by reason of the action of the air, water, vibrations caused by blasting, or otherwise, and that this character of examination was not made. The defendants were aware of the existence of the pothole for a sufficient time before the accident to enable them to make a proper examination and repairs. They failed in this duty, and must respond in damages as a consequence. Knowing of the existence of the pothole, section 73 made it their duty to know of the danger, if by reasonable examination the danger would become apparent.

[5] 3. The court submitted to the jury the question whether the pothole where plaintiff was injured was within his working place, and by the general verdict the jury found that it was not. The court might properly have directed the jury to the same conclusion, in view of the undisputed evidence of this case; and therefore error, if error, in submitting the question to the jury, was harmless.

[6] 4. The contention that plaintiff was not a servant of the company, but an independent contractor, is disposed of adversely to the appellants by the decision in *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

#### In re PETERSON'S ESTATE.

CHELLQUIST et al. v. EUSTANCE.

(No. 3366.)

(Supreme Court of Montana. April 9, 1914.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 314\*)—PROCEEDINGS FOR DISTRIBUTION OF ESTATE—NOTICE.

Rev. Codes, § 7141, providing that, where a written notice of motion is necessary, it must be given five days before the appointed time for the hearing, is not applicable to the hearing of an issue in probate proceedings formed by a petition for distribution and objections thereto.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

#### 2. WILLS (§ 487\*)—CONSTRUCTION—ADMISSIBILITY OF EVIDENCE—INTENTION OF TESTATOR.

Under Rev. Codes, § 4755, providing that, where any testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child must have the same share in the estate as if testator had died intestate, etc., evidence de hors the will may be received to ascertain whether the omission was intentional.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.\*]

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

In re Estate of Mathilda Peterson, deceased. Petition for distribution by Ellen S. Eustance, to which George Chellquist and another filed objections. From a decree for petitioner, objectors appeal. Affirmed.

Fred A. Ewald, of Great Falls, for appellants. C. H. Benton, of Great Falls, for respondent.

HOLLOWAY, J. On February 2, 1902 Mathilda Peterson died, leaving a will which designated Amandus J. Chellquist, her son, and Ellen S. Eustance, her daughter, as sole devisees. At the time the will was executed, Mrs. Peterson had several other children living, but no one of them is named in the will,

and no provision is made for any of them. The daughter, Ellen S. Eustance, was appointed administratrix with the will annexed, and in October, 1912, presented to the district court her final report and petition for distribution. She set forth that she had succeeded to the interest of her brother Amandus J. Chellquist and prayed that the entire property belonging to the estate be distributed to her. Due notice was given that the report and petition would be heard on November 6th. On November 4th George and Bert Chellquist, sons of the deceased, filed their written objection to the distribution of all the property to Ellen S. Eustance, upon the ground that, being children of the deceased not named or provided for in the will, they should share in the estate as though the deceased had died intestate. On February 12, 1913, counsel for the administratrix gave personal notice to the attorney for the objectors that on February 15th the issue raised by the petition and objection, viz., whether Mathilda Peterson intentionally omitted to name or provide for the objectors in her will, would be tried by the district court. On March 25th a decree of distribution in conformity with the prayer of the petition was rendered and entered, and the objectors appealed.

[1] Some technical questions of practice are raised, but they are not entitled to serious consideration. The only issue presented by the objectors was their right to participate in the estate, and that was presented by the petition for distribution and the written objections thereto. When an issue is thus raised in a probate matter, it is to be tried and determined as an ordinary civil action (Rev. Codes, §§ 7711, 7714, 7398), except that a jury trial is a privilege, and not a matter of right (section 7715). Complaint is made that the notice provided for in section 7141 was not given to objectors before the trial was had on February 15th but counsel is mistaken in assuming that section to be applicable to the situation presented here. The notice there mentioned is a notice of a motion. The issue formed by the petition for distribution and the written objections thereto was for trial before the court, and we do not know of any rule of law or practice which requires that any fixed period of time shall intervene between the day upon which a cause is set for trial and the day of the trial. If the objectors were not ready on February 15th, they should have asked for a continuance, and their failure to do so constituted a waiver of any objection on their part to the date set for the trial.

The record is apparently not complete. The appeal is sought to be presented upon the judgment roll, but there is not any proper certificate. The certificate attached contains a great many recitals which the clerk has no authority to make, but fails to state that the papers enumerated constitute the judgment roll. For a discussion of questions

of practice in probate matters, see *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

[2] An important question, and one of first impression in this jurisdiction, is presented for determination, viz.: Could the trial court receive evidence aliunde the will that the testatrix intentionally omitted reference to, or provision for, any of her living children other than the two who were named in the will? Section 4755, Revised Codes, reads as follows: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." The clause "unless it appears that such omission was intentional" suggests the inquiry before us: How may such intention be made to appear? Is the trial court limited in its inquiry to the will itself, or may evidence dehors the will be received? In the absence of any adjudications, we might find some indication of legislative intention in cognate provisions of our Codes. In each of the following sections the lawmakers, in unmistakable terms, limited the inquiry to the will itself as the exclusive source of information respecting the subjects treated: Sections 4745, 4746, 4747, 4759, and 4760. Section 4764 authorizes the court to resolve any uncertainty arising on the face of the will, by reference to other provisions, taking into consideration the circumstances under which the will was made, exclusive of the testator's oral declarations. Similar provisions are found in section 4766. Section 4757 provides that, if the children omitted from the will have received their portions of the estate during the testator's lifetime by way of advancements, then they shall not take anything by virtue of section 4755 above. It would seem very clear that evidence dehors the will might be received to show whether the pretermitted children had received advancements, and, if so, to what extent. When the Legislature intended to limit the court's inquiry to the will itself, it experienced no difficulty whatever in manifesting that intention in plain, terse English, and the fact that no such restriction is imposed by the clause quoted from section 4755 above would seem to suggest that it was the purpose of the Legislature to leave the trial court free to ascertain the intention of the testator from any competent evidence, extrinsic as well as intrinsic.

Many of the states have statutory provision similar to our section 4755, above. Washington, Oregon, Missouri, New Hampshire, Rhode Island, and Tennessee each has a statutory provision on the same subject, but in each instance it is mandatory in form that, if the child is omitted from the will, it takes as though the testator died intestate. Under such a statute, the will alone

can be consulted, and the reason for the rule is manifest. *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *Gerrish v. Gerrish*, 8 Or. 351, 34 Am. Rep. 585; *Bradley v. Bradley*, 24 Mo. 311; *Gage v. Gage*, 29 N. H. 533; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446; *Burns v. Allen*, 93 Tenn. 149, 23 S. W. 111. Prior to 1836 the Massachusetts statute was also in terms mandatory, but after the enactment of that year the statute contained this clause: "Unless it shall appear that such omission was intentional and not occasioned by any mistake or accident." Under the amended statute it has been held uniformly since *Wilson v. Fosket*, 6 Metc. (Mass.) 400, 39 Am. Dec. 736, that evidence dehors the will may be received to ascertain whether the omission was intentional. The clause found in the statutes of Nebraska, Maine, Iowa, Michigan, and Wisconsin is substantially the same as that quoted above from Massachusetts, and the same rule prevails in those states. *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718, 115 Am. St. Rep. 568, 8 Ann. Cas. 632; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. 197, 6 Am. St. Rep. 200; *Lorieu v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *In re Stebbins' Estate*, 94 Mich. 304, 54 N. W. 159, 84 Am. St. Rep. 345; *Moon v. Evans' Estate*, 69 Wis. 687, 34 N. W. 20.

It will be observed that the words "and not occasioned by any mistake or accident," found in the statutes of the last-named states, including Massachusetts, are omitted from ours. California, North Dakota, and Utah each has a statute like our own. Because of this difference in the language between the statute of Massachusetts and its own, the Supreme Court of California reached the conclusion that a different rule should prevail, and held extrinsic evidence inadmissible to show that the omitted children were purposely omitted. *Garraud's Estate*, 35 Cal. 336. In *Coulam v. Doull*, 4 Utah, 267, 9 Pac. 568, upon the same statute the Utah territorial court reached the contrary conclusion, and upon appeal to the Supreme Court of the United States, the judgment of the Utah court was affirmed. The decision in *Garraud's Estate* was severely criticised, and it was pointed out that the addition of the words "and not occasioned by any mistake or accident" does not change the effect of the statute; that the same rule would have been applied in Massachusetts if those words had not been added; and that, since the Massachusetts statute is the parent of all these others, and had received construction in *Wilson v. Fosket* before it was adopted in California or Utah, that construction should be entitled to great consideration, if, indeed, it should not be held controlling. *Coulam v. Doull*, 133 U. S. 218, 10 Sup. Ct. 253, 33 L. Ed. 596. The Supreme Court of North Dakota has likewise followed the Massachusetts doctrine. *Schultz v. Schultz*, 19

N. D. 688, 125 N. W. 555. In the consideration of a statute anything like ours, the California court stands alone in its position.

From the standpoint of sound reasoning, as well as the weight of authority, we adopt the Massachusetts rule, and hold that, in receiving oral evidence of the intention of Mathilda Peterson to omit any reference to her children other than the two named in the will, the trial court did not err.

The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

LAS ANIMAS & S. J. LAND CO., Inc., v. PRECIADO, Tax Collector, et al.  
(Sac. 2014.)

(Supreme Court of California. April 1, 1914.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 33\*)—  
DIVISION OF SCHOOL DISTRICTS—EFFECT—  
"JOINT SCHOOL DISTRICT."

As Pol. Code, § 1583, recognized joint school districts before the enactment of any statute authorizing the creation of such districts, a district which, after one county was carved out of another, lay partly in both is a joint school district; this conclusion being strengthened by the subsequent enactment of section 1590, declaring such districts to be joint school districts, and St. 1905, p. 243, declaring that school districts which have been in existence for five years are duly incorporated bodies politic.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 55; Dec. Dig. § 33.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 107\*)—  
INVALIDITY—ESTOPPEL.

Plaintiff, whose property was within the boundaries of a joint school district, is not estopped from claiming that a second district, organized to take over part of the joint district, is invalid, because he paid one assessment of school taxes by the contested district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 253-256; Dec. Dig. § 107.\*]

3. VENDOR AND PURCHASER (§ 130\*)—CLOUD  
ON TITLES—MARKETABLE TITLES.

A title not deductible of record is clouded and unmerchantable.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246, 247; Dec. Dig. § 130.\*]

4. TAXATION (§ 608\*)—ASSESSMENTS—CLOUD  
ON TITLE.

Whether a deed for unpaid taxes would constitute a cloud on the owner's property depends upon whether, in ejectment by the holder of the deed, the owner would be required to offer evidence to defeat recovery by showing the invalidity of the assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 107\*)—  
TAXES—INJUNCTION.

Where plaintiff's land was located in a joint school district, a sale of the land for taxes levied by a second school district organized to take over part of the territory of the joint district will be enjoined; for, while the organization of the second district is invalid, a tax deed would constitute a cloud on plaintiff's title, evidence being necessary to show the invalidity of

the assessment, and hence an action at law does not afford him adequate relief.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 253-256; Dec. Dig. § 107.\*]

In Bank. Appeal from Superior Court, Madera County; George E. Church, Judge.

Action by the Las Animas & San Joaquin Land Company, Incorporated, against C. F. Preciado, Tax Collector for the County of Madera, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Robert L. Hargrove and W. H. Larew, both of Madera, for appellants. Edward F. Treadwell, of San Francisco, and Johnston & Jones, of Fresno (Lawrence J. Kennedy, of San Francisco, of counsel), for respondent.

HENSHAW, J. The Firebaugh school district, organized in 1878, at that time and for many years thereafter lay wholly within the territorial limits of Fresno county. In 1893, by legislative enactment, Madera county was carved out of the territory of Fresno county, with the result that part of the territory embraced within the Firebaugh school district remained in Fresno county, and part fell in Madera county. The Firebaugh school district thereafter continued to exercise its control over the whole territory. In 1907 the Dos Palos joint union high school district was formed and included, with other districts, all of the Firebaugh school district. Since its formation the Dos Palos high school district has asserted the right and exercised the power to tax all of the territory of the Firebaugh school district. In 1908 the county superintendent of schools of Madera county, acting under the supposed authority of section 1551 of the Political Code, reported to the supervisors of his county that the Firebaugh school district "has never by any action of the board of supervisors of the two counties, as the statutes require, been made a joint school district," and that portion of the Firebaugh school district lying within Madera county had never been attached to any school district within Madera county, and that from this has resulted an indefiniteness in the boundaries of the school district of Madera county. Thereupon the supervisors of Madera county made an order attaching this land to the La Vina school district, of Madera county. The La Vina school district was one of the districts of the Madera high school district, and the Madera high school district, in levying its taxes, asserted and exercised the right to assess the lands of the Firebaugh school district in Madera county. The plaintiff is an owner of lands within the disputed area, and brings an action, in its essence, to have determined in what school district the power to tax its lands really rests. In form the pleading alleges that the land is in the Firebaugh school district and the Dos Palos joint union high school district, and that the assessment and

levy of the Madera union high school district is void. The prayer is for an injunction to restrain the proper officers, acting for the Madera union high school district, from advertising plaintiff's property for sale, and from selling it for nonpayment of the tax which that district has levied. It is conceded that in this particular instance, for irregularities and informalities, the tax levy of the Dos Palos joint union high school district is invalid as to the land here in question.

[1] Sections 1577, 1578, and 1579 of the Political Code contain provisions for the creation of joint districts. A joint school district is one whose territory lies partly within the boundaries of one county and partly within the boundaries of another. Before the enactment of these sections referred to, section 1583 of the Political Code was in existence, and made distinct recognition by name of joint districts. Therefore the law recognized the *existence* of joint districts even before it provided a method for their *creation*. The contention of appellant is that such a joint district can only come into existence by following the method prescribed in section 1577 et seq. of the Political Code. The position of respondent—in which we think it is clearly right—is that the law recognized and declared that a school district whose territory, by the division of a county, lay partly in one and partly in another county ipso facto became a joint district. If a part of the territory of a regularly recognized school district was to be taken from it solely by reason of the fact that through the creation of a new county a part of the land fell into such new county, we would look for some legislative declaration to that end. *Conover v. Parker*, 57 N. J. Law, 681, 31 Atl. 769. We not only find none, but, to the contrary, we find in section 1580 of the Political Code (adopted to be sure after the attempted incorporation of the disputed area with the Madera union high school district) an express declaration that, whenever such a condition results, the original district "shall by operation of law constitute and become established as a joint school district." Furthermore, it is undisputed that continuously and for many years after the creation of Madera county the Firebaugh school district exercised its authority over the land in Madera county, and the statute of March, 1905 (Stats. 1905, p. 243), operates to confirm the authority thus exercised. That statute declares as follows: "All school districts in this state that for a period of five (5) years have been acting as school districts under the laws of this state, are hereby declared to be duly incorporated and to be bodies politic under the laws of this state, and as such school districts, under their appropriate names, shall have all the rights and privileges and be subjected to all of the duties and obligations of duly incorporated

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



school districts." For this additional reason, therefore, it must be held that the disputed area in Madera county was a part of and within the jurisdiction of the Firebaugh district. Such being the case, the attempt of the supervisors of Madera county to deprive the Firebaugh district of it and to annex it to one of its own school districts was abortive, and the result is that neither the La Vina school district nor the Madera union high school district has any right to exercise the taxing power upon and against plaintiff's land.

The argument that respondent is here attacking the organization of one or more of the school districts is baseless. Respondent freely concedes the legal existence of one and all of the affected districts, and, in effect, asks merely that their boundaries be delimited and defined, to the end that it may know in which one its property is situated, and to which one it shall pay its tax.

[2] As little force attaches to the further contention that, by reason of the fact that respondent paid a similar tax assessed upon its lands and levied by the Madera union high school district, it is estopped from contesting the validity of this assessment. The proposition is completely answered by *Wood v. County of Calaveras*, 164 Cal. 398, 129 Pac. 283.

[3-5] There is thus left for consideration the single proposition as to the availability to respondent of the remedy which it has sought, and herein it is argued that, under the authority of such cases as *Savings & Loan Society v. Austin*, 46 Cal. 415, *Houghton v. Austin*, 47 Cal. 647, and especially the case of *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102, the remedy by injunction is not available to respondent. It might be a sufficient answer to this to say that, irrespective of the injunctive relief sought and awarded, plaintiff had the unquestioned right, under section 738 of the Code of Civil Procedure, to determine these conflicting lien claims asserted to affect its property, and that, this being done, the fact that an injunction was also asked would be immaterial to the cause of action specifically pleaded. *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140; *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Dranga v. Rowe*, 127 Cal. 506, 59 Pac. 944; *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44. But it may be better to discuss the principal question to remove any misunderstanding which may exist as to the scope and meaning of *Crocker v. Scott* and the cases like it.

The fundamental proposition in this consideration is that equity will afford relief to a party against whom an illegal tax has been collected or has been sought to be collected. But, as equity makes good only the deficiencies of the law, it will not interpose between the owner and the fiscal officers, where the law then or thereafter affords him adequate redress. But, stating it conversely,

where the law then or thereafter does not afford the owner adequate redress, equity will interpose for the protection of his property rights. While this is the rule, the reason is not alone because equity will not interpose where legal redress is sufficient, but it is additionally because, where, as is usual, the complaint against the tax is a complaint, not against the right of the taxing power to tax, but is addressed to asserted irregularities or illegalities in the ministerial and executive processes fixing the lien upon the property, where, in short, there is an equitable duty to pay some tax, courts have shown a very proper reluctance to come to the relief of an individual and enjoin the collection of the tax, as a whole, to the great disturbance of the revenues. Therefore equity, in effect, has said to such a petitioner: Find your relief at law, for the law usually affords adequate relief in such cases. The usual forms of such relief accorded by statutes are the right of recovery back after payment under protest, or the right to sue the vendee at the tax sale, thus quieting title and removing the lien. The Supreme Court of the United States (*Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098), upon this subject declares: "Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.'" Section 2, Cooley, Taxation (3d Ed.) pp. 1414, 1447, 1453. And in that same case, in giving further instances of the inadequacy of legal relief, it is said: "For example, if the legal remedy consisted only of an action to recover back the money after it has been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

What thus constitutes a cloud and in what cases equity will lend its aid was early laid down in this state in *Pixley v. Huggins*, 15 Cal. 127, and Mr. Justice Field's language in that case has become the accepted doctrine of the courts. Discussing the situations under which equity will assert jurisdiction, he

says: "As the property vested by the deed of August, 1852, no interest would have passed to the purchaser under the sale advertised upon the execution issued upon the judgment of Huggins and Hall. But it does not follow, as the counsel of the defendant insist, that the plaintiff was not entitled to the equitable interposition of the court to prevent the sale. The jurisdiction of the court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be canceled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court that the deed casts a cloud over the title of the plaintiff. As in such case the court will remove the cloud, by directing a cancellation of the deed, so it will interfere to prevent a sale from which a conveyance creating such cloud must result." As to what constitutes a cloud, he further declares: "The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality."

It is important to notice in this connection that a title not deducible of record is clouded and unmerchantable. Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, 11 Ann. Cas. 465. As is so well said by Mr. Justice Field in the quotation above made that, whenever "the defense to the deed should rest in extrinsic evidence," a cloud is cast upon the title which equity may be invoked to remove, so we find, in Woodruff v. Perry, 103 Cal. 611, 37 Pac. 526, an injunction granted to restrain the enforcement of an illegal assessment, this court saying that: "Inasmuch as the invalidity of such assessment would not appear upon the face of the deed given to the purchaser at the sale, \* \* \* the plaintiffs are entitled to the injunction given." To the same effect are Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33; Chase v. Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414.

It necessarily results, therefore, that each of these cases in which an injunction is

sought must rest for its determination on its own peculiar facts. Under the facts in Crocker v. Scott, which was an action to enjoin the tax collector, it was held, and properly held, that neither the certificate of sale nor any acts of the tax collector constituted even prima facie evidence as to the validity of the assessment or levy, "and the taxpayer has a full and complete protection against the creation of any cloud upon his title in enjoining execution of the deed. Under such circumstances, equity will not interpose to the extent of preventing the performance of those preliminary acts which cannot affect the rights of a taxpayer, the failure to perform which may result in prejudice to the state in the enforcement of its revenue laws."

In the last sentence of the last quotation there is a distinct declaration of the equitable consideration to which we have previously adverted, namely: The disturbance of the fiscal system by the granting of such injunctions in any case and the refusal of equity to do so excepting in a clear case. But this is a clear case. Here is a tax, the lien of which clearly casts a cloud upon plaintiff's property. As in Woodruff v. Perry, the deed would not show that the assessment was void, and the equitable consideration of a disturbance of revenues is entirely absent, in that this is an assessment, not by an authorized power which has irregularly exercised its power, but is an assessment by a school district acting absolutely without jurisdiction and authority. There can be no interference, therefore, with the just revenues of this district in enjoining it from the collection of the tax against one individual, since in no sense has it the right to collect such tax from any individual owning land in the affected district. And, moreover, it is well settled that, where the assessment is of property not subject to the particular tax, or where the persons exacting it are without authority in the premises, as here, and where they are seeking to exercise authority over lands not within their corporate jurisdiction, equity will raise its restraining hand. Leach v. Port of Tillamook, 62 Or. 345, 124 Pac. 642.

For these reasons, the judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; SLOSS, J.

TENNANT et al. v. JOHN TENNANT MEMORIAL HOME (TENNANT, Intervener).  
(S. F. 5819.)

(Supreme Court of California. April 1, 1914.)  
1. DEEDS (§ 143\*)—RESERVATION—EFFECT OF INVALIDITY.

Ordinarily, if a reservation in a deed is void as repugnant or contrary to law, the deed becomes absolute.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 453-455, 465-468; Dec. Dig. § 143.\*]

**2. DEEDS (§ 142\*)—RESERVATION IN FEOFFMENT.**

At common law, where a transfer was made by feoffment and livery of seisin, a power of revocation of the grant reserved in the feoffment was void as repugnant to the grant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 464; Dec. Dig. § 142.\*]

**3. DEEDS (§ 3\*)—"LIVERY OF SEISIN."**

"Livery of seisin," which was a necessary part of conveyance by feoffment at common law, consisted of a formal delivery of possession of the premises, symbolized by the manual delivery of a clod or piece of turf, made in the presence of witnesses from the vicinage.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 2-4; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4194.]

**4. DEEDS (§ 143\*)—EFFECT OF RESERVATION.**

A deed reserving a life estate in grantor only conveys a future interest.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 458-459, 465-468; Dec. Dig. § 143.\*]

**5. DEEDS (§ 142\*)—RESERVATION—VALIDITY—RIGHT TO REVOKE.**

A deed conveyed realty to a memorial home, reserving the exclusive possession and use thereof to grantor for life, and further reserving "to the said grantor the right to revoke this deed to the said property \* \* \* or to any part thereof" and the right to sell any part of the property and convey it absolutely, as well as the right to use the proceeds from such sale. Civ. Code, § 3510, provides that, when the reason of a rule ceases, the rule itself should cease. Section 740 permits a future interest to be defeated by any act or means which the party creating it provided for or authorized in the creation thereof, and provides that a future interest, thus liable to be defeated, shall not be on that ground adjudged void in its creation. Section 1229 provides that, where a power to revoke or modify an instrument affecting title to real estate is reserved to the grantor, a subsequent grant of the estate by the person having such power is a revocation of the original instrument in favor of the purchaser from such person. Section 1230 provides that, where one having such power of revocation is not entitled to execute it until after the time he makes such grant, the power is deemed to be executed as soon as he is entitled to execute it, and section 2280 provides that a trust cannot be revoked after acceptance by the beneficiaries, except by their consent, unless declarant reserves a power of revocation, in which case the power must be strictly pursued, and section 741 provides that no future interest can be defeated by any act of the owner of the precedent interest. *Held*, that the reservation of the power to revoke the deed was valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 464; Dec. Dig. § 142.\*]

**6. CONSTITUTIONAL LAW (§ 87\*)—PROPERTY—RIGHT OF DISPOSITION.**

The constitutional right to acquire and possess property includes a right to dispose of it by separating it into estates for successive periods, as well as the right to impose upon the grant of such estates any reservation which grantor may see fit to place upon the grant, provided such rights be exercised in a lawful manner.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. § 87.\*]

**7. WILLS (§ 88\*)—NATURE OF INSTRUMENT—WILL OR DEED.**

An instrument conveyed realty to a memorial home, but reserved to grantor the exclusive possession and use of the rents and profits for her life and continued, "further reserving to

her, the said grantor, the right to revoke this deed as to the said property," and the right during her life to sell any of it and execute deeds therefor in her individual name, and convey absolute title to the purchaser, with the right to use the proceeds arising from such sale to her own use, without any liability for her or her estate to account therefor. *Held*, that the instrument was not testamentary in character, but was a present conveyance of a future interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.\*]

**8. WILLS (§ 88\*)—NATURE OF INSTRUMENT—WILL OR DEED.**

An instrument is testamentary in character only when it shows an intention by the maker that it should not be operative as a disposition of any present or future interest until the maker's death and operates as a present conveyance if it passes a present interest at the time of its execution, though it may only pass an interest in a future estate, subject to being defeated on the happening of a future event.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.\*]

In Bank. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by William F. Tennant and others against the John Tennant Memorial Home, in which Fred W. Tennant, administrator, intervenes. From a judgment for defendant, plaintiffs and intervener appeal. Affirmed.

George W. Waldorf and John P. Fitzgerald, both of San Jose (C. C. Coolidge, of San Jose, and Snow & Freeman, of Fresno, of counsel), for appellants. S. W. Mack, of Monterey, and Daugherty & Lacey, of Salinas, for respondent. R. H. Willey, of Monterey, for appellant Tennant. S. F. Lieb, of San Jose, and John F. Bowie, of San Francisco, amici curiæ.

SHAW, J. On the 7th day of May, 1901, Margaret Tennant executed to the defendant, John Tennant Memorial Home, a deed purporting to grant and convey to it certain real property, "subject to the exceptions and reservations" thereafter mentioned. Afterwards she died, and her heirs begun and are prosecuting this action to quiet their title to the land and recover possession thereof, claiming that said deed is void. The administrator of her estate intervened and filed a complaint asking the same relief on behalf of her estate. The court below gave judgment for the defendant, from which the plaintiffs and the intervener appeal.

The exceptions and reservations mentioned in the opening clause of the deed are inserted therein immediately following the description of the property. They are as follows: "Excepting, however, and reserving to said grantor the exclusive possession and the use and enjoyment in her own right, of the rents, issues and profits of said lots and each of them for and during the term of her natural life. And further reserving to the said grantor the right to revoke this deed as to the said property above described or as to any portion thereof, and further reserving to her,

the said grantor, the right during her natural life to sell any of the above described property, and to sign and execute deeds therefor in her own individual name and to convey by any such deed a full, perfect and absolute title thereto to the purchaser thereof, and with right to use the proceeds arising from such sale or sales to her own use, without any liability for her or her estate to account therefor. In case of such revocation being made, it shall be made and can only be made in writing, duly acknowledged and recorded." Margaret Tennant did not exercise, or attempt to exercise, the power to revoke the deed, nor the power to sell and convey the property, or any part thereof. The decision of the case depends on the validity of the deed. If it is valid, the judgment below was correct; if invalid, the judgment must be reversed.

[1] The appellants contend that the law of this state does not permit the insertion in a deed of a reservation of power to revoke it. Ordinarily, if a reservation is void, either for repugnancy, or because it is contrary to law, the result is to leave the conveyance absolute. The appellants, however, claim that the deed being presumptively a gift, this result would be so destructive of the object and purpose of the grantor that the deed must be declared wholly void. There may be force in this argument, but we need not consider it further here, for we are of the opinion that the law does not forbid such reservations.

[2, 3] Under the ancient common law, there was a rule to the effect that, where a transfer was made by feoffment and livery of seisin, any power of revocation reserved in the feoffment itself was void, on the ground that it was repugnant to the grant. The rule arose from the peculiar nature and purpose of the ceremony of livery of seisin, which was a necessary part of an alienation by feoffment. It consisted of a formal delivery of possession on the premises, symbolized by the manual delivery of a clod or piece of turf from the land, all of which was done in the presence of witnesses from the vicinage. The publicity was required because in those times there were no public records of conveyances and it was necessary in some way to preserve evidence of the transfer. For this reason the ceremony was required and the presence of witnesses was necessary. 4 Kent's Comm. \*480. As this purpose would be defeated if the accompanying deed contained a reservation of power to revoke it, so that thereby the transfer could be absolutely defeated and a retransfer effected without such public ceremony or witnesses, the courts were forced to hold that such reservation in a feoffment was void. 1 Sugden on Powers, 2. It is this asserted invalidity of such reservations at common law to which the appellants resort in support of their argument on this point.

It is true that the common law of England, so far as it is not inconsistent with our statutes, is the rule of decision in this state. Pol-

Code, § 4468. But all the rules of common law are subject to the provisions of our statutes; statutes in derogation of common law are not now to be strictly construed, and the provisions of the Codes contrary thereto are to be "liberally construed with a view to effect its object." Civ. Code, § 4. An important provision bearing on this question is that contained in section 3510 of the Civil Code: "When the reason of a rule ceases, so should the rule itself." The scheme provided by the Code for the transfer of lands and the record of conveyances thereof has removed all the reasons on which the aforesaid rule of the common law was founded. Independent of any provisions of the Code directly upon the subject, therefore, it may well be doubted whether this rule would now be followed in this state. It has long since ceased to exist in England; the statute of uses having practically abrogated it. There may have been good reasons for holding that these old statutes which had become so ingrained in the law of England as to be usually considered as a part of its established common law were also a part of the common law which was to be the "rule of decision" in this state, under section 4468 aforesaid. But it has been held that the statute of uses is not a part of the common law to which that section refers. *McCurdy v. Otto*, 140 Cal. 53, 73 Pac. 748. The provisions of the Civil Code remove all doubt of the proposition that reservations of the kind here involved are not necessarily invalid.

A deed might be so drawn as to make a reservation of this kind repugnant to the grant, in which case it might perhaps be void under section 1441 of the Civil Code. In this deed it could not be so, because the granting clause itself declares that it is "subject to" the reservations thereafter set forth.

[4] The effect of the reservation of the life estate is that the deed conveys a future interest, only, to the grantee. In respect to the time of enjoyment, an interest in realty is either present or future (section 688). A future interest entitles the owner to the possession of the property only at a future period (section 690). A future interest is a vested interest when there is a person in being who will have a right, defeasible or indefeasible, to the immediate possession of the property when the intermediate estate or interest ceases (section 694). This deed therefore purports to pass to the grantee at once a vested future interest in the land, said interest being the entire fee following the termination of the reserved life estate. Such interests may be transferred in the same manner as present interests (section 699). Section 740 is as follows: "A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation."

[5, 6] This language is very broad, and it clearly authorizes the party who creates a future interest by deed to provide, in the deed creating it, for the defeat of such interest, by means of a power of revocation reserved therein, to be exercised by the grantor, or by any other appropriate means. It contains at least a very strong implication that the reservation of such power of reservation as a means of defeating the interest is not contrary to law. The right to acquire and possess property, guaranteed by the Constitution, includes the right to dispose of it, or any part of it, and for that purpose to divide it in any possible manner, either by separating it into estates for successive periods or otherwise, and disposing of one or more of such estates. It also includes the right to impose upon the grant of such estates any reservations or conditions which the grantor may see fit to place in the grant. The only limitation upon these rights is that they must be exercised in a way not forbidden by law. There is nothing in the provisions of the Codes, or in any statute, which purports to forbid such reservations. Aside from the implied permission in the above section, therefore, the reasonable conclusion would be that it was one of the inherent rights of every landowner to include such a reservation in a grant of his land. That this was understood to be the law by our codifiers is further shown by the provisions of sections 1229 and 1230 of the Civil Code. They are as follows:

"Sec. 1229. Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estate, by the person having the power of revocation, in favor of a purchaser or encumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

"Sec. 1230. Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the power is deemed to be executed as soon as he is entitled to execute it."

Each of these sections is based on the assumption that the reservations mentioned would be valid if made. Furthermore, they entirely remove the foundation upon which these reservations, when inserted in deeds of feoffment, were held to be void; that is, to prevent the danger of secret transfers, to the detriment of the lord of the manor, or subsequent purchasers or incumbrancers. There is now no lord of the manor, and the sections provide a complete protection to subsequent purchasers or incumbrancers for value. Furthermore, the effect of the decisions of this court is that such reservations are valid.

The aforesaid sections 1229 and 1230 cannot be distinguished from section 2280, so far as they may be considered as a recognition of the validity of such a reservation. Section 2280 applies to trust estates, only, while these sections apply generally to all estates. Otherwise they point as fully to such validity as does section 2280. The latter is as follows: "A trust cannot be revoked by the trustor after the acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

In *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43, and again in *Estate of Willey*, 128 Cal. 9, 60 Pac. 471, it was held that this section was a distinct recognition of the proposition that such reservations in a deed creating a trust are valid. There is no substantial difference in principle between the case of a deed creating a trust, with such a reservation inserted, and an ordinary conveyance of land, as in the case at bar, with a similar reservation, nor between the effect of sections 1229 and 1230, as giving an implied authority to make such reservations or as a recognition of their validity, and that of section 2280 with respect to trust estates. No reason applies to trust deeds that does not apply as strongly to ordinary conveyances. It has also been held that a gift of personal property may be made with a valid express reservation of power in the donor to revoke it, in whole or in part. *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370; *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047. In view of these decisions and considerations, it is clear that our law does not forbid such reservations and that they are valid.

The argument that such revocations are forbidden by the provision of section 741 that "no future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest" is based on a misconception of the intent and purpose of that section and of the effect of this deed. As the owner of the intermediate estate, Margaret Tennant was given no power to revoke the deed. That power was reserved to her as grantor. A revocation by her would not have been an act in virtue of her ownership of the life estate. It was a mere coincidence that she also owned the life estate. If the deed had granted the life estate to another, reserving the same power in the grantor, section 741 would be wholly inapplicable. That section refers solely to acts which the owner of the intermediate estate may do as such owner, or by virtue of such ownership, and has no application to acts done because she is also invested with a power of revocation entirely distinct from

and independent of her ownership of the life estate.

[7] The main contention of the appellants is that the deed in question is not a present grant of property, so far as the remainder is concerned, but is an instrument testamentary in character and therefore invalid as a disposition of the property, because it is not executed with the formalities necessary to the execution of a will.

[8] The rules by which to determine whether or not an instrument purporting to dispose of property is testamentary in character are clearly stated in *Nichols v. Emery*, supra, 109 Cal. at page 329, 41 Pac. at page 1091, 50 Am. St. Rep. 43, as follows: "The essential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory; it acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status. Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. \* \* \* By such a trust, therefore, something of the settlor's estate has passed from him and into the trustee for the benefit of the cestui, and this transfer of interest is a present one and in no wise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate."

That this was said with regard to a conveyance creating a trust does not detract in the least from its force as applied to the case of a conveyance which does not create a trust. The instrument there considered and declared to be not testamentary in nature was not so held because it created a trust, but because its operation upon the property to pass an interest therein was not deferred until the grantor's death, but was instantaneous upon the execution of the instrument. If it thus operates to pass an interest at the time of its execution, although such interest is in remainder after the termination of the life estate of the grantor, that is, a vested future interest, the mere fact that such remainder, when it comes into the possession of the grantee, will be in the one case his absolute property and in the other a property

held by him in trust for others, is not a factor in the problem and cannot affect the character of the conveyance, or make it otherwise than a present grant of a future estate.

So, also, the fact that in this case there is also reserved a power to revoke the deed and to sell the remainder is of no consequence in the argument upon the question whether it is or is not testamentary. The power of revocation being valid, its exercise would at once revest the title in the grantor and she would then have absolute power to dispose of it by deed or otherwise. The power of sale reserved is therefore of no consequence, since it was necessarily included in the power to revoke. (The reservation of the power to revoke did not operate to destroy, or in any wise restrict the effect of the deed as a present conveyance of a future vested interest. It merely afforded the means whereby such vested future estate could be defeated and divested before it ripened into an estate in possession.) In *Nichols v. Emery*, supra, the same point was urged, and the court said: "Nor did the fact that the settlor reserved the power to revoke the trust operate to destroy it or change its character. He had the right to make the reservation, \* \* \* but the trust remained operative and absolute until the right was exercised in the proper mode." The court there used the word "trust" as a convenient designation of the instrument creating it, for the deed of trust made no disposition of the property other than in trust. That decision is decisive of the present case on this point.

Another argument presented in favor of the proposition that this deed is testamentary in nature is founded upon the circumstance that the disposition which the grantor thereby made of the property conveyed was substantially the same as she might have made by a will, so far as her enjoyment of the property and her control over the fee is concerned. This circumstance does not determine the effect of the deed and has but little bearing on the question. (An instrument is declared to be testamentary in nature only when, and because, it appears from its terms that the intention of the maker thereof was that it should not be operative as a conveyance or disposition of the property, or of any interest, present or future, therein, until his death.) This is always essential. (If the instrument, according to its proper legal effect under the rules of conveyancing, passes at the time of its execution a present interest or title in the property to a third person, although it may be only an interest in a future estate and may be subject to defeat on the happening or nonoccurrence of a future event, it is a present conveyance and not a will.) We do not think the fact that if the grantor had not at that time made this deed, but instead had made her will giving this property to the respondent, she would then have continued to enjoy the property until her death, in the

same manner and as fully as she did there-after enjoy it by reason of her reservation in the deed of an estate therein during her life, constitutes a reason for holding the deed to be a testamentary disposition. Notwithstanding these reservations and this privilege of enjoyment, she did then, in fact and in law, convey to the grantee the future estate which, at her death, became an estate in possession, to said grantee. The deed was not the same, in effect, as a will. It passed a present interest in the remainder, upon the contingency that the grantor should not, during her life, convey to another, or revoke the deed. The will would have had no such effect. The contingencies did not happen; hence the estate is now absolute.

The judgment is affirmed.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

# PACIFIC SASH & DOOR CO. v. ELDERTON. (L. A. 3227.)

(Supreme Court of California. March 31, 1914. Rehearing Denied April 30, 1914.)

## 1. MECHANICS' LIENS (§ 115\*)—FUNDS SUBJECT—ADVANCES TO CONTRACTOR.

Mechanic's lien claimants, who have not served notices to withhold any money from the contractor, cannot compel the owner to pay them, in addition to the 35-day payment of 25 per cent., amounts of prior payments earned by the contractor on or before completion, but advanced to him by the owner before they were due under the contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.\*]

## 2. APPEAL AND ERROR (§ 1122\*)—FINDINGS ON APPEAL.

The Supreme Court cannot make findings of fact in a mechanic's lien foreclosure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4420; Dec. Dig. § 1122.\*]

## 3. MECHANICS' LIENS (§ 290\*)—PROCEEDINGS—FINDINGS—MATERIALITY.

Since lien claimants, not serving notice on the owner to withhold payment, cannot compel the owner to pay them, in addition to the statutory 25 per cent., amounts of prior payments earned by the contractor but advanced by the owner before such amounts were due under the contract, a finding against defendant owner's allegation that each of the contract payments was made when it was payable under the contract may be disregarded as immaterial.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 591-597; Dec. Dig. § 290.\*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Pacific Sash & Door Company against W. C. Elderton. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Judgment reversed, and order reversed, and new trial ordered upon certain issues, and affirmed as to the other issues.

Flint, Gray & Barker, of Los Angeles, for appellant. G. C. De Garmo, of Los Angeles, for respondent Pacific Sash & Door Co. M.

P. Hopkins, of Los Angeles, for cross-complainants and respondent. Schweitzer & Hutton, H. S. G. McCartney, John F. Poole, and Rollin Kerns, all of Los Angeles, for other respondents.

SLOSS, J. A number of actions for the foreclosure of mechanics' liens having been consolidated, a judgment of foreclosure was entered. The defendant Elderton, owner of the land and building involved, appeals from the judgment and from an order denying his motion for a new trial. The contract was made, and the building erected, prior to the amendments of 1911 to the Code sections governing mechanics' liens, and the questions presented must therefore be decided according to the law in force at the time of the transactions giving rise to this controversy.

Elderton, as owner, made a contract with one Saffell, as contractor, for the construction of a building, which was thereafter duly completed. The contract price was \$16,800, payable in installments. Six progress payments of \$1,000 each were provided for, then a completion payment of \$6,225, and finally a payment of \$4,075, or 25 per cent. of the total contract price, 35 days after the building should be completed and accepted. The contract complied in all respects with the Code requirements for the making and filing of a valid building contract.

The claims of the various plaintiffs in the consolidated actions aggregated \$9,129.30. The defendant Elderton answered, alleging that he had paid the contractor at the times when they were payable, respectively, the first seven installments of the contract price, including the completion payment of \$6,225, and that he held the amount of the final payment, \$4,075, in his hands, applicable to the payment of liens. In his answer he offered to pay said sum of \$4,075 into court for distribution among such persons as might be determined to be entitled thereto. The court found that the owner had paid to the contractor pursuant to the terms of the contract only \$10,225 (instead of \$12,225, as stated in the answer), and that \$6,075 remained unpaid and applicable to the liens of the plaintiffs. It found further that it was not true that all payments had been made when due. Judgment was rendered accordingly.

The various plaintiffs filed, within the proper time after the filing of notice of completion, their claims of lien in regular form. It was stipulated that "no notice under section 1184 of the Code of Civil Procedure \* \* \* was ever served on the owner of said premises by any lien claimant requiring said owner to withhold any money from the contractor." That the various plaintiffs had furnished labor and material to the amounts claimed by them was not, and is not now, in controversy.

It was shown beyond dispute that, at the time of the filing of the various liens, the contractor had been paid by the owner all of the progress payments, including the completion payment of \$6,225. All that then remained due, as between the owner and the contractor, was the 35-day payment of 25 per cent. There was, however, evidence tending to prove that, on two or three occasions during the progress of the work, the owner had made to the contractor advances aggregating \$2,000, before the amounts so advanced were payable under the contract. Such amounts were then deducted out of the succeeding payments as they became due.

The question of law to be decided is whether lien claimants, who have not served notices to withhold, may, in case of a valid contract, compel the owner to pay them, in addition to the 25 per cent., amounts of prior payments actually earned by the contractor on or before completion, but advanced by the owner before the date when such payments were due under the contract. The question is not a new one in this court. In *Sweeney v. Meyer*, 124 Cal. 512, 57 Pac. 479, the court held against the contention made by the appellant here, viz., that, as the only fund available to the lien claimant who has served no notice is the 35-day payment of 25 per cent., such claimant is not affected by, and cannot take advantage of, the fact that other payments were prematurely made. The provision of section 1184 that "no payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person except the contractor, but as to such lien such payment shall be deemed as if not made, and shall be applicable to such liens," was quoted, and it was said that this provision "is not made dependent upon the giving or the failure to give notice." *Sweeney v. Meyer* was decided in department 2, and a petition for a hearing in bank was denied; the Chief Justice dissenting. In *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512, which followed shortly after, the same conclusion was announced by department 1 of this court.

The question was again under consideration in *Valley Lumber Co. v. Struck*, 146 Cal. 266, 80 Pac. 405. In this case the contract provided that a certain sum should be paid when the building was completed and accepted by the architect. The payment was made upon the completion of the building, but two days before the acceptance by the architect. Upon the first submission of the case, which was in bank, a judgment holding the owner liable to lien claimants for such payment (which was treated as premature) was affirmed on the authority of *Sweeney v. Meyer*, 124 Cal. 512, 57 Pac. 479. The opinion, prepared by Mr. Justice Shaw, was concurred in by four members of the court. The Chief Justice dissented, filing an opinion in which

he gave his reasons for thinking the decision in *Sweeney v. Meyer* erroneous. Mr. Justice Angellotti dissented on another ground, but added the statement that, if the question had been new, he would have agreed with the views of the Chief Justice. A rehearing was granted, and the appeal again came before the court in bank. On the second submission, the judgment was reversed; a majority of the court taking the position that, as the clause requiring approval by the architect was for the benefit of the owner solely, it might be waived by him, and a payment made in advance of such approval was not to be regarded as premature, so far as the plaintiff's rights were concerned. It thus became unnecessary to decide the question of the effect of a premature payment, if one had been made. Mr. Justice Shaw concurred, taking the position that the payment was premature, but that, for the reasons stated in the dissenting opinion of the Chief Justice on the former submission, the rights of the lien claimants were not affected by such payment. In this opinion the Chief Justice concurred, and Mr. Justice Angellotti concurred in a separate opinion in which he, for like reasons, expressed the view that *Sweeney v. Meyer* should be overruled.

In view of the judicial history just recited, the question of law here presented cannot be said to be finally settled by our decisions. It is true that the contention of the respondents has been twice upheld in department. But, at a later date, a bank decision to the same effect was set aside. Upon resubmission the appeal was disposed of upon other grounds. While the majority of the court expressed no view, one way or the other, on the question which they had before decided, three justices deliberately declared opinions in opposition to the doctrine of *Sweeney v. Meyer*. Taking all the cases together, the court has not committed itself to any definite course of decision, and we feel that we are not now precluded from considering the question anew on its merits.

[1] We are satisfied, upon re-examination, that the contention of the appellants should be upheld and the case of *Sweeney v. Meyer* overruled. The reasons for this conclusion cannot be better stated than in the following quotations from the dissenting opinion of the Chief Justice on the first submission of *Valley Lumber Co. v. Struck*: "By the mechanics' lien law the owner and contractor are authorized to stipulate for the payment of three-fourths of the contract price of a building by installments to become due, at their option, at or before its completion, but no notice of lien can be recorded until after the completion, and consequently no lien can be acquired upon the building by merely recording notice for any greater portion of the contract price than the 25 per cent., which must be made payable not less than 35 days after completion, unless the



owner and contractor voluntarily agree that a larger proportion may be retained until after the time when the lien notices may be recorded. But the law also provides for personal and actual notice to the owner by a laborer or materialman of his claim at or at any time after the time it accrues, irrespective of the completion of the building, and this notice operates as a garnishment to intercept the payment of any installment of the contract price not then due by the terms of the contract, compelling the owner to withhold a sufficient sum to answer such claim and costs. Upon due service of such notice, the owner becomes liable to the extent of all money to become due upon the contract, and, in the event that a notice of lien is afterward duly recorded by the claimant, his building is subjected to a lien as security for the just amount of the claim, and that notwithstanding he may have made a premature payment upon the contract price before the receipt of notice. But this is as far as the statute goes. It does not make the premature payment of an intermediate installment of the contract price invalid as to all materialmen, laborers, etc., but only when the effect of allowing its validity would be to defeat, diminish, or discharge a lien, in favor of persons other than the contractor. So that, if it is an essential condition prerequisite to the creation of a lien upon the building for any portion of a particular installment of the contract price that written notice of the claim should be served upon the owner before payment is due, if no such notice is served, a premature payment of such installment does not defeat, diminish, or discharge the lien; there is no lien to defeat or impair; and the failure of the security is due, not to the fault of the owner, but to the default of the claimant who has omitted to take the step made essential by the statute for the acquisition of a lien. His lien has not been discharged or defeated or diminished by the premature payment, because it has never come into existence. If a payment is due on the 19th, and a materialman desires, for his better security, to have it withheld by the owner, he must give notice of his claim before the 19th, or the owner may make the payment with perfect assurance that he will not have to pay again on account of the materialman's claim, as the latter well knows. But, if he with this knowledge omits to give the notice [the present case], what right, then, has he to complain that payment was made on the 17th? He is no worse off than he would have been if it had not been made till the 19th. His notice of lien, subsequently filed, attaches to the last payment due 35 days after completion of the building; but according to the intent, no less than the language of the statute, it does not attach to any previous installment not garnished by actual notice before it fell due. The decision in *Sweeney v. Meyer*, resulted, in my opinion, from the as-

sumption that the provisions of the statute as to notice to the owner and invalidity of premature payments are separate and independent. They are, indeed, separate, as every clause of every statute is necessarily separate from other clauses; but that they are independent I cannot admit. They are related parts of one general scheme, designed to be complete and harmonious, operating for the protection of laborers, mechanics, and materialmen, without injustice to owners of property. Upon each class a duty is imposed, and the performance of this duty is the condition of enjoying the rights conferred. To intercept a payment and secure a lien, notice of the claim must be served before the payment is due. To give the amplest opportunity for service of notice, the owner must make no payment until it is due according to the terms of his recorded contract. If he makes a premature payment, he does it at the risk of having to pay twice; but he incurs this liability only in case of a timely notice. If no notice is given there is no lien, and to hold the payment valid harms no one."

We have nothing to add to the foregoing discussion except the observation that the construction here adopted preserves to lien claimants who have not served notices to withhold the entire fund upon which, under the law and the terms of the contract, they were entitled to rely. On the other hand, the rule laid down in *Sweeney v. Meyer* imposes upon the owner, for the benefit of the lien claimants, a penalty for an act which has no substantial relation to any right of such claimants. They would not have been entitled to share in any portion of the progress payments, if these payments had been made after they fell due. They were therefore not injured in any way by a premature payment. "The law must be construed against the exaction of the penalty, if in reason it can be." *West Coast L. Co. v. Knapp*, 122 Cal. 81, 54 Pac. 534; *Hampton v. Christenson*, 148 Cal. 729, 84 Pac. 200.

It follows that the judgment cannot stand. We are asked by appellant to direct the court below to enter a judgment in accordance with the views here expressed. But this cannot be done in the present state of the findings. The trial court has found that only \$10,225 has been paid to the contractor, and that \$8,075 remains unpaid and in the hands of the owner. This finding is based on the erroneous view that the owner is not entitled to credit for the \$2,000 prematurely paid.

[2] But, since this court has no power on appeal to make findings of fact, a judgment that the lien claimants are entitled to share in a balance of \$4,075 only would not be sustained by the findings. The error of law must be corrected by further proceedings, leading to the making in the court below of findings upon which a proper judgment can be entered.

[3] The finding against the truth of the defendant's averment that "each of the payments provided for \* \* \* was made \* \* \* at the time when the same was made payable by the terms of said contract" may, under the legal conclusions hereinabove expressed, be disregarded as immaterial.

There will be no occasion for a new trial of the issues which are not now in controversy.

The order denying a new trial is reversed, and a new trial ordered, with respect to the issues raised by defendant Elderton's allegations of the amounts paid by him to the contractor, and the amount of the contract price remaining in his hands. In all other respects said order is affirmed. The judgment is reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

### WILSON v. UNION IRON WORKS DRY DOCK CO. (S. F. 6372.)

(Supreme Court of California. March 30, 1914. Rehearing Denied April 29, 1914.)

#### 1. APPEAL AND ERROR (§ 347\*)—NOTICE OF APPEAL—DESCRIPTION OF JUDGMENT—JUDGMENT OF NONSUIT.

Under Code Civ. Proc. § 581, providing that an action may be dismissed, or a judgment of nonsuit entered, where plaintiff fails to prove a sufficient case, and that such dismissal must be made by orders entered upon the minutes, where the court granted a nonsuit at the close of defendant's evidence, and the judgment was in fact rendered on January 18th, but was not entered in the minutes until February 10th, a notice of appeal "from the judgment of nonsuit and dismissal \* \* \* entered \* \* \* on the 18th day of January" was sufficient, as the entry in the minutes was a "judgment of nonsuit," and the giving of an incorrect date did not invalidate the appeal, where it clearly appeared that but one judgment was ever entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 347.\*]

#### 2. WHARVES (§ 21\*)—DRY DOCK—DEFECT IN STEAMER GANGPLANK.

The proprietor of a dry dock maintained for the use of vessels needing painting or repairs, as a part of whose business gangplanks were kept to put out to vessels docked there to enable those on board to leave the vessel, owed to all persons lawfully and properly on board such a vessel, and wishing to leave it, the duty of exercising reasonable and ordinary care, if not the utmost care or diligence required of carriers, to provide a safe and sound gangplank and such supports or props as were necessary on account of the weakness of the plank or the length of the span from the dock to the ship.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 44-49; Dec. Dig. § 21.\*]

#### 3. WHARVES (§ 21\*)—DRY DOCK—DEFECT IN STEAMER GANGPLANK.

A United States customs inspector who boarded a ship on its way to a dry dock in the course of his duties to prevent passengers from leaving without being searched for dutiable property was one of the persons for whose use the

gangplank was put out to the ship by the proprietor of the dry dock, and such proprietor was liable for his injuries caused by the gangplank breaking.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 44-49; Dec. Dig. § 21.\*]

#### 4. WHARVES (§ 21\*)—DRY DOCK—DEFECT IN STEAMER GANGPLANK.

A proprietor of a dry dock was liable for injuries caused by a gangplank put out to a steamer breaking, though the officers and men of the steamer fastened it at the ship end, where there was no defect in such fastenings; the break resulting from the condition of the stringers and the absence of props.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 44-49; Dec. Dig. § 21.\*]

#### 5. WHARVES (§ 21\*)—DRY DOCK—NEGLECT—EVIDENCE—NOTICE.

Notice on the part of the servants of a dry dock proprietor of the weak condition of a gangplank might be inferred from the fact that on previous occasions it had been shored up when in use.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 44-49; Dec. Dig. § 21.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Joseph P. Wilson against the Union Iron Works Dry Dock Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Metson, Drew & Mackenzie, of San Francisco, and Reed, Black & Reed, of Oakland, (Horatio Alling, of San Francisco, of counsel), for appellant. Wilson & Wilson, of San Francisco, for respondent.

SHAW, J. The plaintiff sued to recover damages for personal injuries alleged to have been caused by the defendant's negligence. At the close of the evidence for the plaintiff the court, on defendant's motion, granted a nonsuit. The plaintiff appeals.

[1] The respondent objects to the consideration of the appeal on the ground that it was taken from the ruling granting the nonsuit, and not from the final judgment. The notice of appeal states that the plaintiff appeals "from the judgment of nonsuit and dismissal therein entered in said superior court on the 18th day of January, 1912." The judgment was in fact rendered on that date. This appears from the reporter's transcript of the proceedings on the trial, but not in the judgment roll. The judgment of nonsuit or dismissal as entered by the clerk in the minutes, as required by section 581, Code of Civil Procedure, was not made until February 10, 1912. It is this discrepancy upon which the respondent relies. There is no merit in the objection. The entry in the minutes under date of February 10, 1912, was a judgment of nonsuit. Code Civ. Proc. § 581; *Matthai v. Kennedy*, 148 Cal. 699, 84 Pac. 37. The notice of appeal incorrectly gives the date of the entry of the judgment appealed from. This defect, however, does not invalidate the appeal, since it clearly ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pears that but one such judgment was ever entered in the case. *Foss v. Johnstone*, 158 Cal. 123, 110 Pac. 294; *Swasey v. Adair*, 83 Cal. 137, 23 Pac. 284; *Weyl v. Sonoma, etc., Co.*, 69 Cal. 204, 10 Pac. 510; *Anderson v. Goff*, 72 Cal. 66, 13 Pac. 73, 1 Am. St. Rep. 34; *Mitchell v. Gray*, 8 Cal. App. 424, 97 Pac. 160; *Larson v. Larson*, 15 Cal. App. 536, 115 Pac. 340.

The plaintiff was in the act of disembarking from the steamer *Mongolia*, over a gangplank furnished for that purpose by defendant, when, by reason of the unsafe condition or weak construction of said gangplank, it gave way in the middle, causing the plaintiff and others who were also disembarking to fall some 15 or 20 feet to the bottom of defendant's dry dock. The plaintiff was severely injured by the fall. The court below appears to have directed the nonsuit upon the theory that, under the circumstances of the case, the defendant owed no duty to the plaintiff to provide a sound and safe gangplank upon which he could leave the vessel, or to put the gangplank in use in a safe and sound condition.

[2, 3] The plaintiff was a United States inspector of customs at the port of San Francisco. On the morning of the accident he was detailed to duty in connection with the steamer *Mongolia*. His duty was to board the ship at Pier 44, stay on board until it reached the defendant's dry dock, and, when the gangplank was made fast at the dry dock to enable persons to leave the vessel there, to go down first and allow no one to precede him, so that other custom house officers who were to be there awaiting his arrival, and who would be standing at the foot of the gangplank, could go aboard immediately and search every one on board for dutiable articles before allowing such persons to leave the ship. The plaintiff went aboard as ordered and reached the dry dock. Five custom house searchers in uniform were at the dock awaiting the arrival of the steamer in order to go aboard there and make the required search. When the gangplank in question was taken in and lashed to the vessel at the dry dock to allow people on board to go ashore, the plaintiff went upon it, followed by a number of other persons, and had proceeded about half way to the end of it when it broke and precipitated all those upon it to the bottom of the dock. The *Mongolia* was taken to the dry dock to have her bottom painted. The gangplank was one of those provided by the defendant at its dry dock for use when steamers were docked there. Preparatory to that occasion it had been rolled forward upon the dock by the defendant's employes to be ready when the *Mongolia* arrived. The work of placing it for use was performed by the employes of the steamer on board and by the employes of the defendant on the dock in conjunction; those on the steamer attending

to its lashings at the steamer end, and those of the defendant to the placing of it in position at the dock end. After it was lashed and properly placed, some one of defendant's employes engaged in the work on the dock called out, "All right;" whereupon the plaintiff and others walked out upon it as above stated. In using this gangplank previously it was usually shored up with props beneath, midway of its length; but on this occasion it was not shored. There was evidence to the effect that the stringers of the gangplank were old, in bad condition, and somewhat decayed, and that this was the cause of the accident. The evidence also tended to show that the defendant maintained this dry dock for the use of vessels which needed painting or repairs, and that as a part of defendant's business it kept this and other gangplanks to put out to vessels when they were docked in order that those on board might leave the vessel by that means, and also that in the usual course of business, when a vessel engaged in foreign trade, as was the *Mongolia*, was docked there, it would be accompanied by custom house officers, as in this case, to search persons aboard and prevent the taking ashore of dutiable property.

Under these circumstances, it is clear that the defendant owed to all persons lawfully and properly on board such vessel on arrival at the dock, and there wishing to leave it, the duty of providing a safe and sound gangplank for their use. These gangplanks were provided by the defendant, and were kept by it for the purpose for which this one was used on this occasion, and as a regular part of its business. People were expected to walk over it from the ship to the dock. For their safety, a sound gangplank was required, with props therefor, if such were necessary on account of the weakness of the plank or the length of the span from the dock to the ship. It was therefore incumbent upon the defendant to use at least ordinary care to provide sound gangplanks and see that they were properly shored. It is not necessary here to determine whether it was, to that extent, a carrier of passengers, and bound as such to use the utmost care and diligence for their safe carriage as provided in section 2114 of the Civil Code. It was, at all events, bound to exercise reasonable and ordinary care for the safe carriage of those whom it had reason to expect would avail themselves of that means of leaving the vessel.

The plaintiff stood in a relation to the defendant which made this duty owing to him. He was aboard the vessel and left it over this gangplank in the performance of his duty—a duty which was usually performed by custom house officers in such cases, and of which it is to be inferred the defendant had notice. He was therefore one of the persons for whose use this gangplank was provided. We do not mean to say that the defendant would be absolved from liability if the plain-

tiff had been casually aboard the vessel as a mere visitor. The question is not involved, and it is not necessary to decide it.

[4] The fact that the officers and men of the vessel took charge and handled the ship end of the gangplank does not change or affect the duty of the defendant in the matter. There was no defect in the fastenings at the ship end. The evidence justified the conclusion that the fall was caused by the weak condition of the stringers composing the gangplank and the failure to shore it up, both of which were under the control and charge of the defendant.

[5] There is no direct evidence that the defendant's servants were aware of this weak condition of the plank; but the jury might well have inferred that they had such notice from the fact that on previous occasions this gangplank had been shored up when in such use. We do not mean to say that under the circumstances proof of such notice devolved upon the plaintiff, or that the maxim *res ipsa loquitur* does not apply.

The decisions in *Grundel v. Union Iron Works*, 141 Cal. 566, 75 Pac. 184; *Pennebaker v. San Joaquin, etc., Co.*, 158 Cal. 579, 112 Pac. 459, 31 L. R. A. (N. S.) 1099, 139 Am. St. Rep. 202, and *Means v. S. O. Ry. Co.*, 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206, are not applicable to the facts of this case. The first was a case in which the person injured went from the shore to the vessel over an insecure gangplank, but did so without the knowledge or permission of the defendant, and with no business there which was in any way connected with the defendant, or in which it was interested. He was either a trespasser or a mere licensee. The second case was that of a public fireman who, upon an alarm of fire, and as a part of his duty, entered the yard of a burned building and was there injured by electricity from live wires which had become unfastened from the effects of the fire. The defendant was a power and light company which furnished the electricity for those and other wires of the city lighting system. In the course of the argument the court referred to the common-law doctrine that "a fireman entering a building under imperative necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition." This proposition rests upon the peculiar relations of the parties and the imperative public necessity under which they must act at the time, as is more fully set forth in *Woodruff v. Bowen*, 186 Ind. 481, 34 N. E. 1113, 22 L. R. A. 198. These did not exist in this case, and the doctrine is not applicable. In *Means v. S. O. Ry. Co.*, the plaintiff was injured by the explosion of sulphuric acid in defendant's freight depot. The plaintiff entered the depot without the knowledge of the defendant or its servants, and up-

on business of his own not in any way connected with that of the defendant. He came under the rule applicable to trespassers or mere licensees. The mere fact that the plaintiff in this case was a public officer performing his public duty does not bring the case within the fireman rule. There was no sudden emergency requiring immediate action by the defendant, and the gangplank was intentionally provided for this occasion, and for the use of plaintiff and others leaving the vessel.

The case comes within the principles stated and applied in the following authorities: 29 Cyc. 454; 21 Am. & Eng. Ency. Law, 471; *Furey v. N. Y., etc., Co.*, 67 N. J. Law, 274, 51 Atl. 505; *Anderson, etc., Co. v. Hair*, 103 Ky. 201, 44 S. W. 658; *Swords v. Edgar*, 59 N. Y. 30, 17 Am. Rep. 295; *Low v. Grand Trunk Ry. Co.*, 72 Me. 313, 24 Am. Rep. 331; *Campbell v. Portland*, 62 Me. 560, 16 Am. Rep. 503.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

#### STALDER et al. v. RIVERSIDE GROVES & WATER CO. et al. (L. A. 3207.)

(Supreme Court of California. March 31, 1913.)

##### 1. BILLS AND NOTES (§ 129\*)—NONPAYMENT OF INTEREST AT MATURITY—OPTION OF HOLDER—ELECTION.

Where the maker of a note stipulating that, on default in interest, the principal and interest should become due at the option of the holder mailed on an interest day a check for the interest, which the payee received on the following day, after he had directed his attorney to notify the payee of his election to declare the entire sum due, and the notice from the attorney was not received by the maker until the next day, the maker tendered payment of interest before the payee exercised his election to declare the entire sum due, and he could not thereafter exercise the option.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.\*]

##### 2. BILLS AND NOTES (§ 129\*)—NONPAYMENT OF INTEREST AT MATURITY—OPTION OF HOLDER—ELECTION.

The payee of a note stipulating that, on default in any interest, the principal and interest might at his option be declared due must do some positive act to indicate an exercise of the option, and, where notice is the method chosen to evidence an election, the giving of the notice fixes the rights of the parties, and must be received by the maker before he tenders payment of past due interest.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.\*]

##### 3. BILLS AND NOTES (§ 129\*)—NONPAYMENT OF INTEREST AT MATURITY—OPTION OF HOLDER—ELECTION.

The right of the payee, in a note stipulating that, on default in any interest, the entire sum may be declared due at his option, to declare the entire debt may be claimed or waived, and, until claimed, the maker may terminate the right by a proper tender of overdue interest.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by A. J. Stalder and another against the Riverside Groves & Water Company and another. From an order denying defendants' motion for a new trial, the Riverside Groves & Water Company appeals. Reversed.

Watkins & Blodget, of Los Angeles, for appellant. MacFarland & Irving, of Los Angeles, for respondents.

SLOSS, J. The defendant, Riverside Groves & Water Company, appeals from an order denying its motion for a new trial.

On July 24, 1909, said defendant made its promissory note, whereby it promised to pay to plaintiffs, on or before January 2, 1912, the sum of \$3,627, with interest thereon at the rate of 10 per cent. per annum, payable semiannually. Principal and interest were made payable at Riverside, and the note provided that, if default should be made in the payment of any interest when due, "both principal and interest shall thereafter be due and payable at the option of the holders of this note." The note was secured by a mortgage of real property.

On February 17, 1911, the plaintiffs commenced this action to foreclose the mortgage, alleging that the maker of the note had failed to pay the interest due on the 24th day of January, 1911, and that on the 25th day of January, 1911, the plaintiffs had exercised their option to declare both principal and interest due and payable. These allegations were denied by the defendant corporation. The findings were in favor of the plaintiffs on the foregoing issues, and judgment of foreclosure followed. The sufficiency of the evidence to sustain these findings is challenged by the appellant.

There is little, if any, dispute about the facts. The single question for decision is whether, on such facts as appear without conflict, the respondents were entitled, by reason of default in the payment of interest, to treat the principal sum of the note as due in advance of the date fixed for maturity.

[1] The appellant, maker of the note, had its office in the city of Los Angeles. The respondents resided at Riverside. On January 24, 1911, the appellant posted at Los Angeles a letter, addressed to respondents at Riverside, containing a check for the amount of interest due on that date. The letter and check reached one of the plaintiffs on the following day, January 25th, at about 6 o'clock p. m. Earlier on said 25th day of January the other plaintiff had directed an attorney to notify the maker that the plaintiffs had elected to declare principal and interest due for failure to pay the interest due on the 24th day of January. Pursuant to such direction, said attorney wrote a letter to appellant, notifying it that plaintiffs had thus declared the entire sum due. This letter did not reach the appellant until the 26th

day of January, the day after the check for the interest had come to the hands of one of the plaintiffs. On the 26th day of January the attorney wrote to appellant again, returning its check, and repeating the statement that the principal of the note had been declared due by the payees for default in payment of interest. No objection was made to the form of payment; the sole ground for refusing to accept the check being that it had not been received on the 24th day of January, the day when interest was due.

Under these circumstances, we think the court below should have held that the maker had tendered payment of the interest before the payees had effectively exercised their option of declaring the principal due.

[2, 3] The case is similar in principle to *Trinity County Bank v. Haas*, 151 Cal. 556, 91 Pac. 385. There, as here, an interest payment had not been made when due. It had, however, been tendered before the payee had manifested its election to declare the principal due, either by commencing action, or by notifying the maker of such election. This court, while recognizing that a provision like the one in the note here before us does not make it incumbent upon the payee, as a condition to the exercise of his option, to give notice to the maker that he has declared the principal due, laid down the rule that the payee must do some positive act to indicate an exercise of the option. The right to declare the principal due may be claimed or waived by the payee, and, until he has claimed it, the maker may terminate the right by a proper tender of the overdue interest. In the case cited it was held, further, that the maker could not exercise his option, either by reaching a mental decision to declare the principal due, or by directing his attorneys to institute an action on the note.

Here the respondents had, at the time when the check reached them, done nothing more than to instruct their attorney to notify the appellant that they had declared the note due. The attorney had written as instructed; but his notification had not reached the maker. While notice to the maker of the exercise of the option was not essential, such notice was the method chosen by the payees to evidence their determination to claim the right conferred upon them by the terms of the note. The giving of such notice was the act fixing the rights of the parties. The attorney, in giving the notice, was the agent of the payees, not the maker. A mere deposit in the mails did not, therefore, constitute a completed declaration of the maturity of the principal. The declaration was not complete until the notice reached the maker. Until then, the payees had done no more than was done in *Trinity County Bank v. Haas*, viz.: To instruct their agent to take steps which, if carried out, would amount to an exercise of their option. In the meantime, the overdue interest had been tendered, and the right

to carry into effect the contemplated, but unexecuted, act of declaring the principal sum due was gone.

The result of the views stated is that the findings regarding the exercise by plaintiffs of their option must be held to be without support in the evidence.

The order denying a new trial is reversed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.

**BRADBURY v. HIGGINSON.** (L. A. 3570.) (Supreme Court of California. March 30, 1914.)

**1. LANDLORD AND TENANT (§ 222\*)—ACTION FOR RENT—DEFENSES.**

A tenant defending an action for rent due under a written lease, on the ground that he had rescinded the lease because of the landlord's breach of a covenant omitted from the lease, must show facts essential to sustain a cause of action to reform the lease so as to include the covenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 879-884; Dec. Dig. § 222.\*]

**2. LIMITATION OF ACTIONS (§ 40\*)—REFORMATION OF INSTRUMENTS SUEO ON AS EQUITABLE DEFENSE—PLEA OF LIMITATIONS.**

The plea of limitations may be interposed in an action at law on a contract, to a defense based on an equitable cause of action for the reformation of the contract.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 212, 213; Dec. Dig. § 40.\*]

**3. LIMITATION OF ACTIONS (§ 187\*)—PLEADING IN AVOIDANCE—MISTAKE OR FRAUD.**

Code Civ. Proc. § 338, subd. 4, fixing a limitation of three years for actions for relief for fraud or mistake, is applicable to relief sought by a tenant, who, when sued for rent, alleges a violation by the landlord of a covenant erroneously omitted from the lease, and, where more than three years has elapsed, he must allege facts excusing a failure to make an earlier discovery of the mistake or fraud relied on, and a mere averment that he did not discover the same within three years of the filing of the answer is insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 696; Dec. Dig. § 187.\*]

**4. CONTRACTS (§ 175\*)—CONSTRUCTION—PAROL AGREEMENTS.**

Civ. Code, § 1640, providing that, when through fraud or mistake a written contract does not express the real intent of the parties, the intention is to be regarded and the erroneous parts of the writing disregarded, embodied in title 3 of part 2 of division third of the Code, dealing with the subject "Interpretation of Contracts," does not authorize the court, in the absence of a showing of the right of reformation, to find on oral testimony that a contract reduced to writing should include a provision not appearing therein and to enforce the same as a part of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.\*]

**5. REFORMATION OF INSTRUMENTS (§ 32\*)—TIME TO SUE.**

The rule that an action for reformation of a contract is not barred so long as an action on the contract may be brought is inapplicable, where the reformation is not merely incidental

to the main relief sought, but is an essential prerequisite to the asking of any relief.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.\*]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Louise S. Bradbury against Augustus B. Higginson. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 123 Pac. 797.

B. F. Thomas, of Santa Barbara, for appellant. Canfield & Starbuck, of Santa Barbara, for respondent.

**SLOSS, J.** The plaintiff brought this action to recover \$600, rent claimed to be due under a lease of a house at Montecito, Santa Barbara county. The lease, which is set out in full in the complaint, was for five years from the 1st day of January, 1905, at a monthly rental of \$100, and the amount here sued for is the rent for the last six months of the term, i. e., July to December, 1909. The complaint, which alleges nonpayment of rent after July 1, 1909, was filed on June 18, 1912. In a former action for the recovery of the same sum, commenced in August, 1909, a judgment in favor of plaintiff had been reversed on the ground that the action, viewed as one for rent, was premature; such action not being maintainable in advance of the time when rent was payable under the lease. *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797. In the present action, the defendant filed an answer, in which he denied the plaintiff's general allegation of performance of all conditions precedent, and set up affirmatively the failure of plaintiff to comply with an alleged obligation to furnish water to the premises, by reason of which failure the defendant had rescinded the contract of lease. A demurrer to the answer was sustained, and, defendant declining to amend, the plaintiff had judgment for the amount claimed. The defendant appeals from such judgment.

The answer, read as a whole, clearly shows that the denial of performance of conditions precedent, above referred to, was intended to be qualified by and to refer to the affirmative allegations relative to the failure to furnish water. Indeed, it is not suggested that there was any other condition to be performed by the plaintiff. The implied covenant to protect defendant's possession (Civ. Code, § 1927) was not broken, as appears from the uncontroverted facts, alleged in the pleadings. The real question, therefore, is whether these affirmative allegations set up a defense good against the demurrer interposed.

The matter thus pleaded was, in substance, as follows: At the time of the execution of the lease, it was mutually agreed that, in consideration of the payment of the rent, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

plaintiff at all times during the term of the lease would, at her own cost, keep the house and premises supplied with necessary water from plaintiff's water plant. Without said agreement the defendant would not have accepted the lease. In reducing the lease to writing, the agreement to furnish water was by mutual mistake omitted. The premises had no other water supply. About June 29, 1909, the premises became uninhabitable for want of water, and continued to be without water until the 18th day of August, 1909. As soon as defendant ascertained that the premises were without water, he demanded of plaintiff that she furnish water, which she neglected and refused to do. Such neglect and refusal continued until August 17, 1909, when defendant elected to rescind said contract of hiring and to vacate the premises on account of plaintiff's neglect to furnish water, and on said date he served on plaintiff a written notice that he surrendered the premises and rescinded the lease. On the same day he did vacate the house and premises. The house and premises could not be used or occupied without water, and by reason of plaintiff's failure to furnish water, the consideration for defendant's agreement to pay rent from July 1, 1909, to August 17, 1909, absolutely failed. The contract of lease was prepared by plaintiff and her attorney, and defendant did not discover until August, 1909, that the written lease did not contain the term and condition orally agreed upon, to wit, that plaintiff should at her own cost furnish the premises with water from her plant.

One of the grounds of demurrer to the foregoing defense was that it is barred by the provisions of subdivision 4 of section 338 and subdivision 1 of section 339 of the Code of Civil Procedure.

Under the lease as written, the failure to supply water did not justify the defendant in abandoning the premises or refusing to pay rent. The writing did not impose upon the lessor any affirmative obligation in this regard. This was definitely established in the former action (162 Cal. 602, 123 Pac. 797), where the defendant sought to interpret the word "appurtenances" in the lease as including an agreement to keep the water system in repair. The decision was against him on this point. The defense is, then, based upon the failure of the plaintiff to comply with an obligation which was not included in the written agreement, but was, as the answer alleges, omitted therefrom by mistake. For this failure, materially affecting the consideration, the defendant has asserted a right to rescind.

[1] It seems entirely clear that, before any rescission or other defense can be based upon an agreement which should have been, but was not, made a part of the written lease, the writing must be reformed by the decree of a court of equity, or, if there be no formal

decree of reformation, there must be a showing justifying such a decree. The defense really consists of two parts, i. e.: (1) A demand that the writing be reformed so as to express the true intention of the parties; and (2) a plea that the agreement has been rescinded for the failure of the plaintiff to perform it, as thus reformed. But since the agreement claimed to be rescinded is not the agreement contained in the writing executed by the parties, it was essential to the defense that a right of reformation be established. The reformation of contracts is a branch of the equity jurisdiction. Under the old system, where legal and equitable rights were administered in different tribunals, the equitable remedy would have had to be sought and obtained in a court of chancery in a suit instituted for that purpose. Under our procedure, however, equitable defenses may be interposed to legal causes of action, and a right to equitable relief, affecting the legal right asserted in the complaint, may be set up by way of answer. But if the matter set up be an equitable cause of action, the answer must contain all the averments essential to the statement of a cause of action as such. *Bruck v. Tucker*, 42 Cal. 352; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119.

[2] If the defendant's right to obtain the equitable relief sought is barred by limitation, the plea of the statute may be interposed to the attempted defense just as it might have been in case the relief had been sought by an independent action. This court has held that the statute of limitations is applicable to claims asserted in an answer by way of set-off or counterclaim (*Lyon v. Petty*, 65 Cal. 322, 4 Pac. 103; *Moore v. Gould*, 151 Cal. 723, 732, 91 Pac. 616), and the same reason exists for making the statute apply to defenses based upon an equitable cause of action asserted by the defendant against the plaintiff.

[3] In the case under consideration the plaintiff, in her demurrer, pleaded subdivision 4 of section 338 of the Code of Civil Procedure, which fixes a limitation of three years for actions "for relief on the ground of fraud or mistake." This is the statute applicable to the relief sought by the answer. *Tarke v. Bingham*, 123 Cal. 163, 55 Pac. 759; *Eureka v. Gates*, 137 Cal. 89, 69 Pac. 850. A reformation of the lease was demanded on the ground of mistake in omitting the covenant binding the plaintiff to furnish water. The cause of action to enforce such reformation accrued, under the statute, upon the discovery of the facts constituting the mistake. Code Civ. Proc. § 338, subd. 4. It is true that the answer avers that the defendant did not discover the mistake until August, 1909, which was within three years of the filing of the answer. But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the

running of the statute. *Hecht v. Slaney*, 72 Cal. 368, 14 Pac. 88; *Burling v. Newlands*, 112 Cal. 476, 44 Pac. 810; *Lady Washington Co. v. Wood*, 113 Cal. 482, 45 Pac. 809; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117. It is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon. *Dennis v. Bint*, 122 Cal. 39, 54 Pac. 373, 68 Am. St. Rep. 17; *Harrington v. Patterson*, 124 Cal. 542, 57 Pac. 476; *Lady Washington Co. v. Wood*, supra. Here the defendant signed the lease in December, 1904. The only ground assigned for his failure to discover that the paper did not include the agreement to furnish water is that the lease was prepared by plaintiff's attorney. This is no sufficient excuse for the defendant's alleged ignorance of the terms of a writing executed and accepted by him. No reason appearing to the contrary, he must be deemed to have known the precise terms of the lease when he signed it. If it omitted a provision which it should have contained, his right to compel a reformation accrued at once and should have been asserted within three years. We do not think this case is one in which the reformation is merely incidental to the ultimate relief sought. It is the foundation upon which every other right asserted by the defendant must rest. Without a reformation, there was no contract which the plaintiff had broken, nor was there any right of rescission.

[4] The defendant relies upon section 1640 of the Civil Code, providing that "when, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." This section is found in title 3 of part 2 of division third of the Code; such title dealing with the subject of "Interpretation of Contracts." Whatever may be the real scope of this enactment, it certainly cannot have the effect of authorizing a court, in the absence of a showing of a right of reformation, to find, upon oral testimony, that a written contract includes provisions which do not appear upon its face, and to enforce such provisions as a part of the written contract. This would not be an interpretation of the contract. It would be altering a written contract by proof of the parol agreement of the parties, a procedure which is contrary to the most elementary principles governing the effect of written instruments. If the decision in *Gardner v. Cal. Guar., etc., Co.*, 137 Cal. 71, 69 Pac. 844, gives to section 1640 the effect contended for by defendant, we think that decision goes too far, and should not be followed on this point.

[5] The opinion in the *Gardner Case* contains, further, an expression to the effect

that an action for the reformation of a contract is not barred so long as an action on the contract itself might be brought. If this be the correct rule, we do not consider it applicable to a case like the one before us, where the reformation is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief.

For the reasons stated, we conclude that the demurrer to the answer was rightly sustained.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

#### PEOPLE v. MacDONALD. (Cr. 1809.)

(Supreme Court of California. March 30, 1914.)

##### 1. RAPE (§ 13\*)—EVIDENCE.

In cases of statutory rape, the willingness of the prosecutrix is immaterial, for she is unable to consent.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. § 12; Dec. Dig. § 13.\*]

##### 2. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.

In a statutory rape case, where the prosecutrix stated that on her visit to accused's residence she sat with him on a couch in the living room, and after some conversation went with him into a bedroom, where they had intercourse, the refusal of the court to allow cross-examination as to whether she went willingly was not error, where there was a sufficient cross-examination to test her credibility and the defense did not outline the theory of the cross-examination; the consent of the prosecutrix in such cases being no defense.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 263.\*]

##### 3. RAPE (§ 46\*)—EVIDENCE—ADMISSIBILITY.

Acts of familiarity of accused towards the prosecutrix prior to the commission of the offense are admissible in a prosecution for statutory rape.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. § 54; Dec. Dig. § 46.\*]

##### 4. CRIMINAL LAW (§ 786\*)—INSTRUCTIONS—EVIDENCE OF ACCUSED.

Where accused charged with statutory rape admitted that he falsely stated to a third person that the girl was not at his house at the time the offense was claimed to have been committed, the refusal of an instruction that, if the evidence is otherwise insufficient to justify a conviction, the mere fact that accused when a witness made a false statement in no way connected with the charge against him will not warrant a conviction, is proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.\*]

##### 5. CRIMINAL LAW (§ 785\*)—TRIAL—INSTRUCTIONS.

A charge that a witness false in one part of his testimony is to be distrusted in others, being in accordance with Code Civ. Proc. § 2061, is proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**6. CRIMINAL LAW (§ 855\*)—TRIAL—REMARKS TO COUNSEL.**

In a prosecution for statutory rape, where accused's counsel justified his cross-examination on the ground that it concerned matters the prosecutrix had glozed over, it was improper for the court to rebuke him for the remark on the ground that he was guilty of ungentlemanly and unprofessional conduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1528, 1527, 1535; Dec. Dig. § 855.\*]

**7. CRIMINAL LAW (§ 1166½\*)—APPEAL—HARMLESS ERROR.**

An erroneous rebuke to accused's counsel, whereby the court characterized his conduct as ungentlemanly and unprofessional, is not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

**8. CRIMINAL LAW (§ 765\*)—TRIAL—INSTRUCTIONS.**

Under Const. art. 6, § 19, prohibiting charges upon matters of facts, and Pen. Code, § 1126, giving the jury the exclusive power to determine the facts, it is improper in a prosecution for statutory rape for the court to characterize the prosecutrix as courteous, kind, and modest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1751; Dec. Dig. § 765.\*]

**9. CRIMINAL LAW (§ 1035\*)—APPEAL—REVIEW—TIME FOR OBJECTIONS.**

In a prosecution for statutory rape, the court rebuked accused's counsel, who stated that he was trying to bring out on cross-examination matters which the prosecutrix had glozed over, admonishing him that the remarks were ungentlemanly and unprofessional, and not to apply such remarks to a witness who had been as courteous, kind, and modest as the prosecutrix. No objection was then made, but about four hours later accused's counsel objected and excepted to the criticism and admonition. Held that, while the remark as to prosecutrix was improper, yet as it might be construed to refer only to her demeanor on the stand, and not to her credibility, accused cannot complain on appeal; the exception not being promptly made, and not calling the court's attention to the remarks concerning the prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2633-2638, 2643, 2644; Dec. Dig. § 1035.\*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

R. C. MacDonald was convicted of statutory rape, and he appeals. Affirmed.

Elcott M. Epstein, of San Francisco, and Clyde Bishop, of Santa Ana, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the State.

SLOSS, J. The above-entitled cause is before this court pursuant to an order of transfer after judgment in the District Court of Appeal for the Second Appellate District. The judgment and order appealed from were there ordered reversed. The opinion, prepared by Mr. Justice Shaw, placed the reversal on the ground of misconduct of the trial court. We do not agree with the conclusion of the learned court of appeal on this point. The opinion includes, however, a discussion, which, in the main, accords with our views, of the

other assignments of error presented by the appellant, as well as an accurate recital of the essential facts. From that opinion we quote as follows:

"The evidence tends to establish the following facts: The prosecutrix, a girl of the age of about 14 years, residing with her mother in the city of Orange, was a pupil at a public school of which defendant, a married man, was principal. At the time of the alleged commission of the offense, namely, Sunday, May 12, 1912, she, after leaving Sunday school and before going to her home, called up defendant's residence over the 'phone. According to her testimony, he answered requesting that she come out to his house. She complied with the request, using her bicycle as a means of conveyance, entered the house, found the defendant's wife was absent and that he was alone, and remained with him for upwards of an hour, during which time the act of sexual intercourse is alleged to have been committed.

[1, 2] "The first error of which appellant complains is that the court limited the cross-examination of the prosecutrix to an extent that was prejudicial to his substantial rights. His contention is that, since the testimony of the prosecuting witness on direct examination showed that upon reaching the house she rang the door bell and, upon the door being opened by defendant, entered the living room and sat down with defendant on a couch, and after some conversation the two went into a bedroom, and while there defendant accomplished his purpose, it was competent to inquire on cross-examination how she entered the bedroom, whether or not by force, whether or not she made any resistance, and the force and tone of any outcry made. In cases of statutory rape, 'where the willingness of the prosecuting witness is immaterial by reason of inability to consent, the matters involved in outcry or complaint have no significance.' People v. Jacobs, 16 Cal. App. 478 [117 Pac. 615]. Notwithstanding this fact, appellant insists that he was entitled upon cross-examination of the witness to question her upon such matters for the purpose of eliciting, if he could, evidence showing the improbability of the offense being committed as related by her, and for the purpose of testing her credibility. Conceding this to be true and that in cases of this kind, where by reason of the heinous character of the offense charged the mere accusation engenders a feeling of abhorrence against the accused, the widest latitude upon cross-examination should be permitted, we cannot see that there was any abuse of discretion on the part of the trial court as to rulings made in this regard. On the contrary, it appears from the record that the witness was subjected to a cross-examination the extent of which was sufficient to test her credibility. Moreover, since the evidence sought to be elicited by the ques-

tions to which objection was sustained was for the purpose and in the hope of eliciting statements which defendant might by other witnesses controvert, thus discrediting the testimony of the prosecutrix, it was due to the court that it be made acquainted with the purpose and object of asking the questions, and this, in a proper case, could be done without the hearing of the witness or jury. No statement was made to the court by defendant as to his special purpose in asking the questions which, on their face and except for some special reason, were immaterial.

[3, 4] "The ruling of the court in permitting the district attorney, under the circumstances shown, to prove conduct and acts of familiarity of defendant towards the prosecutrix at a time prior to the commission of the offense, was not error. *People v. Castro*, 133 Cal. 11 [65 Pac. 13]; *People v. Morris*, 3 Cal. App. 1 [84 Pac. 463]. In testifying in his own behalf defendant stated that in a conversation had with the superintendent of schools he had, in the hope of stopping talk about the matter, denied that the girl was in his house, thus telling him a falsehood. Defendant requested the court to give the following instruction as applicable to such evidence: 'If you find the evidence otherwise insufficient to justify a verdict of guilty, a conviction cannot be found in this case by the mere fact that the defendant, when a witness in his own behalf, made a false statement as to a matter in no way connected with the crime of which he is accused'—which request was refused. In support of his contention that the court erred in its ruling, appellant cites *People v. Wong Ah You*, 67 Cal. 31 [7 Pac. 8], wherein the court reversed a judgment of conviction for the reason that the verdict of the jury was based solely and alone upon a false statement made by the defendant in regard to a matter in no way connected with the crime of which he was accused. The facts of that case bear no analogy to the one at bar. Moreover, the false statement was not made by defendant when a witness, as stated in the instruction.

[8] "There was no error in instructing the jury that a witness false in one part of his testimony is to be distrusted in others, etc. With the qualifications incorporated therein, it is a correct statement of the law as contained in section 2061 of the Code of Civil Procedure. *People v. Delucchi*, 17 Cal. App. 96 [118 Pac. 935]; *People v. Corey*, 8 Cal. App. 728 [97 Pac. 907]."

To what is said on the point last mentioned we may add the observation that the instruction complained of differs, to some extent, from any instruction heretofore approved by this court or by the courts of appeal. It would be a better practice, in matters of this kind, to adhere to forms of expression that have had the direct sanction of appellate courts. At the same time, we do not think the instruction, read in its entirety,

was substantially prejudicial to the appellant's rights.

[6, 7] During the cross-examination of the prosecutrix, and upon an objection being made to a question asked by one of defendant's counsel, Mr. Epsteen, the following colloquy took place: "The Court: The matter about which you are now speaking you brought out on cross-examination. Mr. Epsteen: That is the very fact to be brought out, matters that this witness has glozed over. Mr. West (District Attorney): That statement of the counsel is entirely improper. The Court: The remark of the counsel is very ungentlemanly and unprofessional, and I admonish you to refrain from such remarks to the witness who has been as courteous and kind and modest as this witness has been." Nothing further was said at the time, but later Mr. Epsteen said: "During the course of the examination of one of the witnesses, one of the counsel in this case was admonished or criticised, and at this time the defendant excepts and objects to that admonition of the court and assigns it as error." To this the court replied: "Let the record show this is some four hours afterwards."

It must, in fairness, be said that we find in the remarks of counsel nothing which called for the severe rebuke administered by the court, if, indeed, the remarks made were reprehensible in any degree. Counsel was, apparently, endeavoring to state the object of a question put by him on cross-examination, and it is difficult to see that in so doing he overstepped the bounds of propriety or of due courtesy to the witness. But an affront to counsel, or a wounding of his feelings, although unjustified, will not furnish a basis for appellate review, unless the rights of the defendant are in some way prejudiced, and it cannot, be said that the characterization of counsel's conduct as "ungentlemanly and unprofessional" was calculated to work substantial injury to the case of the defense. *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772; *People v. Modina*, 146 Cal. 142, 79 Pac. 842; *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693.

[8] A much more serious question arises on that part of the court's remarks which had to do with the demeanor and manner of the witness. Under a system of law which prohibits judges from charging juries with respect to matters of fact (Const. art. 6, § 19), and which gives to the jury the exclusive power to determine the facts (Pen. Code, § 1126), the trial judge should, as has often been pointed out, use the greatest care to avoid, in the presence of the jury, any utterance which may be construed as an intimation of his opinion on the issues of fact which are to be determined by the jury. *People v. Williams*, 17 Cal. 147; *People v. Gordon*, 88 Cal. 422, 426, 26 Pac. 502. We cannot doubt that the designation of the prosecutrix as a "courteous, kind, and mod-

est" witness should not have come from the court. The determination of the innocence or guilt of the defendant depended on whether the jury should credit his testimony or that of the prosecutrix. Anything said by the judge, indicating that the witness on the stand had, by her demeanor, created a favorable impression on his mind, would naturally tend to lead the jury to give to her testimony greater weight than they otherwise might. The subject concerning which she was being examined was of a delicate and embarrassing nature, and the suggestion that she had exhibited "modesty" might well have been viewed by the jury as indicating the court's view that what counsel for appellant regarded as an unwillingness on her part to give the facts in detail was caused, not by any desire to evade or to conceal the truth, but rather by a reserve commendable in a young girl. Such an intimation constituted an invasion of the jury's province of judging the facts, in the light of the appearance and demeanor of witnesses, and might be highly prejudicial.

[9] But it has long been the rule in this court that a claim of misconduct on the part of the district attorney or the trial judge will not ordinarily be considered on appeal, unless the complaining party has promptly called the attention of the court to the alleged impropriety and assigned misconduct thereon. *People v. Shem Ah Fook*, 64 Cal. 382, 1 Pac. 347; *People v. Abbott*, 101 Cal. 645, 36 Pac. 129; *People v. Frigerio*, 107 Cal. 151, 40 Pac. 107; *People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *People v. Osborn*, 12 Cal. App. 148, 106 Pac. 891; *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009. The reason for this rule is that the court should be given the opportunity to correct the irregularity or to prevent any prejudicial effect, if that be possible. There may, of course, be cases in which the act done or remark made is of such a character that a harmful result could not be obviated by any retraction or instruction. In such cases the misconduct will furnish ground for reversal, even though the court may have taken immediate steps to correct any impression improperly conveyed to the jury. *People v. Derwae*, 155 Cal. 592, 102 Pac. 268. For like reasons, the want of an assignment of misconduct should not affect appellant's rights, where such assignment could not have led to the curing of the harm done.

In the present case, we do not think the expression of the court was such as to preclude the possibility of guarding against prejudicial effect, if timely and proper assignment had been made. It is true that, as we have pointed out, the remarks made could well have been interpreted as indicating the court's belief that the witness' testimony was entitled to weight. But this was not the only possible interpretation. On a reading of the entire colloquy, it might fairly be inferred that the court was under the im-

pression—a mistaken one, very likely—that the defendant's counsel had failed to treat the prosecutrix with the courtesy which is the due of every witness. The remarks of the court were designed, mainly, as a reproof to counsel for his supposed discourtesy. What was said about the witness was said in this connection, and may well have been intended as a comment upon the propriety, in point of courtesy and good taste, of the witness' demeanor, rather than as an intimation that her testimony was to be believed. While even such comment is to be avoided, it can hardly be said that its effect would necessarily be so prejudicial as to require a reversal. If counsel had promptly called the attention of the court to the objectionable character of its remarks, it is quite reasonable to believe that any improper effect on the minds of the jury could have been obviated by an instruction disclaiming any intention to express an opinion on the weight of the testimony, and emphasizing the duty of the jury to disregard the supposed belief of the court in determining the credibility of the statement of any witness. The mere fact that the assignment of misconduct did not follow immediately upon the expressions of the court would probably not, in and of itself, bar the right to have the assignment reviewed here. But the delay is certainly a circumstance entitled to consideration in connection with the claim of the respondent that the form of the objection was not sufficiently specific to call the attention of the court to the precise matter complained of. It will be observed that what was objected to and assigned as error was the fact that the court had "admonished or criticised" one of the counsel. This form of assignment, if made at the time of the occurrence, would perhaps have been sufficient to bring the mind of the court to a reconsideration of all that it had just said, including an observation regarding the demeanor of the witness as well as a reflection upon the conduct of counsel. But when objection was first taken after the lapse of several hours, it can hardly be assumed that the exact words uttered at a considerably earlier stage of the trial were so fresh in the recollection of the court that an objection to a criticism of counsel would be likely to bring to mind the fact that such criticism had been coupled with matter otherwise objectionable. In the absence of a more prompt assignment, fairness to the court required that the claim that it had expressed an opinion on the weight of the evidence should have been stated in such words as to make the real nature of the claim reasonably apparent. Under the peculiar circumstances of this case, we think the assignment, considering its phraseology together with the time when it was made, was not such as to entitle the defendant to a favorable consideration of the point urged. The language used did not suggest to the court the necessity or propri-

ty of giving a cautionary instruction, and no other request for such instruction was made.

The foregoing discussion covers all the points presented.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.

SHAW, J. (concurring). I concur in the judgment and in all of the opinion of Justice SLOSS, except the part relating to the form of the objection made to the remark of the court upon the cross-examination of the prosecutrix. The objection was expressly directed to the censure of counsel by the court, and to no other part of the remark. I do not think that this court on appeal should or can properly assume that it was intended or understood as an objection to the commendation by the court of the demeanor of the prosecutrix, to which it is now sought to divert it.

ROBERTS v. DUFFY et al. (S. F. 6749.)  
(Supreme Court of California. April 11, 1914.)

PARDON (§ 7\*)—PAROLE OF PRISONERS—STATUTE—CONSTRUCTION.

Under St. 1913, p. 1048, entitled "An act to establish a board of parole commissioners for the parole of and government of paroled prisoners," authorizing the board of prison directors to establish rules and regulations under which any prisoner, who may have served one calendar year of his term, may be allowed to go upon parole, etc., a first term prisoner is entitled, as a matter of right, upon the expiration of one calendar year, to make application to the board for parole, and be accorded a hearing thereon, but no right is given to any prisoner to be granted a parole at any given time, or at all, but the matter of granting or withholding it is committed entirely to the judgment and discretion of the board, since there is no reason why the word "may," as used, should not be given its ordinary meaning, and be construed as permissive or conferring discretion.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.\*]

Shaw, J., dissenting.

In Bank. Application by James H. Roberts for a writ of mandate to be directed against Dennis M. Duffy and others, members of the State Board of Prison Directors, and M. E. Noon, Clerk of the Board. Writ granted.

Carroll Cook, of San Francisco, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Deputy Atty. Gen., for respondents.

LORIGAN, J. This is a proceeding for a writ of mandate and involves a construction of an act of the Legislature entitled "An act to establish a board of parole commissioners for the parole of, and government of paroled prisoners." Stats. 1913, p. 1048. The provisions of the act pertinent to a consideration of the application of petitioner for this writ

read as follows: "The state board of prison directors of the state shall have power to establish rules and regulations under which any prisoner who is now or hereafter may be imprisoned in any state prison, and who may have served one calendar year of the term for which he was convicted may be allowed to go upon parole outside of the buildings and inclosure, but to remain while on parole in the legal custody and under the control of the state board of prison directors, and subject at any time to be taken back within the inclosure of said prison; and full power to make and enforce such rules and regulations, to grant paroles thereunder, and to retake and imprison any convict so upon parole is hereby conferred upon said board of directors, \* \* \* provided, however, that no prisoner imprisoned under a life sentence shall be paroled until he shall have served at least seven calendar years; provided, further, that no prisoner who has served a previous term in any state prison in this or any other state shall be paroled until he has served at least two calendar years, and no prisoner who has had imposed upon him two or more cumulative or consecutive sentences shall be paroled until he has served at least two years of the aggregate time of such cumulative or consecutive sentences."

The petition sets forth that petitioner has been confined in the state prison at San Quentin since July 18, 1912, under a sentence of five years for felony; that prior to the time of filing this petition his actual period of imprisonment exceeded one year and two months; that he had not served a previous term in any state prison in the state or in any other state, and that he had not had imposed on him more than one sentence of imprisonment; that the actual time of sentence of petitioner, when reduced by credits, pursuant to the statutory allowance, and deduction for good conduct, is three years and seven months, and that his conduct during his entire term of imprisonment has been exemplary; that he has conformed to all of the rules regulating the behavior and duties of prisoners at said prison, and has never been punished or reprimanded for any violation thereof or any misconduct. The petition then further avers that under the provisions of the act heretofore referred to and on July 19, 1913, there accrued to petitioner under the act a right to make application to said board for parole and to be given a hearing thereon before said board and at the conclusion thereof, to an immediate release on parole, but that he is prevented by the said board from having his application therefor filed with the clerk of the board or considered or acted on by the board itself, by reason of the declared official attitude of said board toward the application of petitioner, which would render such application an idle, futile and useless act in the premises; that this is due to a rule or regulation of the

board passed in 1909 and designated in its printed book of rules as rule 5, which declares: "Rule 5. Half term must be served. No application for parole shall be filed by the clerk until the prisoner shall have served one-half his sentence unless for some extraordinary reason the same shall have been recommended in writing by the warden with his reasons therefor and ordered filed by the affirmative vote of at least four members of the board." The relief asked by the writ is for a mandate requiring the clerk of the board of prison directors to forthwith receive and file the application of petitioner for release on parole; that the board be commanded to hear such application and thereupon to grant the application of petitioner for release on parole during the remaining period of his term subject to be returned to prison for violation of any of the rules and regulations prescribed by the board governing the conduct of prisoners while on parole.

As simply a question of the construction of the act is involved in this proceeding, the matter is submitted for decision on demurrer interposed by respondents to the petition.

The position taken by counsel for petitioner is that under the act a prisoner, who is undergoing a first and only term of imprisonment and who has not been sentenced for life, is not only given an absolute right upon the expiration of one calendar year of his sentence to make application to the board of prison directors for parole and be accorded a hearing thereon, but, further, that such prisoner is also entitled as a matter of statutory right to a parole after such hearing provided his conduct in prison has been good. The petitioner, belonging to the class of prisoners commonly known as "first termers" and coming within the "one-year" provision of the act, complains of said rule of the board attempting to preclude him from making application for or being granted a parole until one-half of his sentence has been served, as an arbitrary and illegal prevention and denial of what he insists are his rights under the act. The position of the respondents, on the other hand, is that the reference in the act to the periods of sentence to be served by prisoners amounts simply to a limitation upon the power of the board to grant paroles prior to the expiration of such periods; that no rights whatever are conferred on prisoners by the terms of the act; but that, subject to such limitations, the entire matter respecting the parole of prisoners, when and how applications may be permitted to be made to the board and heard and determined, and whether parole shall be granted or not as to any individual prisoner, is left entirely to the discretion of the board.

Considering now the construction to be put upon the terms of the act under the claims of the respective parties to this proceeding, we address our attention to the first claim made by petitioner that as a "first termers" he was

entitled at the expiration of the calendar year of his term to make application for a parole which the board had no power to deny him by this rule.

Respondents assert that this claim of petitioner is entirely disposed of and the validity of the rule supported by a simple reference to what they claim is specific authority granted to make such a rule in the opening provision of the act where it is declared that the board "shall have power to establish rules and regulations under which any prisoner \* \* \* may be allowed to go upon parole outside of the buildings and inclosure, \* \* \*" etc. But the authority so given has no relation whatever to prescribing rules and regulations as to when a prisoner shall make application for a parole or as to a hearing or action thereon by the board. It has reference solely to the adoption of rules and regulations under which prisoners shall be governed and controlled after they are admitted to parole and conditionally released from prison, and for the violation of which during such parole they may be retaken and reimprisoned. In fact, there is nothing in the act itself saying anything about applications or hearings for parole or anything about rules or regulations governing these matters. The authority of the board to make rules and regulations on the subject is not disclosed in the act, but proceeds from an implied power existing in all boards, independent of any express authorization on the subject, to adopt such rules as will enable them to efficiently discharge the duties imposed upon them.

In the absence then of any express grant in the act to the board of discretion to provide when applications shall be made by a prisoner for parole, the question is presented under the first contention of petitioner whether such provisions as are contained in the act reasonably construed disclose an intention on the part of the Legislature to vest discretion in the board on that subject, or whether the intention is to give to a prisoner after the service of a specified period of his sentence, a right, at least, to make an application for a parole and to have a hearing and action of the board upon it. This question must be determined from a consideration of the language employed in the act construed in the light of the main objects and purposes sought to be attained through all parole legislation. It is not necessary to discuss at length these objects and purposes or to discuss them at all further than as their consideration may aid us in interpreting the intention of the Legislature under the provisions of our parole law. That law is humanitarian in character and comports with legislation of a similar nature prevailing in various states of the Union. Under the old penitentiary system a prisoner was allowed his liberty only upon expiration of his term of sentence. The purpose and object of a

parole system is to mitigate the rigor of the old, and while requiring the punishment of a prisoner by actual confinement for a fixed period of his term of sentence, still to provide a more humane management and prison discipline under which there is extended to those who may show a disposition to reform and whose reformation may reasonably be expected, a hope and prospect of liberation from the prison walls under the restrictions and conditions of a parole. It recognizes that, notwithstanding the commission of crime requires a measure of imprisonment as a penalty, still that the interests of society require that under prison discipline every effort should be made to produce a reformation of the prisoner, and proper measures adopted so that this may be accomplished. It realizes that prisoners are not irretrievably bad and that there may exist sufficient good in many of them under which such reformation is possible and through which, if opportunity is given, it may be accomplished. The legislative policy manifested in the act was to provide such a system; one, whereby, notwithstanding fixed terms of sentence, a hope was to be held out to prisoners that through good conduct in prison and a disposition shown towards reformation, they might be permitted a conditional liberty upon restraint under which they might be again restored to society to actually work out their reformation and become useful members of the community, and to this end the board was given certain powers and charged with certain duties.

It is claimed by respondents that, this being true, still, under the provisions of the act, details as to its accomplishment, and all matters respecting parole, are left to the discretion of the board, limited only to the extent that it may not grant parole until the specified term of service of imprisonment as to the different classes of prisoners referred to in the act has expired. As far as the limitation is concerned, it is true that it must be taken as restricting the power of the board to grant a parole before the expiration of such periods; but, in our opinion, the language used there, not being qualified or controlled by any other language of the act, was not intended merely to restrict the power of the board in that respect, but it necessarily implies that when these periods of service have expired a right to have a parole granted to them, if deemed worthy of it, was then conferred on prisoners of these various classes and as incident to that right there was accorded to them the further right or privilege of their making application to the board therefor. In other words, that it was the intention of the Legislature that there should be then given to them the right or privilege of applying for the benefit of a parole to be exercised by them on their own initiative under regulations to be prescribed by the board such as would directly and im-

mediately thereafter permit them to avail themselves of this right.

Giving the act this construction does not at all hamper or interfere with any discretion which may be vested in the board as to granting or withholding parole, but really is in aid of the spirit of the act. The Legislature by permitting a parole after these periods of sentence assumed that there might be prisoners who were at that time worthy of having the benefit of it; that in many instances, and particularly as to "first termers," service of sentence for a specified period would be sufficient punishment, and if it then appeared a prisoner had shown an intention and disposition to reform and that such reformation might be reasonably assured of accomplishment under the restrictions of a parole, the board might extend it to him. It was not expected by the Legislature that the board, its individual members selected from the community at large, men of affairs and holding only periodical sessions in the discharge of the duties imposed upon them, could have knowledge of the case of each individual prisoner who might be worthy of being extended a parole, his previous conduct, his age, the offense for which he was committed or the circumstances surrounding it, his character or disposition as chastened by prison discipline, his inclinations toward a better life and other circumstances which would govern its action in a fair and just determination of whether reformation of the prisoner was reasonably assured and that it might be actually accomplished if he were given an opportunity to effect it under parole. It does not contemplate that the board should take the initiative and investigate the case of each prisoner, and the board so understood this in adopting the rule here in question which left it to the prisoner to make the application. But the condition as to when the application might be made the board had no right to impose. It had no authority to superadd a period of years beyond that which the Legislature had itself definitely fixed when a prisoner might be admitted to parole, and the fixing of which by the Legislature, as we have said, necessarily implied that he should then have the right to make an application to obtain it. If this were not the reasonable construction to be indulged in, it would follow that the board might in its discretion require the service of any period of imprisonment it chose—half the term of sentence or three-fourths or longer—before it would entertain any application for parole. Service of an arbitrary fixed term which has relation to the matter of punishment cannot of itself furnish a proper or just standard of itself by which it may be fairly determined whether or not a prisoner has repented his crime and evidenced a disposition to redeem himself and may with safety to society be granted a parole under which to attain com-

plete reformation. Terms of imprisonment imposed by the various courts of the state on different criminals may be, and in very many cases are, of unequal length when imposed for the same offense. The act divides prisoners subject to parole into three classes, among those being "first" and "second term" prisoners. The obvious intention of the Legislature was to make the "first termers" the most favored class in the matter of parole. Naturally so, because first offenders are to a large extent the more readily redeemable and entitled for that reason to more favorable consideration. Yet, as to prisoners coming within this class for similar offenses, sentences of unequal lengths of imprisonment are imposed. Under these circumstances, if it were intended by the Legislature that the board might by rule arbitrarily fix service of half the term of a sentence, possibly amounting, as to a "first term" under a long sentence, to many years beyond the year fixed in the act, a greater period of service might be required before he would be permitted to file an application for a parole than if he were serving sentence as a "second term." And in this connection it may be suggested, without expatiating upon it, that, as to first term prisoners upon whom is imposed a long-term sentence, it can readily be conceived that though deemed to be prisoners the most susceptible to earliest reformation and to be most favorably considered as to parole, the prevention of an application by them until after years of imprisonment arbitrarily fixed under the rule had been undergone, would tend to defeat, rather than further, the very purpose and object of the act. None of these results may follow when the act is construed as extending the right to a prisoner to make application for parole at the end of the term specified in the act. Nor does this construction interfere at all with the large discretionary power which the board may possess over matters of parole if the other point made by petitioner, that the parole must be granted at the expiration of the periods fixed to prisoners whose conduct is good (which we shall presently consider) is untenable. It simply extends to any prisoner the privilege of making an application and having the board hear and dispose of it when the period fixed in the act as the time when he might be paroled has expired. A construction in harmony with the purpose of the Legislature in creating a parole system, which is to permit the liberation of a prisoner on parole at the earliest period when permitted by law and when on a consideration of the merits and objects of each individual case, parole, ought, in the judgment of the board, to be granted.

This brings us to the other claim urged by petitioner that not only is he entitled to apply for parole at the end of the first calendar year of his sentence, but further entitled

thereon, if his prison conduct during that period is shown to have been good, to a parole as matter of right. His position is that the word "may," used in the section with reference to a prisoner who has served one calendar year of his imprisonment and providing that he "may be allowed to go on parole outside the buildings and inclosures," is to be construed as "must" or "shall," and, thus construed, a mandatory duty is imposed upon the board to parole him; that while the language is permissive in form it should be construed as mandatory in effect. It is only on the theory of such a construction that the claim of petitioner can be sustained, because otherwise the Legislature in the use of the word "may" in the section has clearly vested discretion in the board on the subject. The rule is that "may" used in legislation is to be given its common and ordinary meaning and to be construed as permissive or conferring discretion. It is only to be construed as mandatory when it appears from the terms of the statute in which it is used that it was the clear policy and intent of the Legislature to impose a duty, and not simply to confer a discretionary power and when the public or third persons have a claim *de jure* to have the power exercised, that it is to be construed in a mandatory sense. *Kemball v. McPhail*, 128 Cal. 444, 60 Pac. 1092. Applying these rules to the provision in question, we perceive nothing in the language used or in the policy or intent of the Legislature which requires the word "may" to be given any mandatory construction or requiring that it be construed in any other than its ordinary meaning as extending a discretionary power to the board to grant or withhold parole as in its judgment may appear proper and advisable. Counsel for petitioner directs his discussion of the construction to be given to the act to the first provision thereof having a particular reference to "first term prisoners" and dwells with emphasis upon the peculiar consideration the Legislature must have had for this class and its intention that they should be given an early release from prison and an opportunity for reformation. Doubtless, as heretofore discussed, this was the intention of the Legislature in proper cases, but this in no way requires the mandatory construction which is contended for, nor compels a construction of the act otherwise than it is permissively written. In determining the intent of the Legislature in that respect we must take into consideration the entire act and not one particular phrase of it. Doing so we find as bearing significantly upon the claim as to prisoners who have served "one year" and as disclosing the intent of the Legislature as to the liberation of any prisoner on parole, the further terms of the act as to such parole wherein it is "provided, however" and "provided further" that no prisoner sentenced for life shall be paroled until

he has "served at least seven calendar years," nor shall a prisoner who has served a previous term be paroled until he has "served at least two calendar years," nor shall one be who has had cumulative or consecutive sentences, until he has "served at least two years of the aggregate time of such cumulative or consecutive sentences." Certainly as to these two and seven year classes of prisoners just referred to the board is not required to parole them at the expiration of two or seven years. The use of the term "at least" imports that entire discretion is left the board as to when, if it all, parole will be granted to prisoners coming within these classes after the specified term of service of imprisonment. This being true as to these classes, there is no reason why a different intent should be attributed to the Legislature in regard to the class of "first termers," and the word "may," which ordinarily imports discretion and as so construed shows a harmonious intent as applied to all classes, should be construed as mandatory with reference to the particular class of first term prisoners when it is manifest that as to all other classes discretionary power to parole is given. On the contrary, we are satisfied that the same intent as to the actual parole of prisoners pervades the entire act. It was not intended to nor did it confer any right whatever on any prisoner to be paroled at any fixed time or at all. The purpose of the act is to permit the liberation of prisoners from actual custody in the state prison under certain conditions and restrictions prior to the service of the full time fixed in the sentence of the trial court and when the board of parole is satisfied from an investigation and consideration of the case of any particular prisoner who has served the period of sentence specified in the act that there is such hope and probability of his reformation that he may be permitted to re-enter society under the restrictions and restraints of parole. It is idle to say that the Legislature intended that the fact that a prisoner had served one year or any other period of a term less than the entire term for which he was sentenced, coupled with the further fact that his prison conduct during such period had been good, was sufficient to show that his reformation had been accomplished, and hence entitled him to a parole. In fact, under petitioner's theory of construction it was the intention of the Legislature to invest the board with a mere ministerial duty of discharging prisoners on parole at the expiration of the periods fixed in the act simply on a showing that their prison conduct had been good and without relation to the term of sentence which was imposed upon them or a consideration by the board of any matters at all which would ordinarily and reasonably be taken into consideration in determining whether there was such a reformation as would entitle the prisoner to a con-

ditional liberty. Nothing of this kind could justly be attributed to the Legislature. In our opinion, the intention of the Legislature was, while giving any prisoner at the expiration of the period fixed in the act a right to then apply for a parole, to confer upon the board entire discretion as to whether any individual prisoner should be then given a parole or not. This was not to be determined from the good conduct alone of the prisoner up to that time, but it was intended that the board should examine, not only his daily prison life and his conduct under the prison discipline, but further consider the nature of the offense for which he was sentenced, the term for which he was sentenced and the portion thereof which he had served, his age and life history, his habits, inclinations, disposition and traits of character, the probabilities for and against his reformation, and from these and such other considerations as would enable it to reach a fair and just conclusion in the case of each particular prisoner determine whether or not he was worthy of release from actual confinement under the restrictions of the parole law with a view to his ultimate reformation and without danger to society. The whole matter of actual release upon parole was intended to be left to the judgment and discretion of the board to be exercised as it might be satisfied that justice in the case of any particular prisoner required. There is no public interest disclosed in the act which demands a different interpretation of these provisions; but, on the contrary, it is obvious that public interest is best subserved by giving the word "may" its usual and ordinary meaning as extending to the board a permissive and discretionary power as to the granting of a parole in the case of any particular prisoner.

We have disposed of the only questions properly involved in this application. Our conclusions are that under the act in question petitioner is entitled as a matter of right to present and file with the board an application for parole as a prisoner who has served one calendar year of his term of sentence and to a hearing thereon and determination thereof by the board within a reasonable time thereafter; that rule 5 of the board, as an attempt to limit and restrict this right, is illegal and void; that no right is given under the act to any prisoner to be granted a parole at any given time or at all; and that the matter of granting or withholding it is, under the act, committed entirely to the judgment and discretion of the board.

In conformity with these views, it is ordered that a writ of mandate issue commanding the state board of prison directors to forthwith receive and file the application of petitioner for release on parole, and further commanding said board at its next regular meeting or session, or within a reasonable time thereafter, to proceed to hear and consider such application and take such action.



thereon as in its judgment on the merits of the application it deems proper.

We concur: HENSHAW, J.; MELVIN, J.

SLOSS and ANGELLOTTI, JJ. We concur. The opinion of Mr. Justice LORIGAN holds that the board of prison directors has not the power, by a rule of universal application adopted in advance, to deny to a first termor who has served one year, the right to ask for a parole and to have his request considered on its individual merits. With this we are in entire accord.

When the board takes up any petition for parole, it has the right, however, to consider, as one of the factors bearing upon the exercise of its discretion, the length of the term for which the petitioner was sentenced and the proportion of that term which has actually expired. We do not understand that the main opinion is intended to express a different view. It declares that service of a defined proportion of the term, beyond the minimum of one year fixed by the act, cannot be made an absolute condition precedent to the right to apply for a parole, regardless of all other considerations bearing on the merits of the particular case. But it does not, as we read it, mean to hold that the length of time served, although more than one year, cannot be taken into account by the board in deciding whether a prisoner should or should not be paroled. We are satisfied, too, as is, in effect, declared in the main opinion, that the determination of the board, on any application for parole is conclusive on the courts, regardless of the reasons or facts upon which it may be based.

SHAW, J. I dissent from the opinion and reasoning of the court in this case. The parole act is, in my opinion, an exercise of clemency on the part of the state, and the execution thereof by the board of prison directors constitutes a mere exercise of grace and mercy on the part of the state through its authorized officers toward persons who have been convicted of crime. I do not think it was the intention of the Legislature to create any rights whatever in any prisoner, with respect to parole, which can be deemed justiciable. The act limits the power of the board in certain particulars as, for example, that an ordinary prisoner must have served one calendar year, a life termor seven calendar years, and a second termor two calendar years, before the act can apply to him at all. But after those periods have expired the entire matter is left in the absolute discretion of the board. No court should have power to supervise or control its action, either in establishing rules, or in exercising the clemency of the state after the rules have been established. The declaration of the board in the rule that applications for parole will not be received until one-half of the term

of the prisoner has expired is nothing more nor less than a declaration by the board, in the exercise of its discretion, that good policy requires that prisoners should not be eligible to parole before that time, and this, according to my conception of the purpose and language of the act, is a matter for them to determine and is not subject to review or control by the courts.

In any case the only right granted to a prisoner by the decision of the court would seem to be utterly useless. The prisoner is given the poor comfort of being allowed to have his application filed by the clerk and received and considered by the board, with the statement that after receiving it the board may refuse it with or without reason, and that their action is beyond review and final. I can see no result from this ruling that will be beneficial to the prisoners, and it will only tend to create discontent and disorder and make the task of the management of these institutions more difficult than before.

#### HIBERNIA SAVINGS & LOAN SOCIETY v. DICKINSON et al. (S. F. 6263, 6350.)

(Supreme Court of California. April 8, 1914.)

##### 1. PLEADING (§ 36\*)—ADMISSIONS IN PLEADINGS—CONCLUSIVENESS.

A finding contrary to a fact admitted by the pleadings, within Code Civ. Proc. § 462, providing that every material allegation of the complaint not controverted by the answer must be taken as true, must be disregarded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 81-86; Dec. Dig. § 36.\*]

##### 2. PLEADING (§ 84\*)—ISSUES—ANSWER—SEVERAL DEFENDANTS.

Where a complaint is directed against two defendants, and the liability of one involves facts not material to the liability of the other, and they answer separately, neither need answer those allegations which relate solely to the liability of the other.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 168-171; Dec. Dig. § 84.\*]

##### 3. MORTGAGES (§ 454\*)—FORECLOSURE—PLEADINGS—ISSUES.

In an action to foreclose a mortgage brought against the mortgagor and his subsequent purchaser, the fact that the subsequent purchaser had assumed the mortgage debt is an affirmative defense in favor of the mortgagor and must be affirmatively alleged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1319-1328; Dec. Dig. § 454.\*]

##### 4. MORTGAGES (§ 559\*)—SUBSEQUENT PURCHASERS—LIABILITY—PERSONAL LIABILITY.

The personal liability of a purchaser of mortgaged land for the payment of the debt is based on his assumption of the mortgage debt, which has no relation to the original liability of the mortgagor, and the mortgagee, on foreclosure, in order to obtain a personal judgment against the purchaser, must show that he assumed the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

##### 5. MORTGAGES (§ 559\*)—FORECLOSURE—PLEADINGS—ADMISSIONS.

Where the complaint in a suit to foreclose a mortgage, brought against the mortgagor and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

a subsequent purchaser, alleged that the subsequent purchaser agreed to assume the mortgage debt as a part of the consideration of the conveyance, that the mortgagor did not deny the allegation of the assumption of the debt was not an admission of an assumption and did not prevent a contrary finding and a deficiency judgment against the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

#### 6. MORTGAGES (§ 559\*)—FORECLOSURE—PLEADINGS—ADMISSIONS.

Where in a suit to foreclose a mortgage, brought against the mortgagor and a subsequent purchaser, the cause was tried as if the question whether the purchaser had assumed the mortgage debt was in issue, a finding thereon was necessary, and a finding that the purchaser did not assume the mortgage debt, so as to relieve the mortgagor from personal liability for a deficiency, must be deemed conclusive, unless contrary to the evidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. § 559.\*]

#### 7. MORTGAGES (§ 280\*)—SALE OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT BY PURCHASER.

A deed of mortgaged property, which recites that the property is subject to a mortgage described, does not show that the purchaser assumes the mortgage debt, especially where the deed also recites a nominal consideration.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.\*]

#### 8. MORTGAGES (§ 280\*)—SALE OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT BY PURCHASER.

The promise of a purchaser of mortgaged property to pay the mortgage need not appear in the deed, but the obligation may be made orally, or in a separate instrument, or may be implied from the transaction, or shown by circumstances under which the purchase was made.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.\*]

#### 9. PRINCIPAL AND AGENT (§ 103\*)—AUTHORITY OF AGENT.

A principal directing an agent to purchase for him specified property, provided it can be procured for a specified price, does not thereby authorize the agent to make an agreement binding the principal as purchaser to assume a debt secured by a mortgage on the property.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.\*]

#### 10. MORTGAGES (§ 280\*)—SUBSEQUENT PURCHASERS—ASSUMPTION OF MORTGAGED DEBT—CONTRACTS.

A contract for the purchase of mortgaged property, which recites the receipt of a specified sum as a deposit on account of the price, which is specified, and which then describes the property and proceeds, "subject to mortgage \* \* \* for \* \* \* with interest," and which then states the terms of sale by allowing the purchaser 30 days to examine title and consummate the purchase, and which declares that, at the termination of the 30 days, the balance of the price is payable on tender of a deed, and, if the title is defective, the deposit shall be returned, and, if the purchaser fails to consummate the purchase, the deposit shall be forfeited, does not show an assumption by the purchaser of the mortgage debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.\*]

#### 11. MORTGAGES (§ 290\*)—ASSUMPTION OF MORTGAGED DEBT—ESTOPPEL.

Where there was nothing to justify a vendor of mortgaged property in assuming that an agent of the purchaser had authority to bind the purchaser to assume the mortgage debt, except that the purchaser had authorized the agent to purchase the property and had furnished him money to pay the difference between the price agreed on and the mortgage debt, and the deed carried the implication that there was no personal obligation on the part of the purchaser to pay the mortgage debt, the purchaser was not estopped, as against the vendor, to deny that he assumed the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.\*]

#### 12. PLEADING (§ 236\*)—AMENDMENTS—ALLOWANCE—DISCRETION OF COURT.

Where the complaint in a suit to foreclose a mortgage, brought against the mortgagor and a subsequent purchaser, alleged an assumption by the purchaser of the mortgage debt, the allowance of an amendment to conform to the proof by omitting the allegation that the purchaser had assumed the mortgage debt, made after vacating a judgment for the mortgagee on motion authorized by Code Civ. Proc. §§ 663, 663a, was within the court's discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by the Hibernia Savings & Loan Society against Robert E. Dickinson and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. Vogelsang & Brown, of San Francisco, and Edwin A. Meserve, of Los Angeles, for respondent Montgomery. Tobin & Tobin and George A. Clough, both of San Francisco, for other respondent.

SHAW, J. In this action the plaintiff sued to foreclose a mortgage executed to it by the defendant Dickinson, to secure his note for \$65,000. Dickinson afterwards conveyed the land to the defendant Montgomery. The amended complaint alleges that Montgomery agreed to assume and pay the said mortgage as a part of the consideration of the transfer to him, and prayed for a deficiency judgment against both defendants. Two appeals are presented by Dickinson, numbered as above. No. 6263 is an appeal from that part of the judgment which directs the entry of a deficiency judgment against Dickinson, in case the land does not bring the amount of the mortgage debt, costs, and attorney's fees on foreclosure sale. No. 6350 is an appeal by him from an order afterwards made on his own motion, under section 663 of the Code of Civil Procedure, to vacate the judgment and enter another and different judgment on the findings. This motion was granted with the consent of the plaintiff. We will first consider the appeal numbered 6263.

The answer of Dickinson does not deny the

avertment of the complaint that Montgomery agreed to assume and pay the mortgage debt in consideration of the transfer to him. It alleges as an affirmative defense that, after the conveyance to Montgomery and the assumption by him of the note and mortgage, the plaintiff, with knowledge thereof, made a new contract with Montgomery for the payment of a higher rate of interest, and, without Dickinson's consent, also collected from Montgomery interest in advance on said debt and thereby extended the time for the payment thereof until the expiration of the time for which the interest was paid. Upon this defense Dickinson's claim was that, by the transfer to Montgomery and the assumption by him of the mortgage, Montgomery became the principal debtor and Dickinson a surety upon the mortgage debt, and that, by the subsequent change in the contract, Dickinson was released from all obligation upon the note and from liability to a deficiency judgment. In a so-called cross-complaint against Montgomery, Dickinson alleged the same change of contract and assumption by Montgomery of the mortgage and asked that, if he should be adjudged liable for any deficiency, the judgment should declare that, if he were compelled to pay the same, he should be subrogated to plaintiff's rights and recover the same against Montgomery.

The court found that the deed to Montgomery did not contain any assumption of the mortgage debt, but merely declared that the premises were "subject to the mortgage" of plaintiff; that Montgomery did not, by accepting the deed, assume the mortgage debt or agree to pay the debt; that he never agreed with any one that as a part of the consideration of the deed, or at all, he would assume and pay the debt; that after the transfer, by arrangement between plaintiff and Montgomery, the rate of interest on the debt was raised without the knowledge or consent of Dickinson; and that interest was thereafter paid at the new rate. No finding was made as to the extension of time by payment of interest in advance.

[1] The first proposition urged on behalf of Dickinson is that the fact that Montgomery assumed payment of the mortgage debt is admitted by the pleadings, so far as he is concerned, and consequently that it is a fact established in his favor, upon which no finding was required and which a finding could not control or change.

The Code provides that "every material allegation of the complaint, not controverted by the answer must, for the purposes of the action, be taken as true." Code Civ. Proc. § 462. A finding which is contrary to a fact thus admitted by the pleadings must be disregarded. *Bradbury v. Cronise*, 46 Cal. 288; *White v. Douglass*, 71 Cal. 119, 11 Pac. 860; *Ortega v. Cordero*, 88 Cal. 226, 26 Pac. 80; 1 Ency. of Pl. & Pr. 789. But these propositions are, by the terms of the Code itself, ap-

plicable only to allegations which are material. A material allegation is one which is essential to the cause of action stated in the complaint and which, if not admitted, the plaintiff must prove to maintain his action. Code Civ. Proc. § 463. This is illustrated by the case of *Canfield v. Tobias*, 21 Cal. 360. There the plaintiff, anticipating an affirmative defense, had alleged certain facts to rebut the same. The defendant in his answer set up the affirmative defense, but did not deny the facts alleged in the complaint in rebuttal. The court held that this failure to deny these extraneous allegations did not constitute an admission thereof, saying: "The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call upon the defendant to answer it."

[2-5] Where a complaint is directed against two persons and the liability of one involves some facts which are not material to the liability of the other, upon the cause of action declared upon, and they answer separately, neither is required to answer those allegations which relate solely to the liability of the other. The present case illustrates this proposition. The action was upon the note and mortgage executed by Dickinson alone. His liability was shown by the allegations of the execution and nonpayment of the note and mortgage. Montgomery did not execute them. He was a proper party because he was a subsequent purchaser of the land. But his personal liability for the debt and to a deficiency judgment was founded on the extraneous fact that he had assumed payment of the mortgage debt. This fact had no relation whatever to the original liability of Dickinson. It was not a fact material to the cause of action stated against Dickinson, either to obtain a foreclosure or to obtain a deficiency judgment. Hence it follows that Dickinson was not called upon to deny it and that his failure to deny it did not put it into the category of admitted facts for the purpose of the action, so far as Dickinson and the plaintiff were concerned. Dickinson had, as he claimed, a good defense for the action. It consisted of the facts: First, that Montgomery had assumed payment of the mortgage; second, that afterwards Montgomery and the plaintiff had, without Dickinson's consent, changed the contract in a material part and had extended the time of payment thereof. This was an affirmative defense, and in order to set it up in his answer it was necessary for him to allege therein the aforesaid facts. He was not at liberty to treat the allegation of the complaint directed solely at Montgomery, as an allegation in his own favor and have it stand as an admitted fact by failing to deny it. His defense required that he should affirmatively allege it. Consequently it does not stand as a fact conclusively admitted in his favor.

[9] We do not here refer to those cases where facts are treated on the trial as alleged, or as admitted, and afterwards on appeal the losing party seeks to gain advantage by the technical omission or failure to properly allege or deny them. *Sukeforth v. Lord*, 87 Cal. 402, 25 Pac. 497; *Illinois, etc., Bank v. Pacific Ry. Co.*, 115 Cal. 297, 47 Pac. 60; *Gervaise v. Brookins*, 156 Cal. 112, 103 Pac. 332. This proposition is involved in this case and applies in favor of Dickinson himself. For lack of a direct averment that Montgomery had assumed payment of the mortgage as part of the consideration of the deed, his affirmative defense of a release by the change of contract and extension of time might have been held to be insufficiently pleaded. But there were allegations in his answer referring to such assumption of the mortgage debt, and upon the trial the fact appears to have been considered as alleged for all purposes of the case with respect to both defendants. It is therefore to be considered here, with respect to Dickinson, as if it had been properly alleged in his answer. In that view of the case, it is deemed to have been controverted by the plaintiff, for the purposes of the trial of that defense and a finding upon it was necessary. We must therefore hold that the finding that Montgomery did not assume the mortgage debt is not contrary to the admission of the pleadings, and that it must stand as a fact in the case, unless it is contrary to the evidence.

[7] We cannot say upon the evidence as a whole that this finding is without support. Such an agreement was not shown by the statement in the deed to Montgomery that the property was "subject to" the mortgage, describing it. Such language would not have had that effect, even if the deed had recited as the consideration the full value of the land as estimated in the purchase. *Jones on Mortgages* (6th Ed.) § 748; *Drury v. Tremont I. Co.*, 95 Mass. (13 Allen) 168. There are cases which appear to hold that such a clause in a deed imports an assumption of the mortgage by the grantee, but the better reason and the weight of authority is to the contrary. This deed, however, recited a consideration of only \$10. It is clear that there could be no implication arising from such a deed that the grantee, as a part of that small consideration, had assumed or agreed to pay a mortgage of \$65,000. On the contrary, it raised a strong inference, if not a conclusive presumption, that Montgomery did not assume payment of the mortgage as part of the price, but merely bought the land as it was with the incumbrances on it. This inference is evidence in the case and must prevail unless it is overcome by other evidence showing that there was such an agreement.

[8] It is not necessary that the promise to pay the mortgage should appear in the deed, or in writing. "The obligation may be made orally or in a separate instrument;

it may be implied from the transaction of the parties; or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement." *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868.

[9, 10] Montgomery testified positively that he did not agree to assume or pay the mortgage. The contention that such an agreement was made rests upon the language of two executory agreements made during negotiations for the purchase by Tucker, Lynch & Coldwell, Incorporated, a corporation which was employed by Montgomery to make the purchase for him. Prior to giving it authority to buy, he was told by its officers that the price of the property was \$80,000; that it was mortgaged for \$65,000; that it would require \$17,000 in cash to buy it, including \$1,000 commissions to the corporation; and that they believed it could be resold at an advance on that price in a short time. Upon these statements he gave them his check for \$17,000 and instructed them to buy the property if it could be had for that amount. Nothing was said between them about any agreement by him to assume or pay the mortgage debt, but it was fully understood that he was to pay only the difference between the price fixed and the mortgage debt and take the land with the mortgage still remaining on it. This was in November, 1906. The mortgage did not become due until February 7, 1907. He did not in fact authorize the corporation to agree on his behalf to pay the mortgage debt to effect the purchase. The only direct evidence thereof is in the executory agreements mentioned. By the first, dated November 17, 1906, Dickinson agreed to sell to the corporation at the price of \$79,000. By the second agreement, dated November 19, 1906, the corporation agreed to sell to Montgomery at the price of \$81,000. The two are substantially identical in form. We need state the material terms of the first one only. It began as follows: "Received from Tucker, Lynch & Coldwell, Inc., the sum of \$2,000.00, being deposit on account of \$79,000.00, the purchase price this day sold to it or nominee." It then describes the property and proceeds thus: "Subject to mortgage to Hibernia Bank dated ——— for \$65,000.00 with interest at 4¼% net. Terms of sale: Thirty days are allowed the purchaser to examine title and consummate the purchase; at the termination of said term the balance of purchase money is due and payable on tender of a good and sufficient deed of the property sold." It further provides that, if the title prove incurably defective, the deposit should be returned, and that, if the purchaser failed to consummate the purchase, the deposit was to be forfeited. It was signed by Dickinson, and appended thereto was an agreement signed by Tucker, Lynch & Coldwell, Incorporated, whereby it agreed to purchase the property on the terms and conditions stated above.

The second agreement, running to Montgomery, allowed 28 days to examine the title and consummate the purchase. It was signed by Tucker, Lynch & Coldwell, Incorporated. The appended writing to that agreement was filled out for Montgomery's signature, but it was not signed. It does not appear that it was ever seen by Montgomery. There is no evidence that Montgomery authorized Tucker, Lynch & Coldwell, Incorporated, to make an agreement in his behalf that he should assume payment of the mortgage debt, or become personally liable for it. He told its officers to buy the property for him if it did not require the payment by him of more than \$17,000, taking the land at the price of \$80,000 subject to the mortgage. But this did not authorize the agent to make an agreement whereby he should become personally liable for the debt.

The appellant claims that these agreements constitute conclusive evidence of an assumption by Montgomery of the mortgage debt. We cannot concur in this view. The purchase price is named in each agreement, and in each the amount of the mortgage debt is included as a part of that price, although the fact that it included said mortgage debt is not stated. This does not express a promise or covenant to pay the price. It merely fixes the price. It is followed by the statement that the property is sold to Montgomery "subject to" the mortgage for \$65,000. This again, as we have seen, does not imply that Montgomery shall pay the mortgage, but that he takes the property as it is and that the grantor is to that extent relieved from the force of the covenant against incumbrances implied from the agreement to convey "by good and sufficient deed." The next provision of the agreement is that, at the termination of the time allowed for the examination of the title, "the balance of the said purchase money is due and payable upon tender of a good and sufficient deed of the property sold." This especially, it is argued, is a direct promise to pay the entire price. But, when the circumstances attending the sale are considered, this not only does not imply such agreement but implies the contrary. The mortgage did not become due until February 7, 1907. Hence it could not be paid in November or December, 1896, without the consent of the mortgagee. The interpretation contended for would require Montgomery to pay it on December 17, 1906, as a condition of consummating the contract. It is not pretended that this was ever expected of him. The more obvious intention was that which was actually carried out; that is, that Montgomery should, at the consummation of the purchase, pay enough to make up the \$16,000 constituting the difference between the mortgage and the price named, and that the phrase "balance of the said purchase money" was used to designate the balance of this difference after deducting the \$2,000 al-

ready paid. That this was the understanding of the parties is shown by the fact that Montgomery paid the \$16,000; from which the agents deducted \$2,000 as commissions, and thereupon paid to Dickinson the remaining \$14,000, who accepted the same and executed the deed accordingly. From all these circumstances we think the court below could reasonably have concluded that the two executory agreements did not express a promise to pay the debt, but were in the nature of preliminary negotiations which were superseded by and merged in the deed by which the deal was consummated and which declared only that the property was conveyed subject to the mortgage. This theory is confirmed by the fact that the agent had no authority to enter into such personal obligation for Montgomery and that there is no evidence that he ever was informed thereof or ratified the same.

[11] It is claimed that Montgomery is estopped to deny that he did assume the mortgage. This is based on the aforesaid recitals in the agreements for the purchase. These recitals were inserted by his agents. There is no evidence, as we have shown, that he was cognizant of them at the time he received the deed and paid the \$14,000 to Dickinson, nor that any act of his furnished any ground to Dickinson to believe that Montgomery had authorized his agents to covenant for the payment of the mortgage as a condition of the sale. There was nothing apparent to Dickinson to justify the conclusion that the corporation has such authority, except that Montgomery had authorized it to buy the land, and had furnished it with money to pay the difference between the price agreed on and the mortgage debt. The deed which Dickinson executed, as we have seen, carried the implication that there was to be no personal obligation by Montgomery to pay that debt. We do not think that from these circumstances Dickinson was warranted in believing that Montgomery had authorized the corporate agent to enter into such a covenant for him; that he was at least put on inquiry as to the authority of the agent to make such agreement; and that there was no estoppel against Montgomery.

All the other points presented by the appellant upon appeal No. 6263 relate to and depend upon the proposition that there was an assumption of the mortgage debt by Montgomery. As we have concluded that the finding upon that subject to the contrary is sustained by the evidence, and that there was no admission of that fact by the pleadings, so far as Dickinson was concerned, it is unnecessary to consider the other propositions discussed.

[12] We now take up the appeal in case No. 6350. Section 663 of the Code of Civil Procedure provides that where a judgment is given upon findings of fact, or upon a special verdict, such judgment may for certain causes be

vacated and another and different judgment entered on the same facts, on motion of the losing party. Section 663a provides that "an order of the court granting such motion may be reviewed on appeal in the same manner as orders made on motions for a new trial." The judgment against Dickinson was entered on March 4, 1912. The notice to vacate it was served, naming April 2, 1912, as the date for the making of the motion. The matter was continued and the motion was submitted to the court for decision on April 26, 1912. No order was made thereon until July 15, 1912. The plaintiff had consented that the motion should be granted on condition that it be given leave to amend its complaint to conform to the evidence given at the trial. Thereupon the court ordered that the motion "to vacate and set aside said judgment" be granted, and that plaintiff be permitted to amend its complaint to conform to the proof, but it did not go further and enter another and different judgment on the findings as the motion contemplated. The effect of the order was to leave the case in the court below with findings made and filed but no judgment entered. This is the order appealed from in No. 6350.

In the meantime, on April 29, 1912, after the submission of the motion and before decision thereon, Dickinson appealed to this court from the part of such judgment directing a deficiency judgment against him, being the appeal in case No. 6263 aforesaid.

We do not deem it advisable to consider the technical objections that might perhaps be urged to the maintenance of the appeal from the order, as whether or not it is premature because the court below stopped the proceeding halfway and did not enter another judgment, or, since the same questions would be involved on the appeal from the judgment, whether such appeal did not waive further proceedings on the motion or oust the lower court of jurisdiction to consider it. Considering the appeal on its merits, the only objection which the appellant can urge to the action of the court below on his motion is that it erroneously allowed the plaintiff to amend its complaint to conform to the proof. The obvious purpose of such amendment was to omit from the complaint the allegation that Montgomery had assumed payment of the mortgage debt, an allegation which was supposed to constitute an admission in favor of Dickinson, contrary to the fact established by the evidence and found by the court. We are of the opinion that the court had discretion to permit such an amendment upon a motion under section 663 and 663a, and that, under the circumstances here appearing, the amendment was properly allowed.

The result is that the order must be affirmed. As this will leave the case without a final judgment, it will be necessary for the court below to enter a new judgment to the

same effect as the one appealed from in No. 6263.

The judgment appealed from in case No. 6263 and the order appealed from in case No. 6350 are affirmed. The court below will enter a new judgment upon the findings to the same effect as before.

We concur: SLOSS, J.; ANGELLOTTI, J.

PEOPLE v. STRICKLER. (Cr. 1820.)  
(Supreme Court of California. April 9, 1914.)

1. CRIMINAL LAW (§ 980\*)—PLEAS—WITHDRAWAL.

Where accused, after entering pleas of not guilty, former acquittal, and former jeopardy, withdrew his plea of not guilty, and entered a plea of guilty, and applied for release upon probation, the court had power to pronounce judgment on his plea of guilty, though there was no express withdrawal of the special pleas, especially where, at the time sentence was imposed, he announced that he had no further cause to show why judgment should not be pronounced, and he neither then nor at any other time intimated or suggested that he desired to have the special pleas passed upon by a jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2493-2496; Dec. Dig. § 980.\*]

2. CRIMINAL LAW (§§ 290, 968\*)—INDICTMENT AND INFORMATION (§ 137\*)—FORMER ACQUITTAL OR JEOPARDY—PLEAS.

Under Pen. Code, § 965, specifying the grounds upon which an indictment must be set aside upon motion, and section 1017, prescribing the forms of pleas of guilty, not guilty, former conviction or acquittal, and once in jeopardy, the defenses of former acquittal or former jeopardy must be presented by plea, and not by motion to set aside the indictment or in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 666, 2423-2432, 2435-2444; Dec. Dig. §§ 290, 968.\* Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.\*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Phil Strickler was convicted of an offense, and he appeals. Affirmed.

Conkling & Brown, of El Centro, for appellant. U. S. Webb, Atty. Gen., and Phil D. Swing, Dist. Atty., of El Centro, for the People.

PER CURIAM. The justices of the district court of appeal of the second district being unable to agree in this case, the cause was transferred regularly to this court, with the opinions of the justices of the district court thereon. The defendant contends that the withdrawal of a plea of not guilty and the making of a plea of guilty to the charge does not give the superior court power to pronounce judgment against him, in a case where he had also entered a plea of former acquittal and a plea of former jeopardy, until these additional pleas were withdrawn or determined in favor of the people, even if he does not make the objection at or before

the time of sentence or at all, in the lower court. We adopt the opinion of Mr. Justice James. It is as follows:

[1, 2] "In my opinion the judgment in this case should be affirmed. Defendant, after having entered his plea of not guilty, former acquittal, and once in jeopardy, appeared before the court and withdrew his plea of not guilty, and entered a plea of guilty, and made application to be released upon probation. While there was no express withdrawal of the pleas interposed in bar, all of the circumstances, to my mind, showed that it was the intention of the defendant, at the time he entered his plea of guilty, to waive a hearing upon the other pleas which he had theretofore entered. Can it be for a moment contended, under this state of the record, that, if an order of probation had been made as requested by the defendant, he would have asked for a trial as to the issues of his alleged former acquittal or jeopardy? Furthermore, the record affirmatively recites that at the time he was sentenced, after his motion in arrest of judgment was denied, he announced that he had no further cause to show why judgment should not be pronounced, and did not then, or at any time after entering his plea of guilty, intimate or suggest to the court that he desired to have a jury pass upon the questions which were raised by the special pleas. The motion in arrest of judgment included in general only the grounds which had earlier in the proceedings been made the subject of a motion to set aside the indictment. The questions as to whether defendant had been formerly acquitted of the same offense, or been once in jeopardy, were matters proper to be presented by plea, and not by motion to set aside the indictment or in arrest of judgment. Sections 995, 1017, Pen. Code. After a defendant has entered a plea of guilty and placed himself in the attitude of consenting that the court proceed with the determination of a judgment to be entered against him, and after he has been disappointed in his application to be leniently dealt with, to then give countenance to his claim that the court should not have sentenced him, but should have ordered a trial on the issues raised by the special pleas, would encourage a practice of trifling with the courts not to be tolerated."

The judgment is affirmed.

BEATTY, C. J., does not participate in the foregoing.

FOWLES et al. v. NATIONAL BANK OF CALIFORNIA. (L. A. 3182.)

(Supreme Court of California. April 11, 1914.)

# 1. CORPORATIONS (§ 123\*)—PLEDGE OF STOCK.

A pledgee of stock to secure a debt had no authority to alienate it beyond the title actually possessed by him, or to pledge it to another

as security for his debt, and his action in so doing was a gross fraud on the pledgor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

# 2. CORPORATIONS (§ 123\*)—PLEDGE OF STOCK.

Where an owner of stock executed a transfer in blank and pledged it as security for a debt, and the pledgee pledged it to a bank as security for an indebtedness to it from him, the bank was entitled to hold the stock as security for its debt, if it took the stock in good faith, without notice, and for a valuable consideration, since an owner of personal property who voluntarily furnishes another, not only with possession, but with written indicia of ownership, is estopped to deny his ownership as against one who receives it from him in good faith, and for a valuable consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

# 3. CORPORATIONS (§ 123\*)—PLEDGE OF STOCK—TRANSFER OF PROPERTY BY PLEDGEE—RIGHTS OF PLEDGEE'S TRANSFEREE.

Under Civ. Code, § 325, providing that shares of stock standing on the books of a corporation in the name of a married woman may be transferred by her without the signature of her husband, as if she were a feme sole, where stock standing on the books of a corporation in a married woman's name was pledged with a transfer in blank, indorsed thereon and signed by her as security for a debt, the pledgee's transferee had a right to assume that she was the sole owner thereof and empowered to transfer it, and was not put upon inquiry by the absence of the husband's signature, though the stock was community property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

# 4. CORPORATIONS (§ 123\*)—PLEDGE OF STOCK.

Where a party to whom stock was transferred in blank as security for a debt pledged it to a bank as security for his indebtedness to it, its knowledge that dividends were being declared on the stock, in the absence of any information that they were being paid to the original pledgor, did not put it upon inquiry as to such pledgor's rights, even though it knew that the stock stood on the books of the corporation in her name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

# 5. CORPORATIONS (§ 123\*)—TRANSFER OF STOCK BY PLEDGEE—RIGHTS OF PLEDGEE'S TRANSFEREE.

That one to whom stock was transferred in blank as security for a debt was a stockbroker did not put a bank with which he pledged it as security for an indebtedness from him to it upon inquiry as to his right to pledge it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

# 6. CORPORATIONS (§ 123\*)—TRANSFER OF STOCK BY PLEDGEE—RIGHTS OF PLEDGEE'S TRANSFEREE.

Where a pledgee of stock, as security for a debt, pledged it to a bank to secure an indebtedness due it from him, renewals and extensions and the surrender of certain other pledged securities before the bank learned of the original pledgor's ownership, without the knowledge or consent of such pledgor, did not release the stock; such pledgors being neither guarantors nor sureties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

**7. CORPORATIONS (§ 123\*) — TRANSFER OF STOCK BY PLEDGEE—RIGHTS OF PLEDGEE'S TRANSFEREE.**

Where a pledgee of stock transferred in blank, who was indebted to a bank, and who was then apparently solvent, paid part of the indebtedness, gave a new note for the balance, and pledged the stock to the bank as security therefor, and subsequently became insolvent and absconded, the bank, which, relying upon his apparent ownership, in good faith, took and held the stock as security for the note, was a pledgee for value as against the original pledgor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Nellie M. Fowles and husband against the National Bank of California. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Affirmed.

Wm. Lewis, of Los Angeles, for appellants. Oscar A. Trippet and John E. Biby, both of Los Angeles, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiffs, who are husband and wife, from a judgment in favor of defendant, and from an order denying their motion for a new trial, in an action brought by them to recover possession of certain stock certificates representing 30 shares of stock of the Union Oil Company of California, a corporation, of which they allege themselves to be the owners and entitled to possession. The facts of the case are established by a stipulation of the parties, which is included in a bill of exceptions. The trial court gave judgment that plaintiffs take nothing.

So far as is material to the controlling considerations in this case, the facts are as follows: Defendant is a duly organized banking corporation. Plaintiffs, as has been said, are husband and wife. In September, 1908, they purchased the shares of stock here involved. The same are community property. The certificates therefor were issued in the name of plaintiff Nellie M. Fowles, and have ever since stood in her name in the books of the corporation. On the back of the certificates was a form to be used in transferring the stock, as follows:

For value received ..... hereby sell, assign, and transfer unto .....

shares,  
shares,  
shares,

of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... attorney to transfer the said stock on the books of the within-named company with full power of substitution in the premises.

Date ..... 19...

Indorsement:

On December 29, 1909, Nellie M. Fowles signed her name after the word "Indorsement" on each of the certificates of stock

thus, "Nellie M. Fowles," and she and her husband then delivered the certificates, together with certificates for 30 other shares, to one C. B. Miner, as collateral security for the payment of a certain note of Mr. Fowles to said Miner, dated December 29, 1909, and being for \$4,000. On account of the principal of this note \$2,000 has been paid, and the other 30 shares pledged as collateral have been returned to the pledgors. When the certificates in question were delivered to Miner by plaintiffs, they were pinned to the note. Subsequently Miner separated such certificates from the note, and without the knowledge or consent of either plaintiff, hypothecated them and the stock represented thereby, with defendant, as collateral security for an indebtedness of his own to said defendant. At the time of the original delivery of said certificates to defendant, Miner stated to it that he owned the stock represented thereby, and defendant believed from the statements made by Miner, from the name of Nellie M. Fowles indorsed thereon, and the possession of the certificates by Miner, that he was such owner, and continued to so believe until some time in August, 1910. Except for such belief it would not have accepted such stock as security. Defendant never had any knowledge or notice of the claim of plaintiffs or either of them until some time in August, 1910. About that time Miner absconded, and is now a fugitive from justice and wholly insolvent. Then plaintiffs first learned of the disposition made by Miner of their stock, and defendant first learned of the claim of plaintiffs. Up to that time defendant had no personal acquaintance with and had never met plaintiffs or either of them. Miner's indebtedness to the defendant has not been satisfied, and a sale of the stock of plaintiffs is essential to its payment. The Union Oil Company has paid a regular monthly dividend ever since September, 1908, and that it was paying such dividends was a matter of general and common knowledge among business men and bankers of the city of Los Angeles, where defendant's business was conducted. Defendant never claimed or received any of said dividends, and plaintiffs have been paid all of the same. Defendant had no knowledge or information that plaintiffs or either of them were receiving any of such dividends. Prior to the commencement of this action plaintiffs tendered to defendant all amounts due from them to Miner, and demanded return of the stock.

Defendant claims that under these circumstances it is entitled to retain the stock as security for Miner's debt to it. If this claim be well founded, as the trial court concluded, plaintiffs must necessarily fail in this action for the recovery of the possession of the stock.

[1, 2] Of course Miner had no authority to alienate the stock pledged to him by plaintiffs

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



beyond the title actually possessed by him, or to pledge the same to another as security for his own debt, and his action in so doing was a gross fraud on plaintiffs. As between him and plaintiffs, the latter were the owners of the stock, notwithstanding the pledge. And it is also well established that "the general rule is that one in possession of personal property can transfer to another by pledge or sale no greater interest in the property than he himself has." *Chase v. Whitmore*, 68 Cal. 545, 547, 9 Pac. 942, 944. As said, however, in the case just cited: "There are exceptions to this rule, where the property consists of negotiable instruments, or what comes under the general denomination of currency, and where the owner of the property clothes another with the apparent title to or power of disposition over it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto; the true owner being in such case held estopped from afterward asserting his title." *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 [7 Am. Rep. 341]; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41 [14 Am. Rep. 173]." The italics are ours. In *McNeil v. Tenth Nat. Bank*, *supra*, a case that has repeatedly been cited approvingly by this court, the exception last stated was applied to shares of corporate stock. This case is almost exactly similar in its material facts to the case at bar. In fact, we can see no difference, unless there be a difference by reason of the fact that the stock in this case was community property of Mr. and Mrs. Fowles, and Mr. Fowles did not sign the indorsement. We consider this difference immaterial here, as will be seen from what we say later. In that case the owner had delivered the certificate for the shares of stock to his brokers, as security for any balance that might be due them. There was a blank form of assignment on the back thereof, which the owner signed, without filling in the blanks. The brokers subsequently pledged these shares, without authority from the owner, to a bank, as security for their own indebtedness, without having filled in the blanks in the assignment. The bank took in good faith, and without notice of the owner's claim. It was held that it was entitled to retain the stock as security for the indebtedness due it from the brokers, upon the ground that the plaintiff had conferred upon his brokers such an apparent title to or power of disposition over the shares as estopped him from asserting his own title as against the parties who took bona fide through the brokers. It was recognized that "the mere possession of chattels, by whatever means acquired if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." But it was said: "But if the owner intrusts to another, not merely the possession of the property, but also written evidence over his own signature, of title

thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power." It was held that the fact that the blank assignment was not filled in was immaterial, and that the common practice of passing the title to stock by delivery of the certificate with blank assignment and power had been repeatedly shown and sanctioned in cases coming before the courts, and that a party to whom such a certificate is delivered is authorized to fill it up by writing a power and transfer over the signatures. See, also, *Jones' Pledges and Coll. Securities*, § 163. It was declared to be well settled that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares. This is the settled rule in this state. Section 324, Civ. Code; *Graves v. Mining Co.*, 81 Cal. 303, 325, 22 Pac. 665; *Spreckles v. Nevada Bank*, 113 Cal. 272, 276, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348. It was further held that the holder of such a certificate and power possesses all the external indicia of title to the stock, and an apparently unlimited power of disposition over it. It was then said: "Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact 'substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property,' and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?" This question is answered in the affirmative. The decision was placed upon the well-established principle: "That, where the true owner holds out another, or allows him to appear, as the owner of or as having

full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

This case, as we have said, has been repeatedly cited by this court approvingly so far as this declaration is concerned, and the principle therein set forth applied. See *Chase v. Whitmore*, 68 Cal. 545, 547, 9 Pac. 942; *Woodsum v. Cole*, 69 Cal. 142, 144, 10 Pac. 331; *Dover v. Pittsburgh Oil Co.*, 143 Cal. 501, 505, 77 Pac. 405; *Conklin v. Benson*, 159 Cal. 785, 793, 116 Pac. 34, 36 L. R. A. (N. S.) 537; *Shirey v. All Night and Day Bank*, 134 Pac. 1001. See, also, *Jones' Pledges and Coll. Securities*, § 466. It was recognized as applicable to certificates of stock so indorsed, although they are not negotiable instruments, in *Barstow v. Savage M. Co.*, 64 Cal. 388, 392, 1 Pac. 349, 49 Am. Rep. 705; but it was held in that case that it was not applicable to such certificates in the event that they were *stolen* from the true owner without his fault or negligence. In *Arnold v. Johnson*, 66 Cal. 402, 5 Pac. 798, this principle was applied in the case of a certificate of stock delivered so indorsed to another for a special purpose, and he, without authority, pledged the same for his own debt. The court said that the difference between this case and *Barstow v. Savage M. Co.*, *supra*, was that in this case the owner *voluntarily* delivered the inclosed certificate to the person who pledged it, and thus *allowed* him to assume the apparent ownership thereof, while in *Barstow v. Savage M. Co.*, *supra*, the certificate was *stolen*, and the owner *did not allow* another to assume the apparent ownership. The court said: "The distinction is an important one, and brings this case within the rule stated in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 [7 Am. Rep. 341], cited approvingly in *Barstow v. Savage M. Co.*, *supra*." The same principle was applied in *Ambrose v. Evans*, 66 Cal. 74, 4 Pac. 960. The effort of learned counsel to show that these cases are not controlling, based upon the claim that they were decided under a special statute (Stats. 1877-78, p. 835), which was repealed in 1880 (St. 1880, p. 120), is not convincing. A reading of the statute shows that it is extremely doubtful whether it could be held to be applicable to such cases as the ones referred to. But in any event the cases referred to were in fact decided without reference to such statute, and upon the principle we have discussed. We have already quoted from *Chase v. Whitmore*, 68 Cal. 545, 547, 9 Pac. 942, relied on by counsel as establishing the true rule since the repeal

of such special statute, and have shown that it recognizes and approves the equitable rule declared in *McNeil v. Tenth Nat. Bank*, *supra*. *McNeil v. Tenth Nat. Bank*, *supra*, was approvingly quoted from in *Brittan v. Oakland Bank of Savings*, 124 Cal. 289, 57 Pac. 84, 71 Am. St. Rep. 58, both as to the equitable principle relied upon by defendant, and as to the effect of the delivery of a stock certificate with blank assignment. We are unable to see how it can be successfully contended, in view of the decisions of this court involving the application of the equitable rule referred to, that Miner's pledge of this stock to defendant was not effectual as against plaintiffs, provided defendant took in good faith, without notice, and for a valuable consideration. The views declared in *Arnold v. Johnson*, *supra*, have never been receded from in this state, and we see no reason why such facts as there appeared and here appear do not bring a case fairly within the operation of the rule. It is conceded that, where the ownership of the person dealing with personal property as his own is evidenced by his *possession* only, a purchaser or pledgee from such person takes subject to the rights of the true owner, even though he be a bona fide purchaser or pledgee for value, and the rule above referred to does not apply. But, where such person has, not only the possession, but also written indicia of ownership, with which he has been voluntarily furnished by the true owner, the principle is applicable. The true owner by thus voluntarily holding him forth as the owner is estopped from denying his ownership as against those who take from him in good faith, and for a valuable consideration. Appellants here could easily have protected themselves against any improper disposition of the stock by Miner by writing upon the certificates the terms upon which he held them.

[3] All claims of appellants based upon the fact that the stock was in fact community property, and that the blank assignment was signed by the wife only, appear to be fully answered by the provisions of section 325, Civil Code. The shares stood on the books of the Union Oil Company in the name of the wife alone. That section, as amended in 1905 (St. 1905, p. 397), provides: "Shares of stock in corporations standing on the books of the corporation in the name of a married woman may be transferred by her, her agent or attorney, without the signature of her husband, and in the same manner as if such married woman were a feme sole." Prior to the amendment of 1905 the section provided that such stock as was "held or owned" by a married woman could be so transferred. The code commissioner's note to the section states that the amendment is designed to make it clear that shares of stock standing in the name of a married woman are presumed to be her separate property, and that they may be dealt with by her

as such, in the absence of proof and notice to the contrary. We do not see how, in the face of this statute, it can be doubted that one taking stock standing on the books of a corporation in the name of a woman, married or single, has the right to assume, in the absence of something reasonably sufficient to create a suspicion to the contrary, that she is the sole owner thereof, and is empowered to transfer the same, and that, under such circumstances, he is not called upon to make any inquiry in regard thereto. No case has been cited by appellants that would support any different conclusion. *Mary B. Leiper's Appeal*, 108 Pa. 377, is clearly distinguishable from the case at bar, as is demonstrated in respondent's brief. The statute is clear and unambiguous, and does not appear to admit of any other construction. It is proper also to note, as bearing on the delivery of the certificates to Miner, that the husband himself secured the indorsement of the wife, and personally delivered the certificates indorsed by her to Miner. This fact, however, has no bearing on the question of notice to defendant.

[4] It may be conceded that defendant knew that monthly dividends were being declared by the Union Oil Company. It had no information that any of the dividends declared were being paid to plaintiffs or either of them, so far as the stock pledged by it to Miner was concerned. Certainly no duty rested upon it, in so far as plaintiffs were concerned, to make any inquiry in regard to this matter in the absence of notice of circumstances sufficient to create a suspicion that such payment was being made. We do not think that the mere fact that it must be held to have known that the stock stood on the books of the corporation in the name of Mrs. Fowles created such a duty. The circumstances in this connection are such that it cannot be held that they render the conclusion of the trial court that defendant took in good faith one not sufficiently supported by the facts shown. A reasonable explanation of the failure of defendant to demand and collect the dividends would be that it was entirely content with the security afforded by the shares, without regard to the dividends, and for that reason did not interest itself in the matter of collecting them.

[5] The stipulation of facts states that Miner was a customer of defendant; that he was a broker, and daily dealt in corporate stocks; that he had theretofore often borrowed money from defendant and hypothecated corporate stocks therefor; that it was a usual and customary thing for him to have certificates of stock which showed on the face thereof that the stock had belonged to some other person than himself, and which were indorsed in blank; and that it was the custom of the said bank to make loans to said Miner, and to many other customers, upon stocks so held and indorsed. It is claimed that the mere fact that defendant

knew that Miner was a stockbroker was sufficient, as a matter of law, to put it upon inquiry as to his powers with relation to this stock, when the same was offered by way of pledge; the idea being that, as it is the business of such a broker to buy and sell stocks for others, it is reasonable to assume that stock so indorsed in his hands is the property of others, and that, while it may fairly be assumed that he has the power to sell such stock, it may not be assumed that he has the power to pledge it or otherwise treat it as his own property. We are unable to see any force in this claim, and certainly no such distinction is recognized by the cases brought to our attention, with the possible exception of one or two Maryland cases, which are in conflict with the authorities generally. The *McNeil Case* was, as we have seen, one involving an unauthorized pledge by the brokers of the owner. The same is true of *Shattuck v. American Cement Co.*, 205 Pa. 197, 54 Atl. 785, 97 Am. St. Rep. 735, cited by appellants, where the court said, in relation to a certificate of stock indorsed in blank by the owner to his brokers, who had, without authority, pledged the same, that, where one by his own act arms another with power to act for him, he who so arms the wrongdoer must suffer for the consequences of the wrongdoing, and that there was nothing to put the pledgee on inquiry. The stock was held to be subject to the unauthorized pledge. See, also, *Woods' Appeal*, 92 Pa. 379, 37 Am. Rep. 694, 695. In *Ryman v. Gerlach*, 153 Pa. 197, 25 Atl. 1031, 26 Atl. 302, it was simply held by a majority of the court that the evidence on the question of good faith should have been submitted to the jury.

We are satisfied that the conclusion of the lower court to the effect that the defendant took the stock in good faith, and without notice, cannot be held to be erroneous. There was no actual notice to it of circumstances sufficient to put a prudent man upon inquiry as to Miller's ownership thereof.

[6] There is no force in the claim that renewals and extensions given by defendant to Miner, and the redelivery to him of certain securities pledged, without the knowledge or consent of plaintiffs, operated to release the stock from the pledge. All renewals and extensions and redeliveries were prior to any disclosure to defendant of the fact of plaintiff's ownership. Plaintiffs, of course, were neither guarantors nor sureties. They had not guaranteed the payment of Miner's debt to the defendant, nor had they pledged their stock to defendant for Miner's debt. Defendant had no knowledge whatever concerning them, and had no transaction with them. So far as it was concerned, Miner was pledging his own stock for his own debt. The cases cited by counsel upon this point are in no way applicable to the case at bar.

It is urged that defendant cannot be held, under the circumstances of this case, to have taken the stock in pledge for a valuable con-

sideration. This contention is based on the claim that the stock was pledged by Miner to secure the payment of a pre-existing indebtedness on his part to defendant. According to the answer, the pledge was made on June 10, 1910, to secure the payment of a note given by Miner on that day to defendant for \$14,000 then loaned to him, and interest. The stipulated facts show that this note was given by Miner for the balance then due by him to defendant on a note for \$32,000, which was then past due, given by him to defendants prior to May 10, 1910, which latter note was given in renewal of notes theretofore given by him to defendant for loans of money actually made, and on which he paid to defendants on June 10, 1910, \$18,000, and the interest then due. Among these previous loans actually made was one of \$1,500, made on January 4, 1910, for the repayment of which Miner at that time actually pledged 20 of said shares as collateral security. The remaining 10 shares he pledged at the time of giving the \$32,000 note, and the whole 30 shares thenceforth remained with defendant as collateral security for the indebtedness of Miner, as evidenced, first, by the \$32,000 note, and subsequently by the \$14,000 note.

[7] Looking only to the transaction of June 10, 1910, and regarding the stock as then originally pledged, it is clear that, under our decisions, the defendant was a pledgee for value. In *Stroud v. Thomas*, 139 Cal. 274, 275, 72 Pac. 1008, 96 Am. St. Rep. 111, it was said that the contention of the appellant that a pre-existing debt is not a sufficient consideration for the execution of a note, so far as the sureties thereon are concerned, where the obligation for the pre-existing debt is cancelled upon the delivery of the new note, did not merit discussion, and that it is well settled that such a consideration is sufficient as a foundation for the promise of the sureties, as well as that of the principal. In *Frey v. Clifford*, 44 Cal. 342, a mortgage of land taken to secure an antecedent debt was held to be one taken for a valuable consideration; the court recognizing that there was a great conflict in the decisions of other jurisdictions, but saying that the matter was settled in this state by earlier decisions of this court. *Payne v. Bensley*, 8 Cal. 266, 68 Am. Dec. 318; *Robinson v. Smith*, 14 Cal. 94, 98; *Naglee v. Lyman*, 14 Cal. 450. It was held in that case that the mortgagee was a purchaser for a valuable consideration within the meaning of that clause in the act concerning conveyances, which provides that every conveyance of real estate that shall not have been recorded shall be void as against any subsequent purchaser in good faith, *and for a valuable consideration*, which conveyance shall have been first duly recorded. In *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647, a warehouse receipt for wheat had been pledged to a bank by one Barney, to whom it had been intrusted for some purpose by the owner, as security for Barney's antecedent

debt, and it was decided that upon the authority of the earlier decisions "it must be held that the pre-existing debt of Barney to the bank constituted a valuable consideration within the meaning of section" 2991, Civil Code; the section providing that one who allows another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property "made by the other to a pledgee who received the property in good faith, in the ordinary course of business, *and for value*." In *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. 659, it was held that a pre-existing indebtedness was a valuable consideration for the purchase of land, sufficient to make the purchaser one for value. In *Hart v. Church*, 128 Cal. 471, 480, 58 Pac. 910, 913 (77 Am. St. Rep. 195), it was held: "It is well settled in this state that the extinguishment or security of a pre-existing debt constitutes a valuable consideration for the sale or assignment of property." In *Foorman v. Wallace*, 75 Cal. 554, 17 Pac. 680, it was said that it had often been held that a conveyance in consideration of the cancellation of a pre-existing indebtedness is a conveyance for a valuable consideration within the meaning of section 1214, Civil Code, a section heretofore referred to. The law as thus settled is applicable, at least in the absence of a showing of some equity in favor of plaintiffs, other than the mere fact that they are the rightful owners of the stock. Whatever may be the rule in some other jurisdictions, *prima facie* at least, defendant, receiving the stock as security for a note given for the cancellation of an old indebtedness, was, as against plaintiffs, a pledgee for value. The stipulated facts show that this was some two months before Miner absconded, and was at a time when he was apparently solvent, and when, in fact, he paid defendant \$18,000 and interest on account of his indebtedness. Defendant, relying upon his apparent ownership of the stock, in good faith took and continued to hold the same, as security for the note, which he then gave. Miner afterwards became insolvent and absconded. There is nothing in the equities of the case, as shown by the facts, to warrant us in holding, in view of our decisions, that, as against plaintiffs, defendant was not a pledgee for a valuable consideration. We recognize fully that there is a great conflict in the decisions in other jurisdictions on this point, and that there is much to be said in support of a contrary doctrine; but we regard the matter as definitely settled in this state by a long line of decisions.

The fact that Miner may have been guilty of a crime in connection with these certificates is altogether immaterial, under the circumstances of this case. What we have already said in regard to the rule declared in *McNell v. Tenth Nat. Bank*, *supra*, sufficiently answers the claim to the contrary.

In view of what we have said, no other

point suggested in the briefs of plaintiffs requires notice.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

# MELLEN v. TIMES-MIRROR CO. (L. A. 3196.)

(Supreme Court of California. April 7, 1914.)

## 1. LIBEL AND SLANDER (§ 18\*)—LIBELOUS WORDS—"LIBEL."

An article under the headline "filibustering," and stating that a schooner, which cleared ostensibly for Honduras with a cargo supposed to consist of supplies for a mining company of which plaintiff was the head, was carrying arms and ammunition presumably for the Mexican insurrectos, and that plaintiff and others said she was bound to Honduras and carried supplies for the mining company, but that no machinery or tools commonly used in mines was aboard, and that the barrels supposed to contain oil were believed to contain ammunition, and the coal was believed to cover cases of rifles, was not libelous, under Civ. Code, § 45, defining a "libel" as a false and unprivileged publication exposing any person to hatred, contempt, ridicule, or obloquy, or causing him to be shunned or avoided, or having a tendency to injure him in his occupation, it not appearing that plaintiff had any occupation or that he was injured therein, unless it charged a crime, since it charged at most an attempt to secretly carry arms and ammunition to the Mexican insurrectos, and the word "filibustering," in connection with the remainder of the article, conveyed no other meaning.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 18.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

## 2. LIBEL AND SLANDER (§ 15\*)—LIBELOUS ARTICLES—CHARGING CRIME.

Prior to the adoption of the resolution of Congress authorizing the president in his discretion to prohibit the export of arms and munitions of war to a foreign country under certain conditions, the transportation of arms or ammunition as a commercial venture to a foreign country at peace with this government for use by its subjects, who were in a state of insurrection against their government, was not a violation of the neutrality laws of the United States, and an article charging such transportation was not libelous; Rev. St. U. S. § 5286 (U. S. Comp. St. 1901, p. 3601), prohibiting any person within the territory or jurisdiction of the United States from beginning or setting on foot, or providing or preparing the means for, any military expedition or enterprise to be carried on from thence against another friendly power, having no application.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 1; Dec. Dig. § 15.\*]

## 3. LIBEL AND SLANDER (§ 19\*)—WORDS CAPABLE OF BEING MISUNDERSTOOD.

An article stating that a schooner, which cleared ostensibly for Honduras with a cargo supposed to consist of supplies for the mining company of which plaintiff was the head, was carrying arms and ammunition, presumably for the Mexican insurrectos, though plaintiff and others said it was bound to Honduras and carried supplies, could not reasonably be understood as imputing that plaintiff was guilty of any

crime by reason of his alleged connection with the matter.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 98, 99; Dec. Dig. § 19.\*]

## 4. LIBEL AND SLANDER (§ 86\*)—COMPLAINT—EFFECT OF INNUEENDO.

Where an alleged libelous article could not reasonably be understood as imputing a violation of the neutrality laws of the United States, an allegation in the complaint that it was in fact understood as so charging did not render the complaint sufficient.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 86.\*]

## 5. LIBEL AND SLANDER (§ 123\*)—QUESTIONS OF LAW OR FACT.

Whether an article is libelous is to be determined by the court in the light of such extrinsic facts as are alleged, dependent on whether it is fairly susceptible of the defamatory meaning attributed to it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

## 6. LIBEL AND SLANDER (§ 123\*)—QUESTIONS OF LAW OR FACT.

If the language of an article is capable of two meanings, one harmless and the other libelous, and it is alleged that it was used and understood as conveying the libelous meaning, a cause of action is stated, and it is for the jury to determine in which sense the language was used and understood.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. C. Mellen against the Times-Mirror Company. From the judgment dismissing the complaint, plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant. Hunsaker & Britt and W. N. Goodwin, both of Los Angeles, for respondent.

ANGELLOTTI, J. This is an action for damages for an alleged libel on plaintiff published in "the Los Angeles Times," a daily morning newspaper published by defendant in the city of Los Angeles, and circulated in the city and county of Los Angeles and other counties of California, and also in other states of the United States of America. The article complained of is set out in the complaint, and is as follows:

"Filibustering.

"Suspect Vessel of Taking Arms.

"Steam Schooner Eureka off Coast of Mexico.

"Bound Ostensibly for Honduran Port, Government Suspects Cargo Consists of Munitions of War for the Insurrecto Forces—Angeleno's Name Mixed in Affair.

"(By Direct Wire to the Times.)

"San Francisco, May 20.—(Exclusive Dispatch.) Carrying arms and ammunition presumably for the Mexican insurrectos, the little steam schooner Eureka is trying to land her cargo somewhere along the Mexican coast. The Eureka cleared from this port a

week ago, ostensibly for Amapala, Honduras, and her cargo was supposed to consist of supplies for a mining company of which J. O. Mellen of Los Angeles is the head.

"However, government agents in this city have ascertained that the Eureka's cargo consisted of munitions of war, and a report to this effect has been forwarded to the state department.

"The government agents, however, are not absolutely certain that the arms and ammunition were destined for the Mexican insurgents, although the evidence indicates that such is the fact.

"Mellen and others said the Eureka was bound to the Honduran port and that she carried supplies for a mining company. However, it was noticed that no machinery nor tools commonly used in mines was aboard, and the further fact that crude oil is conveyed in iron tanks and not in barrels added further to the suspicion that attached to the vessel's movements.

"The 300 barrels supposed to have contained oil are believed to have contained ammunition, and the coal is believed to have covered cases of rifles."

It was alleged that by the language used defendant intended to charge and to be understood as charging that plaintiff was engaged in carrying on what is commonly known as a "filibustering expedition," and was a criminal by violating the neutrality laws of the United States in carrying arms and ammunition to and for the subjects of a foreign country, which was at peace with this government, but which subjects were in a state of insurrection against their own government; and further that the article was so understood by the readers of said paper. It was further alleged that the charge was false, scandalous, and unprivileged, that it exposed plaintiff to hatred, contempt, and ridicule, and that by reason thereof "plaintiff was \* \* \* injured in his reputation and good name as a citizen, and said publication inflicted upon him grievous mental suffering, all to his damage in the sum of" \$50,000.

An answer having been filed, the case came on for trial, whereupon the trial court sustained an objection to further proceedings upon the ground that plaintiff's complaint did not state facts sufficient to constitute a cause of action. Plaintiff refusing to amend, judgment of dismissal was given. We have here an appeal from such judgment.

The only question presented is whether or not the published article was libelous in character.

[1] Libel is defined by section 45, Civil Code, as being "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency

to injure him in his occupation." There is no allegation or pretense that the article has a tendency to injure plaintiff "in his occupation." As is suggested by counsel for defendant, there is no allegation that he had any "occupation," and no claim for damage on that account.

Consideration of the alleged libelous article leads us to the conclusion that, unless by fair inference and deduction the article may be taken as charging plaintiff with the commission of some act denounced as a crime by the United States, it is not libelous in nature. It is the duty of all good citizens of the United States to refrain from the commission of any act denounced as a crime by its laws, and a statement to the effect that one is willfully engaged in any such forbidden act is calculated to expose him to more or less obloquy, depending, of course, upon the nature of the crime. A false charge that one has committed *any* crime may therefore be conceded to be libelous. The particular crime here claimed to be charged, viz., a violation of the neutrality laws of the United States in carrying arms and ammunition to and for the subjects of a foreign country in a state of insurrection against their own government, which country is at peace with this government, does not necessarily involve such elements as would impute to a person deemed guilty thereof anything infamous, ridiculous, or disgraceful, or in the nature of moral turpitude, except in so far as the commission of any act forbidden by law, however innocent and free from censure it might otherwise be, would produce such a result. As was substantially said in *Crashley v. Press Publishing Co.*, 179 N. Y. 34, 71 N. E. 258, 1 Ann. Cas. 196, to charge a person with being in sympathy with a revolution in certain South American states, or abetting it, would not seem to impute to him anything infamous or disgraceful. This would appear to be especially true for some years now last past as to a revolution in Mexico, where political uprisings of this character have been almost continuous, and where the "insurrectos" of to-day constitute the government of to-morrow. There is absolutely nothing in the published article, or in the complaint, to indicate that the revolt then in progress in Mexico was not one based upon good or sufficient cause, and animated by the highest and best of motives.

Taking the whole article together, it charges plaintiff at most with being concerned in an attempt to secretly carry by sea from San Francisco to some point on the Mexican coast a cargo of arms and ammunition for delivery to the "Mexican insurrectos." The word "filibustering" at the head of the article, when read in connection with the remainder of the article, cannot be read as conveying any other meaning. No facts are alleged upon which it can reasonably be claimed that this charge imputed to plaintiff

anything dishonorable or disreputable, or anything that could expose him to hatred, contempt, ridicule, or obloquy, or cause him to be shunned or avoided by any one, or that could cause him any injury, assuming always that no crime was charged. Of course, under the circumstances, there is nothing discreditable in the secrecy alleged to have been observed as to the nature of the cargo.

[2] In view of the decisions, it seems clear that the acts attributed to plaintiff and his associates by the article in question did not constitute a crime under any law of the United States. It is thoroughly settled that it is not an offense against the neutrality laws of the United States to transport arms, ammunition, and munitions of war from this country to any foreign country, whether they are to be there used in war or not. Section 5286, U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3601), prohibits simply any person, within the territory or jurisdiction of the United States, beginning or setting on foot, or providing or preparing the means for, "any military expedition or enterprise to be carried on from thence" against another friendly power, and does not prohibit the mere engaging in transportation of arms or ammunition as a commercial venture, nor peaceable aid rendered to either belligerent, so long as this aid arises indirectly only through commercial dealings. An expedition or enterprise designed only to transport munitions of war as merchandise for a foreign belligerent, though for use of an army, is not within the inhibition. See *Wiborg v. United States*, 168 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; note to section 5286, U. S. Rev. Stats.; 5 Fed. Stat. Ann. p. 374; *United States v. O'Brien* (C. C.) 75 Fed. 900. See, also, 2 Wharton's Crim. Law, § 1903. The resolution of Congress authorizing the President to prohibit, in his discretion, the export of arms and munitions of war to a foreign country under certain conditions was not adopted until after the publication of this article.

[3, 4] Not only do the matters stated in the published article of and concerning plaintiff fail to show any violation by him of the neutrality laws of the United States, but furthermore we are of the opinion that the article could not reasonably be understood as imputing that he was guilty of any crime by reason of his alleged connection with the matter. Certainly it was not expressly charged that he had violated any law, and we do not see that such a violation by him is even suggested by the article complained of. Of course the allegation in the complaint that the article was in fact understood by its readers as charging and asserting that plaintiff was a criminal by violating the neutrality laws of the United States in carrying arms and ammunition, etc., does not assist the plaintiff, unless the article was of

such a nature that, in view of the extrinsic facts alleged in the complaint, such a conclusion was fairly deducible therefrom. As said in respondent's brief: "If the words before the innuendo do not sound in libel, no meaning produced by the innuendo will make them libelous, 'for it is not the nature of an innuendo to beget an action.'" *Grand v. Dreyfus*, 122 Cal. 62, 54 Pac. 390.

[5, 6] It cannot be disputed that it is for the court to determine whether, in the light of such extrinsic facts as are alleged the writing can be a libel. If, in the light of such extrinsic facts, the article is not fairly susceptible of the defamatory meaning sought to be attributed to it, the complaint fails to state a cause of action. Of course, if the language of the article is capable of two meanings, one of which is harmless and the other libelous, and it is alleged that the same was used and understood as conveying the latter meaning, a cause of action is stated, and it is the province of the jury to determine in which sense the language was used and understood by the readers of the article. But it is for the judge to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff. See *Van Vactor v. Walkup*, 46 Cal. 124, 133.

We are of the opinion that the lower court did not err in concluding that the article in question was not libelous in character.

The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.; LORIGAN, J.

#### WOOD v. MANDRILLA. (Sac. 2089.)

(Supreme Court of California. April 8, 1914.)

#### 1. DEEDS (§ 95\*)—CONSTRUCTION—MEANING OF WORDS.

Words in a deed must be given their ordinary and popular meaning, unless they are used in a technical sense, or the context shows that they are used in a different sense.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 238, 241-254; Dec. Dig. § 95.\*]

#### 2. DEEDS (§ 113\*)—CONSTRUCTION—MEANING OF WORDS.

The word "half," in a deed conveying a half of a quarter section of land, must be given its natural meaning, in the absence of anything disclosing a contrary meaning, so that the deed conveys a half in acreage.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 331-333; Dec. Dig. § 113.\*]

#### 3. PUBLIC LANDS (§ 24\*)—GOVERNMENT SURVEYS—STATUTORY PROVISIONS.

Rev. St. §§ 2395-2397 (U. S. Comp. St. 1901, pp. 1471-1473), requiring the surveyor general, on the return of surveys of government land, to make out and transmit a description of the lands surveyed, and make a plat of the townships of the lands, describing the subdivisions thereof and the marking of corners, and declaring that the boundaries and contents of the several sections, half sections, and quarter sections shall be ascertained in a prescribed manner, and that, in case of a division of a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quarter section, the line for the division shall be run north and south and the corners and contents of half quarter sections shall be ascertained in the manner prescribed for sections, half and quarter sections, provide a method of ascertaining the line for the division of a quarter section not actually run in the field, and the surveyor general, in making a plat, must draw a north and south line on the plat dividing a quarter into east and west halves from a point equally distant from the southeast and southwest corners of the quarter.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 31, 32; Dec. Dig. § 24.\*]

#### 4. DEEDS (§ 114\*)—CONSTRUCTION—PROPERTY CONVEYED.

The division of a quarter section containing over 160 acres according to the rules laid down for government surveys will, where all the opposite sides are parallel, divide the quarter into equal parts; and hence a deed of the east half, no acreage being mentioned, will convey the east half in quantity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 388; Dec. Dig. § 114.\*]

#### 5. DEEDS (§ 101\*)—CONSTRUCTION.

The rule of practical construction of a deed applies only when the language on the face thereof is doubtful, uncertain, or ambiguous.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 233; Dec. Dig. § 101.\*]

Department 2. Appeal from Superior Court, Tulare County; W. M. Conley, Judge.

Action by P. F. Wood against C. Mandrilla. From a judgment for defendant, plaintiff appeals. Affirmed.

C. L. Russell, of Tulare City, for appellant. Hannan & Miller, of Visalia, for respondent.

LORIGAN, J. This is an action in ejectment to recover a strip of 10 acres of land, part of the southwest quarter of section 30, township 20 south, range 24 east, in Tulare county. This quarter section was originally government land; the fractional quarter section containing 178.98 acres, as returned by the surveyor under the government survey, but, as shown by the evidence in the case, in fact, contains about 180 acres. This quarter section, under one entry and as one tract, was patented in 1872 to the predecessor in title of plaintiff. On October 22, 1909, plaintiff, while still the owner of the whole quarter section, conveyed a portion of it to defendant, the deed describing the part conveyed as "the east half of the southwest quarter of section 30, township 20 south, range 24 east, Mt. Diablo base and meridian." No acreage was mentioned in the deed. Defendant, claiming that the deed conveyed to him the east half of the quarter section in quantity or acreage, took possession of about 90 acres thereof. Plaintiff, claiming, on the other hand, that such deed did not convey the east half in quantity of the quarter section, but only 80 acres as such east half, and that a strip of land of about 10 acres running north and south, taken possession of

by defendant, was part of the west half, and not the east half, of the section, brought this action to recover possession of said strip. The court found that the defendant, under his deed from plaintiff, acquired title to the east half of the quarter section in acreage and quantity, which included the strip in dispute, and accordingly gave judgment in his favor. Plaintiff appeals from this judgment and the order denying his motion for a new trial.

[1, 2] The principal question arising on this appeal is whether the deed to respondent included the strip in question. As the quarter section owned by appellant contained approximately 180 acres, the deed of appellant to respondent of the east half of it, without mention of the number of acres intended to be conveyed thereby (unless there is some merit in the claim of appellant presently to be noticed), transferred to respondent one-half in quantity and hence included the strip in controversy as a part thereof. Words used in a conveyance are to be given their ordinary and popular meaning, unless used in a technical sense, or having a special meaning, or the context shows that they are used in a different sense. The word "half" has a plain, common, and natural meaning, and, when used in describing lands, is to be understood literally. There is nothing uncertain or equivocal in the term, and, if used without qualification in the deed to respondent, must be given its literal significance as one of two equal parts into which anything may be divided, and to have conveyed to him the east half of the quarter section in quantity and acreage. *Jones v. Pashby*, 62 Mich. 614, 29 N. W. 874; *Cogan v. Cook*, 22 Minn. 137.

[3] Appellant does not question but what the usual construction of the word "half" means one-half in quantity, but insists that, as used in describing a tract of land conveyed as the east half or west half of a subdivision of a government survey, the terms "east half" or "west half" thereof are not used with reference to quantity, but with reference to a line fixed by governmental survey as dividing such subdivision into east and west halves; that the expression in the deed to respondent "Mt. Diablo base and meridian" as part of the description of the land conveyed operates, as appellant states it, to "tie the description to the United States government survey," and that a plat of such survey introduced in evidence by consent of both parties shows that this fractional quarter section was subdivided by a government survey into east and west halves, the east half containing 80 acres, and hence excludes the idea that any greater quantity was intended to be conveyed by the deed. The effect of the deed is discussed by both parties, on the theory that the government survey of the township

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



In which this fractional quarter section lies is incorporated as a part of the description thereof; the position taken by respondent being that, under the survey, and the application thereto of the acts of Congress, the same result follows as would follow from giving the word "half" its literal meaning, and that the deed conveys one-half in quantity, which includes the strip in controversy.

In surveying a township, where fractional sections occur, these are thrown on the west and north lines of the township. Such fractional sections occur in the survey of this township. The plat of the township was, as said, introduced in evidence, as there was also testimony respecting the lines of the fractional quarter section under consideration, as shown by the field notes of the survey thereof.

Section 2395 of the Revised Statutes of the United States required the surveyor general, upon the return to him of the surveys in the field of government land by the deputy surveyors, to "cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officer who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships, of the lands describing the subdivisions thereof and the marking of all the corners," and send copies to the place of sale and to the General Land Office.

In conformity with this requirement, the plat introduced in evidence was prepared. On it a line was drawn, presumably when the plat was prepared in the surveyor general's office, running north and south through all the tier of fractional quarter sections on the west side of the township, including the fractional quarter section in question. To the east of this line so drawn and in each fractional section are marked the figures "80," doubtless intended to mean 80 acres, and to the west of said line figures are placed representing whatever the remaining acreage is of each fractional section as the total acreage of each of these quarter sections was computed by the surveyor general; the figures to the west of the line in this fractional quarter section being "98.98." It is by reason of this line on the plat prolonged through this particular fractional quarter that appellant bases his claim that, by government survey, the east half thereof is fixed at 80 acres in quantity, and hence only that acreage was conveyed by the deed. While this is a reasonable argument to make on the face of the plat, there is to be taken into consideration the fact that it is not the plat alone that governs in the matter. The plat is only a record of the surveys, and must be made in conformity thereto. The surveys in the field of government land, and the acts of Congress relative to them and to which the plat must conform, control as to what various subdivi-

sions of the township have been created by the surveys, or, when a division of a subdivision thereof has not been actually segregated by a survey, the method by which such division should be ascertained, should occasion arise in a disposition of the public lands to do so. We have already referred to the section of the Revised Statutes (2395) relative to the plat to be made by the surveyor general from the surveys returned. The sections of the same statutes immediately following (2396 and 2397) prescribe the method of surveying government lands and the method of subdividing surveyed divisions thereof when it may become necessary.

Section 2396 declares:

"The boundaries and contents of the several sections, half sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles:

"First. All the corners marked in the surveys, returned by the surveyor general, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

"Second. The boundary lines *actually run and marked* in the surveys returned by the surveyor general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have *not been actually run and marked* shall be ascertained, by running straight lines from the *established* corners to the opposite correspondent corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township.

"Third. Each section or subdivision of section, the contents whereof have been returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they make part."

Section 2397 provides as follows: "In every case of the *division* of a quarter section the line for the division thereof shall run north and south, and the *corners and contents of half quarter sections* which

may thereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the section preceding.  
\* \* \*

The italics are ours, as are any hereafter used.

It will be observed that section 2396, quoted, prescribing the method of surveying public lands, does not provide for the survey of a township into smaller subdivisions than a quarter section, and in this case, while it appears that the quarter section under consideration was surveyed, it was shown by the evidence that, in fact, there never was any survey by the government dividing or segregating this fractional quarter section into any lesser subdivisions; there were no monuments established or corners set or boundary line run through the quarter by the authority of the government creating any lesser subdivisions. On the contrary, the field notes of the survey show a continuous unbroken line of survey along the south line of the fractional quarter, from the southeast to the southwest corners thereof, and the absence of any monument or corners established thereon. There being then no provision in the law respecting the making of government surveys requiring the survey of any lesser subdivision than a quarter section, and, in the matter of the survey of this particular quarter section, it appearing that, in fact, there was no survey of a lesser subdivision, if occasion arose calling for a division of it into an east and west half, sections 2396 and 2397, referred to, point out first how it must be done, when, in the first section, it is declared that "the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line," and the other section, which provides that: "In every case of the *division of a quarter section the line for the division thereof shall run north and south, and the corners and contents of half quarter sections which may thereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the section preceding.*" Here the statutes quoted directly provide the method of ascertaining a line as to the division of a quarter section which has not been actually run in the field. Here, as we have seen, there was no return in the survey of a line run in the field dividing this quarter section into halves, no corner common to the east and west halves was fixed at any point along the boundary line of said quarter, and the field notes show that a continuous unbroken line from the southeast to the southwest corners of the section was run. Under these conditions, if it was the intention of the surveyor general, in making this plat (a matter to be presently considered), to draw a line on the plat dividing this quarter section into east and west halves, it was his duty, under

the provisions of the statute, to have run this line through the quarter section north and south from a point on the boundary line equidistant from the southeast and southwest corners of the quarter section. This, as the exterior lines of the survey of this quarter section were parallel, would have divided said quarter section into east and west halves equal in quantity, and the tract of land conveyed by the deed of plaintiff as the east half of the quarter section, ascertained in the manner provided for by Congress, would convey one-half in acreage and quantity, as the trial court found. *Jones v. Pashby*, supra; *Edinger v. Woodke*, 127 Mich. 41, 86 N. W. 991.

It is to be observed, too, that occasion for a division of a quarter section into east and west halves could only arise, if it arose at all, after the making of the plat and the lands opened to entry, and then only in the event that there were two or more entries made of portions of the quarter section "which may therefore be sold." As to this particular quarter section, no such occasion arose, because the entry of the land by the predecessor in title of plaintiff in the land office was of the whole of this fractional quarter section, and it was patented to him by the government as a whole.

It is to be further noted that on the plat itself the "80" acres, as marked there to the east of the line, are not described or designated on the plat as the east half of the quarter section, nor the "98.98" acres on the west as the west half thereof. In fact, any designation of the "80" acres as the "east half" of the quarter section not only does not appear on the plat or in the survey, or at all, until it appears in the complaint in this action and reference made to it as such in the course of the trial. Nor does the line on the plat necessarily imply that it was intended to divide this quarter section into east and west halves of the marked acreage, or to do anything more than to aid the officials in the land office in disposing of the government lands, to facilitate their entry and sale, and as a convenience to such officials and to entrymen. As suggested by counsel for respondent, by the homestead laws under which a settler acquires title by residence and improvement to the land embraced in his entry, if it exceeds 160 acres, the entryman was required to pay for the excess, and the making on this plat of these 80-acre tracts on the east side of a line drawn north and south through all the fractional sections on the west of the township would aid in reducing the number of cases in which such excess payments would otherwise have to be made, and possibly in other respects might aid in making other entries. These considerations may have actuated the surveyor general in placing the line on this plat and marking the acreage on either side of it. This presumption it is proper to indulge in, because it furnishes the

only reasonable excuse for the presence of the line upon the plat at all. Certainly its presence there could not legally represent a division of a fractional section into east and west halves, and, as to this section, make the east half contain "80" acres and the west half "98.98" acres, not only because the surveyor general had no authority whatever to do this, but because any attempt on his part to do so would be in direct violation of the provisions of the acts of Congress declaring how, when necessary, the divisions of a quarter section into halves must be made.

[3] Taking it, then, that, as the deed designated the land according to the system of surveys of government land, it was the intention of the parties that the tract should be ascertained in the same manner that the east half of a fractional quarter section should be ascertained under it, we find that no tract of land known or designated as the east half of this quarter section was ever surveyed or segregated by a government survey. The government surveyed the fractional quarter section, and then provided by law how such a quarter section should be divided to ascertain the east and west halves thereof; that this should be done by a line run north and south from a point equidistant from two corners which stand on the same line.

[4] The division of this quarter section, made under this rule as to government surveys, does, as all the lines of this quarter section are parallel, divide the quarter into halves equal in quantity and hence the deed from plaintiff to defendant of the east half of the quarter section conveyed to him the east half in quantity.

[5] It is further contended by appellant that, it being doubtful from the language in the description in the deed how much land was intended to be conveyed by it, the practical construction given it by defendant in taking possession originally of only 80 acres and holding possession to such extent for some seven months before he ousted plaintiff from the 10 acres in controversy should control. This rule as to the practical construction of a contract applies, however, only when the language on the face of the contract is doubtful, uncertain, or ambiguous, and there is nothing of that kind in this deed. Aside from this, it is merely an assumption upon the part of counsel for appellant that plaintiff only went into possession originally of 80 acres under this deed. There is nothing in the evidence that shows this. While the deed to defendant was made in October, 1909, there is no evidence that he went into possession of any of the land he claimed under it prior to May 10, 1910, when he ousted plaintiff from the strip which he claimed was part of it.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

# CROSS v. MAYO. (Sac. 1991.)

(Supreme Court of California. April 7, 1914.)

## 1. APPEAL AND ERROR (§ 528\*)—CONSIDERATION OF MATTERS NOT IN RECORD—NOTICE OF MOTION FOR NEW TRIAL.

A notice of motion for a new trial contained in the transcript, and not contained in any bill of exceptions or statement, cannot be considered on appeal in determining when the notice was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.\*]

## 2. APPEAL AND ERROR (§ 502\*)—MATTERS TO BE SHOWN BY RECORD—NOTICE OF MOTION FOR NEW TRIAL.

The notice of intention to move for a new trial need not be included in the record on an appeal from an order denying the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2306-2309; Dec. Dig. § 502.\*]

## 3. APPEAL AND ERROR (§ 502\*)—MATTERS TO BE SHOWN BY RECORD—GROUNDS OF MOTION FOR NEW TRIAL.

On appeal from an order denying a new trial, it must in some way be made to appear in the record what the grounds for the motion were.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2306-2309; Dec. Dig. § 502.\*]

## 4. APPEAL AND ERROR (§ 933\*)—PRESUMPTIONS—NOTICE OF AND GROUNDS FOR MOTION FOR NEW TRIAL.

Where on appeal from an order denying a new trial, there is a statement or bill of exceptions containing specifications of insufficiency of the evidence and assignments of errors, the presumption is that notice of the motion was duly given, and that the specifications and assignments conform to those in the notice, and constitute the grounds upon which the motion was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.\*]

## 5. APPEAL AND ERROR (§ 719\*)—RECORD—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE.

Where there is no specification of insufficiency of the evidence to support a finding, the finding must be taken on appeal as conclusively establishing the facts stated therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

## 6. APPEAL AND ERROR (§ 1011\*)—REVIEW—CONCLUSIVENESS OF FINDINGS UPON CONFLICTING EVIDENCE.

Findings upon conflicting evidence are conclusive upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

## 7. VENDOR AND PURCHASER (§ 123\*)—RESCISSI—LACHES—KNOWLEDGE OF GROUND—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to support a finding that defendant for more than 10 months after he had acquired full knowledge of the facts alleged to entitle him to a rescission of a contract for the purchase of land continued acting in pursuance of the contract, treated the property as his own, and derived all possible

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

benefits therefrom, before attempting to rescind it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 221-227; Dec. Dig. § 123.\*]

**8. VENDOR AND PURCHASER (§ 114\*)—RESCISSI-  
ON BY PURCHASER—DUTY TO ACT PROMPT-  
LY.**

Under Civ. Code, § 1691, a party to a contract must rescind promptly upon discovery of the facts which entitle him to rescind, and where the purchaser of land, for more than 10 months after acquiring full knowledge of the facts, continued to derive all possible benefits from the contract before attempting to rescind, he waived the right so to do.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 202-204; Dec. Dig. § 114.\*]

**9. APPEAL AND ERROR (§ 842\*)—FINDINGS—  
CONCLUSIVENESS—WAIVER BY FAILURE TO  
RESCIND PROMPTLY.**

Whether a party entitled to rescind has acted promptly so as to avoid a waiver of the right is a question to be decided by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.\*]

**10. VENDOR AND PURCHASER (§ 104\*)—STRICT  
FORECLOSURE OF CONTRACT—TIME—DISCRE-  
TION OF TRIAL COURT—EXTENSION.**

In an action to forfeit defendant's interest under a contract for the purchase of land for failure to comply with its terms, where the court fixed 10 days within which defendant might comply with the contract or be foreclosed, the time given was not unduly short, and the court did not abuse its discretion in refusing an extension.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 178-182; Dec. Dig. § 104.\*]

**11. VENDOR AND PURCHASER (§ 98\*)—FORE-  
CLOSURE OF CONTRACT—RETURN OF PUR-  
CHASE MONEY.**

In an action to foreclose the purchaser's rights under a contract for the sale of land for failure to comply with the contract, the purchaser is not entitled to a return of the portion of the purchase price already paid, where the contract provided that all sums paid should be considered as payments for the use of the land in case of failure to comply with the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163-165; Dec. Dig. § 98.\*]

**12. VENDOR AND PURCHASER (§ 104\*)—FORE-  
CLOSURE OF PURCHASER'S RIGHTS—JUDG-  
MENT FOR MONEY DUE ON CONTRACT.**

Where the purchaser's rights under a contract for the purchase of land were adjudged forfeited for failure to make the payments required by the contract, it was erroneous to also enter judgment for certain payments due under the contract, as the vendor is not entitled to both a forfeiture and an enforcement of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 178-182; Dec. Dig. § 104.\*]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by L. E. Cross against H. B. Mayo. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Judgment modified and affirmed, and order denying a new trial affirmed.

Walter H. Robinson, of San Francisco, and Frank R. Devlin, for appellant. L. G. Harrier, of Vallejo, and T. T. C. Gregory, of San Francisco, for respondent.

**PER CURIAM.** After further consideration the court adopts the opinion written by Mr. Justice ANGELLOTTI when the case was decided in Department. That opinion is as follows:

"We have in this case an appeal from what is declared by defendant to be the final judgment in an action brought by plaintiff to obtain a decree declaring and adjudging that defendant had failed to perform his part of a contract for the purchase by him from plaintiff of certain real property of plaintiff, fixing a time within which he should so comply, and decreeing that if he did not so comply within said time he should be forever foreclosed of all right or interest in the property or to a conveyance thereof. We have also an appeal from an order denying defendant's motion for a new trial. The written decision of the trial judge, findings of fact, and conclusions of law were signed by the trial judge on April 8, 1911, and filed April 10, 1911. These findings of fact fully disposed of all the issues made by the pleadings. By the conclusions of law it was declared that defendant has failed to perform his part of the contract; that plaintiff is entitled to a decree adjudging defendant to be in default in the sum of \$1,000 for interest unpaid, \$8,160 for cattle sold without the permission or consent of plaintiff and unaccounted for, and \$2,923.68 for taxes unpaid, in all \$12,083.68; that plaintiff is entitled to a decree directing defendant to pay to him said sum of \$12,083.68 with interest from certain specified dates, within ten days from the signing, serving and filing 'of this decree and the judgment herein,' or that, failing so to pay said sums, he shall be immediately foreclosed of all his rights under the contract, and plaintiff shall, upon such failure, be entitled to the possession of the land described in the contract, and to receive back from the Stockton Savings Bank the deed placed in escrow therein; that defendant is not entitled to a rescission of said contract, nor a reconveyance from plaintiff of all or any of the real estate conveyed to him by virtue of the agreement, nor the return of any money paid plaintiff by defendant or expended by him on the property, nor any sum of money, or property or thing, nor to any reformation of the contract; that defendant is entitled to nothing under his cross-complaint, and that plaintiff is entitled to recover his costs.

"A judgment in exact accord with these conclusions of law was signed on April 8, 1911, and filed on April 10, 1911. It cannot be questioned that it fully determined all the asserted rights of both parties. There was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

absolutely nothing therein to indicate that it was interlocutory in nature, or that some further judgment was contemplated.

"On April 21, 1911, what is styled in the transcript a 'final judgment' was signed and entered. It recited that the findings of fact and conclusions of law and the judgment and decree had been made and entered herein on the 8th day of April, 1911, and that the same were duly served on the attorneys for the defendant and on the defendant on the 10th day of April, 1911; that both parties appeared by their attorneys; that evidence was introduced, and that it appeared that neither the whole nor any part of the principal sum of \$12,083.68 mentioned in said complaint and findings of fact, conclusions of law, and judgment, nor any part of the interest thereon, had been paid. It then ordered, adjudged, and decreed that the defendant be foreclosed of all of his right, title, and interest in the contract mentioned in said judgment and decree, and, further, that plaintiff have judgment for said sum of \$12,083.68 and interest. It then repeated the adjudications contained in the former judgment.

"The only notice of appeal from any judgment is one served and filed June 20, 1911, by which notice was given that defendant appeals 'from the judgment therein given, made and entered in the said superior court on the 21st day of April, 1911, in favor of the plaintiff in said action, and against said defendant and from the whole of said judgment.' The undertaking on appeal refers to the judgment appealed from as one 'made and entered \* \* \* the 21st day of April, 1911, foreclosing contract and for the sum of \$12,083.68.

"Upon these facts it is claimed that the final judgment was the judgment of April 8, 1911, that the so-called judgment of April 21, 1911, was simply an order made after final judgment, and that while such order was appealable as an order made after judgment, an appeal therefrom cannot be considered as an appeal from the judgment in the action; the result being that the judgment and the proceedings on which the judgment depends cannot be reviewed on such appeal. It is further claimed that the notice of appeal by its express terms limits the appeal to the judgment or order of April 21st, with the result that there is no appeal from the judgment of April 8th. As to the latter claim we are satisfied that the language of the notice is such as to absolutely preclude any other conclusion. We have simply an appeal from the judgment or order of April 21st, and if that is not the judgment in the action, but simply an order made after judgment, we have no appeal from the judgment. There is some force in the claim of plaintiff that the judgment of April 8th finally determined the rights of the parties in relation to all the matters in controversy, and is in fact the final judgment in the action. We deem

it unnecessary, however, to determine this question, as it seems clear to us that the record is such that all of defendant's contentions of any importance are of such a nature that they may be considered on his appeal from the order denying his motion for a new trial.

[1-4] "There is no force in the claim that they may not be so considered. That there was a motion for a new trial on the part of defendant entertained and determined by the trial court is established by its order of December 21, 1911, denying such a motion. The suggestion that the notice of motion was prematurely given if the judgment of April 8, 1911, was not the final judgment is without force, even if we assume purely for the purposes of this decision that the notice may not properly be given prior to entry of judgment, in view of the fact that it does not appear *when* such notice was given. As is suggested by plaintiff, the notice of motion contained in the transcript cannot be considered, being no part of the judgment roll, and not being contained in any bill of exceptions or statement, and there is no other evidence as to the time when the notice was given, except such as is afforded by the presumption, in the absence of a showing to the contrary, that notice was duly given. It is not necessary that the notice of intention to move for a new trial should be included in the record on appeal. While on an appeal from an order denying a new trial it is necessary that it should in some way be made to appear in the record what the grounds of the motion for a new trial were (*Williams v. Hawley*, 144 Cal. 100, 77 Pac. 762), it has several times been substantially held that where there is a statement on motion for a new trial or a bill of exceptions, containing specifications of insufficiency of evidence and assignments of errors of law, the presumption is, in the absence of a showing to the contrary, that notice was duly given, and that the specifications and assignments in the statement or bill of exceptions conform to those in the notice, and constitute the grounds upon which the court was asked to grant a new trial. See *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734; *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Railroad Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627. In the first of the cases cited, *Leonard v. Shaw*, 114 Cal. 71, 45 Pac. 1012, and *Sprigg v. Barber*, 122 Cal. 574, 55 Pac. 419, which are relied upon by plaintiff, were shown to be cases where there was no statement or bill of exceptions, and they were distinguished on that ground. We see no reason for the suggestion that the bill of exceptions was signed by the trial judge 'without any legal sanction.' That the bill of exceptions was in fact on file is established by the stipulation of the attorneys for plaintiff attached to the transcript.

"The contract between the parties was one for the purchase and sale of a large tract of land, described therein as being 'all land in

Swamp Land survey No. 589 in Solano county, and all land in Swamp Land survey No. 115 in Napa county, which lies south of the center line of South slough, so-called; the said lands containing about sixty-five hundred acres, more or less.' The contract was executed on March 3, 1909, the day it bore date. Cross agreed that upon the payment of the stipulated purchase price, with interest, within the time designated, he would transfer this property, free and clear of liens and incumbrances, to Mayo, together with all the personal property thereon. The stipulated purchase price was \$350,000, of which \$50,000 was recited to be paid by the transfer by Mayo to Cross of 320 acres of land in Sutter county and a lot in the city of Oakland, which transfer was made as agreed upon. Mayo was to have until March 3, 1914, within which to pay the remaining \$300,000, with interest thereon at the rate of 4 per cent. per annum from January 1, 1910, which was payable semiannually from said January 1, 1910. Mayo was to enter into possession of all the property, real and personal, at once, and to remain in possession during the life of the agreement. Mayo agreed to pay on account of the interest for 1910, \$2,000 on or before June 15, 1909, and \$3,000 on or before December 15, 1909. He further agreed to pay all state, county, or other taxes levied or assessed upon said lands during the life of the agreement. It was further agreed that upon obtaining the written consent of Cross, Mayo might sell any of the cattle on the land, or the increase thereof, but that the entire proceeds of any such sale or sales shall be paid to Cross immediately upon the same being made, and the amount thereof applied upon the unpaid purchase price. Mayo was to farm the lands for his own benefit, and he agreed to keep the levees and other reclamation works thereon in a state of efficiency, and repair any breaks therein. Cross was to place a deed of the property in escrow with the Stockton Savings Bank, to be delivered upon the payment by Mayo of the full purchase price. It was agreed that if Mayo failed to perform the terms of the agreement on his part, or failed to make the payments therein provided to be made, Cross might end and determine the agreement. It was further provided that in the event of any such failure, 'any and all payments made' to Cross by Mayo 'shall be and belong' to Cross 'as compensation for the use of said land' by Mayo, and that Mayo 'shall have no claim, either at law or in equity' against Cross 'or said lands' because of any of such payments, and that the \$50,000 paid by the conveyance of said land in Sutter county and in the city of Oakland 'shall be and belong' to Cross, and that Mayo 'shall have no claim either at law or in equity thereto.'

"In his complaint in this action, filed August 11, 1910, plaintiff alleged the failure of defendant to perform his contract in three

particulars, viz.: Failure to pay interest due July 1, 1910, amounting to \$1,000; failure to pay state and county taxes amounting to \$2,923.68, which plaintiff had been obliged to pay to save his land from sale; the sale without the consent of plaintiff of the cattle on said property; and the failure to account to plaintiff for the proceeds of such sales, or any part thereof. The value of such cattle was alleged in the complaint to be \$5,590, but this was changed by amendment on the trial to \$8,160. It was further alleged that on August 2, 1910, plaintiff had made a written demand on defendant that he comply with these conditions of his contract within one week, but that defendant had failed to do so.

[5, 6] "The failure to pay the \$1,000 interest due July 1, 1910, was admitted. The trial court found that defendant had failed and neglected to perform his part of the contract in the particulars alleged in the complaint, namely, nonpayment of such interest, nonpayment of taxes and in the matter of the cattle. There is no attack by specification of insufficiency of evidence upon the finding in regard to the taxes, which declares, in accord with the allegations of the complaint, that defendant failed to pay state and county taxes levied and assessed, upon the lands, and that plaintiff was compelled to pay the same, to the amount of \$2,923.68, in order to save his lands from sale. This finding, in the absence of any such attack, must be taken here as conclusively establishing the facts stated therein. In so far as the cattle are concerned, it cannot be held that any of the findings are without sufficient support in the evidence. Admittedly defendant sold such cattle. It is undisputed that plaintiff never gave defendant any consent in writing to do so. Whether or not consent was orally given was a question upon which the evidence was conflicting, and the conclusion of the trial court is conclusive upon us. This is also true as to the question whether defendant accounted to or paid to plaintiff any part of the proceeds of said sales, and also as to the value of the cattle. The testimony of plaintiff furnishes sufficient legal support for the finding as to such value.

[7] "The real contention of the defendant is based on an alleged defect in the title of plaintiff to a quantity of land, claimed by defendant to be 300 acres and by plaintiff to be only 190 acres, the evidence appearing to us to be in accord with plaintiff's claim in this respect, immediately adjoining Swamp Land survey No. 569 on the south. (Swamp Land survey No. 115, the other land referred to in the contract, is in Napa county, and there is no dispute about the same.) None of this land was in fact included in Swamp land survey No. 569, but all of it was a part of Tide Land survey No. 34, which, as surveyed, lay between Mare Island and said Swamp Land survey No. 569. Tide Land survey No. 34 contained 164.55 acres. Title

to said survey 34 is claimed by one Sawyer, who is litigating the question of ownership thereof with the United States government, which claims the land as being a part of Mare Island. Plaintiff's levee intrudes upon said survey 34, and admittedly incloses with his Swamp Land survey 569, 100 acres of the original survey 34 and 90 acres of accretions. Plaintiff never claimed any title to any part of survey 34. His levee was built upon a line agreed upon in the year 1896 by him and the United States authorities as being the line between his property and that of the United States. The claim of defendant is that at the time of the execution of the agreement plaintiff represented to him that all of the land embraced within his levee was within the lines of Swamp Land survey 569, and, consequently, was covered by the agreement for sale. The acreage in fact included in survey 569 and covered by the agreement, apparently measured fully up to the acreage specified in the agreement, viz., 6,500 acres. Defendant's complaint is simply that the agreement does not in fact include the particular land within the levee that is within the line of Tide Land survey 34. Upon the theory that this condition is the result of false representations on the part of plaintiff, defendant, more than two months after the commencement of this action, attempted to rescind the contract, and by cross-complaint set up his alleged cause of action in that behalf. The findings were in favor of plaintiff upon all the issues made by the cross-complaint in this behalf and the answer thereto. It may well be questioned whether there is sufficient evidence to sustain some of these findings. It is doubtful, for instance, whether there is any real conflict on the proposition that plaintiff did represent that his levee was upon his own line, and included only land covered by the agreement. The map which, according to his own testimony, he gave to defendant at the time, would appear to be almost conclusive on this question. Apparently plaintiff believed the facts to be entirely in accord with such representations. There is also perhaps some inconsistency in some of the findings on this particular branch of the case, as is claimed by learned counsel for defendant. But these things do not impair the effect of a finding, which reads as follows: 'Defendant has been in possession and control of said lands described in the cross-complaint since March 3, 1909, and has had every opportunity of ascertaining the truth or falsity of any statements or representations alleged to have been made by defendant previous to the execution of the said contract. Before January 1, 1910, defendant was in full knowledge of the whole truth or falsity of all the matters and facts alleged in his cross-complaint to have been misrepresented to him, and has continued acting in pursuance of said contract, and has treated the property acquired under it

as his own, and has derived all possible benefits from said transaction. Defendant has delayed any right of rescission that might exist to the material prejudice of plaintiff.'

[8] "We have carefully considered the evidence, and are satisfied that it must be held that it furnishes substantial support for this finding. It appears clear enough therefrom that very shortly after the execution of the agreement defendant knew fully as much about the facts in this regard as did plaintiff. There was evidence showing that as early as April, 1909, defendant, who was an attorney, commenced making investigations as to the litigation of Sawyer with the government, involving the land lying immediately north of Mare Island, obtaining from the United States district attorney's office copies of the papers in that litigation. There was ample evidence to sustain a conclusion that before January 1, 1910, he had full knowledge that Tide Land survey 34, as surveyed by Mr. Eager, county surveyor of Solano county, for Mr. Sawyer, included lands lying within the Cross levee. According to the testimony of Cross, which must be here taken as true, it was not until the middle of July, 1910, that he ever said anything to Cross about it. In the meantime he had continued in possession under his contract, farming the property and using it for his own purposes and to his own profit, treating the contract in all respects as though it was a subsisting and binding engagement, without in any way intimating any desire to rescind the contract on account thereof. It was not until August 9, 1910, after he had been notified by Cross to at once pay certain amounts due under the contract, that he made any claim in regard thereto. His letter of that date did not indicate any desire to rescind the contract. He substantially made the claim that 400 acres of the land called for by the contract were not owned by plaintiff, and stated that he was ready to comply with the contract in every respect, whenever it should appear that plaintiff was in a position to convey the same. As we have shown, none of the land actually described in the contract was included in tide Land survey 34. And, as already noted, it was not until October 18, 1910, more than two months after the commencement of this action, that he attempted to rescind the contract, giving notice of rescission on that day. It was in this notice that the claim was for the first time made that plaintiff had been guilty of the alleged false representation that all the land included within his levee was embraced in the description contained in the contract. The question at all times was simply one as to the true location of the southerly line of Swamp Land survey No. 569, in the vicinity of Mare Island. Manifestly plaintiff was entirely honest in his view that the line attempted to be fixed many years before by agreement between himself and the govern-

ment officials at Mare Island was to be taken as the true line. Assuming defendant to have substantially known all the material facts in regard to this matter, as we must assume in view of the finding, we do not see how the trial court's conclusion that he had by his delay waived his right to rescind may properly be held to have been erroneous. It is unnecessary to cite authorities in support of the well-settled proposition that a prompt disaffirmance of a contract by one entitled to rescind, upon discovery of the facts entitling him to rescind, is essential, and that if he fails to rescind promptly, and, to the contrary, continues to treat the contract as binding, he will be held to have waived his right to rescind and to have elected to affirm the contract. As it is stated in our Civil Code, 'he must rescind promptly, upon discovering the facts which entitle him to rescind.' Section 1691. As was said in *Evans v. Duke*, 140 Cal. 22, 26, 73 Pac. 732, 733: 'It is of the essence of the right to rescission that prompt notice shall be given of the demand, and that the action shall be timely brought. Upon obtaining knowledge of the facts entitling him to rescind, plaintiff should commence the proceedings for relief as soon as reasonably possible. "Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief." 2 Pomeroy's Equity Jurisprudence, § 817. "He is not allowed to go on and derive all possible benefits from the transaction and then claim to be relieved from his own obligations by rescission or refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself in reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations." 2 Pomeroy's Equity Jurisprudence, § 897. It would seem to be unnecessary to multiply citations upon this principle of law so fundamental and so well settled.'

[9] "Whether the party entitled to rescind has acted promptly is a question to be decided by the trial court upon the facts of the particular case. The evidence in this case was of such a nature as to support a conclusion that the defendant, with full knowledge of the facts, was not ready to end the contract, and that, continuing to treat the same for his own purpose as valid and binding, he failed to make known any desire to terminate the contract for such a length of time and under such circumstances as to preclude the exercise by him of any right of rescission. See, also, *Kornblum v. Arthurs et al.*, 154 Cal. 246, 97 Pac. 420; *Marten v. Burns W. Co.*, 99 Cal. 357, 33 Pac. 1107; *Bailley v. Fox*, 78 Cal. 396, 20 Pac. 868.

"The defendant also attempted in his cross-complaint to set up a cause of action for reformation of the contract, by amending the description thereof to expressly include so

much of Tide Land survey No. 34 as was within the Cross levee. He asked that in case a rescission could not be had, the agreement be so reformed. The trial court decided against him upon the issues made in this regard. The claim made by defendant in this regard is, of course, a matter in no way connected with his attempted rescission, nor is it material in determining whether he has forfeited all rights under his contract. It is important only in the event that the agreement is to be still deemed a binding and subsisting contract. As we are satisfied that we cannot properly disturb the action of the trial court in adjudging a foreclosure of all of defendant's rights under the contract, it is unnecessary to consider the attacks made upon the conclusions of that court on this branch of the case. It would in no way avail defendant were we to conclude that such conclusions were erroneous.

[10] "The trial court followed the practice suggested in *Keller v. Lewis*, 53 Cal. 113, and followed in *Kornblum v. Arthurs*, 154 Cal. 246, 97 Pac. 420, and many other cases, of fixing a time within which defendant should pay the amounts due upon said contract, or be foreclosed of all his rights under the contract. As was said in the case last cited, 'this was in consonance with equity.' We cannot say that the time fixed, 10 days, was, under all the circumstances, 'an unjustly short limit of time.' We are further satisfied that it cannot be held that the trial court was guilty of any abuse of discretion in subsequently refusing to grant an extension of time, even if we assume that it had the power thus to change the provision as to time contained in the judgment of April 8th.

[11] "While the point is not available on the appeal from the order denying a new trial, there is no force in defendant's claim that he is, in any event, entitled to a return of the payments already made by him under the contract. The authorities relied on by him state the rule in cases where there is a rescission, or abandonment by consent. There was no rescission or abandonment by consent in this case, defendant's claim for a rescission being denied by the judgment. Plaintiff has not attempted to rescind, but has always insisted on the contract and is standing on its terms. His right to retain the purchase price already paid, including the property deeded to him in part payment thereof, is fully sustained by many decisions in this state. See *Glock v. Howard, etc., Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Odd Fellows' Savings Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Oursler v. Thacher*, 152 Cal. 739, 93 Pac. 1007.

[12] "There is unquestionably a sufficient appeal from the judgment or order of April 21, 1911. Whether the latter be considered the judgment, or a special order made after judgment, it is undoubtedly erroneous in decreeing the recovery by plaintiff from defend-



ant of the sum of \$12,083.68 and interest, in addition to decreeing a foreclosure of all his rights under the contract. If it be an order after judgment, this portion thereof is erroneous, in that it finds no support in the judgment of April 8th, which simply required defendant to pay this amount within a specified time or be foreclosed of all rights under the contract. There is no provision therein for any money recovery, except costs, in the event of foreclosure of defendant's rights because of nonpayment of such money within the specified time. If it be considered as the judgment in the action, this portion is erroneous in that it is without support in the pleadings and findings. It is to be borne in mind that this action was not one for the recovery of any money, but simply one to require defendant to pay the moneys due under the contract or be foreclosed of all rights under the contract. Manifestly defendant cannot properly be required to pay the amount for failure to pay which his rights under the contract are declared forfeited, or, to state it in different words, plaintiff cannot have both a forfeiture and enforcement of the contract at the same time. To sustain such a recovery here would be in effect to require defendant to partially perform his agreement of purchase, and at the same time foreclose all his rights under such agreement. No authority is cited by plaintiff to sustain any such claim.

"In view of our conclusion upon the matters already discussed, certain other claims made in the briefs of learned counsel for defendant are immaterial and need not be considered.

"The order denying a new trial is affirmed. The judgment or order of April 21, 1911, is modified by striking therefrom the following: 'It is further ordered, adjudged, and decreed that plaintiff have judgment for \$12,083.68, with interest thereon at the rate of 7 per cent. as follows: On the sum of \$1,000, being a part thereof, from July 1, 1910; on the sum of \$8,160, being a part thereof, from January 1, 1910, and on the sum of \$2,923.68, being the balance thereof, from April 8, 1910,' and as so modified is affirmed."

BEATTY, C. J., does not participate in the foregoing.

**KLUMPKE v. MORENO et al.** (S. F. 6480.) (Supreme Court of California. April 24, 1914.) **QUIETING TITLE (§ 14\*)—JUDGMENT—GRANTING RELIEF ON CONDITIONS.**

The rule that a party's title will not be quieted against an outlawed mortgage unless he pays the mortgage debt does not apply to a party claiming title adversely to the original mortgagor.

[Ed. Note.—For other cases, see *Quieting Title*. Cent. Dig. § 46; Dec. Dig. § 14.\*]

In Bank. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by John G. Klumpke against Francis J. Moreno and others. Judgment in favor of the defendant Barclay Henley was affirmed by the District Court of Appeal for the Third Appellate District (140 Pac. 313). On petition to transfer the cause to the Supreme Court. Petition denied.

R. H. Countryman, of San Francisco, for appellant. Barclay Henley and Frank S. Brittain, both of San Francisco, for respondent.

**PER CURIAM.** The petition for a transfer of the cause to this court after hearing and determination in the District Court of Appeal for the Third Appellate District is denied.

The affirmance of the judgment and order appealed from may properly rest on the following positions stated in the opinion of the district court: (1) That Henley had shown himself to be the owner of an undivided one-third interest in the premises; and (2) that the plaintiff had failed to show, as against Henley, the acquisition of that one-third interest by prescription or otherwise.

The opinion goes further, however, and declares that even if Henley had not acquired title by a valid foreclosure, the plaintiff would be required to pay the mortgage debt as a condition to having his title quieted against the outlawed mortgage. The doctrine invoked is well settled (*Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157, and cases cited), but it has no application to a plaintiff who is not the original mortgagor and does not claim under such mortgagor. *Marshutz v. Seltzor*, 5 Cal. App. 140, 89 Pac. 877. This is the position of the plaintiff here. He does not assert title as successor to William C. Moreno or Mrs. Gonzales, the mortgagors, but claims adversely to them.

We do not therefore approve the part of the opinion which indicates a contrary view on this point. But, as has already been stated, the judgment of the District Court of Appeal does not require for its support a decision on this question.

**SFERLAZZO v. OLIPHANT.** (Civ. 1315.) (District Court of Appeal, First District, California. Feb. 25, 1914.)

**1. CORPORATIONS (§ 414\*)—OFFICERS—POWERS—CUSTOM.**

The president and general manager of a corporation may by custom be invested with the power to indorse and transfer commercial paper of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.\*]

**2. CORPORATIONS (§ 414\*)—OFFICERS—POWERS—CUSTOM.**

A by-law of a corporation, providing that the president shall sign, as such, all certificates of stock and other contracts or instruments which have been first approved by the board of directors, is permissive only, and does not for-

bid the giving to the president of larger powers by custom, and the president may by custom acquire the right to indorse and transfer commercial paper of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.\*]

### 3. CORPORATIONS (§ 298\*)—SPECIAL MEETINGS—BY LAWS—EFFECT.

The by-laws of a corporation that the service of notice of special meetings of the board of directors shall be entered on the minutes, and the minutes, on being read and approved at a subsequent meeting, shall be conclusive on the question of service, merely facilitate the proof of the regularity of the board's proceedings, but do not limit the manner of proving service of notice, and the proof may be by parol.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.\*]

### 4. TRIAL (§ 165\*)—NONSUIT—OBJECTIONS—RIGHT OF PARTY TO SUPPLY EVIDENCE.

A motion for nonsuit must point out the defects in the proof of plaintiff, and the court must permit plaintiff to supply the missing evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

### 5. CORPORATIONS (§ 298\*)—BOARD OF DIRECTORS—SPECIAL MEETINGS—MINUTES.

Where the minutes of a special meeting of the board of directors of a corporation showed that a quorum was present and that two members were absent, and the correctness of the minutes was not called in question, one assailing the legality of the meeting and of an act taken by the meeting must show that it was not called and noticed as required by the by-laws.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.\*]

Appeal from Superior Court, City and County of San Francisco; A. J. Buckles, Judge.

Action by C. Sferlazzo against D. D. Oliphant. From a judgment of nonsuit, and from an order denying a new trial, plaintiff appeals. Reversed.

Gerald Halsey, of San Francisco, for appellant. Schwartz & Powell, of Oakland, for respondent.

**RICHARDS, J.** This is an appeal from an order granting the defendant's motion for nonsuit, and also from an order denying plaintiff's motion for a new trial.

The action is one to recover upon a promissory note executed by the defendant to F. P. Cutting Company, a corporation, payable one day after date, which said note the plaintiff alleged was indorsed and assigned to Gerald C. Halsey, and by said Halsey to the plaintiff. The answer admitted the execution of the note to the corporation, but put in issue its indorsement and transfer, and further averred that there was no consideration for the note. Upon the trial the note was produced, and showed its indorsement to the order of Gerald C. Halsey by "F. P. Cutting Company, by F. P. Cutting, President." The evidence of F. P. Cutting was produced,

showing that he was at and from a time prior to such indorsement the president and general manager of the F. P. Cutting Company. He was then asked the question as to what was the custom of that company regarding the indorsement of checks, notes, and similar instruments during the three years that he had been president of the company. Counsel for defendant objected to the question, and in support of his objection referred the court to a by-law of the corporation already in evidence, reading: "He [the president] shall sign as president all certificates of stock, and other contracts and other instruments of writing which have been first approved by the board of directors, and shall draw all checks." The court sustained the objection, saying: "They don't have any general custom if the by-laws provide a rule."

[1] We think the court erred in this ruling as to the effect of the by-law above quoted. Counsel for the plaintiff raised a question as to the sufficiency of the foregoing by-law in its application to the indorsement of notes or other choses in action; but, aside from this question, we think the rule to be well settled that the president and general manager of a going business concern may, by the custom and usage of the corporation, be invested with power to do a variety of things necessary to be done by some particular officer or agent in the usual and ordinary course of business. The indorsement and transfer of commercial paper and choses in action comes easily within the class of powers with which the president and general manager of a corporation may be shown to have been invested by proof of the usage of its business. *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913.

[2] Nor do we think that the by-law urged here in opposition to the proof of such usage is to be construed as preventing the admission of such proof. Its language is permissive, not restrictive. It assumes to expressly authorize the president to sign all contracts and other instruments in writing which have been first approved by the board of directors; but the by-law does not indicate how that approval may be manifested; nor does it forbid the giving of larger powers in such matters to the active head of the concern. It is not, therefore, to be held to be a limitation upon the power of the directors of the corporation to invest its president and general manager with authority to do things of the kind in question in the ordinary and usual course of its business, and to signify their approval of his acts by the custom and usage of the corporation in the conduct of its affairs (*Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212; *Thompson on Corp.* §§ 4626, 4628); we think, therefore, that the court erred in refusing to permit the witness Cutting to show the custom and usage of the corporation with respect to the indorsement of its paper.

The appellant further contends that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court committed a double error in granting the motion for nonsuit. Immediately after the court had refused to permit the witness Cutting to testify to the custom of the corporation with respect to the indorsement of its commercial paper, the judge asked the said witness whether the minute book showed any authorization in the president to make the indorsement. The witness answered, "Yes," and thereupon, at the request of the court, produced and read in evidence, without objection, the minutes of a special meeting of the F. P. Cutting Company, at which the following resolution was adopted: "Resolved, that the president, F. P. Cutting, is hereby authorized on behalf of this company to indorse, transfer and assign any notes or negotiable instruments owned by this company, for such purposes as he may deem best." The minutes of this meeting show that it was a special meeting; that a majority of the directors were present; but that there were two absentees. The minutes, in the absence of the regular secretary, were kept and subscribed by the president, F. P. Cutting. Upon cross-examination Mr. Cutting testified that the meeting had been called by his order to the secretary, and that he did not know what notices had been given by the secretary to the absent members of the board. The by-laws provide that the president may call special meetings, and that notice of such called meetings shall be given by leaving a written or printed notice at the last known place of business or residence of each director. The by-laws further provide that "such service of notice shall be entered on the minutes of the corporation; and the said minutes, upon being read and approved at a subsequent meeting of the board, shall be conclusive upon the question of service." The service of notice of this called meeting was not entered on the minutes, nor were such minutes read or approved at a subsequent meeting of the board. Upon this state of the record the plaintiff announced that he rested his case, whereupon the defendant moved for a nonsuit. Upon such motion being made, the plaintiff offered to prove by another witness that the two absentees had been duly served with written notice of the meeting. The court refused to allow this proof to be given "upon the ground that the service of notice was not entered on the minutes, nor did it appear that the minutes were read and approved at a subsequent meeting of the board"; and thereupon the court granted the motion for nonsuit.

[3] We think that, as to the reason given by the court for its refusal to permit the plaintiff to make proof of the due service of notice upon the absentees from the meeting, such reason is not sufficient. The object of the requirement in the by-laws that the fact of service of due notice of special meetings shall be entered in the minutes is in order that the recital of such fact therein shall be of itself *prima facie* proof of such notice,

which may become conclusive by the subsequent approval of the minutes; but it cannot be held to be the only permissible proof of such service or of the regularity of such meeting; otherwise the secretary, by the omission of this clerical duty, could destroy the legality of any special meeting of the board of directors, and thereby nullify its acts. The same reasoning applies to the reading and approval of the minutes at a subsequent meeting of the board. These requirements in the by-laws are intended to facilitate the proof of the regularity of the board's proceedings, but not to limit such proof to the minute entries and clerical acts of the clerk. The reasons of the court, therefore, were not only insufficient, but the ruling itself was error.

[4] One of the chief objects subverted by a motion for nonsuit is to point out to the court and to opposing counsel the specific oversights and defects in plaintiff's proof of his case; and this in order that, as to the latter, he may supply, if possible, the specified deficiencies in his proof. *Coffey v. Greenfield*, 62 Cal. 602; *Palmer & Rey v. Marysville, etc., Publishing Co.*, 90 Cal. 168, 27 Pac. 21. When the plaintiff in this case, his attention being called to the matter, offered to do this, it was the duty of the court to permit him to supply the missing evidence; and it was error to refuse this privilege to the plaintiff and, after such refusal, to grant a motion for nonsuit. *Low v. Warden*, 70 Cal. 19, 11 Pac. 350.

[5] But our reasoning upon the merits of this motion for nonsuit carries us back a step further. The plaintiff had presented and read in evidence, without objection, the minutes of the special meeting of the board of directors of the F. P. Cutting Company, at which a resolution, expressly authorizing F. P. Cutting to indorse the commercial paper of the corporation, was passed. The correctness of these minutes is not called in question, and it appears therefrom that a quorum of the board was present; it also appears that two members of the board were absent; but whether or not these two absentees had been duly served with notice of the meeting did not appear either in the minutes or in the proof of plaintiff at the time the motion for nonsuit was made. We do not think it essential that such proof should so appear. While it is true that special meetings of the directors of corporations are not legal unless called and noticed as the by-laws require, or unless these requirements are waived by the members of the board, either expressly or impliedly, by their presence and participation in the meeting, yet it is not incumbent, upon a party relying upon the regularity of acts done at such meeting, to show affirmatively that the meeting was in fact called and noticed in the manner specified in the by-laws. The meeting having been held, and a quorum of the board being present, and having done the act

in question, their meeting and action are presumed to be regular and legal, in the absence of a showing to the contrary; and it is incumbent upon those who assail the legality of the meeting and of the act in question to show that the meeting was not called and noticed as the by-laws require. *Granger v. Oriental Empire, etc., Co.*, 59 Cal. 678; *Stockton, etc., Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Barrell v. Lakeview Land Co.*, 122 Cal. 129, 54 Pac. 594; *Balfour, Guthrie Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743. We think for this reason also the court was in error in granting the motion for nonsuit herein.

The judgment and order denying a new trial are reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

#### SCANLON v. JACOBS. (Civ. 1345.)

(District Court of Appeal, First District, California. Feb. 26, 1914.)

#### 1. JUDGMENT (§ 297\*)—FINDINGS — CORRECTIONS—CONSENT OF PARTIES.

The court may, with the consent of both parties, amend its findings and judgment before motion for new trial has been made or an appeal taken and while it has jurisdiction of the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 581, 584-586; Dec. Dig. § 297.\*]

#### 2. JUDGMENT (§ 331\*)—AMENDED FINDINGS AND JUDGMENT.

Where the court, with the consent of both parties, made amended findings and judgment while it had jurisdiction of the case, and before motion for new trial had been made or an appeal taken, the amended findings and judgment were the only proper subjects of appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 632; Dec. Dig. § 331.\*]

#### 3. JUDGMENT (§ 256\*)—ISSUES—FINDINGS.

Where the complaint was in the form of a common count for merchandise sold and delivered, and the answer alleged that plaintiff sold hogs to defendant under an express agreement that the hogs were sound, and that plaintiff, to induce the purchase, fraudulently represented that the hogs were sound, and that defendant was induced to purchase relying on the representation, which was false, a finding that the allegations of the complaint were true, and that there was no express warranty made on the part of plaintiff at the time of sale with regard to the condition of the hogs, and that there was no agreement at the time in regard thereto, and that the hogs were not sold on any agreement as to their condition, fairly responded to the issues, and negated the claim of defendant, and supported a judgment for plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.\*]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by V. B. Scanlon against James Jacobs. From a judgment for plaintiff, defendant appeals. Affirmed.

J. G. Reisner, of San Francisco, for appellant. Harry E. Styles, of Redwood, for respondent.

RICHARDS, J. This action was brought to recover a balance alleged to be due upon the purchase price of a number of hogs. The plaintiff recovered judgment on December 14, 1912, for the sum of \$363.43, and costs. On January 31, 1913, the court, "upon ex parte motion of counsel for plaintiff, but with the consent of the defendant" (so reads the statement in the case), filed amended findings, and caused an amended judgment to be entered, reducing the amount of the plaintiff's recovery \$20. This reduction in the amount of the judgment seems to have been caused by the discovery that a miscalculation had been made in the amount of interest due to that extent. Later the defendant moved for a new trial, which being denied, he appealed from the judgment of December 14, 1912, and also from the amended judgment of January 31, 1913, and from the order denying the motion for a new trial.

[1] The appellant's first contention is that the court had no power to amend its judgment of December 14, 1912, or to make the amended findings and enter the amended judgment of January 31, 1913. It is a complete answer to this contention that the record shows, and the defendant admits, that he consented to the making and entry of the amended findings and judgment reducing the amount of his liability, and that the same was accomplished before the motion for a new trial was noticed or an appeal taken. How this consent was manifested does not appear; but, in support of the action of the court reducing the judgment against the defendant by his consent and for his benefit, it must be assumed, in the absence of a showing to the contrary, that his consent thereto was given in whatever formal and persuasive way was requisite to induce the court's action. No case has been called to our attention holding that the parties to an action may not alter the findings and judgment by consent before a motion for a new trial has been made or an appeal taken, and while the court still has jurisdiction of the case. We think the appellant's contention in this respect is without merit.

[2] The amended findings and judgment, having thus supplanted the original findings and judgment in the case, are the only proper subjects of appeal.

[3] The only other point urged by appellant is that the court failed to find upon certain material issues in the case. The complaint was in the form of a common count for merchandise sold and delivered. The answer set forth the transaction, and alleged that the plaintiff sold his hogs to the defendant under an express agreement and understanding that said hogs were in a good,

sound, and healthy physical condition, and free from disease, and that the plaintiff, to induce their said purchase, falsely and fraudulently represented and stated to said defendant that said hogs were in such good, sound and healthy physical condition, and free from disease, and that said defendant was induced to purchase them relying upon said representation, which proved to be false.

The court found that all of the allegations of the complaint were true; and further found: "That there was no express warranty given or made on the part of said plaintiff to said defendant at the time of sale or delivery with regard to the condition of said hogs, as alleged in said answer herein, or in said cross-complaint; nor was there

any agreement or understanding at any time in regard to said matter; nor were said hogs sold upon any agreement as to their condition or freedom from disease." We think this finding fairly and fully responds to the issues presented by defendant's answer and cross-complaint, and negatives his averment therein as to the agreement and conditions under which he purchased the hogs. The appellant does not contend that this finding is not fully sustained by the evidence in the case.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

**BROWDER v. STATE.****HALL v. STATE.**

(Nos. A-2067, A-2068.)

(Criminal Court of Appeals of Oklahoma.  
June 16, 1914.)

Appeal from County Court, Stephens County; J. W. Marshall, Judge.

Bill Browder and John Hall were convicted of misdemeanors, and separately appeal. Reversed and remanded.

Womack &amp; Brown and J. B. Wilkinson, all of the Duncan, for plaintiffs in error. The Attorney General, for the State.

**PER CURIAM.** Plaintiffs in error were jointly informed against by the county attorney of Stephens county for the offense of unlawfully conveying intoxicating liquors. The information, omitting the formal parts, was as follows:

"That Bill Browder and John Hall did in Stephens county, on or about the 8th day of March, 1913, commit the crime of conveying intoxicating liquors from one place in the said state of Oklahoma to another place in said state, in the manner and form as follows, to wit: That the said Bill Browder and John Hall did willfully and unlawfully convey intoxicating liquors from one place in the city of Duncan to another place in said city of Duncan, contrary to," etc.

A demurrer to the information was interposed by the defendants, on the ground that it did not state facts sufficient to constitute an offense. The demurrer was overruled, and exception taken. Whereupon the defendants entered pleas of not guilty. Separate trials were demanded and granted. Upon their separate trials each defendant was found guilty, and from the judgments rendered appeals were perfected.

Of the various errors assigned in the petitions it is only necessary to notice the question raised by the overruling of the demurrer. It will be noticed that the information contains no allegation as to the places in the city of Duncan from which and to where the conveyance was made. We think that this omission renders the information insufficient. The statute requires that the information must be direct and certain as to the particular circumstances of the offense charged, when they are necessary to a complete offense. Section 5739, Rev. Laws. The Attorney General confesses error on this point.

The judgments are reversed, and the causes remanded, with instructions to sustain the demurrer to the information.

**COBBLE v. STATE.** (No. A-2030.)(Criminal Court of Appeals of Oklahoma.  
June 16, 1914.)

Appeal from County Court, Garvin County; W. R. Wallace, Judge.

J. D. Cobble was convicted of misdemeanor, and appeals. Reversed.

Carr &amp; Field, of Pauls Valley, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted of a violation of the gambling law. On the 1st day of March, 1913, in accordance with the verdict of the jury, the court sentenced the defendant to pay a fine of \$100 and to be confined in the county jail for 30 days. To reverse the judgment, the defendant appeals.

The Attorney General has filed herein the following confession of error:

**"Confession of Error.**

"Comes now the state of Oklahoma, by the Attorney General, and respectfully calls the court's attention to the charging part of the information filed in this case which is in words and figures as follows: That the said J. D. Cobble did then and there unlawfully and willfully conduct as owner and for hire a certain device, to wit, a slot machine, for money, checks, and credit and other representative of value, against the peace and dignity of the state. Under the holdings of this court in the case of Brown v. State, 5 Okl. Cr. 41, 113 Pac. 219, and in Morgan et al. v. State, 7 Okl. Cr. 45, 121 Pac. 1088, and Proctor v. State, 9 Okl. Cr. 81, 130 Pac. 819, the information must allege that the prohibited game named in the statute was played at for money or some representative value. For these reasons the Attorney General believes that, under the opinion of this court referred to, sufficient error appears of record to authorize a reversal of this judgment and confesses error accordingly."

It is our opinion that the confession of error, for the reasons therein stated, should be sustained. The judgment of conviction is therefore reversed.

**ELLIOTT et al. v. STATE.** (No. A-2047.)(Criminal Court of Appeals of Oklahoma.  
June 16, 1914.)

Appeal from County Court, Grady County; N. M. Williams, Judge.

G. L. Elliott and Carsle Elliott were convicted of a violation of the prohibitory law, and appeal. Affirmed.

J. B. Wilkinson, of Duncan, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiffs in error were jointly informed against by the county attorney of Grady county for the offense of unlawfully conveying intoxicating liquors in said county. The jury assessed the punishment of G. L. Elliott at 60 days' confinement in the county jail and \$100 fine, and Carsle Elliott at 30 days' confinement in the county jail and \$50 fine. From judgments entered in accordance with the verdict, the defendants appeal.

The Attorney General has filed a motion to strike the case-made, and for grounds of said motion shows:

"That the attempted appeal is from a judgment of conviction for a misdemeanor, to wit, for violation of the prohibitory law; that the judgment was rendered on the 12th day of April, 1913, at which time the court made an order allowing plaintiff in error 60 days in which to prepare and serve a case-made, and allowed 90 days from said date in which to file a petition in error in this court; that thereafter, on the 12th day of June, the court pur-

ported to make an order extending the time heretofore allowed, but that the court was without jurisdiction to make the said order, in that the original 60 days had expired."

Thus it appears that the order extending the time for serving the case-made was made on the sixty-first day after the judgment was rendered. Under the statute the trial court in a misdemeanor case has no authority to extend the time after the expiration of 60 days from the day the judgment was rendered. The motion to strike the case-made must therefore be sustained. There is no question of law presented upon the transcript for the determination of this court.

The judgments of conviction will therefore be affirmed.

#### WILSON v. STATE. (No. A-2054.)

(Criminal Court of Appeals of Oklahoma.  
June 23, 1914.)

Appeal from County Court, Beaver County; Geo. H. Healy, Judge.

Jerome Wilson was convicted of a violation of the prohibitory law, and appeals. Reversed.

J. W. Culwell, of Beaver, and Chas. Swindall, of Woodward, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted in the county court of Beaver county on an information which charged the possession of 22 pints of whisky, with the unlawful intent to violate provisions of the prohibitory law. April 12, 1913, judgment was rendered, and he was sentenced to serve a term of 30 days in the county jail and to pay a fine of \$50. To reverse the judgment, an appeal was perfected.

It is contended that the testimony is wholly insufficient to support a conviction, and that the motion to direct a verdict of not guilty should have been sustained. The proof on the part of the state is that M. A. Shuler, a farmer, on the day alleged, was in the town of Forgan, and there met the defendant, who asked him to haul a package of whisky from the depot to Beaver City; that on the road they were stopped by Sheriff Johnnie Jones, who said he wanted to search the wagon for booze, and the defendant said, "Here it is," and the sheriff took the whisky. The defendant as a witness in his own behalf testified that he resided in Beaver City, and that his reason for ordering the amount of whisky he did from Kansas City was because it was talked around by a good many people, and he understood, that within a short time the Webb Law would go into effect, and after that he could not get any more liquor; that he ordered pint bottles, because it was cheaper than in quarts, and offered in evidence the price list, showing that the same was cheaper by getting it in pint bottles. There was no evidence tending to show the

defendant's unlawful intent to violate any provisions of the prohibitory law.

This court has held that the possession of intoxicating liquors is a circumstance that may be considered, together with other competent evidence, in the trial of a person charged with the offense of having the unlawful possession of intoxicating liquor, but that the mere possession, without any other proof of any kind, is not sufficient to sustain a conviction. In *McCarthy v. State*, 6 Okl. Cr. 483, 119 Pac. 1020, it is said:

"The rule declared by justice and reason requires that the fact of criminal intent be proved, and not presumed. Another rule, which is approved by all thinking and just men, requires that guilt should flow naturally and easily from the facts proved, and be consistent with all the facts. The evidence should be of such a character as to overcome prima facie the presumption of innocence. If the evidence raises a mere suspicion; or, admitting all it tends to prove, the defendant's guilt is left doubtful, or dependent upon mere supposition, surmise, or conjecture, the court should advise the jury to acquit the defendant."

It is our opinion that there was no evidence sufficient to show the unlawful intent. It follows that the judgment should be reversed.

#### LOS ANGELES OLIVE GROWERS' ASS'N v. PACIFIC SURETY CO. (Civ. 1401.)

(District Court of Appeal, Second District, California. Feb. 25, 1914.)

##### 1. DAMAGES (§ 80\*)—LIQUIDATED DAMAGES—VALIDITY OF STIPULATIONS.

The rule that where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and a stipulation for the payment of a specified sum for a violation of any of such provisions, which in some instances would be too large and in others too small, such sum is to be treated as a penalty, and not as liquidated damages, has been modified by Civ. Code, § 1671, which provides that the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage from a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 170-175; Dec. Dig. § 80.\*]

##### 2. DAMAGES (§ 163\*)—LIQUIDATED DAMAGES—BURDEN OF PROOF.

Civ. Code, § 1670, providing that every contract by which the amount of damage for a breach thereof is determined in anticipation thereof is to that extent void, except as expressly provided in the next section, must be presumed to apply in all cases, unless the party seeking to recover upon the agreement pleads and proves that his case comes within section 1671, authorizing stipulations for liquidated damages, where it would be impracticable or extremely difficult to fix the actual damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 454-459; Dec. Dig. § 163.\*]

##### 3. DAMAGES (§ 150\*)—LIQUIDATED DAMAGES—PLEADING—SUFFICIENCY.

In an action on a bond given to secure performance of a contract to furnish laborers to harvest a crop, a complaint alleging that it would be and was impracticable or extremely difficult to fix the actual damages suffered by reason of the contractor's abandonment of the contract was sufficient to bring the case within Civ. Code, § 1671, authorizing stipulations for

liquidated damages when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 150.\*]

**4. DAMAGES (§ 85\*)—LIQUIDATED DAMAGES—INVALIDITY OF STIPULATION—EFFECT.**

The invalidity of a stipulation for liquidated damages for breach of a contract to furnish laborers to harvest a crop did not affect the contractor's obligation to perform the contract, and hence a complaint in an action on a bond, given to secure performance alleging the making of the contract, the giving of the bond, a breach, and sufficiently alleging the damage sustained, was sufficient to state a cause of action for actual damages, even though the stipulation was invalid.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. § 85.\*]

**5. PRINCIPAL AND SURETY (§ 155\*)—ACTIONS AGAINST SURETY—PLEADING—NOTICE TO SURETY.**

Under Code Civ. Proc. § 457, providing that, in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but that it may be stated generally that the party duly performed all the conditions on his part, in an action on a bond given to secure the performance of a contract to furnish laborers to harvest a crop, which bond required notice in writing to be given the surety of any act on the part of the contractor involving a loss for which the surety was responsible within 10 days, a complaint alleging that, when the contract had been partially performed, the contractor failed and refused to further carry out its terms and conditions, and wholly abandoned it, of all of which plaintiff duly notified the surety in writing, as by the bond provided, sufficiently showed a compliance with the provisions of the bond as to the giving of notice.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 422; Dec. Dig. § 155.\*]

**6. PRINCIPAL AND SURETY (§ 66\*)—CONSTRUCTION OF CONTRACT—PROMISSORY WARRANTY.**

A provision of a bond given to secure performance of a contract, requiring notice in writing of any act on the part of the contractor involving a loss for which the surety was responsible, to be given it within 10 days, was not a "promissory warranty."

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 108-110, 112; Dec. Dig. § 66.\*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Los Angeles Olive Growers' Association against the Pacific Surety Company. From a judgment dismissing the complaint on demurrer, plaintiff appeals. Reversed, with directions.

Anderson & Anderson, of Los Angeles, for appellant. Parker & Moote, of Los Angeles, for respondent.

**SHAW, J.** Action to recover damages upon a surety bond conditioned for the faithful performance of a contract made by plaintiff with one Rukichi Tajiri, whereby the latter, for the consideration therein specified, agreed to furnish plaintiff with capable Japanese labor in the picking and harvesting of plaintiff's olive crop. Defendant interposed a demurrer to the complaint, which was sustained without leave to amend. Judgment of dismissal followed, from which plaintiff appeals.

The contract and bond are both set out in *hæc verba* in the complaint, from which it appears that on October 10, 1910, Tajiri entered into a contract with plaintiff which, among other things, provided that he should furnish plaintiff orderly and capable Japanese men to pick the olives then growing in plaintiff's olive orchards. The contract contained the following, among other provisions: "It is further understood that the party of the second part (Tajiri) is to furnish a good and acceptable bond to the party of the first part in the amount of \$1,000, which amount it is hereby agreed shall be the amount of damages to the party of the first part in case the party of the second part (Tajiri) fails to fulfill this agreement."

Pursuant to the provision of the contract requiring him so to do, Tajiri secured from defendant a bond executed by it in the sum of \$1,000, payable to plaintiff, and conditioned that Tajiri should well and faithfully perform said contract so made with plaintiff, according to its terms and conditions, in which case it was declared the bond should be null and void, otherwise to remain in full force and effect. This bond, as declared therein, was executed by the surety company upon certain express conditions, namely, that plaintiff, as obligee therein, should fully perform all the covenants contained in said contract on its part agreed to be performed, and notify the surety "in writing of any act on the part of the said principal or his agents or employes which may involve a loss for which the said surety is responsible hereunder, within ten days after the obligee or any representative duly authorized by him to oversee the performance of said contract shall learn of said act; and a registered letter mailed to the general agents of said surety at their office in Los Angeles, Cal., shall be the notice required within the meaning of this bond." The complaint further alleged that on December 1, 1910, Tajiri entered upon and proceeded with the performance of the contract, and "about January 1, 1911, when said contract had been only partially performed, wholly failed, neglected, and refused to further carry out or fulfill the terms and conditions, or any of the terms and conditions, of his said contract with the plaintiff, and wholly abandoned the same and failed, neglected, and refused to further carry out and perform the same, or any of the same, or any part thereof; and that the said contract was never carried out or performed by the said Tajiri or otherwise or at all, of all of which the plaintiff duly notified the defendant Pacific Surety Company in writing, as in and by said bond provided." That plaintiff did and performed each and every and all things required of it by its said contract with the said Tajiri prior to the said abandonment thereof, and was at all times ready, able, and willing to carry out and complete the same according to the terms and tenor thereof. That it would be and was and



is impracticable or extremely difficult to fix the actual damages suffered by the plaintiff by reason of the said breach, to wit, the said abandonment by the said Tajiri of the said contract; and, by reason of such impracticability or extreme difficulty of fixing such damages, the sum of \$1,000 was agreed upon by plaintiff and the said Tajiri in said contract as liquidated damages for such breach and not as a penalty; but that plaintiff is informed and believes, and upon its information and belief alleges, that said damages exceeded the sum of \$1,000. That, though often requested so to do, the defendant Pacific Surety Company and the said Tajiri, and each of them, have failed, refused, and neglected, and still fail, refuse, and neglect, to indemnify plaintiff for its damages suffered by reason of the abandonment by the said Tajiri of his said contract with plaintiff." The prayer was for judgment against defendant for the sum of \$1,000.

In addition to the general demurrer interposed, it was also alleged that the complaint was uncertain, ambiguous, and unintelligible for the reason, among others, that it could not be ascertained therefrom "at what time or in what manner the plaintiff notified the defendant of the failure of R. Tajiri to carry out said contract."

[1-4] By the terms of the contract, Tajiri covenanted to do a number of things varying in degree of importance. He was to furnish bedding and food for the men, keep one general foreman who spoke English and a boy who spoke English with every 20 men, pick the fruit clean, not thrash the trees with clubs, and not allow any one connected with the Japanese camp to furnish intoxicating liquors to any of plaintiff's white help. For a failure to comply with any one of these provisions, it was stipulated in the contract that the amount of damage sustained by reason of such noncompliance should be the sum of \$1,000. Says Mr. Pomeroy in his work on Equity Jurisprudence, § 443: "Where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all of such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages." Applying this rule, respondent insists that the sum of \$1,000 damages stipulated in the contract must be regarded as a penalty. Looking to the Code, however, we find the rule modified by section 1670, Civil Code, as follows: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." The next section (1671, Civil Code) provides: "The parties to a contract may

agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." It thus appears that an agreement whereby the parties to a contract fix the amount of damages for a breach of its obligations in anticipation thereof may be enforced as a valid contract where, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. The rule stated in section 1670, Civil Code, must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671. *Long Beach City S. Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499.

Plaintiff alleged "that it would be and was and is impracticable or extremely difficult to fix the actual damages suffered by the plaintiff by reason of said breach, to wit, the abandonment by the said Tajiri of the said contract." This, in our judgment, is sufficient to bring the case within the exception. The demurrer, of course, admits this allegation to be true. Whether or not the evidence adduced at the trial will support the allegation is a question which does not now arise. It may or may not show the contract which Tajiri is alleged to have abandoned was one the nature of which rendered it impossible to fix actual damages, but with this question we are not now concerned. Moreover, conceding the clause which fixed the damage for a breach of the terms of the contract to be void, such fact did not, as claimed by respondent, render the entire agreement invalid, or affect the remainder of the contract whereby Tajiri obligated himself to perform the covenants on his part contained therein. Save as to such provision, which could not be enforced, the contract was otherwise a valid and binding agreement, and, to the extent that it might be enforced against Tajiri, it could likewise be enforced against his bond. This being true, we may disregard, as immaterial and surplusage, the provision of the contract fixing the damage; and since the complaint shows the making of the contract, the giving of the bond by defendant to secure the performance of its terms, and a breach of its covenants, with a sufficient allegation as to the damage sustained (*Barr v. Southern Cal. Edison Co.*, 140 Pac. 47, decided by this court February 16, 1914), it should be construed as sufficient to state a cause of action for actual damage.

[5, 6] The only point raised by the special demurrer which we deem necessary to consider is that wherein it is alleged that the complaint fails to show at what time or in what manner the plaintiff notified the defendant of the failure of R. Tajiri to carry out said contract. As stated, the bond, as a condition precedent to recovery thereon, provided that the obligee therein should no-

tify the surety in writing of any act constituting a breach of the contract on the part of Tajiri, within ten days after learning of such breach, and further provided that a registered letter mailed to the general agents of said surety at their office in Los Angeles, Cal., shall be the notice required within the meaning of this bond. The complaint, after alleging that the acts on the part of Tajiri constituting the breach of the contract occurred about January 1, 1911, avers that plaintiff gave due notice thereof to the defendant Pacific Surety Company in writing, as in and by said bond provided. Section 457, Code of Civil Procedure, provides: "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance." The allegation that the notice was duly given, as in and by said bond provided, is, under the provisions of this section, a sufficient averment of compliance with the condition. *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925. The provision of the bond, requiring notice of the breach of the contract to be given to defendant by plaintiff, was not a promissory warranty, as suggested by respondent, and hence the cases cited upon the point do not apply.

While the complaint is inartificially drawn, its defects are not subject to the general or special demurrer interposed thereto.

Judgment reversed, and the trial court directed to overrule the demurrer.

We concur: CONREY, P. J.; JAMES, J.

#### LYNCH v. PACIFIC ELECTRIC RY. CO. (Civ. 1483.)

(District Court of Appeal, Second District, California. Feb. 27, 1914. Rehearing Denied by Supreme Court April 28, 1914.)

#### 1. DAMAGES (§ 206\*)—PERSONAL INJURIES—EVIDENCE—JURY QUESTION.

In a personal injury action by a passenger, the question of the severity and permanence of the injuries, *held*, under the evidence for the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 203.\*]

#### 2. APPEAL AND ERROR (§ 1004\*) — PERSONAL INJURIES—VERDICT.

An award of damages in a personal injury action will not be disturbed on appeal, unless the amount is obviously so disproportionate to the injury as to warrant the conclusion that it was the result of passion or prejudice.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

#### 3. APPEAL AND ERROR (§ 1004\*)—PERSONAL INJURIES—REMITTITUR.

The award of damages in a personal injury action is a question for the jury, subject to the supervision and correction of the trial court; and hence, where the trial court directed a new trial, unless remittitur should be entered, that does not show that the verdict was influenced by passion or prejudice, and should be set aside; the verdict after the remittitur being the amount found by the jury under the supervision of the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

#### 4. DAMAGES (§ 132\*)—PERSONAL INJURIES—AWARD.

Where a woman 23 years old was injured in a street car collision, her left leg being broken, several ribs fractured, and her back wrenched so that there was a sensory paralysis of the left arm, an award of \$15,750 damages cannot be held excessive, where the jury were warranted in finding that the paralysis was permanent, or would grow worse.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Superior Court, Los Angeles County; Fred V. Wood, Judge.

Action by Viva E. Lynch against the Pacific Electric Railway Company. From judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. W. McKinley and R. C. Gortner, both of Los Angeles, for appellant. Flint, Gray & Barker, of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff seeks to recover damages for injuries received by her through the negligence of the defendant while she was a passenger in a car of the defendant. By a verdict of the jury plaintiff was awarded the sum of \$22,750, and judgment was entered accordingly. In ruling upon defendant's motion for a new trial, the superior court ordered that said motion be granted, unless the plaintiff should, within a time limited, file a stipulation remitting from the judgment the sum of \$7,000, and that, if the plaintiff should file such stipulation, the motion for a new trial should be denied. The plaintiff did file the required stipulation, remitting from the judgment the sum of \$7,000, and the motion was denied. The defendant appeals from the judgment and from said order denying its motion for a new trial.

The defendant admits its negligence and its liability for such injuries as were received by the plaintiff at the time and place described in the complaint. The defendant contends that its motion for a new trial should have been granted, upon the ground that the damages awarded are so excessive that they appear to have been given under the influence of passion and prejudice; that there is no evidence proving or tending to prove that the plaintiff sustained any injury or suffered any disability which is reason-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ably certain to exist in the future, or any permanent disability whatever; and that the amount of the judgment, even after the reduction to \$15,750, remains so excessive as to be subject to the same objections before mentioned.

The injuries of plaintiff were received as the result of a collision between a train of the Southern Pacific Company and an electric car of the defendant company in which the plaintiff was riding. The injuries received and proved were a fracture of the tibia immediately above the ankle of the left leg; a fracture of the third, fourth, and fifth ribs of the left side; and a wrenching of the back and injury to the nerves, resulting in a sensory paralysis of the left arm along the entire length thereof from the hand to the shoulder. It was shown that the plaintiff suffered much severe pain; was compelled to remain constantly in bed for at least two months; and was required to use crutches for some time thereafter. At the time of the accident she was 23 years of age, her health was good, and she lived at home with her father. It does not appear that she had any other occupation than that of a housekeeper. The fractured bone of the leg was healed so well that at the time of the trial (six months after the accident) she could walk short distances without crutches, and the recovery would soon be practically complete. The fractures of the ribs were well healed, although there remained, and probably would remain, a small calloused lump on the breast. The principal permanent injury claimed consisted in the nervous shock and injury resulting in the paralysis above mentioned.

[1] It is urged by appellant that the testimony given as to the future condition of the arm in question was entirely inadequate to afford any basis for a finding of permanent future disability, and amounted, in fact, only to a statement that the future condition of that arm, either as to improvement or non-improvement, was but a matter of conjecture. Admitting, as we do, that the plaintiff is entitled to receive only fair and reasonable compensation for such harm as follows naturally from the injury, and that she is not entitled to any damages that are merely conjectural or flow from sympathy, we must look to the record to see whether there is any evidence substantially in support of the claim that the injury and described condition of plaintiff's arm are permanent. Dr. Newcomb said that there was a complete sensory paralysis directly over the plaintiff's left shoulder and in the arm, and also in that arm some motory paralysis. "As to sensory condition of the left arm, I would say that, after six or eight months, with no improvement, it looks very unfavorable with reference to prognosis. As to whether there will ever be a complete return of normal conditions in that left arm, I could only say that

it looks very unfavorable." Dr. Brainerd said: "While there may be some improvement over present conditions, there will never be full return of the usefulness of the arm. The sensation and motion and muscular development will never be the same as they were before. It is accurate to state that, in my opinion, the extent of any improvement is entirely conjectural." On cross-examination, he said: "As to the condition of her left arm, my opinion is that we cannot tell what degree of recovery, if any, will take place, and we cannot say that it will not take place. It is too early yet. It is six months now, and no improvement has apparently taken place—very little—and we cannot say from that that there will absolutely be an improvement. Every month that goes by lessens the probability of future improvement, but, when it comes to saying absolutely that this patient will not recover beyond the present condition, we cannot say that." He also stated his opinion that the plaintiff has a distinct lesion of the nerve supply of the limb, and that the type of it is neuritis—brachial neuritis. Dr. Pepper said: "Assuming from the history of the case that the sensory paralysis has extended in the past six months, I would say that it is progressive, and is getting worse, and would be permanent under those conditions. I cannot foretell the extent to which that paralysis will go in the future." On the other hand, we find that Dr. Bryant and Dr. MacGowan were of the opinion that the difficulty existing in plaintiff's left arm is a purely functional trouble; that she was suffering from an hysterical paralysis of the nerves, or sensation in her left arm; and that in a short time there would be a very complete recovery of the plaintiff in respect to the nervous trouble and loss of sensation in the arm, as well as with respect to the other injuries received.

From the evidence thus summarized it appears that there was ample testimony upon which to base the finding implied in the jury's verdict, and in the court's order, that the nervous injuries and condition of paralysis in plaintiff's arm and shoulder are of very serious character, and reasonably certain to continue for an indefinite time. The physicians who testified for the plaintiff were not willing to forecast the future, as to the questions presented, in absolute terms. They indicated a reasonable probability that the injuries are permanent. On the other side, the testimony indicated a reasonable probability that they are not permanent. Under such circumstances of conflicting opinion, the jury, in rendering a verdict, are entitled to find the facts in accordance with that part of the evidence in which they place the greater confidence.

[2] In *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 508, 30 Pac. 601, 602, the Supreme Court, in passing upon a claim that damages

awarded by a jury were excessive, said: "The amount of the verdict is certainly quite large, larger than we, if sitting as a jury, would have felt it our duty to give. But that consideration alone is not sufficient to warrant us in disturbing the verdict. There is no absolute rule in such a case; and about all that can be safely said on the subject may be found in the opinion of the court in *Aldrich v. Palmer*, 24 Cal. 513, and the cases there cited. The general conclusion, as nearly as one can be formulated, is as there stated, namely: That a verdict will not be disturbed because excessive, unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."

In *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 254, 118 Pac. 513, 520, it is said: "It has been decided by this court that the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence. *Doolin v. Omnibus Cable Co.*, 140 Cal. 375, 73 Pac. 1060. Damages in cases such as this are not liquidated. No fixed amount may be recovered, no exact proof of any fixed amount can, from the nature of the case and of the elements which enter into the award of damage, ever be made."

[3, 4] The suggestion is made by counsel for appellant that the conditional order which was made by the court requiring the plaintiff to reduce the amount of this judgment amounts to a finding that the verdict was influenced by passion and prejudice. That suggestion is answered by the language above quoted. The court's order amounted to nothing more than a finding by the judge that the verdict "exceeds any amount justified by the evidence." In the absence of any other evidence affecting the conduct of the jury, the case is now in substantially the same state as if the jury had rendered a verdict for the lower amount, \$15,750, and the court had thereupon denied a motion for a new trial. In this case, while the judgment is large, "the amount of damage was a question for the jury, subject to the supervision and correction of the trial court." That supervision having been exercised, and that correction having been made by the trial judge, the record does not clearly warrant a conclusion that, under the circumstances, the judgment should be further reduced. *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, 722, 103 Pac. 190.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

## MORGRAGE v. NATIONAL BANK OF CALIFORNIA. (Civ. 1475.)

(District Court of Appeal, Second District, California. Feb. 26, 1914.)

### 1. CORPORATIONS (§ 149\*)—STOCK—TRANSFER OF CERTIFICATES.

Where certificates of stock are indorsed in blank to a broker for sale, a third person, who has no notice of any other title than that presumed from the indorsement, may rely upon the indorsement, and acquire rights superior to the true owner.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 539-546; Dec. Dig. § 149.\*]

### 2. CORPORATIONS (§ 123\*)—CORPORATE STOCK—BONA FIDE PURCHASERS.

Where a broker to whom corporate stock was indorsed in blank for sale fraudulently pledged it with a bank to secure a loan, proof by the bank that, when the broker presented the stock, with a draft attached, and requested an advancement on the draft, the stock to stand as security, the bank, believing the broker the absolute owner, credited him with the amount of the draft, which was checked out, sufficiently establishes that the bank, at the time it paid out the money credited to the broker, had no notice of any claim of third persons.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.\*]

### 3. BANKS AND BANKING (§ 179\*)—LOANS—SECURITY.

Where corporate stock indorsed in blank and delivered to a broker for sale was fraudulently pledged to secure an advancement upon a draft attached to the stock, the bank may rely on the pledge, and allow the broker to withdraw other sums of money thereafter deposited, though they were sufficient to have discharged the advancement on the draft.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 667-683; Dec. Dig. § 179.\*]

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Wilbert Morgrage against the National Bank of California. From a judgment for defendant, plaintiff appeals. Affirmed.

W. N. Goodwin and Hunsaker & Britt, all of Los Angeles, for appellant. Oscar A. Trippet and Trippet, Chapman & Bibby, all of Los Angeles, for respondent.

JAMES, J. This action was brought to recover damages for the alleged conversion of 15,000 shares of the capital stock of a certain oil company. The appeal is from a judgment entered in favor of the defendant, and is presented on the judgment roll and a bill of exceptions.

In August, 1910, one C. B. Miner was engaged in business as a stockbroker in the city of Los Angeles, and a banking account was carried with him on the books of defendant. Miner had, during the time that he carried the account with defendant, been a depositor of a large amount of money. Between the 1st and the 11th days of August he had deposited with defendant bank the sum of \$156,919.02. On the morning of August 12,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1910, his cash credit balance was \$5,651.84. At noon on the same day checks had been received by the bank, drawn against the account, aggregating the sum of \$21,241, which checks were held to await a deposit to cover. At about 2 o'clock on that day Miner offered for credit drafts drawn by him, accompanied by certificates of stocks, and some checks drawn to his order. There were four of these items, aggregating \$15,739.05, which amount was passed to his credit. At the end of that day the credit had been exhausted by the payment of checks issued by the depositor. As a matter of fact, of the \$15,739.05 credit on August 12th, the amount of \$12,420 was made up of items which were not bona fide, but fraudulent, which fact was not discovered until later. On August 13th, in the forenoon, a new deposit credit was given Miner for items presented on that day, amounting to \$20,851.25. That was the last transaction had with the bank by Miner, who immediately absconded, and was not thereafter heard from. Among the items included in the credit of \$15,739.05 given on August 12th was one for the sum of \$4,837.50, which was represented by draft drawn by Miner on one Gartland at San Francisco. Attached to this draft were the certificates representing the stock which, it is alleged by appellant, was improperly converted to the use of defendant. In receiving the draft for collection, according to the customary mode of doing business with Miner, the bank did so with the agreement that, if the draft was not paid when presented, the amount thereof should be charged back to Miner in his account, and, if he failed or refused to reimburse the bank, the stock of the oil company should then be resorted to by the bank to secure such reimbursement. A transfer of the certificates of stock had been indorsed in blank by the persons to whom the stock had been issued, and they were presented in that form by Miner to the bank when he deposited the draft.

[1] It is admitted that the bank, if it had no notice of any other ownership than that presumed from the blank indorsement, could rightfully assume that Miner was the owner thereof, and, if it parted with value relying upon that presumption, the title that it might secure in a proceeding taken for the purpose of subjecting the stock to the satisfaction of the debt arising upon the nonpayment of the draft would be a good title, even though Miner was not the real owner, but, as the fact was, had received the stock for the purpose of making a sale of it in the course of his brokerage business. The owners of the stock had, in fact, indorsed the transfer thereof in blank, and had given Miner authority to sell and deliver the shares represented by the certificates. As a matter of fact, however, Miner had made no sale of the stock to Gartland, the person upon whom he drew his draft, and, in view of subsequent events, it appeared clear that his intention, when he

presented the draft and stock was to improperly secure a credit to be made in his favor and upon which he might obtain money. As soon as the bank secured an intimation that Miner had absconded, which was on August 13th, it proceeded to apply the credit balance of Miner's account to cover items owing to it, arising in part upon credits given which were fraudulently obtained on drafts accompanying purported certificates of stock which were found to be forgeries, and including one check drawn in Miner's favor for the sum of \$5,000, the signature of the drawer of which was found to be a forgery. The amount of \$5,800 was credited upon an indebtedness evidenced by a promissory note drawn in favor of the bank by Miner, upon which there was then due the sum of \$12,800; and, when these amounts were charged against the credit, there remained only the sum of \$1,000, which was paid out on a check issued by Miner. After these credits had been applied, Miner was still indebted to defendant. Within a few days thereafter a notice was received that the \$4,837.50 draft drawn upon Gartland had been dishonored, and the bank, in order to reimburse itself for the credit on that account as given to and used by Miner, took proceedings to sell, and did offer for sale and bid in, the stock of the oil company which had accompanied this draft. Meanwhile appellant herein secured by assignment whatever interest, if any, was retained by the persons who had indorsed the stock to Miner, and this action was brought after refusal made by the defendant to deliver up the stock upon appellant's demand therefor.

[2, 3] The first contention made by appellant is that it was essential for the defendant to allege and prove that, at the time it received the stock in question, and at the time it paid out the money credited to Miner on account thereof, it had no notice of any claim of interest possessed by any other person in the shares of stock. The defendant in that regard did allege in its answer the following facts, which were substantiated by the evidence, and found by the court to be true: "And that, in the said transaction involved in this controversy, when the said Miner presented the same to the defendant, with the draft attached as aforesaid, the said Miner did request of the assistant cashier of defendant, who was one of the officers authorized to act for the bank in such transactions, that a credit be given him in his deposit by way of advancement to him for the amount of the said draft, and that the said stock should stand as security for such advancement, as hereinbefore set forth, and defendant did, pursuant to said request, investigate the value of the said stock, and, being of the opinion that its value was sufficient to justify said advancement, did, upon the faith of said security, and upon the transfer and deposit of the same with the said bank, as aforesaid, for the purpose of securing the

said bank, defendant did credit the said Miner with the amount aforesaid, and the same was checked out and received by said Miner as aforesaid, and in the said transaction this defendant understood and believed that the said Miner was the absolute owner of the said stock, and defendant had no knowledge, information, or belief that any other person than the said Miner had any interest therein, or in any part thereof, and said credit was given upon the faith of said belief." By this allegation the agreement and transaction, which included the giving of the credit and the using of the same by the payment of checks drawn against it, were first set out, and the allegation following—that "in the said transaction this defendant understood and believed that said Miner was the absolute owner of the said stock"—seems sufficient, as covering all of the times material to the matter involved in the question made. Because, on the day following the date upon which the draft and the oil stock were deposited and credit given, an additional sum of money was deposited, which would have been sufficient, if so applied, to discharge the amount of the draft credit, that condition of the account did not operate to extinguish the obligation of Miner thereon. The defendant had the right at any time to offset any matured indebtedness owing by Miner to it against his credit (Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59), and it was in the exercise of this right that it utilized the major portion of the credit obtained by the deposit of August 13th. At that time it had not been ascertained that the Gartland draft would be dishonored, although, even had that fact been known, the rights of defendant as to the application of the credit would not have been changed. It was the agreement that the stock accompanying the draft might be utilized for the purpose of reimbursing the bank on account of that particular credit. The bank to that extent had security to cover the amount so credited, and unquestionably it had the right to look to that security in securing satisfaction of the debt. Both questions discussed must therefore be resolved against the contention of appellant, and there are none others which seem to require attention.

There was sufficient evidence to sustain all of the findings made by the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE v. KELLEY. (Cr. 238.)  
(District Court of Appeal, Third District, California. Feb. 23, 1914.)

1. HOMICIDE (§ 282\*) — INSTRUCTIONS—"INVOLUNTARY MANSLAUGHTER"—APPLICABILITY TO EVIDENCE.

Where a watchman intentionally fired at and killed one who was approaching the bed

where the watchman had been sleeping, and claimed the right of self-defense, it was error to instruct as to involuntary manslaughter, which is defined by Pen. Code, § 192, as the unlawful killing of a human being, without malice, in the commission of an unlawful act, or in the commission of a lawful act which might produce death in an unlawful manner, without due caution or circumspection.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3762, 3763; vol. 8, p. 7692.]

2. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR—INSTRUCTION ON MANSLAUGHTER.

Where the verdict was "guilty of involuntary manslaughter," the presumption is, not that the jury would have convicted the defendant of a more serious offense if the instruction had not been given, but that they decided that he was not guilty of the more serious offenses before finding him guilty of involuntary manslaughter; and therefore an instruction as to involuntary manslaughter of which there was no evidence, was prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

3. CRIMINAL LAW (§ 193½\*)—VERDICT—CONSTRUCTION—CONVICTION OF LESSER OFFENSE.

A verdict convicting defendant of involuntary manslaughter is an acquittal of the higher crimes embraced in the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 366, 387, 389, 394; Dec. Dig. § 193½.\*]

4. HOMICIDE (§ 34\*) — INVOLUNTARY MANSLAUGHTER.

The crime of involuntary manslaughter is entirely distinct from that of murder and voluntary manslaughter, since there is wanting the element of malice and preconceived intent essential to murder and the element of intention to take life essential to voluntary manslaughter; the only element in common being that of the killing of a human being.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 55; Dec. Dig. § 34.\*]

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Clarence A. Kelley was convicted of involuntary manslaughter, and he appeals. Reversed.

G. W. Hunter, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Under an information duly filed in the superior court of Humboldt county charging him with the crime of murder, the defendant was found guilty by the jury of the crime of involuntary manslaughter, and this court is asked to review the record and set aside the verdict for alleged errors of the trial court, presented here on an appeal from the judgment of conviction and the order denying the defendant a new trial.

The facts as disclosed by the record are these: At about the hour of 2 o'clock on the morning of May 22, 1913, the defendant shot and killed one Edward B. Schnaubelt; the homicide having occurred in the northern part of Humboldt county on property belonging to the Lagoon Lumber Company. Said company acquired said property by deed,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dated December 28, 1910, from the Humboldt Shingle Company; the latter company having for many years prior to said transfer of the property maintained and operated a shingle mill thereon. While the property was owned by the last-named company, the deceased was, for many years, superintendent of the shingle mill, and, with his family, resided on the premises. The deceased was finally compelled to surrender possession of and remove from the premises; but, claiming an interest in said mill and certain personal property situated on the premises, he subsequently returned and again took possession of the property. Thereafter—either in the month of September or October, 1912—he was again deprived of possession and evicted from the premises by appropriate legal proceedings. At about this time the Lagoon Lumber Company placed the defendant and one Hevener in charge of the premises; their duties being to watch the same and so prevent the wrongful taking of any of the personal property situated thereon. Kelley remained on the premises in that capacity continuously up to the time of the homicide, with the exception of a few weeks, during which time he was in a hospital, where he was required to go and remain on account of illness. Hevener was succeeded by a man named Deiser, the latter by one Bridges, and finally one Henry Hanson was installed in the place of Bridges and remained as an assistant of the defendant up to the day on which the shooting occurred; he having witnessed that act.

Early in the month of May, 1913, the Lagoon Lumber Company sold the machinery in the shingle mill and all the personal property on the premises to one J. F. Helms, who, shortly thereafter, sold the property so purchased to the firm of Larsen & Bell. After Kelley was placed in charge of the premises, it appears that therefrom various articles of personal property were, from time to time, surreptitiously taken or removed. Most of the property so taken was removed from the shingle mill and the blacksmith shop. Kelley and Hanson, up to the 20th day of May, had been sleeping in a cabin which was situated on the premises at a distance, approximately, of 500 yards from the blacksmith shop and of almost 600 yards from the mill. Reasons existed for suspecting that the deceased and his sons—young boys, of the ages of 11 and 13 at the time of the homicide—had made a practice of visiting the premises at late hours of the night or the early morning hours, and taking with them from the mill and blacksmith shop such articles as they claimed belonged to the deceased. In fact, the evidence discloses that Kelley and Hanson knew of certain property having been taken from the property by the deceased.

In the month of May, 1913, Larsen & Bell commenced the dismantling of the mill for the purpose of removing the machinery thereof from the premises. Having been apprised

of the taking of certain parts of the machinery and other personal property from the premises, Larsen a few days before the shooting, admonished and requested Kelley and Hanson to keep stricter vigil or watchfulness than they had theretofore maintained and thus prevent persons from coming on the premises during nighttime and removing therefrom any property. In obedience to the admonition so given, Kelley and Hanson, on the 20th day of May, moved their bed from the cabin which they had been occupying as a sleeping apartment out in the open and upon the ground, at a point between and about equal distance from the shingle mill and the blacksmith shop.

Kelley had had some trouble with Schnaubelt and his sons over the trespassing of the stock of the deceased upon the premises upon which the mill was located. He had also had some controversy with the deceased over the taking by the latter of certain property from said premises; both Larsen & Bell and the former claiming to be the owner thereof. During the course of the controversy referred to, Kelley requested Schnaubelt to keep away from the premises, and declared that he (Kelley) had been placed in charge of the property to keep him (deceased) away. The latter rejoined by saying that he well knew for what purpose Kelley had been put in control of the property, and remarked that other watchmen had previously been placed there for the same purpose, but that they did not remain there long.

Kelley had also been told by other persons that the deceased was a "dangerous man," that he was "an anarchist and a bomb thrower," and that he said that he would "get those fellows," referring to Kelley and Hanson. It further appears that Kelley was aware of trouble which the deceased had had with Deiser, who served as watchman at the premises at one time, and in the course of which the deceased took a shotgun from the possession of Deiser and carried it to his (the deceased's) home.

Kelley and Hanson together occupied the bed which, as above explained, was placed out in the open and upon the ground. Kelley remained awake most of the night beginning with the 20th day of May; but nothing out of the ordinary happened or occurred on the premises during that night. On the following night—May 21, 1913—Kelley and Hanson retired at about 8 o'clock p. m.; the former placing a Smith & Wesson 38-caliber revolver under his pillow. The moon was out that night, and, although an ocean fog, hanging high above the earth, prevailed, a person with ordinary eyesight could easily recognize an acquaintance a short distance from him. Shortly after retiring on the night last mentioned, both Kelley and Hanson fell into a sleep and so remained until at about the hour of 2 o'clock the following morning—May 22d—when Kelley was sud-

denly awakened by a noise which, according to his description of it, sounded like that produced by one stumbling against some object. Upon opening his eyes, he saw the deceased approaching and then within 12 feet of his bed. He at once recognized Schnaubelt, and he thereupon uttered a loud scream, and at the same instant reached for and procured his revolver and began shooting at the deceased. He emptied four shells in firing at Schnaubelt. But one of the shots took effect in the body of the deceased; the bullet entering just below the collar bone, and, taking a downward course, severed the artery leading to the heart, and lodging in the shoulder by the side of the backbone, just under the spine. The wound thus inflicted produced almost the instant death of Schnaubelt.

Hanson testified that he was awakened by the loud, shrill outcry sent out by Kelley and the shot which was fired almost instantaneously therewith. After Kelley had fired at the deceased two or three times, Hanson grabbed the former by the arm and urged him to cease shooting.

Kelley declared that the scream uttered by him, on awakening and seeing the deceased coming toward his bed, was occasioned by fright; that, having been told of the dangerous character of the deceased, he believed that the latter was approaching his bed for the purpose and with the intention of inflicting upon him bodily injury; and that it was under the influence of the fear so entertained that he fired at the deceased, believing in good faith that it was necessary to shoot the deceased to protect himself against violence at his hands.

The foregoing involves an accurate statement, in substance, of all the facts and circumstances leading to and immediately attending the killing, and upon which the jury predicated their verdict.

[1] The defendant here claims that the judgment and the order should be reversed for errors alleged to have been committed by the trial court in its rulings respecting matters of evidence, and in reading to the jury certain instructions; numerous errors being assigned under both those heads. But we are convinced, that the court committed a vital error against the rights of the accused in instructing the jury upon the question of involuntary manslaughter, of which crime the defendant was convicted, and it will not be necessary, therefore, to consider any other point urged by the defendant in impeachment of the judgment and the order than that involved in the action of the court in so instructing the jury.

The instruction referred to reads as follows: "Within the crime of murder is included the crime of involuntary manslaughter. If one person unlawfully kill another person without malice, and while in the commission of a lawful act, which might produce death in an unlawful manner, or with-

out due caution and circumspection, it is involuntary manslaughter. If, therefore, you find from the evidence beyond a reasonable doubt that, at the time and place mentioned in the information, the defendant, while guarding property with a loaded revolver, willfully and without due caution and circumspection, shot and killed the said Schnaubelt, then the defendant would be guilty of the crime of involuntary manslaughter, even though said killing was without malice."

Upon concluding the reading of its charge, the court submitted to the jury, among others applicable to the charge of murder, a form of verdict conforming to the purport of the foregoing instruction, and, as seen, the result arrived at by the jury required the adoption of that form.

By section 192 of the Penal Code, manslaughter is declared to be the unlawful killing of a human being without malice, and is divided into two kinds, viz.: "1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

Thus it is to be observed that, to justify the giving of the instruction above quoted, there must have been some evidence which showed or tended to show, either that the homicide was the result of the commission by the defendant of some unlawful act, not amounting to felony, as, for instance, a violent battery which was the indirect cause of the death of the deceased, or that death was caused by the unlawful manner of doing some lawful act, which might produce death, or by the execution of such lawful act without due caution and circumspection, as, for instance, causing the death of a person by the use or handling of a loaded gun with a degree of carelessness amounting to criminal negligence.

As has been shown, there is absolutely no element of involuntary manslaughter disclosed by the evidence in this case. In other words, there is not revealed by the evidence any fact or circumstance even remotely tending to establish against the defendant a case of involuntary manslaughter. The evidence, upon its face, without conflict, shows these facts: That, the defendant was placed as a watchman in charge of the premises upon which the shooting occurred for the express purpose of keeping the deceased away from said premises, or at least of preventing him from taking therefrom, as he was suspected of having done on some occasions, personal property of which the defendant's employers claimed ownership; that the deceased knew that the defendant had been placed in control of the property for that purpose; that the defendant believed, from statements made to him by other people touching the reputation and the character of the deceased, that the latter was a "dangerous man"—that is to



say, a man who would not hesitate to resort to violence if necessary to carry out his set purposes, of which an intention to obtain custody of certain personal property on the premises, under a claim of ownership thereof, was shown to be one.

The record further shows that the defendant declared and admitted on the witness stand, and his testimony was not controverted in that particular, that he deliberately fired at the deceased, under the belief and the fear that the latter was approaching his bed for the purpose and with the intention of inflicting upon him bodily injury. In a word, the defendant made no claim that the killing was even the result of a sudden quarrel or committed in the heat of passion, much less that it was the result of an unlawful act not amounting to a felony or the consequence of misadventure. Nor did the prosecution make any such claim, so far as the record discloses, and, as stated, no such theory finds the slightest support in the evidence. The defense interposed by the defendant was that of self-defense; his sole claim being that all the circumstances of which he was cognizant, and by which he was surrounded at the time of the shooting, were such as to afford to him reasonable ground to apprehend a design in the deceased to do him great bodily injury, and that there was, when he fired, "imminent danger of such design being accomplished" (section 197, subd. 3, Pen. Code), that the circumstances referred to were "sufficient to excite the fears of a reasonable person," and that, in firing at the deceased, he "acted under the influence of such fears alone" (section 198, Pen. Code). It follows that an instruction upon the subject of involuntary manslaughter is not only foreign to the theory upon which the cause was tried but wholly inapplicable to the evidence or any fact or circumstance developed thereby.

[2] That the action of the court in giving to the jury the above-quoted instruction upon that subject, and in submitting to them a form of verdict conforming thereto, was, under the circumstances of this case, prejudicial, we think is plainly manifest.

Strictly speaking, there was but one or the other of two results which, under the evidence, could logically have been reached by the jury, and that was to convict the defendant of one or the other of the two degrees of murder or acquit him. This is not to say, however, that a verdict of voluntary manslaughter could not be sustained upon the record before us, for it is true, as a general proposition, which might perhaps be held applicable in this case, had the defendant been convicted of voluntary manslaughter, that a party will not be heard in an objection to a verdict of manslaughter against him under an indictment for murder, where it appears that, under the evidence, he in justice ought to have been convicted of the

crime of murder of one or the other of the degrees thereof; the theory of that proposition being that there can in reason be no just cause of complaint by the defendant where the verdict is more favorable to him than is perhaps justified by the evidence. *People v. Barnhart*, 59 Cal. 381; *People v. Maroney*, 109 Cal. 277, 41 Pac. 1007; *People v. Lowen*, 109 Cal. 381, 42 Pac. 32; *People v. Muhner*, 115 Cal. 302, 308, 47 Pac. 128. But it is very clear that this case does not fall within the proposition declared in those cases. The fact that a valid conviction of manslaughter may be had under an indictment for murder "does not justify any kind of a charge which a court may give upon that subject, regardless of the character and the theory of the case; instructions must be applicable to the facts and features of the case in hand." *People v. Huntington*, 138 Cal. 261, 264, 70 Pac. 284.

[3] As we have shown, this case is entirely destitute of any element of involuntary manslaughter, and the instruction under consideration was as inapplicable to it or any of its features or to any theory deducible from the evidence as an instruction upon highway robbery would have been, and it manifestly led to a verdict which not only derives absolutely no support from the evidence, but which is equivalent to the acquittal of the defendant of the higher crimes embraced in that charged in the information. *People v. Muhner*, 115 Cal. 303, 47 Pac. 128; *People v. Cyty*, 11 Cal. App. 702, 706, 106 Pac. 259. In other words, the verdict returned is not only without any foundation in the evidence for its support, but its effect is to acquit the accused of any crime within that charged of which he could legally have been convicted under the evidence.

It is no argument going to the impeachment of the foregoing views to contend that, but for the instruction under criticism, the jury might have convicted the accused of some one of the other offenses included in the charge, and therefore he is now in no position to complain. The presumption arising from the verdict is the reverse.

[4] The crime of involuntary manslaughter is entirely distinct from that of murder and voluntary manslaughter. The three crimes possess but one element in common, and that is the fact of the killing. In murder, there is, essentially, the element of malice or premeditation and the preconceived intention to kill. In voluntary manslaughter, while the element of malice or premeditation in the taking of life is wanting, the intention to do so is present, as the term "voluntary" necessarily implies. Involuntary manslaughter, as the phrase necessarily imports, and as our Code defines that crime, is the taking of life in certain unlawful ways without any intention of doing so. These distinctions were made clear to the jury. Indeed, the jury

were fully and clearly instructed upon the crime and degrees of murder and the lesser offenses included therein, and presumptively understood and were guided by said instructions and the distinctions pointed out therein between the several offenses embraced within the crime of murder. The further presumption is to be indulged that, after deliberating upon and fully considering and testing the evidence by the instructions upon murder and voluntary manslaughter, the jury reached the conclusion that there was disclosed, outside of the fact of the killing, none of the essential elements of either the crime of murder or that of voluntary manslaughter, and that thereupon, and solely influenced by and acting upon the instruction read to them by the court that, under the evidence, they were at liberty to find a verdict of involuntary manslaughter, found the defendant guilty of said offense, and that but for said instruction a verdict of not guilty of any offense would have been the result of the jury's deliberations.

We can see no escape from the conclusion that said instruction was without a just place in the case, and that it was solely responsible for a verdict wholly destitute of a prop for its support.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

#### MATTHEWS v. LOPUS. (Civ. 1153.)

(District Court of Appeal, Third District, California. Feb. 24, 1914.)

##### 1. PLEADING (§ 214\*)—DEMURRER—ADMISSIONS.

A demurrer admits the verity of the facts pleaded in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

##### 2. GAMING (§ 29\*)—LIABILITY OF STAKEHOLDER—WITHDRAWAL FROM WAGER.

Where a party, who has made a wager upon the result of a certain event, withdraws therefrom before the event has happened, he is ordinarily, in law, entitled to the money put up by him.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 68; Dec. Dig. § 29.\*]

##### 3. GAMING (§ 29\*)—LIABILITY OF STAKEHOLDER—WITHDRAWAL FROM WAGER.

Since betting on a contest between men is made a crime by Pen. Code, § 337a (added by St. 1911, p. 4), one who places a wager on a wrestling match in the hands of a stakeholder has committed a complete crime and may not thereafter recover the money from the stakeholder even though he withdrew from the wager before the match was finished.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 68; Dec. Dig. § 29.\*]

##### 4. GAMING (§ 72½ New, vol. 8 Key-No. Series)—PARTIES TO CRIMES—AIDER AND ABETTOR.

The stakeholder who accepts a wager on a wrestling match is an aider and abettor to the making of the wager, which is made a crime by Pen. Code, § 337a (added by St. 1911, p. 4), and is therefore guilty as a principal under Pen. Code, § 31.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by George Matthews against Frank Lopus. Judgment for plaintiff, and defendant appeals. Reversed, with directions to the trial court to sustain the demurrer to the complaint.

W. H. Early, of Petaluma, for appellant. E. M. Norton and Fred W. McConnell, both of Healdsburg, for respondent.

HART, J. This is an action for the recovery of money placed on a wager by the plaintiff and one William Matthews in the custody of the defendant as a stakeholder. The complaint, in substance, alleges that, on the 15th day of September, 1912, at the town of Penn Grove, in Sonoma county, the plaintiff and said William Matthews deposited with the defendant as wagers the sums of \$500 and \$100, respectively, said sums, with other moneys wagered against them, to be held by the defendant as a stakeholder with the mutual understanding between the parties and instructions to the defendant that the moneys so held should be paid to the winner of a certain "wrestling" contest, to take place at said town of Penn Grove, on the said 15th day of September, 1912, between the plaintiff and one George McLeod; that on said day, at about the hour of 3:30 p. m., said wrestling match was started, but that, before the same was finished or completed, it was stopped by one John Lopus, a deputy sheriff of Sonoma county, because such contest involved an infraction of the law (Pen. Code, § 337a, as amended in 1911—see Stats. 1911, p. 4); that immediately upon the stopping of said contest, and before any decision therein was given by the referee thereof, the plaintiff and the said William Matthews gave notice to the defendant that they repudiated said wagers and attempted to withdraw therefrom and demanded of the defendant the return or payment to them of the sums so deposited by them with him; that the defendant refused to yield to that demand, and still refuses to turn over said moneys to the plaintiff, who, subsequently, and before the commencement of this action, so the complaint declares, became the owner by assignment, for a good and sufficient consideration, of the claim of said William Matthews. The prayer of the complaint is for judgment for the sum of \$600, legal interest and costs of suit.

The defendant demurred to the complaint on general and special grounds. The demurrer was overruled, and the defendant thereupon filed an answer, the averments of which need not be noticed here, since the appeal is from the judgment, entered upon the order overruling the demurrer, upon the judgment roll alone, and the sole contention urged against the legality of said judgment is that the complaint does not state a cause of action against the defendant. In support of that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contention, the defendant submits these propositions: (1) "That the placing of money as a wager or bet in the hands of a stakeholder being a criminal offense, punishable by fine and imprisonment (Pen. Code, § 337a, supra), no action can be maintained by one of the guilty parties against the other to recover the money thus illegally staked; (2) because the bet or wager and the partial execution of the illegal object deprives the party of the right to repudiate the illegal contract and recover money paid or deposited thereunder."

[1] Since the demurrer necessarily admits the verity of the facts stated in the complaint, it is to be assumed that that pleading contains a true narrative of the history of the transaction out of which this controversy arises. It must therefore be taken as true that, although the event upon which the wager was staked was actually commenced, it was not in any sense prosecuted to a finish nor, consequently, decided. It must also be accepted as true that the plaintiff, before the completion of the event, disaffirmed and withdrew from the illegal contract to which thus he became a party.

The real question here, then, is whether, under the circumstances disclosed by the complaint, he was legally authorized to repudiate the agreement and so be entitled in law to the return of the money deposited by him under said agreement with the stakeholder.

[2, 3] Gambling contracts, being opposed to good morals and public policy, are not recognized by the courts. The principle applicable to them is expressed in the two maxims, "*Ex dolo malo non oritur actio*," and, "*Ex pacto illicito non oritur actio*." Where, however, a party to such a contract, which involves a wager of money or property upon the result of a certain event, disaffirms or withdraws from the same before the event has happened, he will, ordinarily, be entitled in law to a return of the money so put up by him. The last-mentioned rule and the reason supporting it are stated in the case of *Wassermann v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209, as follows: "The good or bad morals of this understanding is immaterial, for the reason that the venture was in no sense executed, and until executed both parties are given an opportunity for repentance and rescission. Seeing the error of his ways, \* \* \* a party may withdraw from the transaction; and the law extends to him a helping hand by offering the inducement of giving back to him anything of value with which he has parted." See, also, *Johnston v. Russell*, 37 Cal. 670; *Wise v. Rose*, 110 Cal. 159, 42 Pac. 569. If this was all that could be said of the present case, we should be inclined to hold that the complaint states a cause of action and that the judgment, so far as the record before us discloses, should be upheld. But a situation is presented here very different from that found in those cases

in which it is held that one may disaffirm a contract *contra bonus mores*, to which he had become a party, and so be restored to *statu quo*, prior to the execution of the transaction to which such contract relates. This arises from the present state of our law upon the subject of such transactions, particularly that kind of a transaction that constitutes the basis of this controversy.

The Legislature of this state, at its session of 1911, and prior to the time at which the transaction concerned here occurred, amended section 337a of the Penal Code (Stats. 1911, p. 4), by adding thereto the following provision: "Every person \* \* \* who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts or mechanical apparatus, is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

It will thus be observed that, under our law, as it stood at the time of the transaction giving rise to this action and as it now stands, the act of the plaintiff in making the wager upon the result of the "contest of skill," in a wrestling match, between himself and said McLeod was itself a crime, and the money sought to be recovered here constituted one of the essential means whereby the crime was committed. The consequence is that the transaction was void from its very inception. Indeed, the transaction in law was not a contract. It was a crime fully completed and consummated upon the execution of the act of making the wager, and it, of course, could not be the subject of disaffirmance or withdrawal by the parties to the wager in the sense that thus the law could take cognizance of the transaction and restore the parties to *statu quo*.

The rule as to disaffirmance of gambling contracts by the parties thereto applies, as we have shown, only when the wrong as to which the wager is made has not been consummated. In cases where that rule has been applied, there having been no law declaring the act of making bets on events of the character of the one in this case itself a crime, the mere making of the wager was not considered to be characterized by that degree of turpitude which would prevent one from repenting and repudiating such act before the happening of the event upon which it was made and from receiving the sanction of the law for such repentance and disaffirmance. To the contrary, in such cases it is, with eminent propriety, held to be the policy of the law, where it can be done consistently with its express mandates, to encourage persons who have entered into such contracts, which are improvident as to them and, when fully executed, harmful to the best interests

of society, to withdraw from or rescind them, before the event as to which they have been made has taken place—an event upon which the law frowns, even though it has not been penalized.

In the case here, however, while the transaction as to which the wager was made had not been completed and the disaffirmance of the wager may therefore be said to have taken place before the event upon which it was staked occurred, still, as has been shown, the mere act of making the wager was, under the law, itself a completed crime, and in such case therefore a party to the betting transaction cannot claim to be in any different or better position, in the eyes of the law, than if, in the absence of any penal statute against wagering upon such events as the one concerned here, he should, after such event had taken place and been decided against him, seek the aid of the courts in an attempt to recover the money so wagered and lost.

[4] It necessarily follows from the conclusion thus arrived at that not only was the act of the plaintiff in placing the wager a misdemeanor, but that of the defendant, in accepting it as stakeholder, was likewise a misdemeanor, since, by accepting and retaining the wager in that capacity, the latter became an aider and abettor of the plaintiff in the consummation of the crime, or thus encouraged its commission. Pen. Code, § 31. In fact, it was essentially the joint acts of the parties to the wager and the stakeholder, the former in making the wager and the latter in accepting it, to retain it as a stakeholder until the decision of the event upon which the wagered money was placed, which constituted the crime denounced by the Legislature in that part of section 337a of the Penal Code above quoted.

The result of the foregoing views is that the plaintiff and the defendant, in committing the misdemeanor from the civil liability or consequences of which the former seeks to be relieved through the instrumentality of this action, became particeps criminis, and therefore they stand in pari delicto in the execution of the criminal and, by necessary consequence, the illegal agreement.

Necessarily, under the circumstances, the plaintiff, in attempting to state a cause of action, was not only required to plead his own turpitude in the transaction, but was compelled to admit that the transaction itself constituted a crime under the laws of this state. As has heretofore been stated, the law, as administered either in courts of law or of equity, will not, obviously, interpose to grant relief to the parties to such a transaction from any of the effects thereof, but will leave them where it finds them.

The conclusion arrived at here is not only in consonance with the soundest principles, but is sustained by the authorities. See *Ager v. Duncan*, 50 Cal. 325; *McGregor v. Donnelly*, 67 Cal. 149, 151, 7 Pac. 422; *City of Los*

*Angeles v. State Bank*, 100 Cal. 13, 24, 34 Pac. 510; *Parker v. Otis*, 130 Cal. 322, 326, 62 Pac. 571, 927, 92 Am. St. Rep. 56; *Schenck et al. v. Hirshfield*, 136 Pac. 725; *Sutphin v. Crozer*, 32 N. J. Law, 462.

The case of *Parker v. Otis*, supra, involved an action to recover money paid to the defendants by the plaintiff for the purchase of mining stocks of mining corporations on margin. The action was brought upon the authority of section 26 of article 4 of the Constitution, which provides: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Upholding the judgment in favor of the plaintiff, the Supreme Court said, among other things: "The Constitution treats the transactions in question as harmful in their tendency, and because harmful has sought to eradicate the evil not only by declaring the contract void, but also by giving a right of action to recover the money paid under it. Being in pari delicto, the purchaser of stocks would be left where the law finds him but for the remedy given by the constitution." In the case at bar, as we have seen, the law not only gives no remedy for the recovery of money staked upon the result of a wrestling match or other like contest of skill between men, but positively prohibits and penalizes such wager.

But the New Jersey case of *Sutphin v. Crozer*, supra, is like this case in all essential particulars, and for that reason we quote from the opinion therein in extenso, as follows: "That since the act of 1846 to prevent horse racing (Nix. Dig. 339), which declares that all persons concerned in a horse race, directly or indirectly, shall be guilty of a misdemeanor, and that, if any person shall be a stakeholder, he shall be guilty and punishable by a fine and imprisonment, and which enacts that all promises and agreements made by any person, when the whole or any part of the consideration thereof shall be for money betted on the running or trotting of any horses, shall be utterly void and of no effect, no action can be maintained by one of the guilty parties against the other to recover back the money thus illegally staked, whatever disposition may be made of it by the stakeholder. The statute of 8 and 9 Victoria, c. 6, § 18, provides that no suit shall be maintained for the recovery of anything deposited to abide the event of any wager. What this statute has so wisely done in direct terms has, in my opinion, been done with equal efficiency in the case of a wager on a horse race, by the statute in this state abrogating the previous statute, which allowed an action to recover back money actually paid to the winner, and by placing the stakeholder in the category of a particeps criminis. He is thus brought within the

salutary rule that, where the two parties to a transaction are equally criminal, the law will render no aid to either. \* \* \* By accepting the stakes, the stakeholder becomes something more than an innocent stakeholder—he becomes an aider and abettor of the persons betting, and becomes so by their procurement. The persons thus using him have no claim to the aid of a court of justice if he proves false to his trust, nor can they be allowed to say that they have repented of their illegal proceeding and desire to stop the race and reclaim their money. Their crime has been consummated by making and receiving the bet, a crime \* \* \* punishable with the same severity as the actual running of the race."

It is entirely clear to our minds that, under the principle applied in the foregoing case, this action cannot be maintained, and the judgment is therefore reversed, with directions to the trial court to sustain the general demurrer to the complaint.

We concur: CHIPMAN, P. J; BURNETT, J.

### BOYD v. MODEL GROCERY CO. (Civ. 1440.)

(District Court of Appeal, Second District, California. March 2, 1914.)

#### 1. LANDLORD AND TENANT (§ 22\*)—CONTRACT FOR LEASE—CONSTRUCTION.

The provision of a written contract, whereby, in consideration of defendant agreeing to take a lease, plaintiff agreed to build an addition to a stable, that the arrangement of "stalls, doors, driveways, and windows" should be, as per verbal agreement, to suit defendant, cannot be construed to apply to a feedway over the stalls.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

#### 2. ESTOPPEL (§ 93\*)—ACTS AND CONDUCT.

Plaintiff having, pursuant to his contract, in consideration of defendant's agreement to take a lease, to build an addition to a building, and arrange things to suit defendant, arranged them, in his construction, as requested by defendant, defendant is estopped to thereafter demand a change therein.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.\*]

#### 3. LANDLORD AND TENANT (§ 22\*)—CONTRACT FOR LEASE—SUBSTANTIAL PERFORMANCE.

Considering the extent of the work, plaintiff substantially complied with his contract, in consideration of defendant's agreement to take a lease, to build a two-story brick addition, 35x60 feet, to a stable, things to be arranged to suit defendant, though he refused, after the work was done, to make a change, which would cost only \$25, in the feedway over the stalls.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge pro tem.

Action by G. T. Boyd against the Model Grocery Company. From an adverse judgment and order, defendant appeals. Affirmed.

George P. Cary and Edward R. Milliken, both of Pasadena (Bennett & Cary, of Pasadena, of counsel), for appellant. M. E. Butler, of Pasadena, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by reason of defendant's failure to execute a lease of real property in accordance with its contract in writing so to do. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

[1] Plaintiff was the owner of an old building which theretofore had been used as a livery stable. As a result of negotiations between plaintiff and defendant, a written contract was made whereby, in consideration of defendant agreeing to lease the same for a term of five years, plaintiff agreed to "build a two-story brick building, thirty-five by sixty feet, addition to the (old) building now located on the southeast corner of West Green and South Delacy streets, in the city of Pasadena, state of California; each story to be eight feet in the clear on each floor; the arrangement of stalls, doors, driveways and windows as per verbal agreement to suit said Model Grocery Co., \* \* \* said building to be completed by July 1st, 1910." Plans and specifications for the new building were drawn and approved by defendant, and the work of constructing the same completed in full accordance therewith. While the agreement by its terms refers solely and alone to the new building to be constructed, and makes no reference to the old building or any changes therein, plaintiff nevertheless alleges that the verbal agreement mentioned therein was understood to apply and refer to the arrangement of the stalls, driveways and windows in the old building, under which verbal agreement it is alleged plaintiff was to remove the 24 existing stalls, cement the floor occupied by them, locate the stalls and driveways on said floor space where defendant designated, and cut doors through where defendant indicated. There is no ambiguity or uncertainty in the written contract. Except for the allegation of the complaint, the verbal agreement could not be construed as referring to the arrangement of stalls, doors, driveways, and windows in the old building. By its answer defendant alleged that the verbal agreement referred to in said written contract was not restricted as therein specified, but that it had reference to the making of such alterations in the old building in a manner and to such extent as would render it suitable as a barn and stable for the use of defendant; and that such verbal agreement was intended to and did cover, not only the arrangement of stalls, doors, driveways, and windows therein (all of which appear to have been constructed in a manner satisfactory to defendant), but also included and covered the rearrangement and construction of the feedway over the stalls

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the old building, the neglect of plaintiff to make further changes in which constitutes the sole ground upon which defendant now justifies its refusal to execute the lease. The contract is clear and explicit and entirely free from such ambiguity as to call for an application of the rules of interpretation. Conceding plaintiff was required to construct the doors, driveways, stalls, and windows in the old building to suit defendant, the agreement, since it is restricted to such items alone, cannot be construed to apply to the feedway over the stalls, or to other changes not specified.

[2, 3] The court found that: "It is untrue that the verbal agreement referred to in said written contract was that the building of the addition therein mentioned and the alterations in the old building should be made so that said buildings, when completed, might be suitable for the defendant for its barn and stables." And, notwithstanding this finding, which, if supported by the evidence, is fatal to defendant's contention, it also found "that it is true that \* \* \* the runway from the new to the old building was made as ordered and directed by defendant and with defendant's assent and approval and according to said plans and specifications and said verbal agreement"; and further that during all of said times defendant had an inspector present on its behalf to pass upon the work from time to time as it proceeded. An examination of the record shows that, notwithstanding the fact that the contract was free from ambiguity, the court permitted testimony tending to show that prior to its making the parties had discussed the proposed contract for a month or more; that defendant had caused to be prepared a rough pencil sketch from which the plan and specifications of the new building were made; that plaintiff, at the request of defendant, did in fact voluntarily change and reconstruct the feedway in controversy in accordance with the request and suggestions of defendant, whose president and stable foreman were present and inspected the work on numerous occasions, and did not object to the same; that nevertheless it was unsatisfactory to defendant, and it demanded, as a condition of entering into the lease, that the feedway be changed and reconstructed in a different manner; and that plaintiff refused to comply with such demand. In our opinion the evidence is ample to support the findings made by the court. Appellant does not claim that the old building was the subject of a verbal contract, but insists that the written contract, though silent thereon, included the construction of the feedway, when, according to its terms, it is restricted to the four subjects therein specified, all of which were constructed in a manner satisfactory to defendant. The record discloses no evidence, either circumstantial or otherwise, which would have justified the court in finding that

by the terms of the written contract plaintiff agreed to make any changes in the feedway. Assuming, however, that it did, the testimony of plaintiff is to the effect that he, as requested by defendant, changed and reconstructed it as directed. This being true, defendant was estopped from demanding further changes. Moreover, considering the extent of the work in constructing the building and the claim of appellant, based on the evidence, that the change which it insists upon could have been made at an expense of \$25, it constituted a substantial compliance with the contract even as interpreted by defendant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

### EAKE v. BRYANT. (Civ. 1470.)

(District Court of Appeal, Second District, California. Feb. 25, 1914. Rehearing Denied by Supreme Court April 25, 1914.)

#### 1. CONSTITUTIONAL LAW (§§ 205, 296\*)—STATUTES (§ 84\*)—GENERAL OR SPECIAL LAWS—PERSONAL PROPERTY BROKERS—INTEREST CHARGES—SPECIAL PRIVILEGES—DUE PROCESS OF LAW.

St. 1909, p. 969, as amended by St. 1911, p. 978, providing that every person engaged in the business of loaning money upon security of chattel mortgages, bills of sale, assignments of wages, etc., is a personal property broker, and limiting the interest to be charged by such person to 2 per cent. per month, but not regulating the interest charged by those who make such loans occasionally, or those who loan money on pledge, or without security, or upon real estate mortgages, etc., does not violate Const. art. 1, § 11, requiring all laws of a general nature to have uniform operation, Const. art. 1, § 21, prohibiting grants to certain classes of citizens of special privileges and immunities which are not upon the same terms granted to other citizens, or Const. U. S. amend. 14, § 1, prohibiting the abridgment of privileges and immunities of citizens, and depriving persons of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624, 825-838, 840-846; Dec. Dig. §§ 205, 296;\* Statutes, Cent. Dig. § 93; Dec. Dig. § 84.\*]

#### 2. USURY (§ 6\*)—STATUTES—CONSTRUCTION.

Laws enacted to guard against unreasonable rates of interest should be favorably regarded by the courts as they always have been at common law.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 17; Dec. Dig. § 6.\*]

#### 3. USURY (§ 5\*)—REGULATION—STATUTES.

Whenever there comes into existence a class of business, even though included within a more general class, where it is habitual for those engaged therein to charge excessive interest and take particular kinds of security therefor, the Legislature can take cognizance of such business as a distinct occupation subject to regulation peculiar to such business, in order to correct the wrongs connected therewith.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 5.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Frank E. Baker against John Bryant. Judgment for plaintiff, and defendant appeals. Reversed.

R. W. Clapp, of Los Angeles, for appellant. Charles S. Burnell and Haas & Dunnigan, all of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff seeks to foreclose a chattel mortgage given to secure a note for the sum of \$350 loaned by the plaintiff, a broker, to the defendant. Judgment on the pleadings was entered as prayed for by the plaintiff, and the defendant appeals therefrom.

The note provides that defendant shall repay said sum of \$350 in installments of \$50 each month; also pay interest "at the rate of three per cent. per month from date until paid, interest payable monthly, and, if not so paid, to be compounded monthly from date due, and bear the same rate of interest as the principal." There are various other stringent terms of note and mortgage which we need not repeat here.

[1] The appellant claims that, since the note provides for interest at a rate greater than 2 per cent. per month, the transaction is one forbidden by the statute relating to personal property brokers. Stats. 1909, p. 969, as amended in 1911 (Stats. 1911, p. 978). Respondent admits that the transaction was invalid if the above-mentioned statute is constitutional. He contends, however, that said statute is unconstitutional and void: (1) Because it conflicts with the requirement that all laws of a general nature shall have a uniform operation (Const. of Cal. art. 1, § 11); (2) because it grants to some classes of citizens special privileges and immunities which upon the same terms are not granted to other citizens (Const. of Cal. art. 1, § 21); (3) because it conflicts with the provisions of the Constitution of the United States prohibiting the various states from making or enforcing laws abridging the privileges or immunities of citizens, and depriving persons of property without due process of law (U. S. Const. amend. 14, § 1).

The portions of the statute here called in question are as follows:

"Section 1. That every person or corporation engaged in the business of loaning or advancing money or other thing and taking in whole or in part as security for such loan or advance any chattel mortgage, bill of sale or other obligation or contract involving the forfeiture of rights in or to personal property, the use or possession of which is retained by other than the mortgagee or lender, or engaged in the business of loaning or advancing money or other thing, and taking either in whole or in part as security therefor any lien on, assignment of or power of attorney relative to wages, salary, earnings, income or commissions, shall be held, and, for the uses and purposes of this act, is hereby de-

clared \* \* \* to be a personal property broker.

"Sec. 2. Such personal property broker may charge, receive and collect a benefit or percentage upon money or other thing advanced, or for the use and forbearance thereof, of two per centum per month where such loan or advance is made upon security properly falling within the scope of business as set forth in section 1 hereof.

"Sec. 3. No other or further charges either for recording, insuring or examining the security or property, or for the drawing, executing or filing of papers, or for any services or upon any pretext whatsoever beyond the aforesaid charge for interest or discount shall be asked, charged, or in any way received, where the same would thereby make a greater charge for the money or thing advanced than the aforesaid rate of two per centum per month, and where made, all such charges shall be considered and be of the same effect as so much added interest; provided, however, that with the consent of the borrower he may be required to pay the fees or charges actually expended where the same are made necessary by law to give full legal effect to any instrument given hereunder.

"Sec. 4. No contract of any kind or nature made by any personal property broker which comes within the scope of business as set forth in section 1 hereof, or which in any way involves any security given to secure the performance of such contract, shall be valid or of any force, virtue or effect, either at law or in equity, if there is therein or thereon directly or indirectly charged, accepted, or contracted to be received or paid, either in money, goods, discount, or thing in action, or in any other way, a greater benefit, rate of discount, or interest than the rate of two per centum per month. \* \* \*

This legislation has been preceded by other acts whereby the Legislature attempted to limit the rates of interest and charges upon loans on chattel mortgage on certain personal property. See Stats. 1905, p. 422, approved March 20, 1905. This last-mentioned act was the subject of attack before the Supreme Court upon the same grounds as those above stated in *Ex parte Sohncke*, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475. The act of March 20, 1905, attempted to limit to a rate of not more than 1½ per cent. per month the interest to be charged upon loans made upon chattel mortgages against certain specified classes of personal property, and prescribed, also, that certain incidental charges should not exceed \$5 "where the amount loaned does not exceed \$300." The Supreme Court determined in that case that the discriminations and classifications attempted in the statute there under review were purely arbitrary, and not founded upon any natural, intrinsic, or constitutional distinction; that is to say, upon any distinction bearing a relation to or

furnishing cause for the attempted classification. The court said that there was no substantial reason why those who lend money in sums not exceeding \$300 on certain specified kinds of personal property should be limited in their charges, and the business they do in that respect made less profitable than it otherwise would be, while they or others who lend on chattel mortgages upon other classes of personal property which the law permits to be mortgaged, or who lend upon pledges of any kind of personal property, or who lend in sums exceeding \$300 upon any kind of security, should be allowed to exact any rate of interest or other charge which they can obtain from the borrower. "It is a part of the same kind of business, and there is no distinction between the particular classes of persons or things affected by the act and those exempted from its provisions that will justify special legislation. It may be that such exorbitant charges should be absolutely prohibited; but, if so, the prohibition should be made general, and should extend to all who engage in the business as lenders on the one hand, and should protect all who are made the victims thereof on the other hand, without discrimination in favor of any. There is a clear distinction between this case and the case of *Ex parte Lichtenstein*, 67 Cal. 359 [7 Pac. 728, 56 Am. Rep. 713], in which the court held valid a law regulating the business of licensed pawnbrokers. The business of pawnbroking is one well known to the law, and constitutes of itself a distinct class of persons and things which may be properly regulated by a law applying to them alone, as was clearly held in the decision in that case."

The act of 1909, as amended in 1911, applies equally to all classes of personal property and to all loans regardless of the amount thereof. In these respects at least it is not subject to the objections which were sustained as against the former statute. But the respondent insists, nevertheless, that the statute attempts to pick out certain money lenders, to wit, those engaged in lending money and taking as security chattel mortgages, or bills of sale, or assignments of salary, etc., and to define such money lenders as personal property brokers, and to prescribe for them alone a maximum amount of interest which they may charge, and to impose upon them alone the burden of issuing tickets to borrowers, designating the nature of the security, etc. It is pointed out that the statute by its terms does not include loans upon pledge, or loans without security, or loans upon the security of bank books, bank deposits, interests in estates, or contracts, or loans secured by mortgage on real property. It is further suggested that the act by its terms applies to "every person or corporation engaged in the business of loaning or advancing money," etc., and therefore does not include those who make occasional loans, although

not engaged in the business of making loans.

In its decision sustaining the law limiting the interest charges of pawnbrokers, in *Ex parte Lichtenstein*, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713, the Supreme Court said: "We think the act in question may be sustained. It applies to all persons in this state engaged in the business of licensed pawnbrokers, and makes all persons engaged in that business amenable to its provisions. And, if we look into the reason of the law, it is not without good and valid reasons to support it. It is well known that persons frequenting the offices of pawnbrokers are generally the reckless and needy and improvident, who require the protection of the law. To no other class of money lenders do the same reasons apply. Men driven by the necessities of their situation resort to the pawnbroker, and pledge any and all articles in their possession in order to raise money, and they are not particular about the rate of interest charged them. The pawnbroker also does a business peculiar to himself. He always requires a deposit as security for the amounts loaned, which are usually small, and in that respect at least his is a business not carried on by any other person in the state."

The later statutes to which we have referred indicate that the Legislature has discovered other varieties of money lending business, in addition to that of licensed pawnbrokers, where advantage of the necessities of the needy and improvident is habitually taken. A man engaged in the business which the statute here under review calls "personal property broker" also "does a business peculiar to himself." We find no difficulty in observing that there is a well-marked distinction between the transacting of certain business as a regular occupation and an isolated transaction of some item of business within the ordinary scope of that occupation. *Levinson v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661. Likewise there is as much difference between the business of a personal property broker and that of one who lends money upon real estate security as there is between the latter business and that of a pawnbroker. In *Matter of Application of Miller*, 162 Cal. 687, 124 Pac. 427, questions were presented with reference to the validity of the act of March 22, 1911 (Stats. 1911, p. 437), forbidding the employment of women in certain establishments for more than eight hours in one day, etc. Among other things, it was objected as against that statute that it made arbitrary discriminations between persons and classes of persons similarly situated. For instance, that it limited the number of hours of employment of women in hotels and restaurants, but did not attempt to apply such limitation to work in lodging houses and boarding houses. Notwithstanding this difference, the validity of the act was sustained. After stating the general



rules defining uniformity of laws, as those rules are established by the decisions, the court pointed out the differences which exist, or reasonably may exist, between the burdens and conditions of employment of women in hotels as contrasted with boarding houses and lodging houses. The court then said: "It is not unreasonable to suppose that those in the other places will be subject to less strain and tension than those who serve the more transient, varied, and indiscriminate guests of hotels, to whom they are generally entire strangers. The Legislature, in view of all the above facts, may reasonably have so determined. In support of the law, as already stated, the courts are bound to presume that it did make this decision, and, as there are sound reasons upon which it may rest, the decision must be accepted as correct. The conditions stated appear to be a sufficient basis for the classification made. In such matters the Legislature cannot deal with individual cases. It can provide only for classes, and its decision as to the line of cleavage between classes in some particulars the same and in other particulars different must be upheld where it is based on any reasonable grounds. We are of the opinion, therefore, that the law cannot be declared invalid because of this discrimination."

In like manner we reach the conclusion that the objections made by respondent to the present statute respecting personal property brokers are without merit. Since the Legislature has not included in the prohibitions of this act those persons who make loans without security, we may reasonably assume that the Legislature has not found any abuse in that business requiring public correction, if indeed it could find such business in existence at all. And since the lending of money upon the security of real estate, or of bank deposits, or of interests in estates, or of contracts, has not been included within the prohibitions of this statute, we may reasonably assume that the Legislature has not found that the business pertaining to such loans are usually accompanied by the abuses which the Legislature was seeking to remedy. The exclusion from this act of the business of taking pledges as security for loans is accounted for by the terms of the laws already in existence controlling the business of pawnbrokers. Pen. Code, § 338 et seq.; *Levinson v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661.

[2, 3] Laws enacted to guard against unreasonable rates of interest are laws against oppression, and should be favorably regarded, as they always have been favored by the common law of England. When there comes into existence in a state a class of business (even though it be within a more general class) wherein it is customary and habitual for those conducting that business

to charge excessive rates of interest and take mortgages upon the personal goods or assignments of the wages of the borrower as security therefor, the Legislature may take cognizance of the fact that such business is in existence as a distinct occupation, and may set it apart as a business subject to regulation peculiar to itself, in order to avoid the wrongs incidental to such business when unregulated. Such legislation, as instanced in the present case, is not arbitrary. It is based upon differences which in some reasonable degree, as said in the *Miller Case*, "will account for or justify the peculiar legislation."

The contract in this case, being within the description of business defined in the statute, and providing for a rate of interest in excess of 2 per cent. per month, is not "of any force, virtue, or effect, either at law or in equity"; and the plaintiff has no cause of action thereon.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

#### KLUMPKE v. MORENO et al. (Civ. 1200.)

(District Court of Appeal, Third District, California. Feb. 16, 1914. Rehearing Denied by Supreme Court April 17, 1914.)

##### 1. JUDGMENT (§ 743\*)—CONCLUSIVENESS.

Where in an action between plaintiff and defendants' predecessor in title plaintiff was adjudged to have only an interest as tenant in common, that judgment, not having been appealed from, is conclusive as to plaintiff's rights up to the time of its rendition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275-1277, 1284; Dec. Dig. § 743.\*]

##### 2. EVIDENCE (§ 67\*)—PRESUMPTIONS—CONTINUANCE.

Where the parties at one time were tenants in common, it will, nothing else being shown, be presumed that that relation has continued.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.\*]

##### 3. TENANCY IN COMMON (§ 14\*)—OUSTER—WHAT CONSTITUTES.

A mere statement by one tenant in common to the agent of another that he claimed the entire property did not amount to an ouster, and furnishes no basis for the assertion of an adverse title, particularly where the agent collected the rents for the benefit of his principal.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 30-41; Dec. Dig. § 14.\*]

##### 4. TENANCY IN COMMON (§ 20\*)—RIGHTS OF TENANT—PURCHASING OF TAX TITLE.

Where a tenant in common in possession neglected to pay taxes, he cannot allow the property to be forfeited to the state, and then after redemption assert his tax title against his cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 60, 61; Dec. Dig. § 20.\*]

##### 5. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY.

In a suit to quiet title, where plaintiff set up an adverse title against his cotenants, evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

dence held insufficient to show any adverse holding.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

**6. JUDGMENT (§§ 489, 501\*)—COLLATERAL ATTACK—RIGHT TO ATTACK.**

A judgment foreclosing a mortgage cannot be collaterally attacked for mere error or irregularity, but only on the ground of want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925, 941; Dec. Dig. §§ 489, 501.\*]

**7. MORTGAGES (§ 538\*)—QUIETING TITLE (§ 14\*)—VOID FORECLOSURE—RIGHT TO QUIET TITLE.**

Where foreclosure proceedings are void, the legal title remains subject to the lien of the mortgage, the purchaser at foreclosure being considered an assignee and the mortgagor cannot quiet his title against the assignee or mortgagee without paying or offering to pay the mortgage debt though it be barred by limitations.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1470, 1525, 1559; Dec. Dig. § 538; \* Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.\*]

**8. TENANCY IN COMMON (§ 19\*) — RIGHTS OF TENANT.**

One tenant in common cannot assert the nullity of a judgment foreclosing a mortgage upon the interest of his cotenant, and ask that his title to the entire tract be quieted upon payment of the incumbrance.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55-59; Dec. Dig. § 19.\*]

**9. APPEAL AND ERROR (§ 1042\*)—REVIEW — HARMLESS ERROR.**

The improper striking of allegations from the complaint is harmless, where all evidence which would have been admissible under those allegations was admitted without even objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by John G. Klumpke against Francis J. Moreno and others and Barclay Henley. From a judgment for the last-named defendant, plaintiff appeals. Affirmed.

See, also, 140 Pac. 289.

R. H. Countryman, of San Francisco, for appellant. Barclay Henley and Frank S. Brittain, both of San Francisco, for respondent.

**BURNETT, J.** The action was brought to quiet title to a tract of land in San Mateo county, and, at the trial, on motion of plaintiff, was dismissed as to all the defendants except Barclay Henley who, in accordance with his claim, was found by the court to be the owner of an undivided one-third of the property.

The principles of law applied by the trial court and upon which respondent relies are, as substantially stated by him, the following: First. The plaintiff must rely exclusively on the strength of his own title and not on the weakness of that of his adversary. Or, as is stated in *Schroder v. Aden, etc., Co.*, 144 Cal.

628, 78 Pac. 20: "This is in the nature of a suit to quiet title, and in such a case the plaintiff must obtain judgment on the strength of his own title, and if it be shown he has no title, it becomes immaterial to inquire into defendant's rights." Second. Each party is an actor in the suit, a cross-complaint being unnecessary, and a decree quieting his title is awarded to the one establishing his case. *Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195. Third. The status of cotenancy, like other conditions, is subject to the presumption that it continues as long as is usual with things of that nature. Code Civ. Proc. § 1963, subd. 32; *Hohenshell v. So. Riverside, etc., Co.*, 128 Cal. 627, 61 Pac. 371. Fourth. The possession of one cotenant is presumed to be the possession of all, and this presumption can be overcome only by showing that the hostile intent of one is clearly manifested and is brought home to all. The presumption is not overcome by a showing merely that one tenant has failed to recognize the rights of his cotenant. To accomplish this result the possession of the tenant must be with the intent to hold adversely, and it must appear that such intent has been "indicated by acts calculated to exclude the complainants from all participation as tenants in common." *Coleman v. Clements*, 23 Cal. 245; *Hoppe v. Fountain*, 104 Cal. 94, 37 Pac. 894; *Brown v. McKay*, 125 Cal. 291, 57 Pac. 1001. Fifth. Since it is the duty of a cotenant to pay the taxes, he cannot strengthen his title by permitting them to become delinquent, nor by paying them until open hostility is manifested. *Emmeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356. Sixth. A deed in foreclosure is prima facie evidence of title and possession. *Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739. Seventh. A void foreclosure of a mortgage does not relieve the property of the lien of the mortgage, and a decree will not be made quieting the title as against the lien. *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 17 Am. St. Rep. 157. Eighth. A mortgage carries the after-acquired title of the mortgagor, and one claiming under the mortgagor cannot have his title quieted in equity without paying the mortgage debt; in other words, he who seeks equity must do equity. *Burns v. Hiatt, supra*.

As to plaintiff's title, the claim is, first, by the record, and, second, by prescription. Of these, in their order, brief consideration will be given.

In 1893 plaintiff received a deed from Francisco Moreno purporting to convey the entire title to plaintiff. On December 8, 1908, he received from the state controller a certificate of redemption of said real estate purchased by the state for delinquent taxes for the years 1903, 1904, 1905, 1906, and 1907. The property was sold in 1890 to one William Rollins by the tax collector of San Mateo county for delinquent taxes for the year 1889

and the certificate of sale was assigned by Rollins, on April 28, 1900, to plaintiff. Similar proceedings took place in 1891 on account of the delinquency of the taxes for 1890.

[1] The foregoing matters appear in the evidence offered by plaintiff, and were sufficient, no doubt, to make out a prima facie case in his favor, but such effect was completely nullified by what follows. One Jose Miguel Moreno, who was then the owner of the land in controversy, conveyed it to trustees to hold in trust for his daughter, Rosa Ann Moreno, till she was 21 years old, and in the event of her death, to convey the same to William C. Moreno and Francisco Moreno, her brothers. Subsequently Rosa Ann Moreno died, and L. O. Morford was appointed her administrator. Thereafter the said Jose Miguel Moreno died and Charles N. Fox was appointed the executor of his last will and testament. On April 13, 1887, an action was brought in the superior court of San Mateo county by S. O. Morford, administrator as aforesaid, against Charles N. Fox, as executor of said last will and testament of Jose Miguel Moreno, William C. Moreno, Francisco Moreno, certain other persons, and John G. Klumpke, the plaintiff herein, to determine the title to the property herein and the various conflicting claims thereto. Among others, Mr. Klumpke answered, on May 19, 1887, and he set up the same deed on which he relies in this suit and which he received while proceedings were pending in the estate of the said Rosa Ann Moreno, deceased. Among the findings of the court were that the tax deeds upon which Klumpke then relied were void, and that "William G. Moreno, J. G. Klumpke (as grantee of said Francisco) and the estate of Rosa Ann Moreno, deceased, are each entitled to an undivided one-third of the premises in dispute and heretofore described as tenants in common." These findings were signed and filed on March 12, 1892. The decree following the findings was signed August 31, 1893, but was filed October 4, 1902, "nunc pro tunc as of date August 31, 1893." There was no appeal from said judgment and it became final.

The effect of that judgment was to estop Klumpke and any one who might claim under him from asserting title, by reason of anything occurring anterior to said judgment, to the two-thirds awarded to the estate of Rosa Ann Moreno and William C. Moreno. *Riverside, etc., Co. v. Jensen*, 108 Cal. 146, 41 Pac. 40.

[2] There is nothing in the record to show that either the third interest of the said estate of Rosa Ann Moreno or of William C. Moreno ever passed to plaintiff. It is very clear, therefore, that his proof of record title to anything except an undivided one-third interest wholly and absolutely failed. If nothing else then appeared, under the presumption as to things continuing, we should conclude that at the time of the trial said par-

ties were cotenants, each owning an undivided one-third interest in said property.

[3-5] But against this there is the remaining contention of title by prescription. This claim is entirely unsupported by the record.

This consideration is divisible into the two elements: First, the open, notorious, exclusive, and hostile possession; and, second, the payment of the taxes.

Appellant utterly failed in each respect to make out a sufficient case. We may consider together the character of the possession and the question of taxes, dividing the time into two periods, prior and subsequent to the death of Judge Fox.

As to the first, the only evidence of any hostility to the claim of his cotenants was the declaration of appellant that he claimed the whole property, made to Judge Fox while the latter was collecting the rents. There is no evidence that this was brought home to any of the other cotenants. That it did not constitute an ouster requires no argument. Its insufficiency to satisfy the exaction of adverse possession and to overcome the presumption in favor of the cotenancy is entirely clear.

As to the possession itself, this was had by a renter who, in the absence of a showing to the contrary, is presumed to have held under all the cotenants. During this period, Judge Fox, the personal representative of the estate of Jose Miguel Moreno, the said Moreno being one of the heirs of Rosa Ann Moreno, paid the taxes, presumably for all the cotenants.

The period subsequent to the death of Judge Fox and prior to the beginning of the action was not of sufficient length for the acquisition of a title by prescription. Besides, there was lacking at least one other essential element, namely, the payment of taxes. Of course, plaintiff could claim nothing from his purchase of the property at a tax sale. The law does not permit any advantage to be gained by such procedure. If a cotenant permits the property to be sold and buys it in, either in person or through the agency of another, his purchase is considered a mode of paying the taxes for the benefit of himself and his cotenants. *Christy v. Fisher*, 58 Cal. 256.

Appellant testified to the foregoing as follows: "Mr. Fox paid the taxes until he died, and then it went over to the state, and I didn't pay them—and then afterwards I redeemed it."

[6] As to his claim of right, it is true, appellant did testify: "I have for many years prior to the commencement of this action been claiming to hold the land in fee." But it is manifest such a generalization, in the absence of probative facts, can amount to nothing to establish the hostile character of possession.

In this connection, it may be said that, upon the theory that plaintiff was acting in good faith, it is strange that when Mr. Hen-

ley called to see him about the payment of the taxes, appellant did not assert his ownership of the entire property. Mr. Henley testified that he said to him: "We were cotenants of that property and now that Judge Fox was dead, he had been attending to the property for both of us, and paying the taxes, that I wanted him to pay his two-thirds and I would pay my one-third," and that appellant's reply was evasive, that "he failed to favorably respond to my request," but that he did not say that Mr. Henley had no interest in the property. In rebuttal, plaintiff denied some of the statements of Mr. Henley, but he did not testify that at the time of the interview he asserted his claim to the entire property. Plaintiff failed, therefore, to establish any title either by the record or by adverse possession to the one-third interest claimed by respondent. But the latter, essaying the role of actor, established, to the satisfaction of the court, the legal verity of his title to said interest. As to this, the conclusion of the court is just as free from doubt as to the claim of appellant already considered.

The basis of respondent's claim is stated by himself as follows: "The only person who could attack Mr. Henley's title in the William C. Moreno one-third is William C. Moreno himself, or some one claiming directly under him. In the suit of Morford v. Fox it was adjudged that William C. Moreno, until deed to his mother, was a cotenant, owning one-third interest in the property. William C. Moreno mortgaged to Barclay Henley, and Mrs. Josepha Gonzales (the mother), to whom William C. Moreno had theretofore made a deed, shortly thereafter mortgaged the same property to Mr. Henley, reciting the consideration of \$500, and stating it was intended as a mortgage to secure the payment of the note set forth in the mortgage from William C. Moreno. The judgment roll in the foreclosure suit of Henley v. Morford was introduced in evidence, followed by the sheriff's deed, under the foreclosure decree. This evidence constitutes a complete chain of title showing the vesting of the William C. Moreno undivided one-third interest held in cotenancy in Barclay Henley. As stated before, it would be good as against the attack of William C. Moreno himself, and as against the collateral attack of Mr. Klumpke it is impregnable."

Plaintiff, by reason of certain alleged irregularities in the proceedings, does indeed question the validity of said judgment, but, conceding that, although he has not connected himself at all with the said William C. Moreno title, he is in a position to attack it, it is plain that said judgment is not void, but at most voidable, and he simply brings himself within the doctrine of collateral attack which requires him to overcome the presumption of jurisdiction. It is unnecessary to notice his specific objections to said judgment, as we are satisfied the assault is

futile. The principles governing a collateral attack are stated in *Sichler v. Look*, 98 Cal. 600, 29 Pac. 220, and *Richhoff v. Richhoff*, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110, to which it is sufficient to refer.

[7, 8] But if the judgment was void and the mortgage is still unforced, as contended for by appellant, he is not aided in any way. Upon this theory the debt is still unpaid, and the one-third interest is still subject to the lien of the mortgage, and while, strictly speaking, respondent might not be entitled to a decree quieting his title, it is clear in any event that appellant would be required to pay the debt in order to destroy the lien of the mortgage and, for reasons already appearing, he is in no position to question the judgment in favor of respondent.

It is stated in *Burns v. Hiatt* that: "It is clear that where, for any reason, foreclosure proceedings are void, the legal title continues subject to the lien of the unpaid mortgage, and it appears to be well settled that a purchaser of the property at a foreclosure sale in such void proceedings thereby becomes an assignee of such mortgage, and the debt thereby secured, of which the mortgage is an incident, with all the rights of the original mortgagee"; and it is further stated that one standing in the position of the mortgagor cannot quiet his title against such assignee or mortgagee without paying or offering to pay the debt, even though the mortgage debt be barred by the statute of limitations. But it is true also that appellant is in no position to avail himself even of this advantage, since he has shown no title to said one-third interest.

[9] It is conceded by respondent that certain matter was stricken from the complaint by the court on motion that ought to have been left in. Respondent states: "This mistake is one that the court and counsel on both sides fell into and the order striking out portions of the complaint referred to was completely lost sight of on the trial, so that all testimony that was offered or could have been admitted under the allegation stricken out was admitted; in other words, the case was tried upon the theory that all allegations respecting adverse possession, payment of taxes, etc., were not stricken out, and there is not a scrap of testimony that could have been introduced under these allegations that was even objected to."

This is not denied by appellant, and our examination of the transcript confirms the statement. It is therefore plain that appellant was not prejudiced by the error. *Gale v. Tnolunne Water Company*, 14 Cal. 25; *Tynan v. Walker*, 35 Cal. 645, 95 Am. Dec. 152; *Cave v. Crafts*, 53 Cal. 141.

It is believed that there is no merit in the appeal, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**WATSON v. HECLA MINING CO.**  
(No. 11,843.)

(Supreme Court of Washington. April 29, 1914.)

**1. MASTER AND SERVANT (§ 318\*)—INJURIES TO SERVANT—"INDEPENDENT CONTRACTOR."**

An "independent contractor" is one who exercises an independent employment and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished, one having power to select men, provide equipment, and the mode or manner of doing the work; and the operation of the rule is not qualified by reservation which gives the employer the right to supervise the work to determine whether it is being done in accordance with the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3542, 3543; vol. 8, p. 7686.]

**2. EVIDENCE (§ 424\*)—PAROL EVIDENCE—WRITTEN CONTRACT.**

The rule which prohibits the introduction of parol evidence to contradict or modify a written instrument does not apply as against one not a party to the contract, and so not bound by the terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1966-1968; Dec. Dig. § 424.\*]

**3. MASTER AND SERVANT (§ 332\*)—INDEPENDENT CONTRACTOR—QUESTION FOR COURT OR JURY.**

Where a contract between an employer and another for the doing of certain work is certain and definite, the question whether the employé is an independent contractor is for the court, but where the terms of the contract are doubtful, or are rendered doubtful by the introduction of parol evidence, the question is generally for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

**4. MASTER AND SERVANT (§ 332\*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTOR—CONTRIBUTORY NEGLIGENCE.**

In an action for injuries to a servant by the alleged negligence of one engaged in sinking a mine shaft, whether he was a servant of defendant or an independent contractor, and whether plaintiff was guilty of contributory negligence, which was the proximate cause of the injury, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

**5. APPEAL AND ERROR (§ 263\*)—RULINGS—REVIEW—NECESSITY OF EXCEPTIONS.**

An instruction, submitting a question as to the laws of another state to the jury on conflicting evidence, could not be reviewed, where no exception was taken thereto at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.\*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Dick Watson against the Hecla Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wakefield & Witherspoon, of Spokane, for appellant. Robertson & Miller, of Spokane, and C. H. White, for respondent.

**MAIN, J.** This action was brought for the purpose of recovering damages alleged to be due to an accident caused by negligence chargeable to the defendant. The cause was tried to the court sitting with a jury. A verdict was returned for the plaintiff in the sum of \$1,250. Judgment was entered upon the verdict. The defendant has appealed.

The facts are substantially as follows: The appellant was the owner of the Hecla mine near Burke, Idaho, upon which a shaft was being sunk. This shaft had been extended to the station at the 1,200-foot level, and it was desired that it be sunk 300 feet further. For the purpose of accomplishing this result the appellant, by posting notice at the mine, announced its desire to receive bids for the doing of the work. In response to this notice one F. E. Bryan submitted an offer as follows:

"Hecla Mining Company. Wallace, Idaho. July the twelfth Nineteen Hundred and eleven. Hecla Mining Company, Wallace, Idaho—Dear Sirs: I hereby agree to sink your shaft a distance of three hundred feet for the sum of forty-four 70-100 (\$44.70), dollars per foot. I am to do all the labor—drilling, blasting, shoveling and timbering. I am to furnish all explosives—powder, fuse and caps. I am to take care of the slinker pumps, starting, stopping and lowering same, packing when necessary and delivering pump on station in exchange for another when it is necessary to send it to the surface for repairs. I am also to do all the pipework on air line and pump column. I am to break all boulders to size for convenient loading from waste pocket on station level. I agree to do all work in a workmanlike and substantial manner, the same to be inspected and approved by the foreman. I agree to do the blasting through electric wires and to use the piston air drills, which you have with which I am acquainted. I also agree that ten per cent. of the money earned may be retained monthly by you until the contract is completed to your satisfaction, and if I fail to complete the contract to your satisfaction, this ten per cent. so retained is to be forfeited by me to you as liquidated damages. You are to furnish power, drills, drill parts, steel, pump, pump parts, lights and timbers and to deliver same on the 1,200-foot level and you are to pay the men on my pay roll through your office on or before the tenth day of each month for the work done during the preceding month. F. E. Bryan.

"Accepted: Hecla Mining Company. James F. McCarthy, Manager."

By the acceptance of the company, Bryan's letter became the contract. Prior to this time, Bryan had been working for the company as shift boss. The respondent had been working in the same mine under another shift boss. Work was begun under the contract on the 22d day of July, 1911.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The respondent testified that he never talked with Bryan about having the contract, and that the latter never directed the work or gave any orders. He also testified that he was directed by the shift boss in the stope, under whom he was working at the time, to go into the shaft and work there. This shift boss was in the employ of the appellant. In lowering the shaft, four men worked in each shift, one of whom, it was testified, directed the work. On the 25th day of August, 1911, the respondent was directed by the shift boss to grease what was known as the slip joint in the pump. This slip joint was a two-inch pipe within a three-inch pipe about 10 or 12 feet long, the purpose of which was to allow the pump to be lowered a distance represented by the length of the slip joint, without disconnecting and inserting additional pipe. The slip joint had been extended to its full capacity, and it was necessary to insert an additional piece of pipe, the two-inch pipe being pushed down into the three-inch pipe in order that it might be subsequently extended as required. While the respondent was in the act of greasing the slip joint, the shift boss had hold of the top end thereof, endeavoring to cause it to move down into the larger pipe. The evidence shows that it was moved with difficulty, the shift boss telling the respondent that it had stuck. Immediately thereafter, as the respondent's evidence shows, the joint was given a push by the shift boss without warning to the respondent and as it went down, the latter's fingers were caught in the flange, and injury sustained of which he complains.

The manager of the appellant company testified that the mine was in charge of a foreman, and that it was the duty of the head carpenter from time to time to go into the mine for the purpose of inspecting the work and seeing whether it was being properly done. During the time the respondent was working in the shaft he was paid by the company's checks, the same as he had been before.

Three questions are presented for determination: First, did the relation of independent contractor exist between Bryan and the appellant at the time of the injury; second, if the relation of independent contractor did not exist, then were the respondent and the shift boss fellow servants under the laws of Idaho; and, third, was the respondent's negligence the cause of his injury?

[1] I. It is first argued that the relation between Bryan and the appellant was that of an independent contractor. The general rule is that an independent contractor is one who exercises an independent employment and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. An independent contractor is one who has the power to select men, provide equipment, and provide the mode or manner of doing the work. The operation of this rule is not qualified by

a reservation which gives the employer the right to supervise the work for the purpose of determining merely whether it is being done in accordance with the contract. *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1063; *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 116 Pac. 861.

In the *Larson Case*, supra, the rule is stated in this language: "The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. The chief consideration is that the employer has no right of control as to the mode of doing the work; but a reservation by the employer of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation."

[2] Notwithstanding the fact that the contract was in writing, the respondent had the right to introduce evidence showing what the real relation of the parties thereto was. The rule which prohibits the introduction of oral evidence for the purpose of contradicting or modifying a written instrument does not apply, because the respondent was not a party to the agreement, and consequently would not be bound by its terms.

In *Kendall v. Johnson*, supra, it was said: "The appellant was not a party to the contract between the respondent and the firm of Fred Johnson & Co., and never assented to the provisions of that contract. In an action between him and either of the contracting parties he is at liberty to show the true relations subsisting between them, regardless of the relationship which they may have assumed on paper. In other words, it was clearly competent for the appellant to show by oral testimony that the relation of master and servant subsisted between the respondent and the firm of Fred Johnson & Co., and that the respondent had the direction and charge of the blasting which resulted in his injury."

[3] If the contract is certain and definite, the question whether a person operating under it is an independent contractor is for the court; but where the terms of the contract are doubtful, or are rendered doubtful by the introduction of oral testimony, the question generally becomes one for the jury. In *Fehrenbacher v. Oakesdale Copper Mining Co.*, 65 Wash. 134, 117 Pac. 870, it was said: "Where the contract is certain, the question of whether a person operating under it is an independent contractor or a mere servant is a question of law for the court. But where the terms of the contract are in doubt, the relation of the parties is generally a question for the jury."

[4] From the contract above set out it appears that the appellant was to furnish the power, drills, drill parts, steel, pump, pump parts, lights, and timbers, and to deliver the same on the 1,200-foot level. The men on the pay roll were to be paid through its office. It should be noted that the contract nowhere specifies the character of the work other than that it shall be done in a workmanlike and substantial manner. The manager testified that it was the duty of the head carpenter to go into the mine for the purpose of determining from time to time that the work was being properly done. The respondent testified that he was not employed by Bryan, but that he was directed by the shift boss, under whom he had been previously working, to go to work in the shaft. It would seem that these facts would at least cause a doubt as to whether the relation of independent contractor did or did not exist and would bring the case within the rule announced in the Fehrenbacher Case, *supra*. The question was one for the jury, and the jury, under proper instructions, having determined it adversely to the appellant's contention, the verdict will not be disturbed.

[5] II. It is conceded by both parties that their rights are determined by the laws of the state of Idaho. During the trial the appellant, for the purpose of making proof of the laws of the state, offered the testimony of a lawyer who, after answering the qualifying questions, testified that under the laws of the state of Idaho, Bryan and the respondent were fellow servants, and that the appellant was not liable under the laws of that state for the injury which the respondent had sustained. The respondent in rebuttal offered the evidence of a lawyer, who testified diametrically to the opposite. The court by instruction submitted the question to the jury. To this instruction no exception appears to have been taken. Hence it is not subject to review.

III. Some contention is made that the respondent was guilty of contributory negligence which was the proximate cause of his injury. This was obviously a question for the jury. The evidence falls short of showing such negligence as a matter of law.

The judgment will be affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

TROUTMAN v. POLHILL et al. (No. 11,348.)

(Supreme Court of Washington. April 29, 1914.)

1. CONTRACTS (§ 329\*)—RIGHTS OF THIRD PERSON—GRUBSTAKE CONTRACT—LACHES.

Plaintiff, whose husband, in her name without defendants' knowledge of her interest, entered into a grubstake contract in 1898, sued

thereon in 1911. *Held*, she was guilty of gross laches, defeating her right to any relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1511, 1585-1588; Dec. Dig. § 829.\*]

2. MINES AND MINERALS (§ 99\*)—GRUBSTAKE CONTRACT—CONSTRUCTION—"PROCEEDS."

In a grubstake contract entered into in 1898, providing for a division "of all the proceeds derived from said venture," that wages earned should be treated as proceeds, and that the contract should continue so long as defendant was in Alaska, the word "proceeds" meant net proceeds, so that, where the net result of the venture was that defendant, in 1903, finally returned sick and penniless, plaintiff could not recover.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 223, 224; Dec. Dig. § 99.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5639-5642; vol. 8, pp. 7765, 7766.]

Department 1. Appeal from Superior Court, Jefferson County; Lester Still, Judge.

Action by Dora W. Troutman against Robert G. Polhill and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. B. Scott, of Port Townsend, and P. P. Carroll and John E. Carroll, both of Seattle, for appellant. James B. Bruen, of Seattle, for respondents.

GOSE, J. Action upon a contract for an accounting. Judgment for defendants. Plaintiff appeals.

[1] On the 24th day of January, 1898, one D. O. Troutman, in the name of his wife, the plaintiff, entered into a contract in writing with defendant R. G. Polhill and one A. W. Jerry, wherein he agreed to, and did, advance to them the sum of \$500 "as part grubstake or outfit" for prospecting and mining in Alaska Territory. It was agreed that all finds or locations made by Polhill and Jerry should be owned in equal parts by the three parties to the contract. It was further agreed that Polhill and Jerry would pay to Troutman one-third "of all the proceeds derived from said venture;" that wages earned should be considered a find and divided accordingly; and that the agreement should continue "during the entire time and period" that Polhill and Jerry "are in such Klondike country, Alaska Territory, or the Northwest Territory of British America"; and that they should from time to time, as it was practicable, report their "doings and successes" to Troutman. This action was commenced in January, 1911, 13 years after the date of the execution of the contract. The record shows that Jerry presumably lost his life in Alaska, probably in 1898. He and Polhill went to Alaska in February, 1898. The record also shows that D. O. Troutman disappeared in 1899. The heirs of Jerry, if he has any, are not parties to the action. The respondent Polhill did not know that the appellant advanced the money or that she had any interest in the contract. The contract was made with her hus-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

band, D. O. Troutman, who signed her name and acknowledged the contract without disclosing that fact to either Polhill or Jerry. So far as appears from the record, the respondent did not know the appellant's name had been signed to the contract until the commencement of this action. The respondent Polhill went to Alaska in February, 1898. He returned in October, 1899, bringing with him \$713.02. He spent this money for an outfit, and returned to Alaska in the spring of 1900. He returned to Seattle in October, 1901, bringing with him \$237.22. He spent this money, with money of his own, for machinery and provisions, and returned to Alaska the following spring, and came out of Alaska in the fall of 1903, sick and penniless. The appellant contends that she should have one-half of the money brought out in 1899 and 1901.

We do not think that she is entitled to any relief. The trial court concluded, as a matter of law, that she was guilty of "gross laches" in commencing her action. We acquiesce in this view. A reference to the dates will disclose that her action was commenced about 13 years after the contract was made, and about 8 years after Polhill finally left Alaska. She admits that she personally had no transaction with Polhill, and that he knew nothing about her relation to the contract. She made no attempt in her testimony to excuse the delay in asserting her claim; nor did she attempt to show that she had ever made any claim upon Polhill prior to the commencement of the action.

[2] There is another reason why she cannot recover. The contract provides for a division "of all the proceeds derived from said venture," and that wages earned should be treated as proceeds. Viewing the contract as an entirety, the word "proceeds" means net proceeds. Again, the contract is a continuing one, and operates so long as Polhill was in the Alaska country. The net result of his prospecting and mining ventures in Alaska Territory is that, in the fall of 1903, he returned, as the court found, "without funds, sick with the scurvy, and greatly broken in health." We think both views are so elementary that the citation of sustaining authority is unnecessary.

The judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

#### WAY v. LYRIC THEATER CO. et al. (No. 11,618.)

(Supreme Court of Washington. April 27, 1914.)

#### 1. APPEAL AND ERROR (§ 273\*)—PRESENTING QUESTIONS IN LOWER COURT—EXCEPTIONS TO FINDINGS.

Where the court made separate findings of fact, each of which bore a distinctive number, an

exception at the foot of the findings and conclusions of law "to the above findings of fact and conclusions of law" is not sufficient to entitle the appellant to a review of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.\*]

#### 2. HUSBAND AND WIFE (§ 268\*)—COMMUNITY PROPERTY—LIABILITY FOR DEBTS—PROMISSORY NOTE.

Where notes were executed by a theater corporation and certain of its stockholders in payment for an automobile purchased by the corporation, to be offered as a prize to attract patronage and thereby increase the profits, the purchase being, therefore, for the benefit of the corporation and its stockholders, the notes were a liability against the community property of the stockholders, in the absence of a showing that the corporate stock was the separate property of the stockholders.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 953-967; Dec. Dig. § 268.\*]

#### 3. EVIDENCE (§ 459\*)—PAROL EVIDENCE—VARYING NOTE—SIGNING AS CORPORATE OFFICER.

Where a note purports to be the joint, or joint and several, obligation of a corporation and certain individuals, evidence is not admissible to show that the individual signers signed in their official capacity only.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.\*]

#### 4. HUSBAND AND WIFE (§ 268\*)—COMMUNITY PROPERTY—LIABILITY FOR DEBTS.

The test to determine whether community property is liable for debts incurred in a transaction is whether the transaction was carried on for the benefit of the community, not whether it actually resulted in any profit thereto.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 953-967; Dec. Dig. § 268.\*]

Department 1. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Leroy B. Way against the Lyric Theater Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John Salisbury, of Spokane, for appellants. Tolman & King, of Spokane, for respondent.

GOSE, J. This is an action by the plaintiff, as an indorsee, to recover upon four promissory notes, each of which is in the following form, except as to the date of maturity, and with the further exception that one of the notes is drawn for \$50:

"Spokane, Washington, Sept. 7, 1911.

"Four months after date we promise to pay to the order of American Manufacturing Company \$100.00 at our place of business, for value received.

"Lyric Theater Company.

"Bert Muma.

"Theodore Peterson.

"James Anderson.

"G. H. Mueller."

The defendants other than the Lyric Theater Company, a corporation, answered jointly, alleging in substance: (a) That the defendants' husbands executed the note as officers and trustees of the corporation defendant, and for and on its behalf, and not oth-



erwise, and that no consideration moved to them personally; and (b) that the respective communities received no benefit from the transaction. A judgment was entered against the defendants' husbands personally, and against the several communities. This appeal followed.

[1] The court made five separate findings of fact, each of which bears a distinctive number. At the foot of the findings and conclusions of law, the appellants noted the following exception: "The defendants except to the above findings of fact and conclusions of law by their attorney, \* \* \* which exception is allowed." The exception, under the repeated and uniform decisions of this court, is not sufficient to entitle the appellants to a review of the evidence. *Pease v. Clayton*, 62 Wash. 26, 112 Pac. 943, and cases there cited and reviewed.

[2] Including other findings not here especially pertinent, the court found: "(2) That heretofore, to wit, on the 7th day of September, 1911, the defendants herein, being indebted to the American Manufacturing Company in the sum of \$350, as evidence thereof made, executed, and delivered to the American Manufacturing Company, in the city of Lexington, Tenn., their three certain promissory notes of even date, for \$100 each, due respectively one, two, and four months after date, and at the same time and for the same consideration made, executed, and delivered their one promissory note for \$50, due three months after date. \* \* \* (3) That said notes were executed in consideration of the sale and delivery by said American Manufacturing Company to said Lyric Theater Company (of which company the said Bert Muma, Theodore Peterson, James Anderson, and G. H. Mueller were at the time of the execution of said notes stockholders) of one automobile. That said automobile was purchased for the use and benefit of said corporation, and for the use and benefit of the stockholders thereof, and said auto was delivered to and received by said corporation." The findings support the judgment.

We have held that a note given by a married man, who is a stockholder in a corporation, for the benefit of the corporation, is presumed to evidence a transaction for the benefit of the community. This presumption might be rebutted by showing that the corporation stock was the separate property of the husband. *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435.

[3] It is contended that the court rejected evidence showing that the appellants other than the corporation executed the note in their official capacity only, and hence incurred no liability either separate or community. The rule is that, where the note purports to be the joint or joint and several obligation of a corporation and certain individuals,

the latter cannot show that it was intended to create an obligation against the corporation only. *Toon v. McCaw*, 74 Wash. 335, 133 Pac. 469. In that case we said: "The note imports a joint obligation of the appellants, and they have sought to plead and prove that, while they apparently executed the note in their individual capacity, they intended in fact to execute it as the note of the defendant corporation only. This would be to create an ambiguity where none exists, and to make for the parties a contract which they did not make for themselves."

The appellants complain that they were not permitted to show that the notes did not evidence a community transaction. On the contrary, they proved affirmatively that the automobile, which represented the consideration for the notes, was purchased to be offered as a prize to attract patronage to the theater and thereby increase its earnings. These earnings would, of course, be to the advantage of all the stockholders, including the communities composed of the stockholders and their wives, in the absence of a showing that the stock was the separate property of the husbands.

[4] The fact that no profit resulted is immaterial. The test is, was the transaction carried on for the benefit of the community? not whether it resulted in a profit.

The judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

#### STATE v. HART. (No. 11,823.)

(Supreme Court of Washington. April 25, 1914.)

ASSAULT AND BATTERY (§ 60\*)—CRIMINAL OFFENSES—DEGREE OF OFFENSES—"ASSAULT IN THE FIRST DEGREE"—"ASSAULT IN THE SECOND DEGREE."

Under Rem. & Bal. Code, § 2413, providing that every person who, with intent to kill, shall assault another with a firearm or deadly weapon, or by any force or means likely to produce death, shall be guilty of assault in the first degree, and section 2414, providing that every person who shall willfully inflict bodily harm upon another with or without a weapon, or willfully assault another with a weapon or other instrument or thing likely to produce bodily harm, shall be guilty of assault in the second degree, where all the evidence which tended to show an assault showed that the assault was made in a violent manner with a club about 1 by 3 inches, and 16 inches long, resulting in a number of serious wounds, accused, if guilty at all, was guilty of assault either in the first or second degree, and the court properly refused to submit assault in the third degree.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 86; Dec. Dig. § 60.\*

For other definitions, see *Words and Phrases*, vol. 1, p. 538; vol. 1, p. 539.]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Dan Hart was convicted of assault in the second degree, and he appeals. Affirmed.

G. G. Lee and C. F. Bolin, both of Toppenish, for appellant. Harold B. Gilbert, of Spokane, for the State.

**PARKER, J.** The defendant was, by information filed in the superior court for Yakima county, charged with the crime of assault in the first degree, as being committed upon one Duren with a deadly weapon, to wit, a club, and with intent to kill Duren. A trial before the court and a jury resulted in verdict, finding the defendant guilty of assault in the second degree, upon which he was sentenced to the penitentiary. He has appealed to this court.

Contention is made that the evidence was insufficient to sustain the conviction. We think the only answer necessary to this contention is that the testimony was conflicting and of such nature as to make the question of the defendant's guilt clearly one for the jury. We think it was ample to sustain the conviction.

Counsel for appellant's principal contention is that the trial court erred in its instruction to the jury, which, in effect limited the jury's finding to one of three verdicts, "not guilty," "guilty of assault in the first degree," and "guilty of assault in the second degree"; it being insisted that appellant was entitled to have the question of his guilt of assault in the third degree also submitted to the jury. All of the evidence which in any degree tended to show an assault by the defendant upon Duren was to the effect that the assault was made in a very violent manner, resulting in a number of serious wounds being inflicted upon Duren, and made by appellant with a club held in his hand, with which he struck Duren, which club was in size about 1 by 3 inches, and in length about 18 inches. There is no evidence whatever in the record tending in any degree to show an assault of any other nature. Manifestly this was either an assault in the first degree, that is, an assault with intent to kill, by some means likely to produce death (section 2413, Rem. & Bal. Code), or an assault in the second degree, that is, an assault with the club as a weapon and an infliction of grievous bodily harm thereby upon Duren (section 2414, Rem. & Bal. Code), or there was no assault made of any nature, as is claimed by appellant. Under these facts, appellant could, in no event, have been found guilty of assault in the third degree. Our decision in *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, deals with a situation which involves this exact question in principle. Clearly the court did not err in submitting to the jury the question of appellant being guilty of assault in the third degree; there being no evidence whatever upon which a verdict so finding could be permitted to stand. Other claim-

ed errors are briefly presented; but we deem it sufficient to say that we consider them without merit and not calling for discussion. The judgment is affirmed.

**CROW, C. J., and MOUNT and MORRIS, JJ., concur.** **FULLERTON, J., concurs in result.**

**ENGLISH v. GIBBONS et ux.** (No. 11663.)  
(Supreme Court of Washington. April 25, 1914.)

**VENUE (§ 36\*)—TRANSITORY ACTION.**

An action for an accounting of a logging business and to enforce an agreement to convey timber lands was a transitory action, so that the venue was properly changed from S. county, where it was brought, to K. county, where defendant resided.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 54, 55; Dec. Dig. § 36.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by E. G. English against Patrick Gibbons and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Million & Houser and Geo. Friend, all of Seattle, for appellant. Peters & Powell, of Seattle, for respondents.

**CHADWICK, J.** Plaintiff began this action asking for certain relief, alleging the following ultimate facts: That in the year 1896 the legal title of certain lands, 400 acres of timber land and about 260 acres of pasture or agricultural land, in Skagit county, stood in the name of the First National Bank of Mt. Vernon; that he had a right to a transfer of the legal title by the payment to the bank of \$8,000; that the defendant Gibbons agreed to advance this money, in consideration of which the bank was to convey the legal title to him (Gibbons); that Gibbons was to log the timber lands and divide the profits, if any, equally between plaintiff and himself; that the timber lands were eventually to be equally divided between them, and other lands which had been conveyed by the bank to Gibbons were to be held as security for the payment of any moneys which he (Gibbons) might invest in the logging enterprise; that they were eventually to be deeded to plaintiff as soon as Gibbons reimbursed himself for his outlays. He alleges that the logging operations were carried on at a profit of \$5,000. The complaint is denied by defendants. Gibbons acquired title to the property from the bank and logged the land. Any contract that was made between the parties to this action was made in the spring of 1896. This action was begun in January, 1902. Plaintiff prays for an accounting of the logging business and a judgment against defendant for one-half of the profits thereof; that defendant be required to convey to him one-half of the timber land; and that the defend-

ant be compelled to convey to the plaintiff all of the other land conveyed by the bank to the defendant.

The defendant is a resident of King county, and, upon the commencement of this action, filed a motion for a change of venue to King county, which was granted. This is the first error assigned. An action for an accounting or an action to declare a trust in lands is a transitory action, and the court did not abuse its discretion when it made the order changing the venue of the action from Skagit county to King county. *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030.

As for the merits of the case, we have read the record, and are unable to say that the trial judge erred in rendering a judgment for the defendant. It might be that a judgment could have been rendered in favor of either party with some reasonable assurance that it was right, but this is saying no more than that plaintiff has not sustained the burden of proof.

Taking the testimony of the witnesses, the findings of the trial judge, and all of the concomitant circumstances, we are compelled to affirm the judgment.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

NANCE v. WOODS et al. (No. 11,694.)  
(Supreme Court of Washington. April 24, 1914.)

#### 1. JUDGES (§ 51\*)—CHANGE OF—TIME OF APPLICATION.

Where defendants moved for a cost bond, and later for a bill of particulars, and, after a motion for default against them had been denied on terms, filed a motion for a change of judge on the ground of prejudice, pending the determination of which answers were filed, there was no error in denying such motion.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

#### 2. MORTGAGES (§ 25\*)—REQUISITES AND VALIDITY—CONSIDERATION.

Where W. advanced \$3,000 to enable M. to purchase land from N., under an agreement that title should be conveyed to W. and wife, until such sum was repaid, and that W. and wife should execute a mortgage to N. to secure the balance of the purchase price, the execution of the deed to W. and wife was a sufficient consideration for their note and mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 29-42, 1364; Dec. Dig. § 25.\*]

#### 3. MORTGAGES (§ 427\*)—FORECLOSURE—PARTIES.

Where N. conveyed land to W. and wife to secure \$3,000 advanced by them to enable M. to purchase it from N., and W. and wife executed a note and mortgage for the balance of the purchase price, they were primarily liable on the note, and were proper parties to a suit thereon and for foreclosure, though they had conveyed the land to others at M.'s request, after the money they advanced had been repaid.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. § 427.\*]

#### 4. HUSBAND AND WIFE (§ 254\*)—COMMUNITY PROPERTY—MORTGAGE FOLLOWS NOTE.

A mortgage given to secure a note to the wife personally follows the note as regards its character as separate or community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 897-899; Dec. Dig. § 254.\*]

#### 5. HUSBAND AND WIFE (§ 270\*)—COMMUNITY PROPERTY—ACTIONS—PARTIES.

A wife to whom a note and mortgage were given personally had a right to maintain an action thereon in her own name even if it was community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. § 270.\*]

#### 6. MORTGAGES (§ 415\*)—FORECLOSURE—DEFENSES.

That the mortgagee agreed to let the owners sell the land for a certain sum, to be paid to the mortgagee, and cancel the note and mortgage, and also to let the owners execute a second mortgage, and, if it did not bring such sum, to take what it should bring and surrender the first for a second mortgage, did not prevent foreclosure; the agreement not having been carried out, and being without consideration.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1210-1224; Dec. Dig. § 415.\*]

Department 2. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action by Adline Nance against D. L. Woods and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Martin & Wilson, of Davenport, for appellants Woods. Guy T. Walter, of Coulee City, and N. W. Washington, of Almira, for appellants Webb. W. B. Southard, for respondent.

MOUNT, J. This action was brought by the respondent to foreclose a mortgage upon certain real estate. The appellants have appealed from the judgment of foreclosure.

The appellants claim that the court erred in denying their motion for a change of judge in sustaining the respondent's demurrer to the affirmative defenses set up in the answers, and in granting and entering a default against the appellants, and in rendering judgment against them.

[1] It appears from the record that the action was commenced in January, 1913. Thereafter on February 17, 1913, the appellants Woods and wife filed a motion for a cost bond, upon the ground that the respondent was a nonresident of the county where the action was brought. This bond was furnished by the respondent on February 18, 1913. Thereafter, on February 27, 1913, the appellants filed a motion for a bill of particulars. On March 25th the respondent filed a motion for default against the appellants, and on March 27th this motion was denied upon terms. Thereafter, on April 21st, the appellants Woods and wife filed a motion for a change of judge, on the ground that the appellants believed they could not have a fair trial before the judge of the superior court of that county. This motion was afterwards

denied. Between the time the motion for change of judge was made and the order was entered denying the same, answers were filed by the appellants. It is therefore apparent that this case falls within the rule announced in *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40, where we said: "We cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until, by some ruling of the court in a case, he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case, and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question." There was therefore no error in refusing the motion for a change of judge.

[2, 3] The answer of the appellants Woods and wife, after denying certain allegations of the complaint, for an affirmative answer alleged that at the time the mortgage was made the land upon which it was given was the property of the respondent, and at that time the respondent had agreed to sell the land to one McAllister for the sum of \$14,000; that the appellants Woods and wife, at the request of McAllister, agreed to advance \$3,000, which was the first payment, and take title to the land in their own names and give a mortgage thereon for the balance of the purchase price, upon the agreement with McAllister that, as soon as he should repay the \$3,000 advanced by them, they would convey the land to him; that afterwards McAllister paid the \$3,000, and, at his request, the land was deeded by Woods and wife to Webb and wife, subject to the mortgage; that there was no consideration passing from Woods and wife to the respondent for the note and mortgage sued upon. It is plain that this did not constitute a defense to the foreclosure of the mortgage. The deed for the land from the respondent to Woods and wife was a sufficient consideration for the note and mortgage. At the time the mortgage was given by Woods and wife the title stood in their names, and they executed the note sued upon. The note was an ordinary negotiable note, and of course Woods and wife were primarily liable thereon, and were, of course, proper parties. Rem. & Bal. Code §§ 3451 and 3582.

[4, 5] The further answer of Woods and wife alleged that there was a misjoinder of parties, because the respondent Adline Nance was a married woman, and that the note and mortgage sued upon was the community property of Mrs. Nance and her husband. The note, however, was given to Mrs. Nance personally, in her name, and the mortgage follows the note. She clearly had the right to maintain the action in her own name even

if it was community property. *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848.

[6] The separate answer of Webb and wife, in addition to the defense of misjoinder of parties, for a second affirmative defense alleged: That on or about the 1st day of February, 1913, the respondent orally agreed with Webb and wife that the land might be sold for the sum of \$11,000, to be paid to the respondent, whereupon the respondent would cancel and surrender the note and mortgage sued upon, making the title of the land clear in Webb and wife; that they further agreed that the defendants Webb and wife should mortgage the land for as large an amount as they could, and, if the mortgage so made failed to pay \$11,000, the proceeds of said mortgage be turned over to the respondent, and she and her husband agreed to take a second mortgage for the balance due in consideration of the surrender of the amount of money above mentioned. The answer further alleged that the appellants Woods and wife have been ready and willing to comply with this agreement, and that the respondent has refused so to do. It is apparent that this agreement did not prevent the respondent from pursuing her remedy of foreclosure, because it was not carried out, and no consideration passed for it. It is apparent upon the whole record that none of the affirmative defenses were sufficient to defeat the foreclosure of the mortgage.

After the demurrers to the affirmative answers had been sustained by the court, no offer was apparently made to answer further; but the appellants stood upon their answers. The court thereafter entered a default and judgment. There was clearly no error in this.

We find no error in the record, and the judgment is therefore affirmed.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

#### BELLES et ux. v. CITY OF TACOMA. (No. 11,564.)

(Supreme Court of Washington. April 25, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 849\*)—MAINTENANCE OF MUNICIPAL DOCK—LIABILITY FOR INJURIES TO TRAVELERS.

A city maintaining a municipal dock need only exercise reasonable care and diligence in keeping the same in repair, and it does not owe to the public the high degree of care imposed on carriers of passengers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1806; Dec. Dig. § 849.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 849\*)—MAINTENANCE OF MUNICIPAL DOCK—LIABILITY FOR INJURIES TO TRAVELERS.

A city maintaining a municipal dock is not guilty of negligence merely because it permits a plank in the floor thereof to become worn in the center a quarter of an inch below the com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mon level, and it is not liable for injuries to a pedestrian slipping on the plank.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1806; Dec. Dig. § 849.\*]

**3. MUNICIPAL CORPORATIONS (§ 849\*)—MAINTENANCE OF MUNICIPAL DOCK—LIABILITY FOR INJURIES TO TRAVELERS.**

The officers of a city which maintains a municipal dock need not assume that the floor thereof is dangerous merely because the center of a plank in the floor had worn down about a quarter of an inch below the common level, in the absence of any notice that persons had slipped thereon.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1806; Dec. Dig. § 849.\*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Peter Belles and wife against the City of Tacoma. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Burkey, O'Brien & Burkey, of Tacoma, for appellants. T. L. Stiles and Frank M. Carnahan, both of Tacoma, for respondent.

FULLERTON, J. The appellants, husband and wife, brought this action against the respondent to recover for personal injuries sustained by the wife from a fall upon the floor of a public building owned by the respondent city, commonly known as the municipal dock. The appellants were nonsuited in the court below, and appeal from the judgment entered against them.

At the time of her injury Mrs. Belles, the injured appellant, was passing hurriedly through the building from a boat landing, intending to take a car, which was then about due, to her home. As she reached a point in the building, described as opposite the ticket office, she in some manner slipped and fell to the floor, striking on her side and dislocating her shoulder. The appellant was accompanied at the time by a number of ladies, three of whom testified in her behalf at the trial. Their testimony on cross-examination was to the effect that they noticed no unusual condition in the floor where the fall occurred, or defect therein, although they stayed at the place of the accident, waiting for relief to arrive, for several minutes after the accident occurred. Some two or three days later the place was examined by another witness. He testified that one of the boards in the floor seemed to have been composed of softer material than the surrounding boards, and had worn somewhat faster, the effect being that it was slightly grooved out towards its center, leaving it in the shape of a trough, the deepest part being in the middle of the board. The witness did not attempt to measure the actual depth of the groove, but estimated that the deepest part of the groove was about a quarter of an inch lower than the surrounding level. He further testified that the board bore marks

made by nails in the shoes of other persons passing over it, indicating that they had also slipped on the board. The evidence also showed that the general contour of the floor was level at the place of the accident, and was kept oiled by the municipality. There was no evidence, however, that the oil added to the slipperiness of the floor, or in any way added to the dangers of passing over it. Nor was there any evidence that the city had knowledge that this particular board in the floor was grooved in the manner indicated, further than such knowledge might be implied from its actual condition. There was no evidence that any person had theretofore fallen because of the groove, or that the city had knowledge that any person had slipped thereon, although it was in evidence that many people passed over the floor daily.

[1, 2] The appellants argue that the evidence disclosed such a degree of negligence on the part of the respondent as to carry to the jury the question of its liability for the injury suffered by the appellant, and that in consequence the trial judge erred in granting a nonsuit. But without following the argument by which the proposition is sought to be maintained, we think it not supported by the record. In its care of the building, the city did not owe to the public that high degree of care imposed upon carriers of passengers. Its duty in this respect was performed if it exercised reasonable and ordinary care and diligence in keeping the building in repair; the same degree of care that is imposed upon a city with reference to its streets and other public places open to the use of the public. Plainly it would be laying down a harsh rule to say that a city became guilty of negligence whenever it permitted a plank in a board walk, or a slab in a concrete walk, to remain in place whenever its center became worn down a quarter of an inch below the common level. Rules governing the imperative duties of cities with regard to keeping its streets and buildings in repair must be reasonable and practicable rules, else the burden of supporting the government therein will necessitate an abandonment of all government.

[3] Again we think the judgment may rest on another ground. There was no evidence to show notice on the part of the city that the floor was defective, even conceding it so. True the officers of the city could have discovered by an examination of the floor that the particular plank complained of had worn faster than other planks surrounding it, and that its center was to a certain degree lower than such surrounding planks. But they were not bound by this to assume that it was in such a defective condition as to be dangerous. The common observations of their everyday life would tell them that it was not so; and, more than this, they knew that many persons passed over this particular floor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

daily with safety. If it had been shown that other persons had slipped thereon so as to lose their balance or fall, and this fact had been brought home to the officers of the city, a different question might have been presented. But the fall of a single person proves nothing. Persons have been known to slip and fall on the best constructed walks. Nor do we think the evidence to the effect that there were nail marks on the board of any moment on the question of the dangerous condition of the defect. They could have been made, and are usually made, by scuffing the heels, and can be found on any floor generally used by the public where heel marks show.

The judgment should be affirmed; and it will be so ordered.

CROW, C. J., and PARKER, MORRIS, and MOUNT, JJ., concur.

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AUWARTER v. KROLL (No. 11,521.)  
(Supreme Court of Washington. April 22, 1914.)

1. PRINCIPAL AND AGENT (§ 97\*)—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—POWERS OF AGENT—CONSTRUCTION OF POWER OF ATTORNEY.

Where a general power of attorney by its terms authorized the agent to act with reference to all manner of business, the fact that it was given with reference to a certain class of transactions did not limit the agent's authority, as persons dealing with him were not bound to look beyond the instrument.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 344-376; Dec. Dig. § 97.\*]

2. PRINCIPAL AND AGENT (§ 116\*) — RIGHTS AND LIABILITIES AS TO THIRD PERSONS — POWERS OF AGENT—LIMITATION OF AUTHORITY.

While, under certain circumstances, the power of an agent will be determined by reference to the intent of the parties, and the person dealing with him is bound to act at his peril, yet when a power of attorney is general, and there is no uncertainty therein, one dealing with the agent is not bound to look beyond the instrument itself, or make any inquiry that might lead to the discovery of a secret reservation or understanding between the principal and agent at the time the power was executed.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.\*]

3. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICTS—CONCLUSIVENESS.

Where there was sufficient evidence to take certain issues of fact to the jury, their verdict is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

4. NEW TRIAL (§ 9\*)—NATURE AND SCOPE OF REMEDY—NEW TRIAL AS TO PART OF ISSUES.

Where the jury returns a general verdict on several causes of action, the court cannot separate them for the purpose of granting a new trial or dismissal, but, where special verdicts are returned as to each, the court may

deny a new trial as to one, and grant a new trial or dismiss the complaint as to the others, without violating Rem. & Bal. Code, § 399, which provides that "the former verdict or other decision may be vacated and a new trial granted," for any of the causes specified.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 12; Dec. Dig. § 9.\*]

5. APPEAL AND ERROR (§ 1172\*)—DISPOSITION OF CAUSE—SEPARATING CAUSES OF ACTION.

Where a case involves more than one cause of action, the judgment may be affirmed as to one, and there may be a remand for a new trial as to the others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. § 1172.\*]

6. JUDGMENT (§ 199\*) — NOTWITHSTANDING VERDICT—PART OF ISSUES.

Where special verdicts were returned for the plaintiff on three causes of action, and defendant asked only for a new trial, the court could not grant judgment notwithstanding the verdict as to two of the causes of action, but was limited to granting a new trial if the verdicts were believed to have been against the weight of evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by C. Auwarter against William Kroll. From an order denying defendant's motion for a new trial, and dismissing the complaint as to two of plaintiff's three causes of action, after the jury had returned a verdict for plaintiff on all three causes of action, both parties appeal. Affirmed as to the first cause of action, and reversed and new trial granted as to the other two causes of action.

D. W. Henley, of Spokane, for appellant.  
Voorehees & Canfield, of Spokane, for respondent.

CHADWICK, J. [1] There are two principal questions involved in this case. The first is the extent of the authority vested in Arthur H. Kroll by his father, William Kroll, defendant in this action, under a power of attorney containing the following words of authorization: "To ask, demand, sue for, collect, and recover all sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, and demands whatsoever as are now or shall hereafter become due, owing, payable, or belonging to me \* \* \* to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods and merchandise, choses in action, and other property, in possession or in action, and to release mortgages on lands or chattels, and to make, do, and transact all and every kind of business of what nature and kind soever. And also for me and in my name and as my act and deed to sign, seal, execute, and deliver and acknowledge such deeds, leases, and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading,

bills, bonds, notes, receipts, evidences of debt, releases, and satisfaction of mortgage judgments and other debts, and such other instruments in writing, of whatever kind or nature, as may be necessary or proper in the premises. Giving and granting unto my said attorney full power to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could if personally present."

Plaintiff set up three causes of action: A promise to pay a certain sum in consideration of a transfer of a certificate of sale held and owned by plaintiff upon the property of a mining corporation known as the Spokane Lead Mines Company, and for work and labor performed for said company at the instance and request of defendant. The transactions between plaintiff and defendant were had through the intervention of Arthur H. Kroll. Defendant had no interest in the mining property at the time the power of attorney was executed, although he thereafter became possessed of the full legal title.

The next question raised under the assignments of error is whether a power of attorney will operate upon after-acquired property.

[2] We think it will hardly be contended, under a general power such as the one before us, that an agent would not have authority to act with reference to all manner of business until the power is formally revoked. But appellant insists that, inasmuch as the power was given with reference to certain orchard tracts upon which appellant had a mortgage under a contract to release as the tracts were sold, the power must be construed with reference to the intention of the parties; and, this being so, the agent could not bind defendant upon any contract pertaining to the Lead Mines Company. Under certain circumstances, the power of an agent will be determined by reference to the intent of the parties, and the person dealing with an agent is held to act at his peril; but where the power is general, and there is no ambiguity or uncertainty in the instrument creating the agency, one dealing with an agent is not bound to look beyond the instrument itself or to make any inquiry that might lead to any secret reservation or understanding as between the principal and his agent at the time the power of attorney was executed. 31 Cyc. 1325-1327. This rule governs this case, and we find no merit in appellant's first assignment of error.

[3] It is next contended that although it may be held that the power operates upon after-acquired property, and upon contracts made with reference thereto, the testimony shows that the Spokane Lead Mines Company was owned by the appellant and by Arthur H. Kroll jointly, and a power to deal with the property of a principal will not operate upon property owned jointly with another. No apt authority is cited to sustain

this proposition, nor have we been able to find any; but, whatever the rule may be upon an opposite state of facts, we think it cannot be so held in this case, for the testimony shows that the legal title to the property is in the name of the appellant, and there is some testimony, which must have been weighed and given full credence by the jury, to the effect that appellant, for a valuable consideration to him moving, promised to pay the present demands of the respondent. It would serve no useful purpose to review the testimony. It is sufficient to say that there was enough to go to the jury, and its verdict upon the issues of fact is conclusive.

It is next contended that the court erred in giving certain instructions to the jury in which, as it is insisted, the question of agency was not left open, but was submitted to the jury as if it were not an issuable fact. We would not be inclined, in the light of the whole record, and the other instructions, to admit that defendant has been prejudiced by the instructions complained of. However, under our view, it will not be necessary to repeat them in this decision, or to discuss them from that viewpoint. We find that Arthur H. Kroll was the agent of the defendant, and the only question for the jury to decide was whether he actually contracted on behalf of the defendant. This question was foreclosed by the verdict of the jury, and there was no prejudice in the instructions.

[4] The jury returned a general verdict for \$8,890.62. The court, upon its own motion, submitted three special verdicts in form, and which were answered as follows:

"(1) If you find that there is anything due to plaintiff on the first cause of action, how much? \$5,107.40.

"(2) If you find that there is anything due to plaintiff on the second cause of action, how much? \$372.91.

"(3) If you find that there is anything due to plaintiff on the third cause of action, how much? \$910.31."

A new trial was denied as to the first cause of action, and the court, of its own motion, ordered that plaintiff's complaint as to the second and third causes of action be dismissed, and that he take nothing. Both sides appeal from this order; defendant insisting that the court had no power to enter a judgment other than to grant or deny the motion, while the plaintiff insists that the verdict and judgment be reinstated as to the second and third causes of action, or, if that cannot be done, the order vacating the judgment as to the second and third causes of action be set aside and a new trial granted. If the jury had returned a general verdict only, the position of the defendant would be well taken, for the court could not then have apportioned the judgment; but where, as in this case, special verdicts are returned showing the amount allowed by the jury upon each cause of action, an order of the court deny-

ing a new trial upon one cause of action and granting it as to another does no violence to section 399 et seq., Rem. & Bal. Code. The question, so far as we now remember, has never been decided by this court, but we are not without sound authority to sustain us. "If the motion be for a new trial as to the entire action, the court may grant it in part and deny it in part, leaving its former determination upon a portion of the issues to remain." *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521; *Duff v. Duff*, 101 Cal. 1, 35 Pac. 437; *Mountain Tunnell G. M. Co. v. Bryan*, 111 Cal. 36, 43 Pac. 410.

[6] Without assembling the cases, it is not out of place to say that it is the settled practice in this court to affirm a judgment as to one cause of action and remand, as to another, for a new trial.

[6] Just why the court assumed to grant a judgment non obstante veredicto as to the second and third causes of action, we are not advised. Defendant had not asked that relief, and now insists that the court erred in granting it in that the verdict must stand or fall as a whole. In ruling upon the motion for a new trial, the court was called upon to pass upon the sufficiency of the evidence to sustain the verdict, and we can divine no reason, certainly none is apparent in the record, for the order of the court, except that the judge was of the opinion that the verdict was contrary to the weight of the evidence. If so, his power was limited to making an order granting a new trial. We believe that the court abused its discretion in dismissing plaintiff's case as to the second and third causes of action.

Our conclusion is that the judgment of the lower court should be affirmed as to the first cause of action, and that the case be remanded for a new trial as to the second and third causes of action.

It is so ordered.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

#### NORTHERN BANK & TRUST CO. v. GRAVES et al. (No. 11,544.)

(Supreme Court of Washington. April 29, 1914.)

#### 1. HUSBAND AND WIFE (§ 268\*)—COMMUNITY DEBT—NOTES—SIGNATURE.

The signature of a wife to a note for a community debt is not necessary to bind the community property; the signature of the husband being sufficient for that purpose.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 953-967; Dec. Dig. § 268.\*]

#### 2. HUSBAND AND WIFE (§ 156\*)—NOTES—SIGNATURE BY WIFE—EFFECT.

A wife's common-law disability to contract having been entirely removed, her signature to a note payable to a third person imports the same obligation as the signature of any other person, to wit, that a judgment may be taken against her for her failure to pay, and that

her separate property may be taken in execution to satisfy the same.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 606-622; Dec. Dig. § 156.\*]

#### 3. BILLS AND NOTES (§ 371\*)—SIGNATURE BY MARRIED WOMAN—ACCOMMODATION INDORSER.

Where married women indorsed their names on the back of a note executed by a partnership composed of their respective husbands for a partnership debt, they were accommodation indorsers under Rem. & Bal. Code, § 3420, defining an accommodation party as one who has signed the instrument as maker, drawer, acceptor, or indorser without receiving value therefor, and to lend his name to some other person, and were therefore individually liable to the payee or a holder for value, even with notice that they were accommodation parties.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 964; Dec. Dig. § 371.\*]

#### 4. HUSBAND AND WIFE (§ 152\*)—WIFE'S SEPARATE PROPERTY—LIABILITY.

A rule that a wife's separate property is not ordinarily liable for community debts does not prevent her from binding her separate property by her own contract.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 596-602; Dec. Dig. § 152.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Northern Bank & Trust Company against Helen M. Graves and Clara La Belle and their respective husbands. From a judgment dismissing the suit against the female defendants, plaintiff appeals. Reversed.

Shorett, McLaren & Shorett, of Seattle, for appellant. Morris & Shipley and Paul S. Dubuar, all of Seattle, for respondents.

ELLIS, J. This is an action against the defendant wives on a promissory note which was signed by them and also by their husbands. The husbands were made parties defendant in compliance with the statutory requirement that husbands be joined in suits against married women. Rem. & Bal. Code, § 181.

The action was tried before the court without a jury upon a written statement of agreed facts, from which it appears that the husbands for some time had been engaged in business as partners, under the firm name of Federal Paint & Wall Paper Company; that in the prosecution of this business they had become indebted to the plaintiff for money borrowed and used in the business, in the sum of \$2,900, evidenced by five demand notes, executed by all of the defendants in this action; that on July 1, 1912, about seven months after the maturity of the last note, the note now in controversy for \$2,900, due one day after date, was executed by the partnership and also by the individuals composing it, and, before delivery, was signed on the back by the individual partners and their wives. There is no controversy as to the execution of the note. The note contains the usual words, "One day after date, with-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



out grace, I promise to pay," and waives presentment for payment, protest, and notice of protest for nonpayment by all the parties thereto. From the statement of agreed facts, it further appears that there was no consideration for the wives signing the note, "other than such consideration as inured to the benefits of the matrimonial community existing between the said defendants E. L. Graves and Helen M. Graves and said defendants G. E. La Belle and Clara La Belle." It is admitted that the husbands have gone into voluntary bankruptcy, and that the plaintiff filed its claim against the bankrupt estates on account of this note, and received a dividend of \$152.01. It is further admitted that the plaintiff is the owner and holder of the note, and that no part of it has been paid, except interest to November 1, 1912, and this bankruptcy dividend. The trial court dismissed the action. The plaintiff appeals.

[1] There is no claim of absence or failure of consideration as against the husbands, nor that the signatures of either the husbands or the wives to the note in question were obtained by fraud or through mistake. It is not claimed by the respondents that they signed as indorsers; their answer alleging and their argument being that they signed merely as members of their respective communities, and in order to bind the communities. This was, of course, unnecessary, since the signature of the husband alone to a note given for a community debt or in prosecution of a community enterprise is all that is necessary to bind the husband personally and the community, and to subject the community property to the judgment thereon.

[2] The signatures of the wives for this purpose would be an idle thing and without effect. The wives, in signing this instrument, must have intended that act to have some effect, rather than none. *Toon v. McCaw*, 74 Wash. 335, 133 Pac. 469. Such, also, must have been the intention of the appellant in requiring their signatures. The fact that the wives made themselves parties to the note by signing it raises a presumption, not rebuttable by parol evidence, that they intended to bind themselves personally. In *Hemrich v. Wist*, 19 Wash. 516, 53 Pac. 710, the same defense was pleaded as that here invoked. The note was a joint and several note of the husband and wife. The husband died. The note was not presented to the administrator of the community estate within the time prescribed by statute. Action was thereafter brought against the wife upon the note. The answer alleged a parol understanding that she was not to be held personally liable thereon, and that she signed it only as a member of the community. This court, sustaining a demurrer to the answer, said: "A defense of that kind should not be allowed to contradict the terms of the written instrument. No fraud was alleged as against the appellant in inducing her to

sign the note, and we are of the opinion that her separate property became liable upon the contract." In *Lumbermen's Nat. Bank v. Gross*, 37 Wash. 18, 79 Pac. 470, this court, holding that a community debt was sufficient consideration for a joint note of husband and wife, said: "A community debt or obligation, past or present, is a sufficient consideration for a joint note of the husband and wife. Upon such a note a personal judgment can be recovered against both husband and wife, and on such judgment the community property of the husband and wife, and the separate property of either, not otherwise by law exempt, can be taken in execution. It seems to us that any other rule would lead to the utmost uncertainty and confusion. Under the law of this state, a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose. Her signature to a contract imports the same obligation as the signature of any other person, viz., that a judgment may be taken against her for failure to perform, and that her separate property may be taken in execution to satisfy the judgment." We are thus committed to the doctrine, which it would seem must, in any event, necessarily follow from the removal of the wife's common-law disability to contract, that a wife's signature to a contract imports the same obligation as the signature of any other person, namely, that a judgment may be taken against her for her failure to perform, and that her separate property may be taken in execution to satisfy the judgment.

[3] As we have said, there is no claim that the wives signed the note merely as indorsers, though the position of the names, in the absence of the tacit admission that they signed as makers, might, under the sixth clause of section 17 of the Negotiable Instruments Act (Rem. & Bal. Code, § 3408), warrant the holding that they signed as indorsers. Assuming, however, that they did sign as indorsers, that would not alter the case. They must still be held to have signed, even in that capacity, to some purpose rather than none. Their liability, under the foregoing decisions, would be the same as that of other indorsers. As pointed out in *Bradley Engineering, etc., Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 184 Am. St. Rep. 1127, the main object of the Negotiable Instruments Act was to make the law of negotiable instruments certain and to make such instruments speak the true intent of the parties. There is no good reason, either in law or morals, why this purpose should not prevail, even as between the original parties to a negotiable instrument, in the absence of fraud, mistake, or failure of consideration. In any view of the case, the respondents must, under section 29 of the Negotiable Instruments Act, be held as accom-

modation parties. That section declares: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Rem. & Bal. Code, § 3420.

As we have seen, if they were makers, the community debt was a sufficient consideration for the joint note of husband and wife. If they be held indorsers, whether there was, in fact, an independent consideration for their indorsement is immaterial, since, without consideration, they, as accommodation parties, would be liable to the holder for value, even with notice that they were only accommodation parties. This same rule prevails as in favor of an original payee. *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518. It is true that this court, in the early case of *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919, held that, notwithstanding the wife's right to enter into contracts and manage her separate property, she cannot make a contract of partnership with her husband, and that in the later case of *Elliott v. Hawley*, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016, referring to the *Hayden* Case, we said: "The rule discussed and decided in the case cited is for the protection of the wife's separate property, to prevent her from entering into such engagements with her husband that her separate property may be taken from her in satisfaction of his debts." That, however, is a very different thing from saying, as we are asked to say here, that the removal of the wife's disabilities does not authorize her to enter into the same contracts and incur the same obligations to third persons that any other person sui juris may enter into and incur. The contract here, whether the respondents be regarded as makers or indorsers, is a contract, not with their husbands, but with the appellant.

[4] It is also true, as this court has often held, that a wife's separate property is not ordinarily liable for community debts; but that is a very different thing from holding that she cannot make it so liable by her own contract. That also is a rule for her protection from the acts of her husband. It was never intended to reimpose her common-law disabilities.

We have not discussed citations from other jurisdictions, since our own decisions are clearly controlling. It cannot be doubted that a creditor has the right to proceed against a bankrupt debtor's codebtor, whether the codebtor be primarily or secondarily liable. Section 15 (a), Bankruptcy Act (Act

July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]).

The judgment is reversed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

LYLE et al. v. CUNNINGHAM et ux.

(No. 11,568.)

(Supreme Court of Washington. April 29, 1914.)

1. APPEAL AND ERROR (§ 1041\*)—REVIEW—HARMLESS ERROR.

Where land did not contain the number of acres represented, and the purchaser assigned his contract, the allowance of an amendment to the assignee's complaint, which did not show that the right to sue for the deficiency had been assigned, was harmless, if erroneous, where the assignment carried no beneficial interest, and the purchaser was made a party plaintiff, for the purchaser, being the real party in interest, had the right to litigate his claim of fraudulent misrepresentations in the sale.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.\*]

2. VENDOR AND PURCHASER (§ 334\*)—DEFICIENCY—FRAUD.

Where the owner of property undertakes to point out to a prospective purchaser its boundaries, he must do so accurately, and the failure to do so will constitute a fraudulent representation, entitling the purchaser to recover for any deficiency.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

3. REFORMATION OF INSTRUMENTS (§ 32\*)—CONTRACTS—DEFICIENCY.

Where it was discovered in the spring of 1910 that land sold the preceding year did not contain the number of acres represented, the purchaser, who entered into lengthy negotiations with the vendor was not guilty of laches because he did not institute his action to reform for nearly three years and during the interim allowed his interest payments to lapse.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.\*]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by J. T. S. Lyle and another against James Cunningham and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Boyle, Brockway & Boyle, of Tacoma, for appellants. Bates, Peer & Peterson and Sullivan & Christian, all of Tacoma, for respondents.

MAIN, J. The purpose of this action was to reform a real estate contract, and for other relief. The facts are as follows: On the 14th day of December, 1909, the plaintiff J. L. McMurray, purchased from the defendants the following described real estate: The N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of lot 7, section 20, township 20, range 4 E., W. M., contain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing 59.87 acres, according to the government survey. Also a strip of land 16 feet wide along the east side of lot 16 of said section and township used for a private road to the county road. The purchase price was \$18,000, of which \$9,000 was paid in cash. The remaining \$9,000 was to be paid on or before five years from the date of the contract. Interest was to be charged upon the unpaid balance at the rate of 6 per cent. per annum, payable on or before December 15th of each year. Immediately thereafter McMurray went into possession of the land. On or about April 1, 1910, he caused the land to be surveyed. This survey showed that the tracts of land sold contained only 46.77 acres instead of 60 acres. After discovering this fact, McMurray entered upon negotiations with the defendant James Cunningham for the purpose of securing a settlement, but the parties could not agree upon an adjustment. On October 12, 1910, McMurray made an assignment of the contract to J. T. S. Lyle. Thereafter, and on January 6, 1913, an action was instituted in the name of Lyle as plaintiff. After the issues were formed, the cause came on for trial on March 20, 1913. The defendant at this time objected to the introduction of any evidence because the complaint did not state a cause of action; the reason being that the assignment pleaded from McMurray to Lyle only transferred the contract and not the right of action, if any, that McMurray had on account of fraudulent representations in inducing the sale. The court sustained the objection to the introduction of testimony for the reason given. The plaintiff thereupon asked leave to amend the complaint by adding McMurray's name as a party plaintiff, and setting out that the assignment to Lyle was as trustee only and carried no beneficial interest. To this the defendants objected. The court permitted the amendment, and continued the cause upon terms until the 7th day of April, 1913. At this time the cause was tried upon the issues formed. The plaintiffs claimed that the contract had been induced by fraudulent representations, and sought to have the amount of the purchase price abated in proportion to the deficiency in the quantity of land. In other words, that the contract be reformed so that the plaintiff would be required to pay for only 46.77 acres, the amount actually in the tracts purchased, instead of for 60 acres, the amount represented. The defendants denied the charge of fraud, and claimed affirmatively that the contract had been forfeited owing to the failure of McMurray to meet certain interest and tax payments as required by the contract. The evidence shows that the northern boundary of the tracts of land sold was the Puyallup river. This river, following an irregular course, caused the northern boundary of the land to be likewise irregular. At the time of the purchase it was represented by both the

defendant James Cunningham and his agent that the tracts of land contained 60 acres. While McMurray was looking over the land with a view to purchasing it, in company with the agent and Cunningham, the latter pointed out that the northeast corner of the tract as shown by the government survey was about in the center of the river at that point. It was in fact about 600 feet north of this. The river, since the making of the government survey, had gradually changed its course, cutting into the land which was the subject of the sale. Cunningham stated at this time that there had been cut away at the northeast corner about half an acre, and that this was compensated for by an acquisition of a like amount of land at the northwest corner, by reason of the action of the river at that point. Owing to the irregularity of the northern boundary of the land due to the winding course of the river, McMurray was unable to estimate with accuracy the number of acres in the tracts of land. The court entered a judgment against the defendants in the sum of \$2,150.56, and directed that this amount be credited upon the balance of the purchase price. It was also adjudged that the plaintiffs pay to the defendants the interest due on the deferred payments, and certain taxes. From this judgment the defendants have appealed.

[1] It is first argued that the court erred in permitting the amended complaint to be filed. It must be remembered that McMurray was the real party in interest. He had the right in some form of action to have his claim of fraud litigated. Even if technically the ruling was erroneous, it was not prejudicial. The cause was continued upon terms, and the defendants were given full opportunity to meet the situation presented by the amended complaint. The cause was fairly tried upon the issues. To at this time hold that allowing the amendment was reversible error would be to elevate form at the expense of substantial justice.

[2] Upon the merits the principal issue presented is whether there were fraudulent representations inducing the contract. As appears from the facts stated, there was a misrepresentation as to the location of the northeast corner. Had the location of this corner been in approximately the center of the river, as represented, there would have been no material deficiency in the acreage. The law is that, where the owner of property undertakes to point out to a prospective purchaser its boundaries or corners, he must do so accurately, and the failure to do so constitutes a fraudulent representation. *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880; *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Bradford v. Adams*, 73 Wash. 17, 131 Pac. 449.

In the case last cited it was said: "From numerous decisions of this court, it has become the settled doctrine that the vendor, when he undertakes to point out lands or boundaries to a purchaser, must do so correctly. He has no right to make a mistake except under penalty of having the contract rescinded or responding in damages." McMurray, therefore, was entitled to the relief claimed, either in the form of an abatement of the purchase price to correspond to the deficiency in the acreage, or a judgment for damages.

Since the misrepresentation as to the location of the northeast corner establishes fraud, it is unnecessary to consider whether the misrepresentation as to the number of acres would also be fraudulent in view of the fact that the northern boundary was irregular, and rendered it impossible for the purchaser to accurately estimate the number of acres without causing the land to be surveyed. Upon this question no opinion is expressed.

[3] Some claim is made that McMurray was guilty of laches, and also that by permitting the taxes and interest to become delinquent, his rights were forfeited by notice to that effect, given after the suit was instituted. Neither of these claims are well founded. After McMurray had caused the land to be surveyed, and had thereby discovered the fraud that had been practiced upon him, he entered upon negotiations with the appellant James Cunningham for an adjustment of the matter. These negotiations continued over a considerable period of time. We think the court did not err in resolving these questions against the appellants.

The judgment will be affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

STATE v. SHEPPARD. (No. 11,556.)  
(Supreme Court of Washington. April 28, 1914.)

1. LICENSES (§ 7\*)—PEDDLERS' LICENSES—CONSTITUTIONALITY OF STATUTE.

Const. art. 7, § 5, providing that every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied, only refers to the manner of taxing property according to value in case of a general tax, and according to benefits in case of special assessment, and is not applicable to Laws 1909, c. 214 (Rem. & Bal. Code, § 7067), imposing a license fee upon peddlers, and requiring it to be paid to the county treasury.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

2. LICENSES (§ 33\*)—DISPOSITION OF FEES.

Where revenue, as peddlers' license fees, is directed by law to be paid into the state or county treasury, without specific direction as to its application, it becomes the property of the county or state, applicable to the payment of the general obligations of such county, etc.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 67; Dec. Dig. § 33.\*]

Department 2. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

O. P. Sheppard was charged with the offense of peddling without a license, and, from a judgment dismissing the prosecution, the State appeals. Reversed.

C. G. Jeffers, of Ephrata, for the State. Hibsachman & Dill, of Spokane, for respondent.

PARKER, J. The defendant was charged by information with the offense of peddling without a license in violation of the peddlers' license law of 1909. Rem. & Bal. Code, §§ 7065-7069; Laws of 1909, p. 736. He demurred to the information upon the ground that it did not charge facts constituting a crime, in that the peddlers' license law of 1909 violates section 5, art. 7, of our state Constitution, and is therefore void. The superior court sustained the demurrer upon this ground, dismissed the action, and discharged the defendant. From this disposition of the case, the state, by the prosecuting attorney for Grant county, has appealed.

The claim of counsel for respondent that the law is unconstitutional is rested upon the fact that it does not state the purpose to which the license fees to be collected from peddlers shall be applied, further than that the licensee "shall pay the said treasurer the county license fee as follows: 1. Peddler on foot, \$100.00. 2. Peddler with one horse and wagon, \$150.00. 3. Peddler with two horses and a wagon, \$250.00. 4. Peddler with any other conveyance, \$300.00." Rem. & Bal. Code, § 7067. This, it is insisted, is such a failure to comply with section 5, art. 7, of the Constitution, as to render the law void. That section reads as follows: "No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." It is argued that since the fees exacted by the law would be excessive, viewed as an exercise of the police power for regulation only, that the law is, in substance, an exercise of the taxing power, and, as such, it must, in order to be a valid exercise of that power, state distinctly the object to which the moneys so coming into the county treasury shall be applied. The constitutionality of this law was the subject of our consideration in McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (N. S.) 1207, where it was held constitutional, upon the theory of it being an exercise of the taxing power. The attack then made upon the law did not, however, rest upon the ground here urged against it.

[1] The controlling question here is: Does the above-quoted section of the Constitution have reference to a tax of this nature or only

to a tax upon property? It is, of course, only a limitation upon the manner of exercising the taxing power, as, manifestly, are also all of the other provisions of article 7 of the Constitution wherein it is found. Those provisions, it seems to us, have reference only, when read together, to the manner of taxing of property according to value, if the tax be general, and according to benefits, if the tax be by special assessment. In *State v. Clark*, 30 Wash. 439, 71 Pac. 20, it was held that the rule of equality imposed upon the legislative exercise of the taxing power, found in article 7 of the Constitution, did not render the graduated inheritance tax unconstitutional, because such constitutional rule referred only to tax upon property, and that, the Constitution being silent on the subject of inheritance tax, the Legislature has inherent power to provide for the imposition of such a tax, unrestrained by the rule of equality applicable to a property tax. The only taxes mentioned in article 7, or elsewhere, in the Constitution are property taxes, and, from the reading of that article as a whole, we are of the opinion that the limitation here sought to be invoked is no more applicable to this tax than the equality rule is applicable to the inheritance tax. This tax, like the inheritance tax, finds no mention in the Constitution, and, like the inheritance tax, is exacted by virtue of the inherent power of the Legislature, unrestrained, we think, by any constitutional rule of the exercise of that power.

[2] When revenue so derived is, by law, directed to be paid into the state, county, or municipal treasury, without specific direction as to its application, we think the conclusion necessarily follows that it is intended to become the property of the state, county, or municipality, as the case may be. In *State ex rel. Adams v. Irwin*, 74 Wash. 589, 593, 134 Pac. 484, 485, we said: "Manifestly all lawful obligations of a municipality are payable from its general fund, unless the law specifically provides otherwise."

We think it is also manifest that all revenues coming into the treasury of a municipality in pursuance of law, unless the law specifically provides otherwise, becomes a part of its general fund, applicable as such to the payment of the general obligations of such municipality, without any specific legislative direction therefore, except it be the proceeds of such a tax as the Constitution requires shall be levied only in connection with a legislative statement of its purpose and applicability. We conclude that the peddlers' license law does not violate the constitutional provision here invoked against it.

The judgment is reversed.

CROW, C. J., and FULLERTON, MOUNT.  
and MORRIS, JJ., concur.

# FLOOD v. VIRNIG et al. (No. 11,557.)

(Supreme Court of Washington. April 29, 1914.)

## TAXATION (§ 5\*)—LIABILITY OF PERSONS AND PROPERTY—HOMESTEAD INTEREST—SUSPENSION OF LIABILITY.

Plaintiff, whose proof upon his application for a patent under the law as to commuted homestead entries, was accepted and his money received by the United States land office, and a receipt therefor issued, acquired a beneficial interest in the land subject to taxation by the state, and the subsequent rejection of his proof and the holding up of his application for patent until final favorable determination by the General Land Office did not suspend the state's right to tax the land, which ceased to be public land after it was entered at the local land office and a certificate of entry given to plaintiff.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 17, 81-44; Dec. Dig. § 5.\*]

Department 2. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action for injunction by Henry Flood against M. H. Virnig and others, as Commissioners of Grant County, and C. T. Saunders, as Treasurer. Judgment for defendants, and plaintiff appeals. Affirmed.

Davis & Davis, of Spokane, for appellant.  
C. G. Jeffers, of Ephrata, for respondents.

MORRIS, J. Appellant sought to enjoin the officials of Grant county from collecting taxes levied upon his lands for the years 1909-10-11, and appeals from an adverse ruling sustaining a demurrer to his complaint and a dismissal of the cause upon his refusal to plead further. The complaint recites that appellant entered the land as a homestead; that on July 17, 1908, he paid the receiver of the United States land office at North Yakima the sum of \$402; that at the time of making said payment he submitted his proof upon his application for a patent in accordance with the law relative to commuted homestead entries, and that the receiver issued to him a receipt for the money so paid, showing the payment of the money upon his commuted homestead entry for 160 acres of land at \$2.50 per acre, and the taking of testimony in support of the application. The receipt is set out in full, with an allegation that no other receipt or certificate was received by him. The complaint then recites "that some time after having made proof" he was notified by the register and receiver that his proof was rejected upon the ground of fraud, and that he might appear before a United States commissioner and give testimony "relative to the matter of the declaration of the receiver to cancel his homestead entry," and that a final hearing would be had before the register and receiver 30 days later; that he so appeared, submitted his testimony, and the register and receiver rejected his proof and canceled his homestead entry; that he then appealed to the Com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

missioner of the General Land Office, and that in January, 1912, after a hearing before the Commissioner, the ruling of the register and receiver was reversed, and he was notified of his right to a patent to the land. Upon these facts he bases his claim that the land was not subject to taxation by the state for the years 1909-10-11.

It is apparent that appellant's proof was accepted in the first instance at the hearing in July, 1908, and that, upon such acceptance, his money was received. When he made his proof and it was accepted by the local land office and his money received and the receipt issued, he acquired a beneficial interest in the land subject to taxation. *Haumesser v. Chehalis County*, 136 Pac. 1141. That this proof was afterwards rejected and his application for patent held up until the final determination by the Commissioner of the General Land Office does not suspend or deprive the state of its right to tax the lands, as appellant, during all these proceedings, and subsequent to the first acceptance of his proof, retained his interest in the land. Public lands cease to be public lands after they have been entered at the local land office and a certificate of entry has been given the applicant. *Carroll v. Safford*, 8 How. 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363.

Appellant had paid for the land in full. The money had been accepted and retained by the United States, and the fact that the government withheld the patent pending investigation into appellant's right thereto did not deprive him of his equitable title to the land. "Whenever full payment has been made to the United States, and the full equitable title has passed to an individual purchaser or homesteader, the mere delay in furnishing to such purchaser or homesteader the legal evidence of his title does not relieve the land from ordinary state taxation." *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162. "The party who makes proofs which are accepted by the local land office, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation." *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737.

From the time of the issuance of the receipt upon proof taken, appellant was in possession of these lands under his receipt, which gave him a right of property in the land, which could be divested only by subsequent proceedings on the part of the government. "He who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation." *Wisconsin C. R. Co. v. Price*

*County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687.

Many other federal authorities might be cited, but the above, in connection with the *Haumesser Case*, are sufficient to establish the right of the state to tax these lands.

The judgment is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

## ALASKA COAST CO. v. ALASKA BARGE CO. (No. 11,696.)

(Supreme Court of Washington. April 25, 1914.)

### 1. SHIPPING (§ 58\*)—CHARTER PARTIES—BURDEN OF PROOF.

A charter party provided that the vessel should be in complete control of the charterer, except that the owner might select the chief engineer, and that the master and pilot should be satisfactory to the owner, and required the return of the boat in as good condition as received, wear and tear and the act of God excepted. *Held* that, upon the return of the boat injured, the charterer has the burden of showing that the injury was caused by the act of God.

[Ed. Note.—For other cases, see *Shipping*, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.\*]

### 2. SHIPPING (§ 58\*)—CHARTER PARTY—"ACT OF GOD"—WHAT CONSTITUTES—"INEVITABLE ACCIDENT."

The term "act of God" is not equivalent to "inevitable accident," for, while every act of God is an inevitable accident, every inevitable accident is not necessarily an act of God, for inevitable accident may be the result of the acts of men; and hence proof by a charterer of a vessel that, when it was proceeding in still water many fathoms deep, the propeller struck something which broke off a blade will not show that the accident was the result of an act of God.

[Ed. Note.—For other cases, see *Shipping*, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 118-126; vol. 4, pp. 3571-3573.]

### 3. SHIPPING (§ 39\*)—CHARTER PARTY—CONSTRUCTION.

While the charterer of a vessel is only a bailee, the duties of the charterer may be fixed by the charter party, which special contract will prevail against the general principles of law applicable to such bailments.

[Ed. Note.—For other cases, see *Shipping*, Cent. Dig. §§ 141-148; Dec. Dig. § 39.\*]

Department 1. Appeal from Superior Court, King County; *Boyd J. Tallman*, Judge.

Action by the Alaska Coast Company against the Alaska Barge Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Richard Saxe Jones, of Seattle, for appellant. Wm. H. Gorham, of Seattle, for respondent.

GOSE, J. This is an action upon a charter party for damages sustained to a steamboat, it being alleged that the charterer breached

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

its contract in failing to return the boat in good condition.

The appellant, being the owner of the steamship *Jeannie*, chartered it to the respondent for voyages from Puget Sound to ports in Southeastern Alaska. The charter party provided that the vessel should be delivered to the respondent "unmanned and without a crew;" that the owner should carry insurance on the steamship "not to exceed \$27,000," in some insurance company satisfactory to it, for which the charterer agreed to pay at the rate of 15 per cent. per annum, plus additional short-rate charges if the policy should be canceled, for such time as the boat should be engaged in the service of the charterer; that the owner should select a chief engineer for the operation of the steamship during the full term of the charter, but that the master and pilot were to be selected by the charterer, and should be satisfactory to the owner. It was further agreed that the owner should not be liable "for the operation, maintenance, and control of said steamship, but the same is fully assumed by the party of the second part [the respondent], except that, if such steamship is not properly cared for by the party of the second part in accordance with the views and opinions of the chief engineer, acting with either the master or pilot, then party of the first part may immediately cancel this charter and re-take possession of said steamship. \* \* \*

It is further agreed that party of the second part will return said steamship *Jeannie* to party of the first part upon the expiration of this charter, or any extension thereof, in as good condition as she is received, natural wear and tear and the act of God or the enemies of the United States of America excepted; but that, if party of the first part shall receive from insurance placed upon said steamship by party of the first part, any sum or sums arising from any cause covered by such insurance, then the sum so received by party of the first part shall be deducted from any claim of loss, damage, or injury for which party of the second part would be liable under this clause. \* \* \*

In the event that said steamship shall meet with any accident for which insurance is thereafter collected, then the amount of insurance so collected by party of the first part and retained by them, shall be the full and true measure of all damage or loss sustained, and no claim shall be made on parties of the second part by party of the first part for loss or damage to said ship by reason of any accident happening thereto which is covered by insurance."

After the *Jeannie* was turned over to the respondent, it struck some unknown, submerged object in Frederick Sound in Alaskan waters, threw a propeller blade, and otherwise damaged the ship. The ship was returned to appellant in damaged condition, and this action is brought to recover the

amount of such damages. The appellant took out the required amount of insurance, but it is conceded that the damages sustained are not recoverable under the policies. The respondent paid the premium upon the policies in harmony with its agreement.

[1, 2] The first question to be considered is: Was the accident which caused the damage an "act of God?" The burden of proof was upon the respondent to show that the injury sustained was caused by an "act of God," in order to excuse itself from liability under this clause of the charter. *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *The Majestic*, 106 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *McKinley v. C. Jutte & Co.*, 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452; *Ewart v. Street*, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 394; *Klair v. Wilmington Steamboat Co.*, 4 Pennewill (Del.) 51, 54 Atl. 694.

In *Ewart v. Street*, supra, it is said: "It was rightly said on the part of the plaintiffs that it is enough to show the damage done, in order to render the defendants liable; and the burden is on them to show that it was occasioned by such a cause as will exempt them from liability."

In *McArthur v. Sears*, supra, the court said: "The defendant was a common carrier; and it is not denied, as a general rule, that, to protect himself from responsibility for the loss, he was bound to prove that it arose from the act of God or the enemies of the country."

In *Merritt v. Earle*, supra, the term "act of God" is thus defined: "The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses. The expressions 'act of God' and 'inevitable accident' have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an 'inevitable accident' which no foresight or precaution of the carrier could prevent; but the phrase 'act of God' denotes natural accidents that could not happen by the intervention of man, as storms, lightning, and tempest. The expression excludes all human agency. In the case of *Trent Proprietors v. Wood*, 4 Doug. 287, Lord Mansfield said: 'The general principle is clear. The act of God is natural necessity, as winds and storms, which arise from natural causes, and is distinct from inevitable "accident."' The same judge, in *Forward v. Pittard*, 1 Term Rep. 27, defined the 'act of God' to be something in opposition to the act of man, adding 'that the law presumes against the carrier, unless he shows it was done by such an act as *could* not happen by the intervention of man, as storms, lightning, and tempest.'" (The italics are ours.) Sub-

stantially the same definition is given in *Pollack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115.

In *Reaves v. Waterman*, 2 Speers (S. O.) 197, 42 Am. Dec. 364, it is said: "The act of God is commonly illustrated by such natural convulsions as tempests, lightning, earthquakes, the unknown shifting of shoals, and the like."

In *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 583, it is said: "It is true that every 'act of God' is an inevitable accident, because no human agency can resist it; but, because it is so, it does not therefore follow, in the sense of the books, that every inevitable accident is an act of God. Damage done by lightning is an inevitable accident, and also an act of God; but the collision of two vessels in the dark is an inevitable accident, but not an act of God, such as the stroke of lightning, nor is it so considered by the authorities."

In 1 Cyc. p. 758, in a footnote, it is said that in numerous cases the courts have expressed the opinion that the words "inevitable accident" and "unavoidable accident" are exactly equivalent to the expression "act of God." "This is not strictly true, however, for, while every act of God is an inevitable accident, every inevitable accident is not an act of God." In *Blythe & Lehman v. Denver & R. G. Ry. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403, it is said: "\* \* \* There is a legal distinction between 'inevitable accident' and the 'act of God.'" In *McKinley v. C. Jutte & Co.*, 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452, it is remarked that: "The terms 'inevitable casualty or accident' and 'acts of God' are not synonymous. 'Inevitable casualty' is a broader and more comprehensive term than 'act of God.'"

In *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398, it is said: "If the defendants are common carriers, the question must be merely: What are the liabilities of common carriers? The answer is: For all losses, even inevitable accidents, except they arise from the act of God or the public enemy."

These cases are not in conflict with *Smith v. North American T. & T. Co.*, 20 Wash. 580, 56 Pac. 372, 44 L. R. A. 557, and *Bullock v. White Star Steamship Co.*, 30 Wash. 448, 70 Pac. 1106. Nor are they opposed to the rule announced in *The Majestic*, cited by the respondent, where the court said: "The burden in this respect is on the carrier. *Clark v. Barnwell*, 12 How. 272 [13 L. Ed. 985]; *Transportation Co. v. Downer*, 11 Wall. 129 [20 L. Ed. 160]; *The Edwin I. Morrison*, 153 U. S. 199 [14 Sup. Ct. 823, 38 L. Ed. 688]; *The Caledonia*, 157 U. S. 124 [15 Sup. Ct. 537, 39 L. Ed. 644]. The act of God, said Chancellor Kent (volume 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies'; and, again (volume 3, p. 216), that 'perils of the sea denote

natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *quod damno fatali contingit, cuius diligentissimo possit contingere*. It is a loss happening in spite of all human effort and sagacity.' The words 'perils of the sea' may, indeed, have grown to have a broader signification than 'the act of God,' but that is unimportant here. Judge Shipman in the Court of Appeals quotes from 1 Parsons on Shipping, 255, the definition there given of the 'act of God,' and the reason for it, as follows: "The 'act of God' is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency, in causing the loss; for, if this were possible, he should be held."

Nor are they opposed to the rule announced in *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 394, cited by the respondent, where the court said: "By the act of God is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as the violence of the winds or seas, lightning, or other natural accident. If the loss happen by the wrongful act or neglect of a third person, the carrier is responsible, and is to seek redress of the wrongdoer. If divers causes concur in the loss, the act of God being one, but not the immediate or proximate cause, such act of God does not discharge the carrier. To have this effect, it must be one exclusive of human agency."

The facts touching the cause of the accident are these: The chief engineer testified: "I know she struck something hard, something submerged, and broke one of the blades, and put everything out of line. \* \* \* She gave a sudden stop and then started off. \* \* \* Struck something submerged. I don't know whether it was a log or a chunk of ice, or it might have been a rock." The master of the ship testified that the accident happened in the middle of Frederick Sound, 3 miles from land, in about 125 fathoms of water, in clear weather, with the sea "smooth as glass." He further said: "I felt a jar, but you can feel a jar when a ship loses a blade. It might be a submerged body; it probably was; I don't know. I want to say that I don't know. I just felt the jar." The accident happened in the month of September, in the daytime. It was stipulated that the chief mate would, if called as a witness, testify that he was watch officer on the bridge at the time of the accident, and that he did not see or hear of any floating objects at or near that time. The testimony does not show whether icebergs were to be anticipated at the time and place of the accident.



This is far from showing that the act could not have happened by the intervention of man. It leaves the cause of the accident to speculation. The most that can be said is that it may have been caused by an "act of God," or it may have been caused by the act of man. We are not required to adopt the strict rule laid down by Judge Shipman and quoted in the excerpt from *The Majestic*, viz., that, if it were possible that the injury was caused by the act of man, the respondent should be held. Under the authorities, it is at least required to show by a preponderance of the evidence that an "act of God" was the cause of the injury. In this it has signally failed. Nor are we willing to adopt the respondent's view that, because it may have been an inevitable accident or casualty, it was an "act of God."

The respondent next contends that, under the charter party, the appellant was its own insurer. The charter party is not susceptible of this construction. When taken as an entirety, the view is compelling that the respondent assumed responsibility for all injuries sustained to the vessel not caused by "the act of God or the enemies of the United States of America," and not "covered by insurance." The testimony is that the appellant procured the highest and best form of insurance obtainable. The charter shows that it was clearly in the minds of the parties that the boat might sustain an injury not covered by the exception clause and not covered by the insurance. The responsibility for such damages was assumed by the respondent. While it is true the appellant furnished the chief engineer, it is also true that the respondent assumed control of the vessel.

[3] It is also argued that there can be no recovery without proof of negligence upon the part of the respondent, because it is said that the respondent was only a bailee. The authorities to which we have referred show that this position is untenable. Moreover, if we assume that the charter party was a bailment, the respective duties are fixed by contract, and the respondent's liability must be measured by that instrument. *Patterson v. Wenatchee Canning Co.*, 59 Wash. 556, 110 Pac. 379. In that case we said: "A special contract of bailment prevails against general principles of law applicable, in the absence of an express agreement."

If respondent breached its contract, it is liable, and it can only excuse itself from liability by showing either that the damages were caused by an act of God or covered by the insurance, or probably—but this is not before us under the evidence—that the appellant, had it exercised reasonable care, could have procured insurance which would have covered the damage. The evidence here, however, is that such insurance could not have been obtained. We think, under the law and the evidence, the appellant is en-

titled to recover the damages the vessel sustained.

The case will be remanded, with directions to the trial court to ascertain the damage and enter judgment for the amount thereof.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

# VOLLMAN et al. v. INDUSTRIAL WORKERS OF THE WORLD et al.

(No. 11,365.)

(Supreme Court of Washington. April 25, 1914.)

## APPEAL AND ERROR (§ 781\*)—DISMISSAL—GROUNDS—TERMINATION OF CONTROVERSY.

Where appellants admit that the controversy has ceased, the appeal will be dismissed, since the court will not consider moot or abstract questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by M. Vollman and others against the Industrial Workers of the World and others. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

Beeler & Sullivan, of Seattle, for appellants. Thos. R. Horner and R. B. Brown, both of Seattle, for respondents.

PER CURIAM. During the progress of the oral argument appellants' counsel, in response to a question by the court, admitted that the controversy had ceased. We have uniformly held that we will not consider cases where nothing but moot or abstract questions are involved. *State ex rel. Mortgage Co. v. Meacham*, 17 Wash. 429, 50 Pac. 52; *State ex rel. Land v. Christopher*, 82 Wash. 59, 72 Pac. 709; *Lamona v. Odessa State Bank*, 35 Wash. 113, 76 Pac. 534; *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811; *Smith v. Palmer*, 38 Wash. 276, 80 Pac. 460; *Stevens v. Jones*, 40 Wash. 484, 82 Pac. 754; *Wilson v. Fraser*, 67 Wash. 347, 121 Pac. 829.

In the case last cited we said: "Courts will not concern themselves with academic questions, nor hear and determine abstract questions of law in order to determine as between the parties who shall pay the costs. This rule is so well settled we content ourselves with simply citing the authorities sustaining it"—citing authorities.

Following the uniform practice in these cases, the appeal will be dismissed.

# STATE v. GEORGE. (No. 11,540.)

(Supreme Court of Washington. April 27, 1914.)

## 1. CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—GROUNDS—DEFECTIVE INFORMATION.

Under Rem. & Bal. Code, § 2183, providing that a judgment may be arrested on motion of

the defendant on the ground that the facts stated in the information do not constitute a crime, the sufficiency of the information may be questioned by such motion, although no objection was made thereto before the plea was entered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

## 2. SODOMY (§ 5\*)—"ATTEMPT"—INFORMATION—SUFFICIENCY.

An information charging that the defendant did "attempt to carnally know one —, a living human being by the anus," is not sufficient, since the attempt, either by assault or by solicitation, is punishable, and this information does not therefore inform the accused of the nature of the charge; the word "attempt" meaning an intent coupled with an act, an inchoate effort toward action, and is not synonymous with assault (citing Words and Phrases, title "Attempt").

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 6; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, vol. 1, p. 621; vol. 8, p. 7586.]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Nick George was convicted of attempting to commit the crime of sodomy, and he appeals. Reversed and remanded, with instructions to sustain the motion in arrest of judgment.

Thos. F. Murphine and Harry Sigmond, both of Seattle, for appellant. John F. Murphy and Thos. J. L. Kennedy, both of Seattle, for the State.

CHADWICK, J. [1] Defendant is charged with having attempted to commit the crime of sodomy. The charging part of the information is that he "unlawfully and feloniously did attempt to carnally know one —, a living human being by the anus." When the case was called for trial defendant demurred and objected to the introduction of any evidence on the ground that the information does not state facts sufficient to constitute a crime. This objection was overruled by the court. It was renewed upon a motion in arrest of judgment. The state contends that the objection came too late, citing *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377; *State v. Bodeckar*, 11 Wash. 417, 89 Pac. 645; *State v. Phillips*, 65 Wash. 324, 118 Pac. 43; *State v. McBride*, 72 Wash. 390, 130 Pac. 486. In these cases it is held that a defendant must make timely objection when relying upon the insufficiency of the indictment or information; that our procedure in criminal cases is statutory; that the time for raising such objections is before plea; that courts will not entertain an objection to the introduction of testimony, or pass upon the legal sufficiency of the pleadings, after a plea of not guilty has been entered or while it is pending. As we read the record, we are not called upon to decide whether appellant waived his right to object because of his failure to demur to the information, for the same statute which fixes

the time for demurrer gives the accused the right to raise the same question by motion in arrest of judgment. This appellant did. The right to move in arrest of judgment in such cases is admitted in the *Blanchard Case*. Section 2183, Rem. & Bal. Code, provides that, a judgment may be arrested on motion of the defendant for the following causes: " \* \* \* 2. That the facts as stated in the indictment or information do not constitute a crime or misdemeanor." In *State v. Feamster*, 12 Wash. 461, 41 Pac. 52, this court held, notwithstanding the fact that the defendant had gone through two trials of his case without objecting to the sufficiency of the information, by demurrer or otherwise, that the objection was still available to him under this statute.

[2] Whether the information states a cause of action is a more difficult question. Appellant relies upon the case of *State v. Heath*, 57 Wash. 246, 106 Pac. 756, while the state relies upon the case of *State v. Baker*, 69 Wash. 589, 125 Pac. 1016. The *Heath Case* involved an inquiry as to the sufficiency of an information charging an assault. The *Baker Case*, the sufficiency of an information charging an attempt to commit a robbery. Whether the word "attempt" as used in an information implies a physical act recognized or defined as a crime, or whether the acts constituting the attempt must be set out in every case, are not necessarily pertinent to our present inquiry. In this case, no facts constituting the attempt are set out. This distinguishes this case from the *Baker Case*, where the court held, notwithstanding some general expressions in the opinion, that the information charged the defendant with attempting to do the precise things which are recited in the statute as constituting the crime of robbery, and implied an assault, a physical act. Moreover, it was there charged that the defendant "did unlawfully, feloniously, wrongfully, and with force and violence, attempt to take from the person," etc. This was held to be a sufficient charge of an overt act. But it is our understanding of the law that the word "attempt" does not necessarily imply a physical act. An attempt may consist of acts of persuasion or solicitation or threats. An attempt is "an act done with intent to commit a crime." Section 2264, Rem. & Bal. Code. Reference to the definitions gathered in Words and Phrases under the title "Attempt," et seq., will show that an attempt implies an intent or purpose coupled with an act. It is said to be an inchoate effort toward action. We know of no cases holding that the act or effort employed to effect the object designed must necessarily possess any element of an assault. To apply the *Baker Case* we would have to hold that the words "attempt" and "assault" are synonymous. This is not so. If it were, we might say that the charge of an attempt to commit a crime like sodomy, statutory

rape, adultery, or swindling is equivalent to a charge of assault or physical contact. An attempt may or may not require a physical act touching the person or property of another. An attempt to commit the crime of statutory rape or sodomy, or to obtain property of another by any of the deceitful methods prescribed in our Criminal Code, may be committed by resort to physical acts or by letter (Reg v. Ransford, 18 Cox C. C. 9) or by words. This distinction is recognized by Mr. Bishop. In discussing the crime of sodomy, he says: "A solicitation to commit this offense is an indictable attempt; and there may be other forms of the attempt, as, assault with intent." Bishop, Criminal Law, § 1195. "To make overtures to one to commit sodomy \* \* \* is an indictable misdemeanor, though the person approached declines the persuasion." Id. § 767. Ever since the statute against sodomy was passed it has been held in England that a solicitation to sodomy is an indictable common-law attempt. Id. § 768, 2. Mr. Bishop notes that this doctrine has been questioned in some of the American books. We agree with him that the criticisms are not sound, and are no more than mistaken judicial dictum.

Under the Constitution of this state, and under all authority, an accused person is entitled to demand the nature and cause of the accusation made against him. It being possible to commit the crime charged in more than one way, the facts constituting the crime must be set out with sufficient particularity so that the accused may know, either from the terms of the indictment or information, or from the implications that attend its charging words, the charge he is called upon to meet. If it were not so, a charge of "an attempt to murder" "by killing him" would be good. By this test, the information does not state facts sufficient to constitute a crime.

The case is reversed and remanded, with instructions to sustain the motion in arrest of judgment.

CROW, C. J., and GOSE and ELLIS, JJ., concur.

CARR et al. v. BONTIUS. (No. 11,632.)  
(Supreme Court of Washington. April 27, 1914.)

1. **BILLS AND NOTES (§ 523\*)—ACTIONS—EVIDENCE.**

In an action on a note indorsed over to a third person, but later returned to plaintiffs, evidence *held* to show that plaintiffs were the owners.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.\*]

2. **EVIDENCE (§ 18\*)—JUDICIAL NOTICE.**

In an action on a note, the court may allow reasonable fees, without evidence as to what constitutes a reasonable fee; the court being

as competent to judge of that matter as witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. § 18.\*]

3. **SALES (§ 441\*)—BREACH OF WARRANTY—EVIDENCE.**

In an action on a note given for the price of machinery, evidence *held* insufficient to show a breach of warranty by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

Department 2. Appeal from Superior Court, Lincoln County; F. K. P. Baske, Judge.

Action by A. H. Carr and others against D. C. Bonthius. From a judgment for plaintiffs, defendant appeals. Affirmed.

Martin & Wilson, of Davenport, for appellant. Freece & Pettijohn, of Davenport, for respondents.

MOUNT, J. This action was brought by the plaintiffs upon a promissory note and to foreclose a chattel mortgage given as security therefor. The complaint is in the usual form. The answer of the defendant admitted the execution and delivery of the note and mortgage, and that the same had not been paid, but denied that there was anything due thereon. The defendant alleged affirmatively that the note and mortgage were obtained by fraud and misrepresentation, and were without consideration, and that, if there was any indebtedness thereon, the same was due to the International Harvester Company of America, and not to the plaintiffs. The reply denied the affirmative defenses alleged. Thereafter the cause was tried to the court without a jury. Findings were made in favor of the plaintiffs, and a judgment of foreclosure was entered. The defendant has appealed from that judgment.

It appears from the record that in May, 1911, the appellant purchased a gasoline engine, pump, and pumping plant, to be used for irrigation purposes, and in consideration therefor, executed two notes, both being dated May 6, 1911. One of these notes was for \$457, and was due October 1, 1911; the other was for \$570, due November 1, 1911. They were both made payable to the International Harvester Company of America. The machinery for which the notes were given was purchased by the respondents from the International Harvester Company of America. The notes were taken in the name of the harvester company, and delivered to it by the respondents as security for debts which they were owing to the harvester company. After these notes became due and were not paid, and after the appellant had used the machinery during the season of 1911, an extension of time in which to pay the notes was granted by the respondents to the appellant, and at that time, viz., October 26, 1911, a new note was executed by the appellant, payable to the respondents upon demand, for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

\$1,253.85. This included the amount of the first two notes, which were past due, and also an item of \$170.75, which was due from the appellant to the respondents upon an open account. At the time this last note was given, the two notes first above mentioned were surrendered to the appellant, and the mortgage in question was given to secure the payment of the note last given. Thereafter this note was indorsed by the respondents and delivered to the International Harvester Company of America. The respondents thereafter paid the debts which they were owing the harvester company, and the note was redelivered to them, and, after demand was made for payment thereof, this action was brought upon the note and to foreclose the mortgage.

[1] It is contended by the appellant: First, that the debt represented by the note is due to the International Harvester Company of America, and not to the respondents; and it is contended that the evidence showing the transaction tended to contradict the original notes and the original contract. There is no merit in this position, because it appears without dispute that the original notes, while taken in the name of the harvester company, were taken up and paid by the subsequent note given to the respondents. While this note was indorsed by the respondents, it was afterwards returned to them by the harvester company, and at the time of the trial the respondents were in possession of the note, and, under all the evidence, they were the owners of the note. There was no attempt, and, in fact, there was no evidence, which tended to dispute or vary the terms of the original contract. The respondents, under the evidence, were clearly the owners and holders of the note. In *Seattle National Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262, this court said: "It is in testimony that the note was made formally payable to the Commercial National Bank simply as a matter of convenience in keeping the accounts between the two banks, and, so far as the sufficiency of the complaint is concerned, if there had been no allegation in relation to the assignment of the note, the allegation that the plaintiff was the owner and holder of it would have been sufficient, under the statute which requires that the action shall be brought in the name of the real party in interest, to have admitted proof of the assignment and transfer of the note to the plaintiff, or of any fact which would tend to establish the ownership of the plaintiff in the note." It is clearly and positively shown in this case that the respondents were the real parties in interest and the owners of the note.

It is next argued that the court erred in refusing to make certain findings proposed by the appellant. But we think the evidence is clear to the effect that the note sued upon was given by the appellant to the respondents

for a valuable consideration; that the note was past due; and that the respondents were the owners and holders of it at the time. The respondents, therefore, were clearly entitled to foreclose the mortgage.

[2] The court found that \$250 was a reasonable attorney's fee to be allowed for the foreclosure. It is argued by the appellant that there was no evidence to support this conclusion. But we held in *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297, that no evidence was necessary in such cases; that the court was as competent to judge what was a reasonable attorney's fee in such a case as the ordinary witness which might be called. There was no error in this finding.

[3] It is also argued by the appellant that the pump was sold upon a guaranty to do certain work, and that the pump and engine did not comply with the guaranty. A reading of the evidence in the case shows that at times the engine and pumping plant did not work properly. But the evidence also shows that whatever was wrong with the engine or pumping plant was due entirely to the method of its management, and not to any defect in the engine or the plant. Furthermore, after the appellant had used the engine and pumping plant for one season, he gave the note and mortgage sued upon herein without questioning the warranty. And we are satisfied from the evidence that there was no sufficient showing that the pumping plant did not fulfill the warranty, or that the appellant was not perfectly satisfied therewith.

We find no merit in the appeal, and the judgment is therefore affirmed.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

In re BECK'S ESTATE. (No. 11,604.)  
(Supreme Court of Washington. April 28, 1914.)

# 1. WILLS (§ 293\*)—CONTEST—ADMISSIBILITY OF EVIDENCE—CAPACITY.

In a will contest on the ground that it was not the will of testatrix because she did not understand the English language, or what was being said when it was read to her in English by the attorney who drew it, evidence that he was requested to draw it, and obtained all his information as to it from the contestees, sons of testatrix and the principal beneficiaries, was material.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 668-672, 675-678; Dec. Dig. § 293.\*]

# 2. WILLS (§ 164\*)—CONTEST—ADMISSIBILITY OF EVIDENCE—UNDUE INFLUENCE.

Such evidence was also admissible on the issue of undue influence on the part of contestees.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

# 3. WITNESSES (§ 199\*)—PRIVILEGED COMMUNICATION—ATTORNEY.

Such evidence was not inadmissible on the ground that the communications by the attorney to the beneficiaries, or by them to him, were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

privileged, since in drafting the will he was acting for the testatrix.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 749-751, 766, 767; Dec. Dig. § 199.\*]

**4. WILLS (§ 302\*)—CONTEST—SUFFICIENCY OF EVIDENCE—PRIMA FACIE CASE.**

A showing that testatrix did not understand the English language in which her will was written, and that it was read to her in English, and not explained to her so that she could understand its terms, was sufficient to make a prima facie case that it was not her will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.\*]

Department 2. Appeal from Superior Court, Whitman County; R. L. McCrosky, Judge.

Contest of the will of Annie Beck, deceased, after its admission to probate, between Samuel Beck and others against John F. Beck and another. Judgment for contestees, and contestants appeal. Reversed and remanded.

Chas. R. Hill and Neill & Burgunder, both of Colfax, for appellants. Hanna & Hanna, of Colfax, and Fred E. Helwig, of Malden, for respondents.

**MOUNT, J.** This action is a contest of a will. The will was executed by Annie Beck, deceased, and was admitted to probate by the superior court of Whitman county on March 1, 1912. Thereafter, in September, 1912, the contestants filed a petition, contesting the will of the deceased upon the following grounds: Undue influence upon the testatrix by John F. Beck and Joseph W. Beck, sons of the deceased, and the principal beneficiaries under the will; that the will was not executed as required by law; that the testatrix at the time of executing the will did not have sufficient mental capacity to execute the same; that she did not know and did not understand the contents of the instrument; that the will was written in the English language, which the testatrix could not speak or understand; that the will was not translated to her; that she did not sign the will, or request any one to sign it for her; and that it was not her will. Issues were made up upon these questions, and the case was tried to the court without a jury. After the evidence offered on behalf of the contestants was before the court, the court dismissed the action. This appeal followed.

It was clearly shown by the evidence of the contestants that the testatrix, at the time she made the will, was 73 years of age; that she had lived in the vicinity where the will was made for a long period of years; that she did not understand or speak the English language, her native tongue being Bohemian; and that she could not carry on a conversation either in German or English.

The will was prepared by one Helwig, an

attorney, and was executed by the testatrix in the presence of two witnesses. She was not able to write her name, but signed the will by making a cross. The will was read to her in English by one of the attesting witnesses, and, when asked if she understood it she said, "Yes." She was asked several questions, and to each she simply answered, "Yes." She may or may not have understood the questions, but it is apparent from the evidence which is brought here that she did not understand the English language, and certainly did not understand the will when it was read to her. If the will was not explained to her in her native tongue, she clearly did not know the contents of it.

[1,2] The principal contention of the contestants upon the trial was, that the will was not the will of the testatrix, because she did not understand the English language, and did not understand what was being said when the will was being read to her. During the trial, one Helwig, the attorney who drew the will, was upon the witness stand, and was asked the question: "Q. At whose request did you draft it?" This question was objected to upon the grounds that it was immaterial and irrelevant, and not responsive to any issue in the action, and that it was privileged. The court sustained the objection upon the ground that the testimony was immaterial. The contestants then offered to prove that the witness "was employed by and was requested by John and Joe Beck, the principal beneficiaries of the instrument admitted in this court as the last will of Annie Beck, deceased, and that they gave him the information from which the will was drawn by him, and that all the information that he had was derived from one or the other or both of those parties, and from no other source." This offer was objected to, and the objection was sustained. We think the court erred in rejecting this evidence. As above stated, the principal points relied upon by the contestants were that the deceased at the time the will was executed by her did not understand it, and upon the ground of undue influence exercised by these two beneficiaries upon the testatrix. The fact that these two beneficiaries procured an attorney to draw the will, if it be a fact, was material upon both questions: First, as to whether the testatrix understood the will; and, second, upon the question of undue influence.

In 1 Underhill, *Law of Wills*, § 137, it is said: "The fact that the person who drew a will for the testator, or who was active in procuring and superintending its execution, is named as beneficiary in it was sufficient to make the instrument invalid at the Roman civil law. But the common law does not go to such an extreme as this. \* \* \* Many cases seem to hold that the circumstance that a party draws a will, or actively superintends its execution, under which he

takes a legacy, alone and without positive proof of the active procurement of the benefit, raises a presumption of undue influence exerted by him which must be rebutted by clear and satisfactory evidence. \* \* \* The fact that the party superintending the execution of the will, or the person who propounds it for probate, takes a large benefit under it is a circumstance raising a suspicion of undue influence. It must then be shown to the satisfaction of the court that the testator did in fact know and approve of the contents of the will. Upon this point the evidence must be clear, affirmative, and conclusive. \* \* \* But the safer and more correct statement of the rule is that such a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. Such wills are certainly not looked upon with favor. The court will cautiously and carefully examine into the circumstances which were attendant upon their execution, and will scan with a scrutinizing eye the evidence offered to procure their probate. No presumption of undue influence invariably arises from the fact that a will is drawn by a beneficiary under it, which is sufficient to cast the burden of showing the absence of influence upon the proponent. It is a fact to be considered with other facts. It is undoubtedly a suspicious fact, but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected. In some cases it would have no weight at all. Thus, if it appear that the testator had testamentary capacity, that he dictated his will and knew its contents at the date of its execution, and that it was executed in the statutory manner, the mere fact that the will was written by the sole beneficiary would not be enough, unless coupled with other extremely suspicious facts, to overthrow it, or, taken alone, to cast the slightest suspicion upon it."

And in *Rood on Wills*, § 190, it is said: "Undue influence is not to be inferred from the scrivener being procured by the principal legatee, though the testator lived with him and was old and sick. If the testator was well and strong, there arises no presumption of undue influence or fraud from the fact that the person who drew it up was favored by it. But if the testator was weak and the scrivener benefited, slight circumstances in addition may suffice to cast the burden upon him to show that there was no fraud practiced and no undue influence exercised."

In this case it was shown conclusively, we think, that the testatrix did not understand the English language sufficiently to carry on an ordinary conversation, and it is clearly shown that she did not understand enough of the English language to comprehend the terms of the will which was read to her in the English language. It seems plain, therefore, that if it can be shown that the will

was procured by the principal beneficiaries, who stated to the scrivener the terms of the will, and it was then drawn according to their dictation and not according to the dictation or desires of the testatrix, and it was not fully explained to her, or that she did not understand it as it was read to her in English, this would be sufficient to set the will aside. We are satisfied, therefore, that the court should have allowed the fullest investigation into the facts surrounding the drafting of the instrument, and if they were unexplained and not shown to have been thoroughly understood by the testatrix, the will was clearly not her will.

[3] We think there is no merit in the contention that the communication was privileged. If the will was drawn by an attorney who was employed by the principal beneficiaries, the communications made by such attorneys to the beneficiaries, or by the beneficiaries to the attorney, cannot, we think, be reasonably interpreted as privileged, because in drafting the will he was acting for the testatrix.

[4] The facts shown, namely, that the testatrix did not understand the English language, in which the will was written, and that the will was read to her in English, and not explained to her so that she could understand its terms, were sufficient, we think, to make a prima facie case that it was not her will. We are of the opinion, therefore, that the court erred in refusing to receive the evidence offered, and also in concluding that a prima facie case had not been made.

The judgment is therefore reversed and the cause remanded for further proceedings.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

#### GOSKY v. SEATTLE TAXICAB & TRANSFER CO. (No. 11,577.)

(Supreme Court of Washington. April 29, 1914.)

#### TRIAL (§ 295\*)—INSTRUCTIONS.

In an action for personal injuries by being struck by a taxicab, in which an ordinance fixing the speed limit within certain districts was excluded, because there was no evidence that the accident occurred within such districts, the court submitted the case upon the theory that negligence was to be determined independently of the ordinance, but, in prefacing the instruction, reference was made to the ordinance. The court had previously instructed that there was no evidence that the taxicab was being driven in violation of the ordinance, and that it should not be considered. *Held*, that the reference to the ordinance could not have misled the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Harry Gosky against the Seattle Taxicab & Transfer Company. From a judg-

ment for plaintiff, defendant appeals. Affirmed.

Brightman, Halverstadt & Tennant, of Seattle, for appellant. Milo A. Root and Reed & Hardman, all of Seattle, for respondent.

**MAIN, J.** In this action the plaintiff sought to recover damages for personal injuries alleged to be due to negligence chargeable to the defendant.

On August 31, 1912, the plaintiff while crossing Second avenue, in the city of Seattle, at the intersection of that street with Union street, was struck by a taxicab operated by one of the defendant's drivers. On January 7th thereafter the present action was instituted. After the issues were formed, the cause came on for trial before the court and a jury. A verdict was returned for the plaintiff in the sum of \$850. Upon the verdict judgment was entered. The defendant appeals.

A detailed statement of the facts is unnecessary. The case of *Chase v. Seattle Taxicab & Transfer Co.*, 139 Pac. 499, and the present case were argued on the same day. Practically the same briefs were filed in each case. Upon oral argument, if not in the briefs, it was practically conceded that the holding in this case should follow that of the *Chase Case*, unless the error sought to be predicated upon an instruction should cause a reversal and a new trial. The affirmation of the *Chase Case* renders it only necessary here to consider the question of the instruction.

During the trial the respondent offered in evidence an ordinance fixing the speed limit of automobiles within certain districts in the city of Seattle. Owing to the fact that there was no evidence offered showing that the present accident occurred within a district where the speed as fixed by the ordinance was eight miles per hour, it was not admitted. The cause was submitted to the jury by the trial court upon the theory that it was to determine, from the surrounding facts and circumstances, whether the driver of the taxicab had exercised due care, independent of any consideration of the ordinance. In prefacing the instruction, the trial judge referred to the ordinance which made it illegal for a taxicab to be driven at a speed greater than eight miles per hour. He had previously told the jury that there was no testimony that the taxicab was being driven at a speed in violation of the ordinance, and that it should not take such ordinance into consideration in deliberating upon the case. The instructions, when read in their entirety, make it plain that the court was submitting to the jury the question of the appellant's negligence, disregarding any speed limit fixed by the ordinance. While the reference to the ordinance which is com-

plained of may have been improvident, it could not, in the light of the other instructions, have misled the jury.

The judgment will be affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

# ATWOOD et al. v. WASHINGTON WATER POWER CO. (No. 11,615.)

(Supreme Court of Washington. April 29, 1914.)

## 1. TRIAL (§ 139\*)—EVIDENCE—QUESTION FOR JURY.

Where reasonable men may differ as to the sufficiency of the evidence, the jury must determine the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

## 2. CARRIERS (§ 320\*)—INJURY TO STREET CAR PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

Whether a street car was negligently started with a sudden jerk so as to cause injury to a passenger attempting to board the car *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

## 3. DAMAGES (§ 208\*)—PERSONAL INJURIES—EVIDENCE.

Where, in an action for a personal injury, a physician testified that the injury produced the miscarriage of plaintiff, and other physicians testified to the contrary, and plaintiff testified that her health was good before the injury, and that immediately after the injury she began to suffer pain and continued to suffer pain until the miscarriage occurring on Thursday following the injury on Sunday, the question whether the miscarriage was caused by the injury was properly submitted to the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

## 4. DAMAGES (§ 163\*)—PERSONAL INJURIES—EVIDENCE.

One suing for personal injuries need only show that an injury complained of probably resulted from the accident, and he may rely on presumptions and inferences and the probabilities must be weighed by the jury in determining the extent and character of the injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.\*]

## 5. DAMAGES (§ 20\*)—INJURIES TO PASSENGERS—NEGLIGENCE—LIABILITY.

A carrier negligently causing or contributing to a passenger's injury is liable for any injury flowing from its negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 55-57; Dec. Dig. § 20.\*]

## 6. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested instructions, where the law of the case was covered by the court's instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Crow, C. J., and Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Dora E. Atwood and husband against the Washington Water Power Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 71 Wash. 518, 128 Pac. 1065.

Post, Avery & Higgins, of Spokane, for appellant. Munter & Flood, of Spokane, for respondents.

GOSE, J. This action was brought to recover damages for personal injuries sustained by the plaintiff wife in one of the defendant's street cars, in consequence of its alleged negligence. From a verdict and judgment in favor of the plaintiffs, the defendant prosecutes an appeal. This is the second appeal. See *Atwood v. Washington Water Power Co.*, 71 Wash. 518, 128 Pac. 1065.

The testimony tends to prove the following facts: On Sunday afternoon, June 18, 1911, between 5 and 6 o'clock, the respondent wife, hereafter called the respondent, with two of her small children and her stepdaughter, became passengers on one of the appellant's street cars. Before entering the car, the respondent lifted or assisted her little daughter, five years of age, weighing 30 or 35 pounds, onto the first step of the car. She then entered the car, followed by her son, then about eight years of age, and a grown stepdaughter. When the respondent reached the platform of the car, she took her daughter by the hand, walked into the car, and had gotten almost to the first cross seat when the car started, with "such an unusual jerk" that she was thrown back, her shoulder and the right side of her head striking the door. She testified that she had often ridden on street cars, and that she had "never [before] experienced such a violent shock, so quick and so sudden." The respondent's son, who was about nine years of age at the time of the trial, testified that the car started with a jerk as he was entering the door, and that he fell into the arms of the conductor. The stepdaughter testified that the car started with quite a jerk; that she had ridden on street cars many times; that she "never experienced that kind of a jerk before"; and that she was in the vestibule, had hold of a rod, and was thrown toward the north when the car started. The appellant's testimony tended to show that no such accident happened.

[1, 2] The appellant contends that the facts stated do not establish its negligence. The real question is, Does the evidence sustain an inference of negligence, or, put in another way, did it justify the jury in finding that it was negligent? We think the jury was warranted in inferring negligence. *Behling v. Seattle Electric Co.*, 50 Wash. 150, 98 Pac. 954. The rule adopted by this court, and indeed by most courts, is that, where the minds of reasonable men may differ as to the legal sufficiency of the evidence, the jury and not the court must determine the issue. *Thore-*

*son v. St. Paul & Tacoma Lumber Co.*, 73 Wash. 99, 131 Pac. 645, 132 Pac. 860.

In *Work v. Boston Elevated Ry.*, 207 Mass. 447, 93 N. E. 693, cited by appellant, the court, after observing that jerks while running, and jerks in starting and stopping to take on and let off passengers, and lurches in going around curves, are among the usual incidents of travel in electric cars which passengers must anticipate, and that if a passenger is injured by such a jerk, jolt, or lurch, there is no liability, said: "On the other hand, an electric car can be started and stopped, for example, with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence and the company liable. The difference between the two cases is one of degree. The difference being one of degree and one of degree only, it is of necessity a difficult matter in practice to draw the line between these two sets of cases in which opposite results are reached. No general rule can be laid down. Each case must be dealt with as it arises. \* \* \* The plaintiff to make out a case must go further than merely to characterize the jerk, jolt, or lurch, and must show (1) by direct evidence of what the motorman did that he was negligent in the way that he stopped or started the car (as in *Cutts v. Boston Elevated Railway*, 202 Mass. 450 [89 N. E. 21]), or (2) by evidence of what took place as a physical fact. \* \* \*." It will be observed that this differentiation is covered by the testimony in the case at bar. The testimony is that the jerk was not only unusual, but the most unusual that witnesses, who were accustomed to riding on street cars, had ever experienced. In addition to this, the evidence discloses what took place as a physical fact; that is, it shows the physical result of the alleged negligence. The appellant also cites *Wile v. Northern Pacific Ry. Co.*, 72 Wash. 82, 129 Pac. 889. There the injury occurred on a train composed of 38 freight cars and a passenger car. The negligence claimed was a bump from the front of the standing train. In holding that no negligence was shown, we said that the respondent did not attempt to show that the jolt or jar was greater than is ordinarily incident to the operation of freight trains with passenger accommodations attached. In *Bollinger v. Interurban Street Ry. Co.*, 50 Misc. Rep. 98 N. Y. Supp. 641, cited by the appellant, the court said: "The only evidence as to the character of the start and stopping was that of the plaintiff's wife, who repeatedly used the words, 'violent jerk,' and that of her sister, who said that the car started with a 'sudden jerk.' This evidence conveys no definite impression to the mind as to the character of the movement of the car, does not show that that movement differed in any way from that usually attending the starting and stopping of an electric car, and is insufficient as evidence of defendant's



negligence." It is, of course, true that negligence cannot be inferred from the use of mere exclamatory words without some accompanying statement showing an unusual or extraordinary condition, or some unusual physical result.

[3] The respondent suffered a miscarriage on Thursday following her injury on Sunday. The appellant argues that the evidence does not warrant the inference that the injury sustained on the car caused or contributed to the miscarriage. The argument is that the miscarriage may have been caused by lifting the child onto the car step, or by weakness following two previous miscarriages, the second of which was followed by a treatment known as curettement of the womb, and that there is no definite evidence pointing to the fact, or the inference, that the sudden and unusual starting of the car was the proximate cause of the miscarriage.

Upon this subject the respondent's testimony discloses the following facts: The respondent was about 36 years of age at the time of the accident, and had four living children. She had had a miscarriage about 14 years before the accident, and a second miscarriage 3 or 4 years before that time. No apparent cause was shown for the second miscarriage. The respondent said that immediately after being thrown against the door she felt "quite dizzy," "quite dazed and quite excited"; that her head began aching before she alighted from the car; that after leaving the car she had slight pains through the abdomen; that in a short time she began to feel "sick and faint"; that after she left the car she went to consult Dr. Rohrer about her little boy; that she returned to the car and reached the end of the car line at Ft. Wright about 8 o'clock; that she then got into a buggy with her husband and rode home, a distance of about 2½ miles, arriving about 8:30 o'clock, after which she ate lunch. She further said that, on the next morning, she got up as usual, but that she had headaches, and that her stomach was "greatly upset"; that she had pains through the abdomen; that on Tuesday, the next day, she felt much worse, and had a great deal of headache, and that evening she began to have "slight hemorrhages," and was taken with "an awful vomiting spell"; that about 9 o'clock Wednesday morning she began to have sinking spells; that on Wednesday the doctor came, and on Thursday the miscarriage took place, and that she was about three months pregnant. Dr. Rohrer, her physician, testified that when she came to his office Sunday afternoon she was pale and nervous. In answer to a hypothetical question which fairly epitomized the evidence, he expressed the opinion that the injury she sustained on the car produced the miscarriage. He also said that weakness incident to the two former miscarriages or the lifting of the child might have caused it. Dr. Kalb testified that, in determining the cause of

the miscarriage, he would consider all things in any way connected with the subject—the accident on the car, the debilitated condition of the woman—and that the debilitated condition would be the producing cause, while the accident on the car may have been the exciting cause; that the usual and most general exciting causes of miscarriage are hard work, washing, etc., and that grief or fright might cause it. The respondent further testified that she had four children, aged 15 to 7 years; that she lived in the country; that before the injury she did the ordinary work of a housewife, and assisted her husband in preparing vegetables for the market; that she often helped milk the cows; that she could work all the time; that she was "well," and that her health was "good" before the injury; and that she had many times before lifted her little daughter into the car. Dr. Frances Rose testified on behalf of the appellant that she treated the respondent beginning in the spring of 1907, and continuing until the spring of 1908; that at that time she had heart and kidney trouble, which was in her opinion incurable. She and other physicians expressed the opinion that the miscarriage was not caused by the injury sustained upon the car. Upon the facts stated the court was warranted in submitting the case to the jury.

[4, 5] The question is not what might have caused the accident. The law deals with probabilities, not possibilities. In *Graaf v. Vulcan Iron Works*, 59 Wash. 825, 109 Pac. 1016, quoting from *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526, we said: "All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause." In cases of this character a party seeking legal redress must usually rely upon presumptions and inferences. It is obvious that it could not be mathematically demonstrated that a given injury actually caused a miscarriage in a woman who was in perfectly sound health. The probabilities of the case must be submitted to, and weighed by, the trier of fact, whether that trier be a court or a jury. The testimony shows a sequence of events, physical symptoms beginning at once, growing rapidly in intensity, and culminating in a short time in a miscarriage. It warrants the inference that the injury either caused or contributed to the miscarriage. In either event the appellant is liable for any injury flowing from its negligence. *Potter v. Aetna Life Ins. Co.*, 71 Wash. 374, 128 Pac. 647; *Jensen v. Shaw Show Case Co.*, 136 Pac. 698; *Davies v. Rose-Marshall Coal Co.*, 74 Wash. 565, 134 Pac. 180.

The appellant cites and relies upon the following cases from this court: *Hansen v. Seattle*, 31 Wash. 604, 72 Pac. 457; *Stone v. Crewdson*, 44 Wash. 691, 87 Pac. 945;

Knapp v. N. P. Ry. Co., 56 Wash. 662, 106 Pac. 190; Gardner v. Porter, 45 Wash. 158, 88 Pac. 121; Armstrong v. Cosmopolis, 82 Wash. 110, 72 Pac. 1038; Reidhead v. Skagit County, 33 Wash. 174, 73 Pac. 1118; Stratton v. Nichols Lumber Co., 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; Peterson v. Union I. Works, 48 Wash. 505, 93 Pac. 1077; Olmstead v. Hastings Shingle Co., 48 Wash. 657, 94 Pac. 474; Whitehouse v. Bryant Lumber Co., 50 Wash. 563, 97 Pac. 751; Weckter v. G. N. Ry. Co., 54 Wash. 203, 102 Pac. 1053; Lewinn v. Murphy, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D, 438. In none of these cases was the cause of the injury or death which was the subject of the litigation shown. A number of reasons for the injury or death were suggested, some of which would, and others would not, have imposed a liability. The cause of the injury or death in each case was as reasonably traceable to the one cause as to the other. In other words, they are guess cases.

[8] The appellant assigns error in the refusal of the court to give one of its requested instructions. This claim of error, however, is not argued in the briefs. We deem it sufficient to say that the law of the case is covered by the court's instructions. The instructions are commendably brief, lucid, and to the point, and they warned the jury that negligence is never presumed, but must be established by a preponderance of the evidence, and, further, that the burden was upon the respondent to prove by a preponderance of the testimony that the injury received in the car was the proximate cause of the miscarriage.

The judgment is affirmed.

ELLIS and MAIN, JJ., concur.

CROW, C. J. I dissent for the reason that the finding that respondent's injury was caused by the alleged negligence of the appellant must be predicated in conjecture and speculation only.

CHADWICK, J., concurs.

#### CULP v. KIRKMAN. (No. 11,690.)

(Supreme Court of Washington. May 1, 1914.)

#### 1. CONTRACTS (§ 312\*)—BREACH—ACTS CONSTITUTING.

Where a contractor employed to prepare land and seed to alfalfa at a specified sum per acre and a half of the crops during the contract, which was to continue for about five years, prepared a tract as required by the contract, but the owner refused to permit him to proceed with the preparation of more land on seeding the tract prepared, the contract was breached, because thereby the contractor was deprived of his right to compensation for preparing the land and to a part of the crop produced thereon, and the contractor could recover the damages sustained; but a letter written by the owner to the contractor directing him

to discontinue preparing land for the present because of scarcity of money was not alone a breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279½; Dec. Dig. § 312.\*]

#### 2. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence on an issue of fact will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Department 2. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Charles C. Culp against William H. Kirkman. From a judgment for plaintiff, defendant appeals. Affirmed.

Reynolds & Bond, of Walla Walla, for appellant. Dunphy, Evans & Garrecht, of Walla Walla, for respondent.

PARKER, J. This is an action to recover damages which the plaintiff claims from the defendant as the result of his breach of a contract. Trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

The contract here involved, so far as we need notice its terms, reads as follows:

"This agreement made and entered into this 31st day of May, A. D. 1911, by and between William H. Kirkman, the first party, and Charles C. Culp, the second party, witnesseth: That the second party hereto agrees to level according to contour, and seed to alfalfa, to the satisfaction of the first party, not less than forty (40) acres of ground in the east half (½) of section twelve (12) in township eight (8) north, of range thirty (30), east of the Willamette meridian, during the summer and fall of 1911, and the spring of 1912; that subsequent thereto, as rapidly as possible, he will continue to grade and seed to alfalfa, the balance of said described land; it being agreed that, where the land is too level or flat for proper flow of water, such land may be leveled and diked so that it can be properly flooded; that before July 1st, 1912, he will dig all ditches necessary to demonstrate that water can be distributed over all of said tract of land, and will produce growing crop of alfalfa upon at least forty (40) acres of said premises, and place said premises in a condition that the first party hereto can make his final desert claim proof upon said premises before the officers of the land office at Walla Walla, Washington, for the purpose of securing a patent for the said land from the government of the United States; \* \* \* that he will, during the existence of this agreement, in addition to the placing of the land in cultivation, care for all the crops of hay which are raised upon said premises, and deliver one-half of all such hay to the first party at the railroad station designated by said first party,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or, in the event that the hay shall be sold upon the premises, shall deliver one-half thereof to the first party thereupon; that he will do all work and labor in connection with the care and protection of all crops and in the farming of said premises. \* \* \*

The first party hereto agrees to pay the second party for the leveling and seeding of said land and for placing the same in cultivation, the sum of twenty-five (\$25) dollars per each acre of land upon which a stand of alfalfa shall be secured, \$20 per acre of which payment shall be made to the second party whenever each twenty (20) acres of land has been leveled, and the balance when a stand of alfalfa shall be secured thereon sufficient for the purpose of clipping. \* \* \*

It is further agreed that the second party shall have one-half of all crops produced upon said premises during the term of the existence of this contract. It is further agreed that the first party shall have the privilege of designating what lands shall be graded, and the orders in which the different portions of said land shall be graded, leveled, and put in cultivation. \* \* \* It is understood and agreed that the first party hereto owns a water right from the Burbank Power & Water Company for the irrigation of said tract of land, and that he will furnish for the irrigation of the said premises such water as he is able to obtain under the terms of said contract; it being understood and agreed, as hereinbefore stated, that all ditches and flumes for the distribution of said water over said premises shall be constructed by the second party, and that all material necessary for fluming shall be furnished by the first party at the nearest railroad station. \* \* \* It is further agreed that this contract shall exist and continue until the first day of December, A. D. 1916, unless previously canceled by the agreement of the parties or by operation of the law."

Respondent proceeded with the preparation of the land during the fall of 1911, until he had 126 acres thereof leveled and ready for seeding, when he was notified by appellant in writing as follows:

"Walla Walla, Wash. Nov. 4, 1911. Mr. C. Culp, Burbank, Wash.—Dear Sir: Because of scarcity of money I must direct that you discontinue grading and leveling on my Burbank land during the present fall at least. However, I am pleased that the work has progressed sufficiently for a good showing and hope that the weather conditions may be favorable for seeding and cultivating that which has been prepared. Respectfully, W. H. Kirkman."

Some further work was done by the respondent upon the land in the late fall of 1911, by way of seeding it to rye, but nothing was done towards preparing any more of the land. On December 1, 1911, respondent sought from appellant further definite information as to when he would be willing to proceed with the preparation of the re-

maining land; respondent informing appellant that he "desired to know just what to count on." This request brought forth no definite response. About March 25, 1912, the time for seeding 40 acres or more of the land to alfalfa having arrived, as the contract contemplated, respondent again requested the right to proceed with the preparation of the remaining land, offering to immediately seed to alfalfa 40 acres of that which had been already prepared. Appellant denied him the right to proceed with the preparation of more land, though appellant was willing, and, we assume, desired respondent to seed to alfalfa 40 acres of that which had already been prepared. Thereupon respondent declined to proceed further under the contract, treated it as having been breached by the appellant, and, a few weeks later, commenced this action to recover damages resulting from such breach. During the fall of 1911, after appellant's letter of November 4th, he paid respondent for preparing the land up to that time, and some \$200 in excess thereof. Just why this excess payment occurred the record does not plainly show.

[1] The question here presented is: Was there a breach of the contract on the part of appellant? His counsel contends that there was no breach of the contract, and also that, if there was a breach, it was waived by respondent, by his seeding the prepared land in the fall of 1911, after appellant's letter of November 4th, and by thereafter accepting payment in excess of the amount due for preparing the land up to that time. The argument of counsel for appellant evidently proceeds upon the theory that the breach of the contract by appellant occurred, if at all, in the writing of the letter of November 4, 1911. We think this is too narrow a view to take of the question of appellant's breach of the contract. In respondent's complaint, the breach is alleged to be: "That on November 5, 1911, defendant ordered and notified plaintiff to cease, stop, and discontinue any further work of grading and leveling of said lands mentioned in the said contract, and that said defendant continues to adhere to the said order and notice given to the plaintiff; that plaintiff called upon defendant and notified him that he was ready and willing to comply with the terms of the contract, but to no avail."

Had appellant, by his letter of November 4, 1911, only caused delay in respondent's proceeding with the further preparation of the land until the seeding of 40 acres of it to alfalfa, it might be argued that respondent's proceeding to seed the prepared land to rye in the fall of 1911 and accepting excess payment for that previously prepared, after the letter of November 4th, should be held to be a waiver of such breach as that letter, standing alone, constituted. But that letter does not tell the whole story of the breach of the contract on the part of appellant; nor, as we interpret respondent's po-

sition assumed in his complaint and upon the trial, is he relying thereon alone. When the time for seeding the 40 acres of alfalfa arrived, and appellant offered to proceed, he was informed, in substance, that he could not do so further than to seed the land already prepared. He was plainly denied the right to proceed with preparing more land immediately upon seeding the 40 acres, which he offered to do, and was thereby, we think, denied one of his most valuable rights under the contract; certainly the most valuable so far as his immediate profits to come therefrom were concerned; that is, the compensation of \$20 per acre for preparing the land. We have seen that, by the terms of the contract, respondent was entitled to proceed to prepare the land, and thus earn his \$20 per acre therefor "as rapidly as possible" following the seeding of the first 40 acres to alfalfa. Another valuable right he had in this connection was to have the whole of the land become crop-producing as early as possible, in view of his one-half interest in the crops to be taken from the land during the five succeeding seasons. Some contention is made that the words "as rapidly as possible" mean, as the jury was instructed by the trial court, "as rapidly as the work could be done with reasonable care and diligence, and as soon as was practicable under the conditions existing in the district," and that the conditions prevailing in the district were not such as to make it practicable, without the risk of injury to the land, that all of the remaining land should be prepared for crop during the spring and summer of 1912.

[2] But whether the conditions there existing were practicable, in view of water supply, or want thereof, and the effect of winds upon the land when the sage brush should be removed therefrom, in preparing it for cultivation, presented questions of fact upon which the evidence was conflicting. We are quite clear that this involved nothing but questions for the jury. Indeed, we are of the opinion that, in its last analysis, the whole problem here presented became a question of fact, as to which the jury was fully warranted in finding as it did upon the evidence presented.

Some contention is made on behalf of the appellant that the instructions given the jury established the law of the case, so that the jury could not find as it did without ignoring the instructions. Some of the instructions might seem to narrow the issue of breach of the contract on the part of appellant to his letter of November 4, 1911, which letter, it is insisted, and we may concede, did not, of itself, constitute a breach of the contract. We think, however, when read as a whole, the instructions did not have the effect of so limiting the question of the breach of the contract. It seems to us that in no event did any prejudice result to appellant from

the seeming broader view of the breach of the contract taken by the jury than the theory upon which the instructions were given.

We conclude that the judgment must be affirmed.

It is so ordered.

CROW, C. J., and FULLERTON, MORRIS, and MOUNT, JJ., concur.

**HALL v. CITY OF SPOKANE.** (No. 11,829.)  
(Supreme Court of Washington. April 27, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 816\*)—TORTS — NOTICE OF INJURY — CONSTRUCTION OF PLEADINGS.**

In an action for personal injuries against a city whose charter provided that claims for injury from its alleged negligence should be presented in writing within 30 days after injury, that if claimant was physically or mentally unable to so present it, it might be filed by some one in his behalf where the complaint alleged that within 30 days plaintiff duly presented her claim for damages, with a verification deposing that she was unable to sign it, an answer admitting the filing of the claim on the date alleged, and denying all other allegations, did not admit its legal presentation, or that plaintiff was physically unable to present it within the prescribed time.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 818.\*]

**2. MUNICIPAL CORPORATIONS (§ 812\*)—DEFECT IN STREET—ACTION FOR INJURIES—PRESENTATION OF CLAIM.**

Under charter provisions and Rem. & Bal. Code, § 7996, relating to accident claims against municipalities, and providing that such claims should conform both to the charter and the act, and section 7997, making compliance with the act mandatory, a verification of a claim for damages by another, deposing that plaintiff, who within 30 days after the alleged injury had frequently visited her physician and was able to go about, was unable to sign it was insufficient to show physical incapacity, and defeated a recovery.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.\*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by Sarah Hall against the City of Spokane. Judgment for defendant, and plaintiff appeals. Affirmed.

Frederick W. Dewart and Frank R. Monfort, both of Spokane, for appellant. H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for respondent.

GOSE, J. The plaintiff in this action has sued for injuries sustained to an eye, from falling upon a concrete sidewalk in the city of Spokane on the 4th day of September, 1912. She alleges that the walk had been out of repair for such a length of time that the city knew, or in the exercise of reasonable care ought to have known, its condition.

At the close of the plaintiff's testimony, the court withdrew the case from the jury and entered a judgment in favor of the defendant. Plaintiff has appealed.

[1] On the 4th day of October, 1912, Sarah E. Barton, on behalf of the appellant, filed with the city a claim for damages. In the verification she deposed that the appellant "is unable" to sign the same. The city charter of the city of Spokane provides that all persons having claims for damages for personal injuries sustained by reason of alleged negligence of the city must present such claim to the council "within thirty days after the injury or damage." It also provides: "If the claimant is physically or mentally unable to present such claim within the time aforesaid, it may be presented and filed by some one in his behalf. Failure to present such claim in writing, duly verified in the form, manner, and time aforesaid, shall bar any action against the city for such alleged damage or injury." In paragraph 6 it is alleged: "That within 30 days after said injury, plaintiff duly presented her claim for damages to the defendant corporation, a copy of which is hereto attached and made a part hereof, and that said claim for damages was, by said defendant, rejected on or about the 30th day of November, A. D. 1912." The city answered this paragraph as follows: "Admits that the written instrument attached to the complaint and referred to in paragraph 6 thereof, was filed in the office of the clerk of said city of Spokane on the 4th day of October, 1912, and that said claim for damages was rejected by the defendant on or about the date alleged in the complaint. The defendant denies each and every allegation contained in the said complaint not herein expressly admitted." It is contended that the answer admits the due and legal presentation of the claim. This position is untenable. There is no allegation in the complaint that the appellant was physically or mentally unable to present her claim within the 30 days limited by the charter. Nor is this fact stated in the body of the claim. The only reference to it is in the verification. The legal effect of the answer is to admit that the claim attached to the complaint is a copy of the claim which was presented. In all other respects paragraph 6 of the complaint is denied. The answer cannot be construed as an admission that the claim was legally presented, nor can it be construed as admitting it to be a fact that the plaintiff was "physically or mentally unable to present such claim" within the time limited by the charter.

[2] The appellant in this behalf relies upon *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383. A reference to page 623 of 27 Wash. (68 Pac. 383), will disclose that in that case it was alleged that the claim was presented by the claimants and duly verified by them. Under the issues it devolved upon the appellant to prove that she was physically or mentally

unable to present her claim within the charter period.

The appellant verified her complaint on the 5th day of December, 1912. She testified that from the time of the accident up to the time she signed the complaint her eyesight was gradually failing, and that it was in a worse condition at that time than it was at the time the claim was filed. Mrs. Barton, the person who presented and verified the claim, testified that the appellant's eyesight was in a very bad condition for four months following the injury; that during all that time she had to poultice the appellant's eyes and bathe them with hot water, and that she and the appellant went to see the doctor every 5 days at first and then every 10 days. The appellant tendered testimony which tended to show that on October 4th, the day the claim was filed, the appellant was confined to her home and unable to attend to business on account of the condition of her injured eye; that on that date Mrs. Barton for the first time came to the office of the appellant's counsel; that it was late in the afternoon, and the claim had to be hurriedly prepared and presented. While these facts excuse counsel for a failure to comply with the provisions of the charter and the statute, they do not excuse the appellant. Our statute, Rem. & Bal. Code, § 7996, provides: "Nothing in this act shall be construed as in any wise modifying, limiting or repealing any valid provision of the charter of any such city relating to such claims for damages, but the provisions of this act shall be in addition to such charter provisions, and such claims for damages, in all other respects, shall conform to and comply with such charter provisions."

Section 7997 provides: "Compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages."

These statutes are so plain and unequivocal that they leave no room for construction. They require a compliance with both the statute and the charter. The case must be resolved against the appellant under the authority of *Benson v. Seattle*, 139 Pac. 501, recently decided, and *Ransom v. South Bend*, 136 Pac. 365. In the *Benson* case the claim had not been presented within the time limited by the charter. The evidence showed that, for the first two weeks after the accident, the plaintiff was able to present her claim. She sought to excuse the failure to present the claim within the time limited by law by a showing of incapacity after the lapse of two weeks. In treating this question the court said: "If we concede this position [that is, that the rule announced in *Born v. Spokane* and *Ehrhardt v. Seattle* should be followed], we are still satisfied that no sufficient excuse has been shown for not presenting the claim within the 30 days, because it is admitted, both in the complaint and in the

evidence of the appellants, that for a period of two weeks after the injury Mrs. Benson was not incapacitated. \* \* \* It will not do to say that, where there is capacity to file a claim, one need not be filed within the time."

In *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, and *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827, the incapacity covered the entire period fixed by the city charter for presenting claims. In the *Born* case the court said: "We think the general rule is that it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person to procure the notice to be served, and, if there is an actual incapacity, it makes very little difference in reason whether the incapacity is mental or physical."

No claim is made in the instant case that the appellant was unable to present her claim within the first 29 days following the injury. Indeed, her own evidence shows that she frequently visited her physician during this time, that she was able to go about, and that she could have presented her claim in person. It is not contended that the charter provision is either unreasonable or invalid. The contention is that the appellant brought herself within its provisions. Under the authorities cited the court was right in withdrawing the case from the jury. The statute makes a compliance with the charter provisions mandatory.

The judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

STATE ex rel. SCHOOL DIST. NO. 3 OF KITTITAS COUNTY v. PRESTON.  
(No. 11,701.)

(Supreme Court of Washington. April 27, 1914.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 19\*)—PUBLIC SCHOOLS—APPORTIONMENT OF STATE SCHOOL FUND.

Rem. & Bal. Code, §§ 4562-4574, as amended by Rem. & Bal. Code, §§ 4562, 4567, relating to the apportionment of current state school funds, and providing that the apportionment to each county shall be based on the total number of days attendance, not excepting private schools, high schools, parental schools, and schools for defectives, nowhere provide for crediting the attendance of children in a model training school conducted by a state normal school, and such a provision cannot be read into the statute.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 16, 34-37; Dec. Dig. § 19.\*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 19\*)—PUBLIC SCHOOLS—APPORTIONMENT OF THE STATE SCHOOL FUND—"COMMON SCHOOL."

A model training school, in which children are taught by legally qualified supervisors, with the assistance of junior and senior students in the normal school, is not a "common school" within Rem. & Bal. Code, §§ 4562-4574, as

amended by Rem. & Bal. Code, §§ 4562, 4567, providing that the apportionment of the current state school funds to the various counties shall be based on the total number of days attendance; a "common school" being one free to all children and subject to the control of the qualified voters of the school district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 16, 34-37; Dec. Dig. § 19.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1335, 1336.]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 19\*)—PUBLIC SCHOOLS—APPORTIONMENT OF STATE SCHOOL FUND.

Rem. & Bal. Code, § 4714 et seq., making attendance upon a public or private school compulsory, does not show that a model training school conducted by a state normal school is a common school or private school within sections 4562-4574, basing the apportionment of the current state school funds on total days of attendance, as the statute requires children to attend as therein provided, but does not provide that they must attend common schools of the state or private schools.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 16, 34-37; Dec. Dig. § 19.\*]

Department 1. Application by the State, on the relation of School District No. 3 of Kittitas County, for a writ of mandamus against Josephine Preston, to compel respondent, as State Superintendent of Public Instruction, to apportion to Kittitas County for relator's benefit certain moneys from the current state school fund. Writ denied.

C. R. Hovey, of Ellensburg, for relator. W. V. Tanner and R. E. Campbell, both of Olympia, for respondent.

CROW, C. J. School district No. 3 of Kittitas county, as relator, seeks a writ of mandamus directed to respondent Josephine Preston, state superintendent of public instruction, commanding her to apportion to Kittitas county, for relator's benefit, certain moneys from the current state school fund.

[1] A number of school children residing within district No. 3 attend the model training school, a department conducted by the state normal school located at Ellensburg. Relator contends that these children should be considered by respondent in apportioning to Kittitas county its share of the current state school fund. Respondent has allowed relator an apportionment for school children taught in two rooms of the model training school, for which teachers are employed and paid by district No. 3, but has refused to allow the district any credit for children attending other rooms where instruction is given by supervisors employed by the normal school, assisted by junior and senior students.

It is first contended that the legislative intention was to allow credit to each school district for every day's attendance of pupils receiving the requisite instruction, irrespective of the school attended. The statute relating to the apportionment of current state

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

school funds may be found in sections 4562 to 4574, 2 Rem. & Bal. Code, as amended by sections 4562 and 4567, 3 Rem. & Bal. Code. Sections 4563 and 4564 read as follows:

"4563. For the purpose of the apportionment the superintendent of public instruction shall base his calculations upon the days' attendance as shown by the several county superintendents' last annual reports filed in his office.

"4564. The basis of the apportionment to each county shall be on the total days of attendance in the several districts of the county: Provided, that each school district shall be credited with at least two thousand days' attendance."

Other sections provide that school districts shall be credited with children attending private schools, high schools, parental schools, night schools, and schools for defectives, but nowhere is it provided that a district shall be credited with the attendance of children in a model training school conducted as a branch of a state normal school, and located within such school district. If it had been the intention of the Legislature to allow a school district credit for such attendance of pupils in a model training school, express provision would have been made therefor. We cannot, by interpretation, read such a provision into the statute when it does not exist, but seems to have been purposely omitted.

[2] It is next contended that, as the model training school is conducted as an ordinary common school of the district, Kittitas county is entitled to the credit demanded. In other words, relator argues that the model training school so conducted is a common school within the recognized meaning of that term. It appears that the pupils of two rooms of the training school, known as model or observation rooms, are instructed by qualified teachers employed by the directors of district No. 3. Respondent has allowed credit for the attendance of these pupils. Teaching of pupils in the other rooms of the model training school is done by supervisors, legally qualified to teach under the laws of this state, assisted by junior and senior students of the normal school. Some of these students are qualified by law to teach in the common schools of this state, while others are not so qualified. The supervisors of the model training school are chosen by the normal school trustees, although an arrangement exists whereby the directors of the school district may secure their dismissal. In *School District v. Bryan*, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033, we had occasion to determine whether a model training school conducted by a state normal school was a common school. Discussing this question, we said: "The teachers under his charge (the principal of the normal school) may be devoted in their pursuit of the art of teaching, but they are not teachers within the

meaning of the law which has undertaken to insure that public school children shall be taught only by those who have met (not those seeking to attain) a certain standard of proficiency. In other words, the argument of counsel emphasizes the fact that in its operation the act of 1907 would break the uniformity of the common school system. To summarize, a common school, within the meaning of our Constitution, is one that is common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent. Under the system proposed, instead of the voters employing a teacher with proper vouchers of worthiness, they are made recruiting officers to meet a draft for material that the apprentice may be employed." Applying the rule thus announced to the facts before us, it is manifest that the model training school is not a common school, and that Kittitas county is not entitled, in an apportionment of the current state school fund, to a credit predicated on attendance of children at such training school.

[3] Relator makes some contention that the provisions of the compulsory school law (section 4714 et seq., Rem. & Bal. Code) indicates that the model training school is either a common school or a private school, as children are required to attend either a public or private school. There is no merit in this contention. The compulsory school law requires the attendance of children, as therein provided, but does not provide that they must attend common schools of the state or private schools. It therefore does not tend to show that a model training school is either a common or private school.

The writ is denied.

CHADWICK, ELLIS, MAIN, and GOSE, JJ., concur.

BURGESS v. PETH et al. (No. 11,777.)

(Supreme Court of Washington. April 27, 1914.)

1. JUDGMENT (§ 670\*) — CONCLUSIVENESS — MATTERS CONCLUDED.

An adverse judgment, in an action to quiet title, in which title and right of possession were alleged to be in trustees of an unincorporated association for the benefit of the contributors to its purchase, on the ground that the association never had any capacity to take title to the land, and in which previous receivership and tax foreclosure proceedings to which the association's then acting trustees were parties, and under which the plaintiff therein acquired title, were attacked with a prayer that defendants be declared tenants in common of the land, was res adjudicata in a subsequent ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion, where the receivership and the tax proceedings, and the purchaser's title thereunder, were attacked, and where the title and right of possession was alleged to be in trustees of the association for the benefit of its members at large, and it was sought to establish the trust and quiet title in the trustees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185; Dec. Dig. § 670.\*]

#### 2. CHARITIES (§ 39\*)—ABANDONMENT OF PURPOSE.

The purposes of an unincorporated association with a constitution providing that meetings of the national organization should be held at least once a year, and for the organization of local bodies, were abandoned where it held no such meetings between 1905, after receivership and tax foreclosure proceedings, and 1912, and did not attempt to organize any local bodies, and where all of its members were in default under the by-laws.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 100; Dec. Dig. § 39.\*]

#### 3. RECEIVERS (§ 143\*)—SALE—TAXES—PAYMENT BY PURCHASER.

Where land was sold by a receiver subject to the taxes, the purchaser, as between the receiver and himself, could not deduct the amount paid for taxes from the price to be paid.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 252; Dec. Dig. § 143.\*]

#### 4. TAXATION (§ 674\*)—TAX SALE—RIGHT TO PURCHASE.

One who is under a moral or legal obligation to pay taxes cannot become a purchaser at a tax sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1357-1360; Dec. Dig. § 674.\*]

Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by David Burgess against John J. Peth and others, in which William Hogan and others intervened. Judgment for defendants Peth and others, and interveners appeal. Affirmed.

Geo. McKay and R. Winsor, both of Seattle, for appellants. E. C. Millon and Geo. Friend, both of Seattle, for respondents.

MORRIS, J. [1] Many of the facts in this case are set forth in *Peth v. Spear*, 63 Wash. 291, 115 Pac. 164, to which reference is made, as this appeal is an attack on Peth's title to the land involved in that action. Nothing need be said as to the contention of the plaintiff in this action, since, having failed to appeal, the decree has become final as to him. The appellants came into the action as interveners in September, 1912, alleging that they were Socialists and the acting trustees of the Brotherhood of the Co-Operative Commonwealth, an unincorporated, voluntary association; that the lands in question were acquired by the association, and were to be held in trust by its trustees as a charitable trust. They then attack the receivership and tax proceedings through which respondents claim title, and pray that these proceedings and the resulting conveyances to respondents be set aside, and that the title to the land be quieted in them. The lower

court has found against them on these several contentions, and they have appealed.

The receivership proceedings referred to in *Peth v. Spear* were commenced in 1906 and ended in 1908. All of the trustees then acting, and who had been elected as such at the annual meeting in January, 1905, were made parties in that proceeding, together with all other persons who were then members of the colony or who claimed any interest in the property. So far as we can discover from the record, nothing was done by any persons claiming to represent any rights in the premises, until in June, 1909, when, at a called meeting of the brotherhood, E. E. Spear was authorized to represent it in any defense it might have to the action brought by Peth to quiet title. The record in that case shows that Spear appeared and filed an answer on behalf of himself and others who had been made defendants in that action, and it was this answer which we then held failed to show any title or right of possession in the then defendants. The next step appears to be a meeting on June 26, 1909, when some 18 persons met and voted to organize themselves into a local of the brotherhood. Nothing more seems to have been done until January 1, 1912, when some persons (who or how many is not shown, except the minutes recite that, inasmuch as there was no quorum of the trustees present, the chair appointed two persons to act as trustees), met and called a meeting on January 29, 1912, to elect trustees. This meeting was held, eight persons being present, and the interveners were elected as trustees. Inasmuch as the answer in *Peth v. Spear* was held to show no right in any of the then defendants, it might be well to compare that answer with the present contention of appellants. In that answer it was alleged that the title and right of possession to the property were in the eight trustees and their successors, for the use and benefit of those who had contributed to the fund paid for the purchase of the land; that the brotherhood never had any legal existence or capacity to transact business or to receive the title to the land, and never became a beneficiary under the trust deeds. The receivership proceedings and the tax foreclosure proceedings were then attacked, with the title acquired by Peth in those proceedings, and the prayer was to set aside those proceedings and the deeds issued therein, and decree the defendants to be tenants in common of the land. The interveners' plea in this action is the same as in the answer in the former case, so far as it attacks the receivership and tax foreclosure proceedings and the deeds issued to Peth thereunder. It alleges the title and right of possession as originally in the trustees named in the first deeds and in the appellants as their successors. So that the only difference between the two pleas is that in the former the title and right of posses-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sion were alleged to be in the trustees for the benefit of those who had contributed to the purchase of the land, while in the latter the title and right of possession were in the trustees for the benefit of the membership at large. In the first plea it was sought to have the trust declared void because there were no beneficiaries capable of ascertainment for whose benefit the trust could be enforced, while in this plea it is sought to establish the trust and quiet the title in the interveners as trustees. As we have seen, the defense in the first case was made by Spear under authority from those who claimed to then represent the brotherhood, and that authority is not here attacked. It seems to us because of this fact that decree is as final and binding upon those who now claim to represent the association as it was upon those who then claimed to represent it, and that it is *res adjudicata*, not only to the defense that was interposed, but to any that might have been interposed, including the one now set up, for, if this is a good plea now, it was a good plea then. Of these eight interveners, four were defendants in the first Peth Case, together with all those who then were acting as trustees.

[2] It also appears that, after the appointment of the receiver in 1906, the officers of the brotherhood failed to perform any duties as such, and the scheme was, to all intents and purposes, abandoned by all those who had been parties to it, and the only life injected into it was the meeting called in June, 1909, when Spear was authorized to make a defense to the Peth suit. The same can be said of the present situation. The only purpose of the action of these interveners in seeking to keep alive this brotherhood is to continue litigation based apparently upon what was said in the first case as to a charitable trust. The constitution of this brotherhood provides that meetings of the national organization shall be held at least once a year. So far as we can gather, there was no attention paid to this provision and no election of trustees between 1905 and 1912; the national organization being abandoned when the receiver was appointed in 1906. Neither has there been any attempt to organize any so-called locals under the constitution, save the one organized at Burlington in 1907; and at the time of this meeting all the members were in default for over two years, contrary to the by-laws of the brotherhood, which provide that a member may not continue in good standing who is in arrears for dues for a longer period than three months.

It seems clear to us that the purposes of this trust had failed, and that this brotherhood scheme had been abandoned prior to the commencement of this action except as these appellants sought to keep it alive for the purpose of continuing this litigation.

The original brotherhood, as it then existed, was dissolved and destroyed in the receivership proceedings, and there has been no attempt to reorganize it for the purpose of continuing what its promoters deemed to be its beneficial purposes. So far as the receivership and tax foreclosure proceedings are concerned, nothing is shown against their validity, and no reason appears why the same effect should not be given them as in any other like proceedings. Certainly, as to the portion of the lands held by Peth under the tax title, appellants could obtain no relief except in observing the condition precedent fixed by the statute in actions seeking to overthrow such proceedings by making a tender of the amount represented by the taxes paid.

[3] The idea is advanced, in order to escape this requirement, that the receiver's sale was made subject to the taxes, and that it therefore became the duty of Peth to pay the taxes. The only meaning to be given to that provision is that, as between the receiver and the purchaser at the sale, the purchaser must pay the taxes, and could not deduct the amount due for taxes from the price to be paid the receiver.

[4] Peth was a stranger to the land and was under no duty, either moral or legal, to pay the taxes. The case, therefore, does not fall within those cited by appellants, of which *Christy v. Fisher*, 58 Cal. 256, is an illustration, which holds that one who is under a moral or legal obligation to pay taxes cannot become a purchaser at a tax sale. So far as we know, there was nothing which prevented Peth from purchasing the tax title issued to one McCoy upon a certificate of delinquency for the taxes of 1904, issued February 6, 1906, 18 months prior to the time when Peth became the purchaser at the receiver's sale in June, 1907. *Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025.

We are therefore of the opinion that these interveners have no rights superior to those vesting in Peth under the receivership and tax foreclosure sales, and that the decree of the lower court should be, and it is in all things, affirmed.

CROW, C. J., and PARKER and MOUNT, JJ., concur.

SHIELDS v. CITY OF SEATTLE et al.  
(No. 11,436.)

(Supreme Court of Washington. April 23, 1914.)

1. MUNICIPAL CORPORATIONS (§ 237\*)—CONTRACTS—NOTICE FOR BIDS—CONSTRUCTION.

A published notice for bids for the sale of fire apparatus to a city, giving notice that proposals would be received for furnishing "two (2) combination city service hook and ladder and chemical trucks, and one (1) 75 foot automatic aerial truck, four-wheel motor-driven or tractor drawn, for the Seattle fire department in accordance with specifications now on file," required bids on all three pieces of apparatus, so

that bids which did not include the aerial truck could be rejected.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 670; Dec. Dig. § 237.\*]

**2. MUNICIPAL CORPORATIONS (§ 993\*) — CONTRACTS—INJUNCTION—BURDEN OF PROOF.**

In an action by a taxpayer to enjoin a city from contracting for the purchase of fire apparatus upon the ground that the agreed price is greater than the lowest bid submitted, the burden was on plaintiff to show that the bid accepted was illegal as alleged.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2158-2161; Dec. Dig. § 993.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by B. F. Shields against the City of Seattle and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Eugene A. Childe, of Seattle, for appellant. Jas. E. Bradford and Wm. B. Allison, both of Seattle, for respondents.

**PARKER, J.** The plaintiff, a taxpayer and resident of Seattle, seeks to enjoin that city and its officers from entering into a contract for the purchase of certain fire apparatus from the Seagrave Company, upon the ground that the price agreed upon is greater than the lowest bid submitted in response to the published notice inviting bids therefor. The cause came on for hearing before the trial court upon the plaintiff's application for a temporary injunction, evidence being submitted by the respective parties in the form of affidavits only. At the conclusion of that hearing, it was stipulated by counsel for the respective parties that the trial court should dispose of the cause upon the merits, and that the affidavits submitted should be considered as the entire evidence before the court for that purpose. The cause being so submitted, judgment of dismissal was entered in favor of the city, and the plaintiff's prayer for relief denied. The plaintiff has appealed.

The only portion of the published notice inviting bids with which we are here concerned reads as follows: "Notice is hereby given that sealed proposals will be received by the undersigned secretary of the board of public works of the city of Seattle up to 10 o'clock a. m., Friday, March 7, 1913, for furnishing and delivering f. o. b. Seattle, Wash., two (2) combination city service automobile hook and ladder and chemical trucks, and one (1) seventy-five (75) foot automatic aerial truck, four-wheel motor-driven or tractor drawn, for the Seattle fire department, in accordance with specifications now on file in the office of the board of public works."

Among the bids submitted in response to this notice were the following:

Pacific Coast Fire Supply Company: "2 combination city service hook and ladder and chemical trucks, \$12,300.00."

Columbia Engineering Works: "2 Robinson city service motor trucks, \$12,400.00."

Seagrave Company: "2 motor-propelled city service trucks, \$13,100.00. If given contract for above, together with tractor-drawn aerial truck, price for three items will be \$22,000.00. 1 motor-propelled aerial truck, \$9,575.00. If awarded contract for above item, together with two city service combination hook and ladder and chemical trucks, price will be \$22,000.00."

Other bids submitted are of no consequence here, since none of them could possibly be considered lower in amount than that of the Seagrave Company.

[1] Assuming, for argument's sake, that the city charter of Seattle is mandatory in its terms in requiring contracts of this nature to be let to the lowest bidder, without any discretion whatever in the board of public service to be exercised, in view of the different makes, the main question here is: Which of these bids is the lowest? If the invitation for bids be construed as requiring bids upon the whole of the apparatus sought to be purchased—that is, all three pieces—manifestly, the bid of the Seagrave Company is the lowest bid that complies with the invitation, since the other bids above noticed do not include any aerial truck as called for in the notice. The only guide we have before us as to whether the bids were required to be for all three pieces is the language of the notice. What is in the specifications touching this subject we do not know; since we are not favored with a copy of the specifications. We are inclined to the view that even the language of the notice inviting bids, standing alone, would warrant the board of public works in construing it as requiring bids upon all three pieces. In any event, in the absence of the specifications, we cannot say that the board was not warranted in rejecting the bids which did not include the aerial truck and award the contract to the Seagrave Company, which, manifestly, was the lowest bid including all three pieces.

[2] Some contention is made by counsel for appellant that there was a failure on the part of the Seagrave Company, in making its bid, to comply with the specifications. Considerable is said about the specifications in the affidavits submitted; but the information thus given is almost wholly argumentative, and statements of the conclusions and opinions of the several affiants. Manifestly, this does not furnish such information as to enable us to determine whether the Seagrave Company complied with the specifications in making its bid or not. We are not furnished with copies of the bids; only the amounts thereof and the brief statements of the nature of the pieces. This question and also the one first discussed must be determined in favor of the city, upon the ground that appellant, having the burden of proof, has

failed to show, with such clearness as to call for judicial interference, an unlawful exercise of power on the part of the board of public works, even though the charter be held to limit the board's power as claimed.

The judgment is affirmed.

CROW, C. J., and MOUNT, FULLERTON, and MORRIS, JJ., concur.

**ST. MARTIN et al. v. SKAMANIA BOOM CO.**  
(No. 11,407.)

(Supreme Court of Washington. April 29, 1914.)

**1. APPEAL AND ERROR (§ 204\*)—OBJECTION BELOW—NECESSITY—EVIDENCE.**

In an action by the widow and children of a homesteader, the defendant cannot, on appeal, contend that the marriage was not sufficiently proven to show the title of the widow and children where testimony that the widow and decedent had lived together as husband and wife from the time of the acquisition of the homestead was received without objection below that it was not the best evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.\*]

**2. EVIDENCE (§ 601\*)—WEIGHT AND SUFFICIENCY—PHENOMENA OF NATURE.**

Evidence that a hot mineral spring on plaintiffs' land located on a river rose and fell with the rise and fall of the river, and was hotter whenever the flow was greater, cannot be discredited on the assumption that the cold waters of the river would have lessened the heat of the spring, instead of increasing it, where there was no evidence as to its source and the reasons for its heat.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2425, 2456-2459; Dec. Dig. § 601.\*]

**3. WATERS AND WATER COURSES (§§ 138, 160\*)—PRESCRIPTIVE RIGHTS—DAMS.**

So long as defendant's impounding of the waters of a stream on which plaintiffs' land abutted did not injure plaintiffs' riparian rights, defendant could acquire no prescriptive rights to impound the waters.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151, 193, 196; Dec. Dig. §§ 138, 160.\*]

**4. WATERS AND WATER COURSES (§ 179\*)—PRESCRIPTIVE RIGHTS—DAMS.**

In an action to prevent defendant from impounding the waters of a stream, and thus interfering with the flow of a spring on plaintiffs' land, located on the river bank, evidence that, after objections, the waters were not impounded at any time for over a year is admissible on the question whether defendant had acquired a prescriptive right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.\*]

**5. WATERS AND WATER COURSES (§ 179\*)—PRESCRIPTIVE RIGHTS—EVIDENCE.**

Where defendant claimed a prescriptive right to impound the waters of a stream which interfered with the flow of a spring on the land of a lower riparian owner, evidence of negotiations between defendant and the owner after defendant's erection of its dam is admissible to show that defendant acquired no prescriptive right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.\*]

**6. WATERS AND WATER COURSES (§ 179\*)—DAMS—PRESCRIPTIVE RIGHT—ELEMENTS.**

One claiming a prescriptive right to impound the waters of a nonnavigable stream has the burden of proving an adverse, hostile, continuous, and uninterrupted use for the period of limitations under a claim of right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.\*]

**7. WATERS AND WATER COURSES (§ 179\*)—DAMS—PRESCRIPTIVE RIGHT—EVIDENCE.**

In an action to enjoin defendant from impounding the waters of a stream, thus lessening the flow of a spring on the land of a lower riparian owner, evidence held insufficient to show that defendant's use was hostile or adverse, or had continued during the period of limitations.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.\*]

**8. LOGS AND LOGGING (§ 13\*)—BOOM COMPANIES—RIPARIAN RIGHTS—RIGHT TO IMPOUND.**

In view of Rem. & Bal. Code, § 7110, providing for the condemnation by boom companies of shore rights of lower riparian owners, the filing of a plat by a boom company does not give it the right, as against a lower owner, to impound the waters of a stream.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 31-35; Dec. Dig. § 13.\*]

**9. APPEAL AND ERROR (§ 877\*)—REVIEW—PERSONS ENTITLED TO ALLEGE ERROR.**

Where the evidence would have warranted an injunction restraining the defendant from impounding the waters of a stream to the injury of lower riparian owners, defendant cannot complain that the court, instead of issuing an unqualified injunction, allowed it the alternatives of permitting sufficient water to flow for plaintiffs' purpose or of building a dam below their land to maintain the water at a sufficient level, in accordance with an agreement between parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

Department 1. Appeal from Superior Court, Skamania County; H. E. McKenney, Judge.

Action by Margaret St. Martin and others against the Skamania Boom Company, a corporation. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. S. Shepherd, of Portland, Or., for appellant. Miller, Crass & Wilkinson, of Vancouver, and Walter G. Hayes, of Portland, Or., for respondents.

ELLIS, J. The plaintiffs, as owners and tenants in common of certain lands in Skamania county, brought this action to secure a permanent injunction restraining the defendant from interfering with the natural flow of the waters of Wind river across those lands. The plaintiffs claim title as the widow and heirs at law of the original homesteader, Isadore St. Martin, who died intestate in 1910. On the land in question is a valuable mineral spring of hot water, which flows from the ground within a few feet of the edge of the waters of Wind river

at its ordinary stage. This spring has an established reputation for its mineral properties, and is largely patronized as a health resort. The plaintiffs maintain a hotel and camping accommodations for their patrons, and, for a consideration, permit the use of the waters of the spring. It requires the entire natural flow of the spring to accommodate the number of persons normally seeking its use in the dry summer season. For some unknown reason, the flow of the spring is so affected by the volume of water in the river that, when the flow of the river is obstructed above the spring in the dry summer season, the spring furnishes only a small part of its normal supply, and is wholly insufficient to accommodate the plaintiffs' guests and patrons. It is in the summer time that the withholding of the waters of the river thus injuriously affects the spring. It is also claimed that the waters of the spring are hotter when flowing copiously than when the flow is scant; the evidence tending to show a temperature varying from 104 degrees Fahrenheit when the flow is slight, to 118 degrees when the flow is copious. The normal temperature of the water of Wind river is about 55 degrees.

The defendant corporation was organized in March, 1900, under the laws of the state, as a boom and driving company, for the purpose of driving logs and timber products on Wind river. On March 30, 1900, it filed its plat in the office of the secretary of state, by which it sought to appropriate the waters of Wind river and its tributaries and the contiguous shores for its driving operations. Wind river is an unmeandered nonnavigable stream rising in the Cascade mountains and flowing into the Columbia river, much of its course being through a rocky cañon or defile. It is necessary to impound its waters by means of a dam to produce artificial freshets, called "splashes," to drive logs down the stream. In the summer and fall of 1901 the defendant erected a dam about 12 miles above the plaintiffs' premises. The gates of this dam are about 26 feet high, and the pond formed covers 40 or 50 acres. Three floods or splashes in close succession, covering in all three days, were produced late in November, 1901. At that time other streams tributary to Wind river below this dam were not dammed. The appellant has since dammed these tributaries. The evidence shows that the impounding for these first splashes did not noticeably affect the spring. No other splashes were produced until the spring and summer of 1902. In the winter time it requires only about six hours to fill the dam. In the summer time it requires several days to impound water sufficient to make a splash. Other evidence, so far as material, will be considered in the discussion of the case. The action was commenced March 23, 1912.

The cause was tried to the court without a jury. The court found the facts in favor of

the plaintiffs, and, on appropriate conclusions of law, adjudged that the defendant be enjoined from operating its dam in such a way as to interfere with the plaintiffs' spring, or, as an alternative, erect and maintain, below the spring, a dam sufficient to maintain the water in the river at such stage as not to interfere with or diminish the flow of the spring during the operation of the impounding dam. The defendant appeals.

The appellant contends that the decree is contrary to the evidence, in the following particulars: (1) That the respondents failed to show any title; (2) that there was no evidence that the spring was materially affected by the impounding of the water of the river; (3) that the appellant established a prescriptive right to obstruct the flow of the river by showing an adverse enjoyment for over ten years.

[1] 1. The contention that the respondents failed to prove title is based upon the fact that there was no proof of a ceremonial marriage between Isadore St. Martin, the deceased homesteader, and the respondent Margaret St. Martin, the mother of the other respondents, of whom the deceased was the father. The following testimony of one of the respondents was admitted without objection: "Q. Do you know how your father acquired this property? A. It was his homestead. Q. Were your father and mother living together then as husband and wife? A. Yes, sir. Q. And always lived together from that time on as husband and wife? A. Yes, sir." It is argued that this was not the best evidence of the marriage, since Mrs. St. Martin was a witness and could have testified positively as to the marriage, had there been one. The evidence given tended to prove the fact, and was not objected to as not the best evidence, or on any other ground. Had the appellant intended to rely upon this objection, it should have raised it at the time. The marriage was only a collateral issue. The evidence offered was sufficient to prove it, in the absence of such objection.

[2] 2. The claim that the respondents failed to show that the spring was materially affected by the impounding of the water of the river rests upon the assumption that, if the water of the river were so connected with the spring as to cause the spring to rise and fall with the river, the water in the spring would be cooler in periods of high water than in periods of low water. Practically all of the evidence on the subject was to the effect that the spring rises and falls with the rise and fall of the river, and that the water in the spring is hotter when the flow is greater than when the spring is low. It is argued that the latter statement is inherently unbelievable. This argument, however, proceeds upon an initial assumption that the access of the cold river water to the vein of the spring would, of necessity, cool

the waters of the spring. An argument a priori such as this, to be of any value, must rest upon some admitted general principle or truth as a basis or cause. It is just here that the argument breaks down. To give it convincing force, it is necessary that we know and understand the operation of the hidden forces which control the flow of the water of the spring, and impart to it its temperature, but we neither know nor understand these forces in the present case. For example, it may be that the water in the spring flows more rapidly from the subterranean heating point when under the greater pressure supplied by the rise of the river, so that it may not have the same time for cooling before reaching the surface as when this pressure is not applied. This is offered not as a theory, but as showing that the assumption that access to the vein of the spring by the water of the river would necessarily cool the water is only an assumption, and not an established principle or truth which would only give validity to appellant's argument. Clearly, in such a case, all that the court can do is to take the evidence of the objective phenomena without speculation as to their causes. There being no evidence to the contrary, we must accept these things as facts.

[3-7] 3. The appellant's claim of a prescriptive right to impound the waters of the river at all times of the year, regardless of any injury to the respondents' spring, cannot prevail for two reasons: In the first place, there was no evidence that the respondents suffered any injury until the summer of 1902, which was less than ten years before the commencement of this action; in the second place, the evidence, taken as a whole, failed to show that the appellant's use of the river, as against the respondents', was hostile or adverse, or under an unqualified claim of right. The evidence on all of these questions was sharply conflicting. On the one hand, there was evidence that the appellant's dam was built in 1901, and has been operated under a claim of right every summer since that time. On the other hand, the respondents' evidence strongly tended to show that the impounding of the water in the wet winter season does not appreciably affect the spring. It fairly appears that no damage was experienced by the impounding of the water for short periods in the fall of 1901, when only two or three floods were taken off. It is clear that the fact that the impounding of the water would affect the spring was not discovered until the summer of 1902. For the interference with the flow of the stream in the fall of 1901 the respondents had no cause of action, because they were not damaged. It is also clear from the evidence that the injury to the respondents resulted only from the interference with the natural flow of the river in the summer time, and that such interference in the winter had no ap-

preciable effect upon the spring. We think that, both on reason and authority, the period of a prescriptive right to an easement to use or damage the lands of another can only begin to run from the time when the person suffering the damage first had a cause of action arising from the adverse use. "In cases of this character, the prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action. Where a right by prescription to maintain a railroad bridge and change the current of a stream and injure the land of a riparian owner below by causing it to wash away his land is claimed, the commencement of the time required for the prescription to ripen is not from the erection of the bridge, but from the first actual damage to the land consequent on the erection of the bridge. *Bells v. Chesapeake R. R. Co.*, 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787." *Roe v. Howard County*, 75 Neb. 448, 450, 106 N. W. 587, 592 (5 L. R. A. [N. S.] 881). "A prescriptive right to the use of water is not initiated until the owners of the water 'are deprived of its use in such a substantial manner as to notify them that their rights are being invaded.' *Long on Irrigation*, § 90; *Hall v. Blackman*, 8 Idaho, 272, 68 Pac. 19; *McCoy v. Huntley*, 60 Or. 372, 119 Pac. 481." *Sander v. Bull*, 185 Pac. 480, 492.

There was much evidence also to the effect that the appellant's dam was not operated at any time during the year 1908. This evidence would be of little force standing alone, since a temporary interruption in the use of an easement will not alone establish an abandonment, or stop the running of the period of prescription, but, when taken in connection with the evidence that the respondents' decedent was at all times objecting to the use of the dam in the summer time in such manner as to injure his spring, it has some tendency to show that the use was not adverse and under an unqualified claim of right. Mrs. St. Martin testified that, after the discovery of the fact that the impounding of the water injuriously affected the spring, the operation of the dam was acquiesced in by her husband upon an agreement with the president of the appellant company that water would be allowed to flow down the river whenever the respondents wanted it. The president of the appellant company denied this, but, at the same time, admitted that he knew that his attorney was in negotiation, from time to time, with Mr. St. Martin concerning the matter. Mrs. St. Martin's testimony was corroborated by another witness, who testified that water was, from time to time, in the summer of 1908, actually let out of the dam in order to raise the water in the respondents' spring. Another witness testified that, on investigation as to the effect of the dam on the spring, in 1906, it was practically agreed by the appellant with St.

Martin that the appellant would thereafter either let sufficient water flow in the river to supply the spring, or would build a dam in the river below the spring to keep the water at the height necessary for that purpose. We think the evidence clearly preponderates in favor of the fact that the respondents' decedent never acquiesced in the appellant's use of its dam in such way as to injure the spring, and that the use of the dam was permitted upon the understanding testified to by these witnesses, which was, for a time at least, complied with by the appellant. "The subsequent negotiation between the plaintiffs and the defendant, for a purchase, by the plaintiffs, is the strongest evidence to show that the use of the water on their part had not been adverse." *Watkins v. Peck*, 13 N. H. 360, 376, 40 Am. Dec. 156, 161.

Upon the evidence, the court would have been justified in finding that the injurious effect of the dam was not discovered until the summer of 1902; that the operation of the dam so as to injure the respondents' spring was not continuous for ten years, even from the construction of the dam in 1901; and that its maintenance was merely permissive, on condition that the dam should be so operated as not to injure the respondents' spring. In either case the right to impound the water to the respondents' damage is not prescriptive. The burden was upon the appellant to prove an adverse, hostile, continuous, and uninterrupted use under a claim of right. *District of Columbia v. Robinson*, 180 U. S. 92, 21 Sup. Ct. 283, 285, 45 L. Ed. 440. It failed to maintain this burden.

[8] We are not impressed with the appellant's claim that the filing of the plat of its proposed location conferred directly upon it the right of absolute dominion over the waters of the river. The authorities cited in support of this contention do not sustain it. In *Nicomien Boom Co. v. North Shore Boom & Driving Co.*, 40 Wash. 315, 82 Pac. 412, the contest was between rival boom companies. In such a case, it is elementary that the company making, in good faith, the first location has the better right. That case, however, does not hold that the mere filing of the plat gives to a boom company the right to injure the property of riparian proprietors without condemnation and compensation. The contrary is clearly implied by the analogy drawn by the court between the purpose of the filing of the plat of a boom company and the filing of the plat of definite location by a railroad company. In support of this view, the court cites *Bal. Code*, § 4378 (*Rem. & Bal. Code*, § 7110), which provides for the condemnation by boom companies of shore rights or other property sought to be appropriated in the manner provided by law for the appropriation of private property by railways, adding: "The legislative scheme for boom companies requires that the landowner

shall permit his land to be subjected to the use of such companies, upon receiving compensation therefor, and the title is thus acquired."

In *Berryman v. East Hoquiam Boom & Logging Co.*, 68 Wash. 657, 124 Pac. 130, the plaintiff not only had such notice as was given by the filing of the plat of the boom company in the office of the secretary of state, but also acquiesced in the use of the stream by the boom company for a period of more than ten years apparently without objection. That decision is not authority for the position that the filing of the plat confers the right to injure a lower riparian proprietor without compensation. Such a construction of the law would render it void on constitutional grounds.

[9] The evidence in this case would have justified the court in enjoining the operation of the appellant's dam during the summer season until such time as the right to injure the respondents' spring had been secured by condemnation, and the damages assessed and paid. The appellant cannot complain of the decree rendered, if the court found, as the evidence would have justified it in finding, that the appellant had agreed either to permit a sufficient flow of the water at all times that the respondents' spring might not be injured, or to construct a dam below the spring to maintain the water in the river at the necessary stage. The decree merely requires that appellant conform to that agreement.

Judgment affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

BROKAW et ux. v. TOWN OF STANWOOD.  
(No. 11,550.)

(Supreme Court of Washington. April 28, 1914.)

1. MUNICIPAL CORPORATIONS (§ 657\*)—VACATION—FAILURE TO OPEN—BURDEN OF PROOF.

Where an adjoining lot owner claimed title to a strip of land, which had been dedicated as a street before it was included within an incorporated town, on the ground that it had been vacated under Laws 1890, p. 608, § 32, vacating any county road which remained unopened for public use for five years after authority was granted for opening the same, the burden was upon the lot owner to show that the street remained physically unopened for the statutory time.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.\*]

2. MUNICIPAL CORPORATIONS (§ 657\*)—VACATION—FAILURE TO OPEN—WEIGHT OF EVIDENCE.

The fact that there was no public travel upon the street was not sufficient to show that it was not open for public travel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. MUNICIPAL CORPORATIONS (§ 657\*) — STREETS—FAILURE TO OPEN—STATUTE.

Where the street was included within the limits of an incorporated town within one year after it was inclosed by the adjoining lot owner, it was no longer subject to vacation under Laws 1890, p. 603, § 32, vacating county roads which remain unopened for public use for five years, since that act did not apply to streets within cities and towns.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.\*]

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by W. C. Brokaw and wife against Town of Stanwood. Decree for the plaintiffs, and defendant appeals. Reversed.

Joseph H. Smith, of Everett, for appellant. Geo. M. Mitchell, of Stanwood, and W. P. Bell, of Everett, for respondents.

PARKER, J. The plaintiffs are in possession of and claim title to a strip of land which the town of Stanwood, in Snohomish county, threatens to take possession of and improve as a portion of a public street. The plaintiffs commenced this action in the superior court for that county, seeking to enjoin the town from so doing. A trial was had, resulting in judgment and decree in favor of the plaintiffs as prayed for, from which the town has appealed.

The questions presented are: Has the strip involved ceased to be a part of an existing public street, the street having at one time been dedicated to such use so as to include the strip? and, have respondents acquired title by adverse possession as against the town? The controlling facts are not in dispute and may be summarized as follows:

Stockbridge's Fourth addition to the town of Stanwood was surveyed and platted, by the owners of the land covered thereby, into lots, blocks, and streets, the latter being regularly dedicated to public use as such, and the plat duly recorded in the office of the auditor of Snohomish county on July 1, 1891. Block 5 of the addition, as shown upon the plat, is bounded on the west by Union street and on the south by Rainier street. In October, 1902, the respondents became the owners of lots 1 to 7, inclusive, in block 5, being the westerly 280 feet of that block. We infer from the record, though it is not clear, that the title then acquired by respondents was by conveyance from the original platters and dedicators, describing the land conveyed by lot and block numbers, and name of the plat. Immediately thereafter, respondents took possession of the strip of land here in controversy, being a strip 18½ feet wide and 280 feet long, lying immediately to the south of and adjoining their lots, which strip lies within the boundaries of Rainier street as platted and dedicated, occupying somewhat less than the northerly half of that

street. Respondents have, ever since then, had actual physical possession of the strip, claiming to be the owners thereof as against all the world. There has never been any public travel upon Rainier street, nor has there ever been any public money expended in the improvement thereof. Whether or not Rainier street was physically inclosed or obstructed in any way, so as to prevent use thereof by the public by the usual means of travel upon public highways, during any portion of the period from its original platting and dedication in 1891 to the taking possession of this portion thereof by the respondents in 1902, we are left entirely without information, so far as this record is concerned; and, since the record before us purports to contain all the facts brought before the trial court, we must assume that no evidence whatever was there presented upon that question. The town of Stanwood was incorporated in October, 1903, about one year after respondents took possession of the strip, since which time the addition has been within the corporate limits of the town. Prior to that time, the addition was not within the corporate limits of any city or town. Respondents' claim of title may be regarded as resting upon two grounds, which we will notice in order.

[1] Respondents claim title upon the theory that Rainier street was vacated and the strip in controversy thereby rendered a part of their adjoining lots before they acquired title to the lots and took possession of the strip. This claim is rested upon the assumption that the vacation was accomplished by Rainier street remaining "unopened for public use" for a period of more than five years after its platting and dedication, within the meaning of section 32, p. 603, Laws of 1890; section 3803, Bal. Code, in force prior to 1909, reading as follows: "Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time." The real question in this branch of the case is: Was Rainier street, in fact, "unopened for public use" for a period of five years following its dedication, and prior to respondents' taking possession of the strip here involved?

Our attention is directed to *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115, and *Cheney v. King County*, 72 Wash. 490, 130 Pac. 893, which are principally relied upon by counsel for respondents. In the *Murphy Case*, the court stated, at page 590 of 45 Wash., and page 1115 of 88 Pac., that "the streets were covered with a heavy growth of timber and underbrush, and had never been open to public travel." There was apparent-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ly, in that case, no controversy as to that fact; the real question being as to whether dedicated streets upon a plat made by owners of land outside of the corporate limits of any city or town constituted such streets county roads, within the meaning of the law of 1890, above quoted. The court there simply assumed that the streets had remained unopened for public use for more than five years following their dedication, as to which question there seems to have been no controversy, and then gave its consideration to the real question in the case. In the Cheney Case, there was evidence tending to affirmatively show that the street involved was in fact not physically open to public use; that is, that it was not physically capable of being used by the usual means of travel upon public highways. The paths there mentioned did not proceed along the street in any measurable degree within the side lines of the platted street. The street was held to have remained unopened for public use for more than five years following its dedication because there was evidence affirmatively showing that to be a physical fact. In *Taylor v. Howell-Hill Mill Co.*, 74 Wash. 66, 182 Pac. 726, it is assumed, rather than decided as a controverted fact, that the street "was never opened to public use."

In the case before us, we have no evidence whatever that Rainier street was unopened for public use during any portion of the period from the time of its dedication in 1891 to the taking possession of this portion thereof by respondents in 1902. For aught that appears in this record, and we are to remember that all of the evidence presented to the trial court is before us, Rainier street, along in front of respondents' lots, may have, during this entire period, been actually physically open for public use, unobstructed, uninclosed, and by nature well suited for ordinary travel by such means as are in common use upon public highways. Shall we presume to the contrary, in the total absence of proof upon that question? We are of the opinion that we should not do so, and that the burden of showing that such a street has remained unopened for public use for the period named in the statute should be upon those who rest their claims upon such a fact.

[2] Nor do we think that the fact that there was no public travel upon the street during the period from its dedication to respondents' taking possession thereof argues that it was unopened for public use during that period. The public is not, under all circumstances, obliged to take physical possession of public highways, whether they have been acquired by dedication or otherwise, in order to preserve its rights therein. If a highway is in fact physically open to

the free use of the public as a highway, we think the public's constructive possession thereof is sufficient to protect its acquired paper title thereto. It is not so much a question of the public being in actual physical possession of the highway as it is a question of some one else being in possession thereof, claiming adverse to the public. We have no evidence here whatever, as we have noticed, indicating that any such claim was ever asserted during the eleven-year period following the dedication of this highway up to the time respondents took possession of the portion thereof here involved.

We are of the opinion that, at the time respondents took possession of this strip of land, Rainier street has not been shown to have been vacated in the manner claimed, and that, the public's paper title thereto being perfect at all times, the burden was on respondents to show a better title. It might well be argued, from the facts shown in this record and the fair inferences to be drawn therefrom, that the conveyance of these lots by the original dedicators of this street and the platters of this addition in 1902, describing them by lot and block numbers and the name of the addition, was, in substance, a re-dedication of this very street at the time. 13 Cyc. 455. Upon this interesting question, however, we express no opinion.

[3] As to respondents' adverse possession, little need be said, in view of the conclusions we have reached on the question of the claimed vacation of Rainier street prior to the time their adverse possession commenced. Having reached the conclusion that the street was not shown to be vacated at that time, it is manifest that respondents' adverse possession can avail them nothing here. We have noticed that the town of Stanwood became incorporated in 1903, only one year following the commencement of respondents' adverse possession of the strip in controversy. That incorporation brought the street within the corporate limits of the town, thereby exempting it from the further operation of the law of 1890 above quoted. It was, thereafter, no longer subject to vacation, or to being lost to the public, by the operation of that statute, since that statute had no application to streets within cities and towns. *West Seattle v. West Seattle Land, etc., Co.*, 38 Wash. 359, 80 Pac. 549; *Murphy v. King County*, 45 Wash. 587, 593, 88 Pac. 1115.

We conclude that the judgment and decree of the trial court must be reversed, upon the ground that Rainier street, in front of respondents' lots, is still an existing public street. It is so ordered.

CROW, C. J., and FULLERTON, MORRIS, and MOUNT, JJ., concur.



**FRANCE et al. v. DEEP RIVER LOGGING CO. (No. 11,706.)**

(Supreme Court of Washington. April 28, 1914.)

**1. WOODS AND FORESTS (§ 1\*)—REAL PROPERTY—STANDING TIMBER.**

Standing timber is real property, when title to both timber and land is vested in one ownership.

[Ed. Note.—For other cases, see Woods and Forests, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**2. FRAUDS, STATUTE OF (§ 56\*)—CONVEYANCE OF STANDING TIMBER.**

A conveyance of standing timber, with the right of entry upon the land and removal of the timber therefrom within a stated period or a reasonable time, is within Rem. & Bal. Code, §§ 8745, 8746, requiring conveyances of any interest in realty to be by deed.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

**3. LOGS AND LOGGING (§ 3\*)—CONVEYANCE OF TIMBER.**

A deed conveying all of the timber and trees upon described land, "and the right of entering upon said land and removing said timber and trees from same at the pleasure of said grantee, his heirs, personal representatives, and assigns, \* \* \* to have and to hold the said granted property and privileges" to the said grantee, "his heirs, personal representatives, and assigns forever," gave the grantee a perpetual right to enter and remove the timber, and hence did not convert the timber into personalty.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**4. TAXATION (§ 708\*)—FORECLOSURE—SERVICE.**

A sheriff's return in a tax foreclosure proceeding against a corporation, showing that the corporation could not be found in the county, and an affidavit that it was not a resident and could not be found in the state for service of process, were sufficient to support a judgment of foreclosure, and put the burden on the corporation to show, in a collateral proceeding, that it could have been personally served.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.\*]

**5. TAXATION (§ 708\*)—FORECLOSURE—PERSONAL SERVICE—EVIDENCE.**

Evidence that a witness was the statutory agent of a corporation during the year a tax foreclosure proceeding was brought against it, and was on the land at intervals of a month or two during the year, was not sufficient to overcome the presumption of jurisdiction arising from the sheriff's return in the foreclosure proceeding, showing that the corporation could not be found in the county, and by the usual affidavit that it could not be found for service in the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.\*]

**6. TAXATION (§ 765\*)—SUFFICIENCY OF TAX DEED—SIGNATURE BY TREASURER.**

Where a tax foreclosure proceeding was regular in all respects, and the treasurer duly acknowledged the execution of the tax deed, and his name appeared as grantor in the granting clause, the fact that his name was not subscribed at the foot of the deed would not render it invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1523-1527; Dec. Dig. § 765.\*]

Mount, J., dissenting.

Department 2. Appeal from Superior Court, Pacific County; Edward H. Wright, Judge.

Action by E. L. France and others against the Deep River Logging Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Coovert & Mannix, of Portland, Or., and Bond & Eddy, of South Bend, for appellant. Welsh & Welsh, of South Bend, and Abel & Burnett, of Montesano, for respondents.

**PARKER, J.** The plaintiffs, claiming to be the owners of a tract of land in Pacific county, commenced this action in the superior court for that county, seeking recovery of damages from the defendant for cutting and removing timber therefrom. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs for \$9,000 damages, from which the defendant has appealed.

The real controversy is over the title to the timber upon the land. Appellant claims title to the timber through conveyance thereof from William J. Dyer, the original patentee of the land, while respondents claim title to both the land and the timber through a tax foreclosure and deed thereunder, issued to them by the treasurer of Pacific county some two years before the removal of the timber by appellant.

On November 16, 1892, William J. Dyer, by deed duly executed and acknowledged, conveyed the timber upon the land, with the right of entry and removal, to G. H. Mooers; the granting language of the conveyance being as follows: "By these presents do grant, bargain, sell, and convey unto said G. H. Mooers, his heirs, personal representatives, and assigns, all timber and trees (inclusive of both standing trees and fallen trees) upon the south half of the southeast quarter and the south half of the southwest quarter of section 30, in township 11 north of range 8 west of the Willamette meridian, in Pacific county, state of Washington, and the right of entering upon said land and removing said timber and trees from the same at the pleasure of said grantee, his heirs, personal representatives, and assigns, and of doing all things necessary to log or remove said timber without unreasonable damage to said land. To have and to hold the said granted property and privileges to the said G. H. Mooers, his heirs, personal representatives, and assigns, forever." On July 1, 1902, Mooers conveyed this same timber, with the right of entry and removal, to the Deep River Logging Company, appellant, using this same language in the granting portion of the conveyance. Both of these conveyances were duly recorded in the office of the auditor of Pacific county soon after their execution as deeds to real property.

In July, 1907, respondents, having become the owners of the lien charged against the land for general taxes in the years 1902 and subsequent years, evidenced by certificate of delinquency and tax receipts, commenced foreclosure of their lien in the superior court for Pacific county against William J. Dyer and Deep River Logging Company. Thereafter such proceedings were had in that foreclosure action that judgment and order of sale of the land was rendered therein, sale of the land in pursuance thereof was made at which the respondents became the purchaser thereof, and a tax deed was accordingly issued to respondents by the treasurer of Pacific county on December 19, 1907. The land and the timber thereon had not been assessed or taxed separately at any time prior to the time of respondents' tax foreclosure; the whole being assessed together as real property. Appellant never requested that the timber upon the land be assessed separately from the land, nor did appellant ever make any return of the timber upon the land as personal property to the assessor of Pacific county, nor did appellant ever pay any taxes thereon in any form, though it did make return of and pay taxes upon personal property owned by it in Pacific county. During the months of July, 1910, to April, 1911, inclusive, appellant went upon the land, and cut and removed therefrom standing timber of the value of \$9,000, for which damages in that sum were awarded to respondents by the judgment in this action, as we have stated. Other facts will be noticed as may become necessary in connection with our discussion of appellant's several contentions.

[1] Counsel for appellant first contended that respondents' tax deed did not convey to them the title to the timber upon the land, because the timber was constructively severed from the land and became personal property by the conveyance by Dyer to Mooers in 1892. Prior to the act of 1907 (Rem. & Bal. Code, § 9095), which became the law long after the assessment and levy of the taxes upon which respondents' foreclosure and deed rests, we had no statute law touching the question of standing timber being real or personal property for purposes of assessment and taxation when separately owned. It is elementary law that standing timber is real property—as much so as the land on which it stands—when the title to both the timber and the land is vested in one ownership.

[2] It may now be regarded as the settled law of this state, in harmony with the decided weight of authority elsewhere, that conveyance of standing timber, with the right of entry upon the land and removal of the timber therefrom in the future, whether the time of removal be measured by stated or reasonable time, is within our statute requiring conveyances of real estate or any interest therein to be by deed. Rem. & Bal.

Code, §§ 8745, 8746; *Seymour v. La Furgey*, 47 Wash. 450, 92 Pac. 267; *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225; *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 Pac. 1030, 20 Cyc. 212; *Ives v. Atlantic, etc., B. Co.*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732. See note to this case in 9 Ann. Cas. 192. It is plain, therefore, that the timber here involved was, in any event, real property until conveyed by Dyer to Mooers in 1892, and that its conversion into personal property depends entirely upon the effect of that conveyance. Manifestly the timber did not become personal property, unless it became such by virtue of that conveyance. The conveyance by Mooers to appellant thereafter had no effect upon this question.

There have been two decisions rendered by this court which may seem to have some bearing upon this question. In *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275, there was under consideration a duly executed and acknowledged written contract for the sale of standing timber. Some contention was there apparently made that the contract did not in form amount to a conveyance; but, it having recited full payment of the consideration, it was held by the court to be in effect a conveyance of the timber, carrying an implied license to remove it from the land. A subsequent purchaser of the land had actual notice of the conveyance of the timber, and was held not to have acquired the timber with the land; this being the main question involved. In a per curiam opinion so holding, this court, among other things, said: "Conceding that the sale of the growing timber was a sale of an interest in the land, upon the execution and delivery of the contract of sale, the timber became personal property, and the only interest the defendants had, or could claim, in the land upon which the timber stood, was an implied license to enter and remove the timber." *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275. The court expressly refrained from determining the question of time limitation against the removal of the timber, as not being involved in the case. A review of that case, we think, renders it plain that the court's decision would have been the same, regardless of whether or not the timber became personal property by the conveyance there involved, and that that question was wholly unnecessary to be decided in disposing of the case as the court did.

In the recent case of *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 Pac. 1030, we had under consideration a situation leading to a decision in substance somewhat inconsistent with the remarks of the court above quoted from the *Brodack Case*. The action was to recover compensation for services rendered in effecting a sale of standing timber. Recovery was denied by this court on the ground that there was no contract for such service evidenced in writing, as

required by section 5289, Rem. & Bal. Code, rendering void, if not evidenced in writing, "any agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." The standing timber involved in that case was in part upon lands owned by appellant and in part upon lands owned by third persons who had sold the timber thereon to appellant; appellant being the defendant in the action, from whom commission upon the sale of the timber was sought to be recovered. The decision in that case was, in effect, a holding that no part of the commission could be recovered, notwithstanding a portion of the timber sold by the plaintiff, claiming commission, was owned by the defendant separate from the ownership of the land by another. It would seem that, if appellant's contention in the case before us be well grounded, the plaintiff in the Engleson Case would have been entitled to recover upon the oral contract, so far as he was entitled to commission for the sale of the portion of the defendant's timber owned by him separate from the land. The question, however, does not seem to have been presented for consideration in that case, yet the question comes as near being in the case as it was in the Brodack Case. We conclude that neither of these decisions should be regarded as controlling authority upon this question. This leaves us without any controlling authority upon the question, so far as our own decisions are concerned.

A number of decisions of the courts are brought to our notice, holding that standing timber, when sold by the owner of the land, with the right of entry and removal, ceases to be real property, and becomes personal property. The decisions so holding, rendered since 1850, to which our attention has been called, upon examination, will be found to involve sales of timber with the right of entry and removal for a fixed, limited period, or cases where such right of entry is subject to be revoked upon notice by the landowner. In *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173, the right of entry and removal was limited to 3 years. In *Fairbanks v. Stowe*, 83 Vt. 155, 74 Atl. 1006, 138 Am. St. Rep. 1074, the right of entry and removal was limited to 5 years. In *Montgomery v. Peach River Co.*, 54 Tex. Civ. App. 143, 117 S. W. 1061, the right of entry and removal was limited to approximately 7 years; besides, the land was school land, and in no event taxable, while the timber was owned by a private person, and was held to be taxable as personal property of such person. In *Barber v. Rodgers*, 71 Pa. 362, the right of entry and removal was subject to be revoked upon 30 days' notice. At pages 366, 367, the court observes: "If the agreement does not contemplate the immediate severance of the timber, it is a contract for the sale or reservation of an interest in land,

and until actual severance the timber in such case passes to the heir, and not to the personal representative. But when the agreement is made with a view to the immediate severance of the timber from the soil, it is regarded as personal property, and passes to the executor and administrator, and not to the heir. \* \* \* If the reservation had been of a perpetual right to enter on the land and cut all the pine and hemlock timber growing thereon, or of a right to cut and take it off at discretion as to time, then it would be within the rule laid down in *Yeakle v. Jacob*, 33 Pa. 376, and *Pattison's Appeal*, 61 Pa. 294 [100 Am. Dec. 637], and be regarded as an interest in land, which would pass to the heir and not to the administrator on the vendor's death."

This is a recognition of a distinction between the effect of an agreed immediate removal or upon notice, and an agreement to preserve the right of entry and removal for an unlimited time. Our attention is also called to *Warren v. Leland*, 2 Barb. (N. Y.) 613, decided in 1847. That decision, however, and the numerous earlier decisions there reviewed, we regard as of little practical aid to the solution of the question here involved. They furnish but little light touching the nature of such a continuing right of entry upon land and removal of the timber therefrom as is here involved.

[3] Now, assuming, but not deciding, that a conveyance of standing timber, with the right to enter upon the land and remove it within a stated or reasonable time, such as would be held to mean presently, that is, within such time as would enable the grantee, under ordinary circumstances, to conveniently remove it, having in mind its quantity, and the size of the task of its removal, would have the effect of converting the timber and the right of entry for its removal into personal property; did the grant of this timber, together with the right of entry and removal thereof, made by Dyer to Mooers in 1892, convert the same into personal property? Recurring to the language of that conveyance, it will be noticed that it gave to Dyer and his assigns "the right of entering upon said land and removing said timber and trees from the same at the *pleasure* of said grantee, his heirs, personal representatives, and assigns, \* \* \* to have and to hold the said granted *property and privileges* to the said G. H. Mooers, his heirs, personal representatives, and assigns, *forever*." We italicize the words we regard as controlling here. This language points, we think, conclusively to an intention on the part of the grantor to convey a continuing, perpetual right, for all time, to enter upon the land and remove the timber. The grantee's assigns or descendants may do so 100 years hence. Grants in substance the same as this were held by us to have such effect in *Skamania Boom Co. v. Youmans*, 64 Wash.

94, 116 Pac. 645, and *Healy v. Everett & Cherry Valley Traction Co.*, 139 Pac. 609.

No decision has come to our notice, rendered by any court in this country within the past 70 years, holding that such a grant of standing timber, with right of entry upon the land, converted the property right thereby created into personal property, nor are there any early decisions which we regard as controlling authority here to that effect. Not only is this the meaning of the language of the conveyance; but the acts of all parties concerned point with equal certainty, by their acts and admissions, to this construction by them of the language of the grant, as evidenced by the fact that more than 17 years elapsed from the making of the grant, when it is claimed that the property was converted into personal property, until it was removed by the grantee's successor, this appellant, that appellant has never returned or listed the timber as personal property, that appellant has never paid any taxes upon the timber in any form, and that appellant has never requested the taxing officers of Pacific county to assess the timber separate from the land. Even if we regarded the question as doubtful, we would resolve such doubt in favor of the view that the timber, for the purpose of taxation, has been at all times real property, since, viewed in its physical aspect alone, it is real property, and will be presumed to be such until clearly shown to be otherwise.

If this property right acquired by Mooers and his grantee, appellant, became personal property by Dyer's conveyance, manifestly it then ceased to be an interest in real estate, and could thereafter be conveyed otherwise than by deed; interest in real estate being required to be so conveyed by sections 8745, 8746, Rem. & Bal. Code, leases for less than one year being the only exception (section 8802, Rem. & Bal. Code). Is it possible that this property right, to wit, title to the timber with the right of entry and removal, "*to have and to hold the saw granted property and privileges \* \* \* forever,*" ceased to be real property by the conveyance of Dyer, containing this language? It is not conceivable to us that this question can be logically answered in the affirmative. The right to the timber was so connected with the continuing right to enter upon the land as to not be severable one from the other, except by the actual physical removal of the timber, thereby putting an end to the right of entry.

It may be suggested that possibly the logical classification of conveyance of standing timber, for the purpose of determining whether the interest so conveyed thereby becomes personal or remains real property, would be to regard the interest conveyed as real property in all cases where the right of entry upon the land is to continue for more than one year. We leave this for future

consideration, however, and desire not to be understood as expressing an opinion thereon at this time. We give no consideration to the effect of the law of 1907. We conclude that the land and timber here involved were properly assessable together as real property, and that the tax foreclosure, if regular as against Dyer and appellant, vested title in respondents to both the land and timber at least two years before the removal of the timber by appellant.

[4] It is next contended that the tax foreclosure upon which respondent's tax deed rests was of no force or validity as against appellant, because appellant was not personally served with summons therein. Appellant is an Oregon corporation. William J. Dyer, the owner of the land at the time of the tax foreclosure, was then also a resident of Oregon. Service was had in the tax foreclosure action by publication. No contention is made against the sufficiency of that publication or the prima facie showing then made upon which it rests; the contention being only that appellant then had officers within this state, enabling these respondents, plaintiffs in the tax foreclosure proceeding, to cause it to be served personally. A sheriff's return in the tax foreclosure proceeding, showing that appellant could not be found within Pacific county, was made; also affidavit in usual form to the effect that appellant was not a resident of this state and could not be found therein for service of process upon it. Manifestly this is sufficient to support the judgment in the tax foreclosure and put the burden of proof upon appellant to show that it had officers within this state who could have been personally served with summons in the foreclosure action.

[5] The only information we have upon that subject is furnished by the testimony of one Olson, manager of appellant's business, whose residence was in Portland, Or., and upon whom they claim service should have been made in the tax foreclosure action, as follows: "During the years 1906, 1907, and 1908 I was actually on the land down there near the Nasel river. I was not there continuously. It might have been a month or two between each time I was over there. I was manager of the company. It was my duty to do the operating and get the logs out of there. I was the statutory agent of the corporation here in 1906 and 1907. We were shut down part of the time, but never closed down the entire plant for any period to exceed from two to four weeks. I go down at least every two weeks. This was true in 1907." We are of the opinion that this is not sufficient to overcome the presumption of the court having acquired jurisdiction in the tax foreclosure action, as evidenced by the proceedings and recitals of the judgment rendered therein. *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067, 101 Am. St. Rep. 993; *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463.

Contention is made against the sufficiency of the treasurer's deed issued to respondents, upon their becoming purchasers at the tax sale held under the foreclosure, in that, as proven upon the trial, the treasurer's signature was not subscribed at the foot of the deed. The original deed of the treasurer had become lost, and it therefore became necessary to prove the same by a certified copy from the records of the county auditor, where it had been recorded. This certified copy fails to show the signature of the treasurer. It is in the usual statutory form, reciting the sale to respondents, and that it was made "between J. E. Stout, as treasurer of Pacific county, state of Washington, party of the first part, and E. L. France, L. L. Wakefield, and E. S. Avey, parties of the second part," and "that I, J. E. Stout, county treasurer of Pacific county, \* \* \* do hereby grant and convey unto E. L. France, L. L. Wakefield, and E. S. Avey, and to their heirs and assigns forever, the said real estate hereinbefore described. ———, County Treasurer." Execution of the deed was duly acknowledged by the county treasurer, as evidenced by certificate under official seal, indorsed thereon in usual form, by an officer authorized to take acknowledgments.

[8] In view of the fact that this deed is but the culmination of the tax foreclosure upon which it rests, that such foreclosure appears in all respects regular, that the treasurer acknowledged its execution before an officer authorized to take acknowledgments, that his name appears in the granting clause as the grantor, and the fact that the execution of the deed was nothing more than a ministerial act, which respondents were entitled to have the treasurer perform, we are of the opinion that the respondents' tax title should not be held void because of the absence of the subscription of the treasurer's name at the foot of the deed. The following lend support to this view: *Tingley v. Belingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 30 Pac. 446; *Anderson v. Wallace Lumber Co.*, 30 Wash. 147, 70 Pac. 247; *American Savings Bank & Trust Co. v. Heigeson*, 64 Wash. 54, 116 Pac. 837, Ann. Cas. 1913A, 390. The last cited decision, however, was overruled on rehearing in 67 Wash. 572, 122 Pac. 26, Ann. Cas. 1913A, 390, upon the particular facts of that case.

Respondents have also rested their title to the land and the timber thereon upon the three-year statute of limitations against actions to set aside tax deeds (Rem. & Bal. Code, § 162), which they claim has run in their favor. In view of the fact that appellant must have been in possession of the land some considerable portion of the three years following the execution of the tax deed, there may be reasons for regarding the statute as avoided by such possession, under our deci-

sion in *Buty v. Goldfinch*, 74 Wash. 532, 133 Pac. 1057, where we consider this statute of limitations in the light of the original owner being in possession. We prefer to express no opinion upon the rights of respondents, in so far as they are sought to be rested upon the three-year statute of limitations, and it is unnecessary for us to do so here.

The judgment is affirmed.

CROW, C. J., and FULLERTON and MORRIS, JJ., concur.

MOUNT, J. I dissent. It seems clear to me that the deed from Dyer to Mooers in 1892 severed the timber from the land, so that thereafter the timber and the land for all purposes became separate properties, one personal and the other realty, in different owners. The case of *Brodack v. Morsbach*, supra, so holds, and the cases of *Skamania Boom Co. v. Youmans* and *Healy v. Traction Company*, supra, hold to the same effect.

Taxes thereafter levied upon the land did not affect the timber and a sale of the land for taxes did not carry the timber. The ownership of the timber is still in the appellant. The judgment is therefore wrong and should be reversed.

# CLUMPNER v. SPOKANE-COLUMBIA RIVER R. & NAVIGATION CO.

(No. 11,620.)

(Supreme Court of Washington. April 27, 1914.)

## RECEIVERS (§ 189\*)—ACTIONS—COSTS—RIGHTS OF RECEIVERS.

A receiver, being an officer of the court appointed to conserve an estate, cannot continue the receivership to advance his own interests, and hence is not entitled to costs expended on his appeal from a judgment reducing his compensation, or for services rendered in conserving the property pending the appeal.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 379, 380; Dec. Dig. § 189.\*]

Department 1. Appeal from Superior Court, Spokane County; H. H. Sullivan, Judge.

Action by H. V. Clumpner against the Spokane-Columbia River Railroad & Navigation Company, in which B. C. Mosby was appointed receiver. From a judgment refusing him further compensation, and denying him costs on the petition of the Farmers' & Mechanics' Bank and another, he appeals. Affirmed.

D. W. Henley and Harris Baldwin, both of Spokane, for appellant. Starkey & Belknap, of Spokane, for respondents.

GOSE, J. This is an appeal by the receiver from a judgment refusing him further compensation, and denying him his costs incurred on a former appeal.

The facts in brief are these: The appellant receiver was appointed as such in the

year 1906. All property belonging to the receivership was reduced to cash in the year 1908. A petition of the creditors for a final accounting and distribution was filed in March, 1911. Thereupon the receiver, in April, 1911, filed his final account, showing total receipts of \$14,779.68, and total expenses, exclusive of the receiver's compensation, of \$1,427.30. The receiver asked for \$10,000 for his services and as attorney's fees. Exceptions were filed to his account, and, upon the hearing, it was adjudged that the receiver "is hereby allowed the sum of \$3,600 in full compensation for all services, including attorney's fees, \* \* \* and the said receiver is hereby ordered to disburse the remainder of the moneys in his hands [\$5,594.47] to the creditors listed as preferred creditors." This judgment was entered on the 20th day of May, 1911. The receiver appealed to this court. In considering the appeal, we said: "The only question presented is the compensation for receiver's and attorney's fees on final settlement of the receivership. The receiver was his own attorney. \* \* \* After reading the record, we conclude that the allowance made was liberal, and should not be disturbed." In re Spokane-Columbia B. & Nav. Co., 70 Wash. 142, 126 Pac. 418. After the remittitur was filed in the court below, and on the 4th of March, 1913, the receiver filed a supplemental account, showing expenses of \$40 for two yearly premiums on the receiver's bond since the judgment of May 20, 1911, \$32.70 for two years' annual license fee of the insolvent corporation since that date, and \$102 for costs and expenses incident to the former appeal, and showing \$583.33 received as interest from May 1, 1911, at 4 per cent. upon \$5,000 of the \$5,594.47 in his possession, and which he had been directed to pay to the creditors. In the supplemental account the receiver asked for further compensation for administrative services in the sum of \$60 per month from May 20, 1911, which he later reduced to \$30 per month, and for professional services upon the former appeal. Certain of the creditors appeared and objected to the allowance of any of these items, and also to the allowance of any further compensation to the receiver, and asked that he be required to account for interest on the full amount held by him, \$5,594.47, from May 20, 1911, at 6 per cent. The court allowed the items paid on the bond and paid to the secretary of state for the annual license fees of the insolvent corporation, and disallowed all the other items, including the receiver's demand for compensation and costs and expenses incident to the former appeal. The court also denied the claim of the creditors for interest in excess of the amount actually realized by the receiver. The court found that the receiver had rendered no services since the date of the former judgment which benefited the estate, other than the payment of the premi-

ums on the bond and the annual license fees and the receipt of the interest as heretofore stated; that the appeal to the Supreme Court and the motion for a rehearing which followed an adverse decision were solely for the interest and benefit of the receiver personally, and were adverse to the interest of the estate and the creditors; and that the delay in disbursing the funds on hand was unreasonable.

The views reflected in the judgment of the trial court are so pregnant with common sense and withal so wholesome that we unreservedly adopt them. A receiver is an officer of the court appointed by the court to conserve an estate. While the receiver is entitled to reasonable compensation for his services, he will not be allowed to continue the receivership to advance his own selfish interests. We found that the first allowance was liberal, and affirmed the judgment. Indeed, the allowance was so liberal that it was the imperative duty of the receiver to pay the money over to the creditors in obedience to the first order of the court. *Dalliba v. Winschell*, 11 Idaho, 364, 82 Pac. 107; *Burroughs v. Toxaway Co.*, 185 Fed. 435, 107 C. C. A. 505; *Wilkinson v. Washington Trust Co.*, 102 Fed. 28, 42 C. C. A. 140. In the *Burroughs Case* the court very aptly observed: "A receiver as such is a mere officer of the court. In theory, at least, it matters naught to him how long the receivership shall last. He serves the court while the court wants his services. When the court reaches the conclusion that neither his services nor those of any other receiver are needed, that is the end of the matter so far as he is concerned." In the *Wilkinson Case* it is said: "Courts and their officers should be active and prompt to pay over to beneficiaries trust moneys in their control, and receivers must not be permitted to prolong their possession of property by frivolous appeals or baseless claims."

The court dealt very kindly with the receiver when it allowed him the items of premiums on the bond and the license fees paid to the state, and in declining to charge him legal interest upon the full fund retained from the time of the entry of the first judgment. Both the trial court and this court had held that he had been amply compensated for both administrative and legal services. The first appeal was not prosecuted for the benefit of the estate but for the benefit of the receiver only, and he had no reasonable grounds upon which to take the appeal. Since the entry of this order, he has rendered no administrative services which were of any value to the estate. The net result of those services is a charge of \$72.72 for premiums on bond and license fees to the state, and 4 per cent. interest realized on the larger part of the fund. The estate money should have been disbursed in obedience to the first judgment.

The judgment will be affirmed, and the costs of the action will be taxed to the receiver personally and his bondsmen.

CROW, C. J., and ELLIS and MAIN, JJ., concur.

CHADWICK, J. I concur in all that has been said by Judge GOSE, and want to say in addition to his argument, that the judgment of the lower court may be sustained by reference to a fundamental principle, that is: Where a court fixes the compensation of a receiver and directs the winding up of the receivership, the fee so fixed will be held as a matter of law to include the salary or fees of the receiver up to the time his work is done, in so far as it pertains to the subject-matter of the receivership then in the custody of the law and of the receiver. There is no showing in this case that any property came to the hands of the receiver other than that possessed by him at the time the original order was made and its earnings, earnings which would not have accumulated if he had distributed the fund as directed by the court.

SPAULDING et al. v. ADAMS COUNTY.  
(No. 11,380.)

(Supreme Court of Washington. April 25, 1914.)

1. TAXATION (§ 263\*)—PERSONAL PROPERTY—SITUS—STATUTES.

Under Rem. & Bal. Code, § 9236, providing that any person or firm which, subsequent to the 1st day of March of each year, brings into any county any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale, without intent to engage in permanent trade at such place, shall immediately notify the county assessor, who shall assess it at the current rate, a stock of buggies shipped in a dismantled condition carried from the cars to a warehouse rented by plaintiff, where they were reassembled and kept until sold by soliciting agents who usually delivered them to the purchaser, although some were delivered from the warehouse, was assessable at the current rate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 437; Dec. Dig. § 263.\*]

2. TAXATION (§ 58\*)—STATUTES—LIBERAL CONSTRUCTION.

Taxing statutes are to be liberally construed, and the action of the taxing officers is to be upheld in all cases where the substance and spirit of the statute are followed, even though there is a departure from its strict letter.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 134, 135; Dec. Dig. § 58.\*]

3. TAXATION (§ 102\*)—TAXABLE PROPERTY—DOUBLE TAXATION.

Personal property shipped into this state for sale, and otherwise taxable, is not exempt because it has been taxed for the same year in the state of the seller's domicile, since the state is subjected to the burden of its protection.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 102.\*]

4. TAXATION (§ 543\*)—CONSTRUCTION OF FINDING—"IMMEDIATELY."

In an action to recover taxes on personal property paid to defendant county under pro-

test, a finding that it was "immediately" assessed after arrival in the county was just as applicable to an assessment made after it had been unloaded from the cars and stored, as to an assessment before as the word "immediately" does not necessarily mean "upon the instant," but may mean "proximately" or "directly."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1006-1016; Dec. Dig. § 543.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3403-3410.]

5. COMMERCE (§ 72\*)—INTERFERENCE BY STATE—TAXATION.

Where goods are brought into the state and stored in advance of sales, and orders therefor are filled from the place of storage, the business is not interstate, but local commerce, and laws imposing taxes thereon are not invalid as interfering with interstate commerce; and the same rule applies where the goods reach their destination in this state for storage and sale, even before they are unloaded from the cars.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 123-136; Dec. Dig. § 72.\*]

Department 2. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by E. H. Spaulding and others, copartners doing business as the Spaulding Manufacturing Company, against Adams County, Wash. Judgment for defendant, and plaintiffs appeal. Affirmed.

John M. Cannon, of Spokane, for appellants. W. O. Miller, of Ritzville, for respondent.

FULLERTON, J. The appellants the Spaulding Manufacturing Company, a copartnership, brought this action against Adams county, Wash., to recover the sum of \$273.38, with interest, paid by them under protest to that county as taxes upon certain of their personal property. They failed to recover in the court below, and appeal from the judgment entered against them.

In the years 1909 and 1910 the appellants shipped from Grinnell, Iowa, to Ritzville, in Adams county, four several car loads of buggies; the first arriving at that place on March 20, 1909, the second on April 10, 1909, the third on August 30, 1909, and the fourth on April 1, 1910. The buggies were shipped in a dismantled condition, and were unloaded from the cars in which they arrived and carried to a warehouse rented by the appellants where they were reassembled and kept until sold. The buggies on their arrival at Ritzville were taken in charge by an agent of the appellant, called a sales manager, who directed their disposition. This manager employed a number of sales agents, to each of whom he delivered from the stock two or more buggies which the sales agents would drive through the country and solicit orders from prospective purchasers, using the buggies as samples. When an order was received for a buggy, a note was taken from the person giving the order for an amount equal to the purchase price of the buggy ordered, which note was turned over to the sales

manager for approval. If the sales manager approved the order, he would cause a buggy similar in kind to that selected from the samples to be delivered to the person executing the note. If the sale was not approved, the note was returned to the maker. This process was continued until the entire stock including samples was sold.

No sales were solicited nor were buggies sold at the warehouse, although deliveries were sometimes made thereat; the usual process, however, was to deliver the buggy at the home of the purchaser. In certain instances buggies were sold by the sales agents and delivered to the purchasers from the samples, but the trial court found that no such sales had been made within the limits of the city of Ritzville. It further appeared that the appellants at no time intended to engage in permanent trade in Adams county, and did not engage in permanent trade therein, but quit trading there as soon as the last of the buggies were sold. It appeared also that the appellants had been assessed on the buggies, or on the materials which entered into their manufacture, by the authorities of Poweshiek county, Iowa, for the years current with the years in which they were assessed in Adams county as hereinafter stated, and had paid the taxes so levied thereon.

On the arrival of each car load of buggies at the city of Ritzville, the corporate authorities of Adams county caused them to be valued for assessment purposes, and caused a tax to be levied on such valuation at the rate current in the county for the particular year in which the buggies arrived. The aggregate of these several sums constitute the tax for which this action is prosecuted to recover.

[1] The statute under which the authorities of Adams county acted in making the several levies upon the property is found at section 9236 of Rem. & Bal. Code, and reads as follows: "Whenever any person, firm or corporation shall, subsequent to the first day of March of any year, bring or send into any county any stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale, without the intention of engaging in permanent trade in such place, the owner, consignee or person in charge of the said goods or merchandise shall immediately notify the county assessor, and thereupon the assessor shall at once proceed to value the said stock of goods and merchandise at its true value, and upon such valuation the said owner, consignee or person in charge shall pay to the collector of taxes a tax at the rate assessed for state, county and local purposes in the taxing district in the year then current. And it shall not be lawful to sell or dispose of any such goods or merchandise as aforesaid in such taxing district until the assessor shall have been so notified as aforesaid and the tax assessed thereon paid to the collector. Every person, firm or corporation

bringing into any county of this state goods or merchandise after the first day of March shall be deemed subject to the provisions of this section."

The first contention on the part of the appellants is that their business as conducted by them was not of such a nature as to render their property taxable under the provisions of the statute. It is argued that the buggies were not sent into Adams county "to be sold or disposed of in a place of business temporarily occupied for their sale," and in fact were not so sold or disposed of; that the property was temporarily stored only in a place in Adams county, and were sold and disposed of generally throughout the county at no particular place, and no sales were made at the place of storage; that the statute applies only to cases where the vendor opens a store and sells goods to customers who come to the store to buy them, and not to sales made entirely elsewhere than at the storage place, and are only delivered to the purchaser from such place. It is argued further, also, that the last sentence of the section, namely, "every person, firm or corporation bringing into any county of this state goods or merchandise after the first day of March shall be deemed subject to the provisions of this section," should be read as if it were at the beginning and not at the end of the section, and construed as if it were a part of the first sentence thereof. With reference to the latter phase of the contention, we think it may be conceded that the sentence quoted does not alone authorize the assessment made upon the appellants' property, but that the right to assess such property must be found in the first sentence of the section; that it must be found that the appellants brought within the county of Adams a stock of goods or merchandise to be sold or disposed of in a place of business temporarily occupied for their sale without the intention of engaging in permanent trade in such place, before the property can be deemed to be assessable under the statute.

But after so conceding we have no difficulty in reaching the conclusion that the appellants' property is assessable. Clearly, the appellants brought within the county of Adams after the 1st day of March a stock of goods to be sold or disposed of in that county, without the intention of engaging in permanent trade in such county, and it is no more than a liberal construction of the statute to say from the facts recited that such goods were brought within the county to be sold and disposed of in a place of business temporarily occupied for their sale. True, orders for the goods were not taken at the place of actual deposit, but deliveries upon the orders were made at and from such place, and delivery is as necessary to a completed sale as is the entering into the contract of sale.

[2] We are aware that the older rule was to construe the taxing statutes strictly. Tax



titles were once proverbially worthless. This court has not, however, followed this rule. It is not necessary to set forth the decisions here, but a most cursory examination of the reports of our adjudicated cases will show that such statutes have been given a liberal interpretation, and that we have upheld the action of the taxing officers in all cases where the substance and spirit of the statute has been pursued, even though there may have been a departure from its strict letter. We think now that this is the better policy. The government must exist. It cannot exist without taxation. Taxation to be just must be levied upon the property of all persons alike, and it is not levying taxes upon all property alike if the property of one person justly assessable is to escape by technical construction and the increased burden caused thereby levied upon the property of another.

There is no hardship in the particular case. The appellants, residents of a foreign state, brought their property into this state to dispose of it to our citizens at a profit to themselves. The property as soon as it arrived was under the protection of the state. The contracts made with our citizens with reference to the sale of the property are enforceable under our laws. The machinery of our courts is open to the appellants to enforce such contracts, and it is used by them for such purpose. It is but just that for this protection and for these privileges the property should contribute to the support of the state.

[3] It is suggested that the property is not taxable in this state because taxed in the state of Iowa for the year in which it was shipped into this state. But the rule is to the contrary. Property otherwise taxable in this state is not exempt because it has been taxed for the same year in another state. *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 65 L. R. A. 336, 102 Am. St. Rep. 888; 37 Cyc. 755. As was said in *Holton v. City of Bangor*, 23 Me. 264: "If a person chooses to employ his visible and tangible personal property within a jurisdiction, where he has no domicile, thereby receiving, it may be, peculiar favor from its laws, and subjecting them to the charge of its protection, it may not be unjust or unreasonable that it should be subjected to taxation within that jurisdiction, although it may in law be considered as following the person of the owner, and subject to taxation there also. The state must be the judge of its rights and duties in such cases; and the persons may relieve themselves from the possibility of a double burden by the disposition of their property, or by a change of their domicile."

[4, 5] Lastly it is urged that the goods were still in transit, or at least had not become of the mass of property within the county of Adams, at the time it was assessed, and that the assessment was therefore unlawful as an interference with or burden

upon interstate commerce. On its facts the case is before us on the findings of the trial court; no statement of facts having been sent up as a part of the record. These findings recite that the property was assessed by the assessor of Adams county, "immediately upon its arrival at Ritzville, in said Adams county," and the appellants construe this to mean that it was assessed prior to the time the property was unloaded from the cars in which it was carried into this state, and the contention that the property was assessed while in transit, or before it had become of the mass of the property of the state, is based upon this construction of the findings. It has seemed to us, however, that the finding is capable of another construction. The word "immediately" does not necessarily mean "upon the instant," but may mean "proximately," or "directly," and is thus (in the instant case) just as applicable to an assessment made upon the property after it had been unloaded from the cars as it is to an assessment before that event. That the latter was the meaning of the trial judge is made clear from the written memorandum made by him when he decided the cause; for in the memorandum he expressly recites that the property was assessed after it had been stored in the warehouse. This being true, there can be no question as to the status of the property when the assessment was levied. Where goods are brought into the state and stored in advance of sales, and orders taken for the property are filled therefrom, the business is not interstate but local commerce, and laws imposing taxes thereon are not invalid as interfering with interstate commerce. *Hynes v. Briggs* (C. C.) 41 Fed. 468; *American Harrow Co. v. Shaffer* (C. C.) 68 Fed. 750; *Kehrer v. Stewart*, 117 Ga. 969, 44 S. E. 854; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Pittsburg, etc., Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538.

But we think the rule would not be different were the appellants' construction of the findings the correct construction. The property had reached its destination. It had come to its place of rest for final disposal and use, and was to remain there until finally disposed of by the owner. As such, we think it constituted a part of the mass of the general property of the county even while on the cars, and was thus subject to taxation under the provision of the statute quoted, since it was the intention of the owners to take it to a place of business to be temporarily occupied for its sale.

We conclude therefore that the tax in question is legal and valid and no cause for its recovery by the persons paying it exists.

The judgment is affirmed.

CROW, C. J., and PARKER, MORRIS, and MOUNT, JJ., concur.

**ACRES v. FREDERICK & NELSON, Inc.**  
(No. 11,526.)

(Supreme Court of Washington. April 29, 1914.)

**1. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—INJURY TO SERVANT—DEFENSES—INDUSTRIAL INSURANCE LAW.**

An employer who relies on the Industrial Insurance Law (Laws 1911, c. 74) as withdrawing from the courts an action by the employé for a personal injury must plead and prove a compliance with the law.

**2. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.**

In an action for injuries to an employé falling into an elevator shaft, evidence held to show that the proximate cause of the injury was the negligent failure of the employer to maintain the gates in condition to work automatically.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

**3. MASTER AND SERVANT (§ 185\*)—INJURY TO SERVANT—NEGLIGENCE.**

The duty of an employer to use reasonable care to maintain a reasonably safe place for his workmen is nondelegable, and the employer is liable for injuries to an employé caused by the negligence of a fellow employé in the performance of such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

**4. MASTER AND SERVANT (§§ 101, 102\*)—OBLIGATION OF MASTER—SAFE PLACE TO WORK.**

The rule that an employer must use reasonable care to maintain a reasonably safe place for his workmen means that the employer must not expose employées to dangers which may be guarded against by reasonable care and diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**5. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.**

The burden is on an employé, suing for a personal injury negligently inflicted, to make it appear more probable that the injury came in whole or in part from the employer's negligence than from any other cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**6. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.**

In an action for injuries to an employé falling into an elevator shaft, evidence of the employer's negligent failure to properly light the floor held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**7. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

An employé who entered the building in which he worked a few minutes before the working hour, and who took the middle passageway, but failed to throw on the lights at the switch because he did not know the location of the switch or the manner of using it, was not as a matter of law guilty of contributory negligence so as to preclude a recovery for injuries by falling into an unguarded elevator

shaft, though he knew the location of the elevator.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**8. MASTER AND SERVANT (§§ 206, 288\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

An employé assumes no risks except those which are reasonably a necessary incident to his employment, and an employé does not assume, as a matter of law, the risk of going through a passageway provided by the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 1068-1088; Dec. Dig. §§ 206, 288.\*]

**9. MASTER AND SERVANT (§ 103\*)—INJURY TO SERVANT—LIABILITY OF MASTER—INDEPENDENT CONTRACTOR.**

An employer may not escape liability for injury to an employé who fell into an elevator shaft while being repaired, where the shaft was unguarded because of the breaking of a casting of the gates not caused by any act of the person who was making the repairs, on the theory that such person was an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**10. TRIAL (§ 349\*)—SUBMISSION OF INTERROGATORIES TO JURY—DISCRETION OF COURT.**

The submission of interrogatories to the jury rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.\*]

**11. DAMAGES (§ 131\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

A person 27 years old and earning \$10 a week sustained a comminuted fracture of the neck of the femur. At the time of the trial the muscles of the injured leg were atrophied and the injured leg was an inch and a quarter shorter than the other. One physician testified that it might continue to shorten and that there was a soft union, while other surgeons testified that there was a bony or fibrous union. Held, that a verdict for \$4,000 would not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 131.\*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Patrick J. Acres against Frederick & Nelson, Incorporated. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Roberts and Wright, Kelleher & Caldwell, all of Seattle, for appellant. James T. Lawler, of Seattle, for respondent.

GOSE, J. The plaintiff, an employé of the defendant, fell into an elevator shaft in defendant's warehouse, on September 18, 1912, and sustained injuries for which he demands redress in this action. There was a verdict and judgment in his favor for \$4,000. This appeal followed.

The appellant raises the following questions: (1) That the Industrial Insurance Law, Laws 1911, p. 345, withdraws this class of actions from the courts; (2) that there was no negligence shown; (3) that the respondent was guilty of contributory negligence; (4) that he assumed the risk; (5)

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that, if any negligence was proven, it was that of a fellow servant; (6) that respondent was a mere licensee in the building at the time and place he received his injury; (7) that the negligence, if any, was that of an independent contractor; (8) that the court erred in refusing to submit certain interrogatories to the jury; (9) that the damages are excessive.

[1] The first question merits scant attention, for the following reasons: (a) It is not raised in the pleadings and was not suggested in the court below; (b) it is not briefed in this court further than a mere reference to the statute; and (c) the appellant has not brought itself within the terms of the act. Section 8, p. 362, provides: "In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 4, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman \* \* \* as he would have been prior to the passage of this act." It was the duty of the appellant to plead and prove a compliance with the act.

[2] A consideration of the second question, viz., that there is no evidence of negligence, requires a reference to the facts which the evidence tends to prove. Appellant's warehouse, consisting of basement, main floor, and upper floor, is 120 feet square. The main floor is used for storing furniture. The office is near the northwest corner. Not far from it are the electric light switches. The elevator, 8 by 10 feet in dimensions, is situated a little to the west of the center. It is operated by means of a rope upon a cable. The gates work automatically; that is, when the elevator is down the gates are up, and when the elevator is up the gates are down. A passage runs north and south through the center of the building, connected by four short passages with a parallel passage on the east leading to a toilet in the southeast corner. Respondent testified that he began working for appellant on September 17th; that, on arriving the next morning, he registered at the office at 7:20, and went to the toilet; that he had been there twice the previous day; that he walked east from the office to the east passage and followed that south to the toilet; that in returning at 7:25 he got confused, followed the east passage to about the center of the building, and turned west through a passage which led directly to his place of work; that the floor was dark, the lights from above casting a glimmer thereon; that the passageways were not straight; that in his confusion and in the darkness, not having the elevator in mind, he fell into the open shaft and received his injury; that furniture was piled on both sides of the passageways, some of it to a considerable height; and that on the afternoon before they had piled it all around the ele-

vator. A diagram of the building shows that about one-half of the wall space on three sides is windows, but the respondent said that the lighting was inadequate: (a) Because the windows were not kept clean; and (b) because of the height of the furniture, that is, that there was light above, but not sufficient light upon the floor. He further testified that electric lights were used for lighting this floor during the working day, but were not on at the time he fell. The working day began at 7:30 a. m. The sun rose at 5:50 a. m. on September 18th, but the local representative of the weather bureau testified that the weather was "partly cloudy." It developed during the trial that the elevator was on the top floor, and that the gates were tied up with ropes at the time of the accident. It is not shown who tied the gates. The testimony further shows that the elevator was being repaired during the afternoon of September 17th.

One Montgomery, who was engaged in repairing the elevator on the 17th, testified as follows: "Q. In what condition did you find the elevator? A. There was something got caught in a beam and bent it, and we took a sledge hammer and straightened it. \* \* \* Q. Did you have to work the elevator up and down? A. No, sir. Q. Did you have to bring it down to the main floor? A. It was at the main floor. Q. What did you do with the gates? A. Took a casting off there. Q. Off the gates? A. Yes. Q. Why did you take the casting off? A. It was broken. It has nothing to do with the gates being down. This casting was broken. Your gates go down and the gates were down. Q. In order to repair the elevator, the gates had to be out of the way? A. No, sir; the gates were down, and we were on that car straightening the car. Q. You brought the car down to the first floor? A. The car was at the first floor. \* \* \* Q. And the gates were right in place? A. Yes, sir; the gates were down. Q. How could the gates be down if the elevator was down? A. The automatic part was broken. Q. And you fixed it? A. Not at that time, but I got it fixed. Q. When did you fix it? A. Well, the day after or the following afternoon, as near as I can remember. Q. The casting? A. Yes, sir. \* \* \* Q. You left the elevator on this floor when you left? A. Yes, sir. Q. And the elevator was on that floor with the gates down? A. Yes, sir. \* \* \* Q. You say that the automatic casting was broken? A. Yes, sir. Q. And the fact of that being broken, then the gates could not work? A. The gates would go down. Q. And they could not work? A. They could not be raised. Q. You would have to raise them by hand? A. You would have to raise them by hand. \* \* \* Q. And if one went there and wanted to see them, it is very easy to slide them up and down with their hands? A. Yes, sir. \* \* \* Q. Then a few days later when you fixed the automatic cast-

ing, then the elevator would work automatically? A. Yes, sir; after the elevator was repaired."

It will be observed that the repair work was being done on the afternoon of the 17th of September; that a casting was broken so that the gates would not work automatically, but had to be worked by hand; and that they were not repaired until after the respondent was injured. The appellant's testimony shows that about 23 men were working in the warehouse, and that each of these men used the elevator as the necessities of the work required. The primary question is: What was the proximate cause of the accident; was it the tying up of the gate, or was the tying up of the gate a mere incident? We think the proximate cause of the injury was the broken casting. The employes used, and were expected to use, the elevator in the prosecution of their work. If they found it more convenient to tie the gates than to raise and lower them by hand in carrying on the work, this would not exempt the master from liability, even if it were shown, which it was not, that the gates were tied by a fellow servant.

[3] It is the duty of the master to use reasonable care to maintain a reasonably safe place for the workmen, and this duty is non-delegable. *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091; *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016.

[4] This rule means that the master must not expose the employe to dangers which may be guarded against by reasonable care and diligence. *McLeod v. Chicago, etc., R. Co.*, 65 Wash. 62, 117 Pac. 749.

[5] The burden is upon the one charging negligence to make it appear more probable that the injury came in whole or in part from the master's negligence than from any other cause. *Graaf v. Vulcan Iron Works*, supra.

[6] It is alleged in the complaint, and evidence was offered to sustain the allegation, that the floor was inadequately lighted. Whatever may be said of the tying up of the elevator gates, this circumstance, if standing alone, would have been sufficient to carry the case to the jury. *Schwarzschild v. Drysdale*, 69 Kan. 119, 76 Pac. 441.

[7] It is argued that the respondent was guilty of contributory negligence in entering the building a few minutes before the working hour, in taking the middle passageway, and in failing to throw on the lights at the switch post near the office. He testified that he did not know the location of the switches, and the appellant's foreman testified that he neither pointed them out to the respondent nor instructed him as to the manner of using them. It cannot be said as a matter of law that any of these acts constituted such negligence as to take the case from the jury. While the respondent knew the location of the elevator, he had a right to assume that

there were no unguarded pitfalls in the building. Moreover, as the trial court aptly observed, it was not negligence as a matter of law for the respondent to be ready to go to work a few minutes before working time, and to so hold would be to put a premium upon indolence. *Perrault v. Emporium Department Store Co.*, 71 Wash. 523, 128 Pac. 1049; *Schwarzschild v. Drysdale*, supra. The appellant has cited and relies upon *Jones v. Moran Bros. Co.*, 45 Wash. 391, 88 Pac. 626, in support of his contention that the respondent was guilty of contributory negligence. In that case the injured party was engaged in painting on a steamship, working between decks. At the close of the noon hour he went down the stairway from the upper deck to the one next below, and started to pass through a compartment which he said was pitch dark, on his way toward his place of work. The court said: "If this compartment was 'pitch dark' when respondent entered it, he, of course, knew and appreciated that fact, and cannot hold the master for any results flowing directly and solely from that condition." That case is distinguishable because of the fact that the party did not receive his injury in the compartment where he was working, while in this case the injury was sustained on the floor where the respondent's work called him.

[8] The questions of contributory negligence and assumption of risk approximate in cases of this character. The law is that the employe assumes no risk "not reasonably a necessary incident to the actual work in hand." *Koloff v. Chicago, etc., Ry. Co.*, 71 Wash. 543, 129 Pac. 398; *Dumas v. Walville Lumber Co.*, supra. It will not do to argue that the appellant was not negligent in assuming either that the elevator was on the main floor, or that, if it had been taken above or below, the gates were working automatically and barred access to the shaft; and at the same time contend that the respondent, who had worked in the place only one day, was guilty of contributory negligence in falling into the shaft, or that he assumed the risk in going to the toilet and returning to the place where he was required to work. The toilet was used, and was intended to be used, by the employes, and it cannot be said as a matter of law that an employe assumed the risk of going from the toilet through a passageway provided by the master.

What we have said disposes of the contention that the negligence, if any, was, or may have been, the negligence of a fellow servant. As we have said, it is not shown who tied up the gates, but the appellant knew that the elevator had been out of repair.

The foregoing discussion also disposes of the appellant's contention that the respondent was a mere licensee on the premises at the time he met his injury.

[9] The argument that appellant's injury was due to negligence of Montgomery who was engaged to repair the elevator, that he was an independent contractor, and that no liability ensued from any want of reasonable care on his part, is fallacious for two reasons: (a) The break in the casting of the gates was not due to any act of his; and (b) the duty of the master to use reasonable care to keep the place reasonably safe was a continuing and nondelegable one. In addition to the authorities cited, see *Covington, etc., Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375. In *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283, 109 Am. St. Rep. 917, cited by appellant, the plaintiff was employed by the defendant as a carpenter in building a battleship. His injury was due to the falling of a steel plate which was being handled by employes of an independent contractor who had undertaken to place the plates on the side of the ship. In *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904, also cited by appellant, it was held that the relation of master and servant does not exist between the original contractor and employes of an independent contractor, and hence that the former was not liable for the negligence of the employes of the latter. *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083, is to the same effect.

[10] The appellant also assigns error in the refusal of the court to submit certain interrogatories to the jury. We have repeatedly held that the submission of interrogatories to a jury rests in the sound discretion of the trial court. *Loy v. Northern Pacific R. Co.*, 68 Wash. 83, 122 Pac. 372.

[11] In respect to the assignment that the damages awarded—\$4,000—are excessive, the testimony shows that the appellant was injured on the 18th day of September; that he was taken to and remained in the hospital until Thanksgiving; that the neck of the femur was broken, and, according to the testimony of one of the physicians, the fracture was what is known among surgeons as a comminuted fracture, meaning a shattered fracture. At the time of the trial the muscles of his injured leg were atrophied, and the injured leg was an inch and a quarter shorter than the other. One surgeon testified that it may continue to shorten, and that there is a soft union. Other surgeons testified that there was a bony or fibrous union. The testimony shows that the result was good from the standpoint of surgeons, but the surgeons differ materially as to the ultimate usefulness and strength of the leg. The appellant voluntarily paid the hospital expenses and the expenses of the surgeons who attended the respondent while he was in the hospital. The respondent was 27 years of age at the time of the injury, and was working for

\$10 a week. He testified, however, that he had theretofore earned in harness work, a line in which he had had considerable experience, \$18 a week. On this testimony we do not feel inclined to disturb the verdict.

We find no error in the record, and the judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

## INTERNATIONAL CONTRACT CO. v. CITY OF TACOMA. (No. 11,474.)

(Supreme Court of Washington. April 28, 1914.)

### 1. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS FOR IMPROVEMENTS—ADDITIONAL WORK—REASONABLE VALUE.

Under a contract for the construction of a city's gravity water system, providing for the doing of itemized work at unit prices fixed for each item, that the city might change the work without allowance to the contractor, except where the quantities of materials were increased, and then at the contract price, and that any work or material not contained in the specifications should be done or furnished at actual cost, plus 10 per cent., the fact that excavation estimated at approximately 450 cubic yards amounted in fact to 3,500 cubic yards was not such an excess as to take it out of the contract and entitle the contractor to payment measured by the reasonable value of the work, where a reference to the plans and a computation therefrom would have shown the actual amount of excavation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

### 2. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACT FOR IMPROVEMENTS—ALTERATIONS OR ADDITIONAL WORK.

A municipal corporation, making improvement work more expensive than it would have been under the terms of the original contract, or directing the performance of work or the furnishing of materials not within such contract, in the absence of contrary stipulation, is liable to the contractor for the increased cost, or for the extra work where the claim is not inconsistent with the contract when reasonably construed or outside of the provisions as to charges for extra work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

### 3. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACT FOR IMPROVEMENT—INSTRUCTION—INTEREST ON ACCOUNT.

Under a contract with a city for the construction of a gravity water system, a provision that any work or material not contained in the plans and specifications should be done or furnished at actual cost, plus 10 per cent., was simply auxiliary to the contract to provide a compensation for things unforeseen, and, as to work on such account amounting to less than one-fifth of the whole, the contractor was not entitled to a 6 per cent. overcharge for its office expenditures, officers' salaries, insurance, etc., as a part of the cost of force account work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 370\*)—CONTRACT FOR IMPROVEMENTS—DEDUCTION FROM PAYMENTS—ESTOPPEL.

Under a contract with a city for the construction of a gravity water system, providing for the payment of itemized work at unit prices for each item, and for extra work at cost, plus 10 per cent., and that payments should be made monthly for work and materials actually done or put in place, upon estimates of the city's engineer, approved by its commissioner, the estimates on which payments were made were not conclusive upon the city, so as to estop it from counterclaiming for deductions on the theory that previous excess payments were based on mistakes in the estimates.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 902, 903, 908, 909; Dec. Dig. § 370.\*]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the International Contract Company against the City of Tacoma, with counterclaim by defendant. Judgment for plaintiff, and it appeals. Affirmed.

Walter M. Harvey, of Tacoma, for appellant. T. L. Stiles and F. M. Carnahan, both of Tacoma, for respondent.

**PARKER, J.** The International Contract Company commenced this action in the superior court for Pierce county against the city of Tacoma, to recover the sum of \$33,885.52, claimed by it as a balance due from the city upon the construction of the headworks, tunnels, and river crossing near there of the city's Green river gravity water system. The city denied the facts pleaded by the contract company upon which its claim was rested, and made a counterclaim, for which affirmative judgment was demanded, claiming certain errors and mistakes in estimates upon which payments to the contract company were made during the progress of the work. A trial before the court without a jury resulted in findings and judgment in favor of the contract company for the sum of \$1,041.18, from which it has appealed.

In January, 1910, the city council of Tacoma passed an ordinance proposing to the voters of the city, as an addition to its existing water system, a gravity water supply to be taken from Green river at a point in King county some 30 miles east of the city, to be conveyed to the city by gravity at an estimated cost of \$2,000,000. This proposal, having been submitted to the voters at an election held for that purpose, was duly ratified. Thereafter plans and specifications for the construction of the headworks, together with certain other work near there, were prepared, and bids invited for that portion, as a section of the work, to be constructed under one contract. Bids were invited and submitted upon the unit basis; "approximate quantities of work to be done" being stated in the instructions to bidders. Appellant submitted its bid as follows:

"The undersigned hereby proposes to fur-

nish all the material and construct the headworks, tunnels and river crossing for a gravity water supply on Green river for the city of Tacoma, in accordance with the maps, profiles and plans on file in the office of the commissioner of light and water of Tacoma, and the attached specifications and contract, for the prices named in the following schedule:

#### Headworks.

Excavating earth, per cu. yd.....	\$ 50
Excavating rock, per cu. yd.....	1 30
Concrete masonry, per cu. yd.....	10 50
Cement plaster, per sq. yd.....	30
Steel reinforcing bars, per pound....	039
Structural steel, per pound.....	062
Railroad rails, per pound.....	035
Washout and regulating gates, in place, each .....	490 00
Steel pipe, per lin. ft.....	25 00
Timber in place, per 1,000 ft. B. M. .	28 00
Tunnel excavation, per cu. yd.....	8 00

#### Tunnel.

Excavating earth, per cu. yd.....	\$ 1 00
Excavating rock, per cu. yd.....	1 50
Concrete masonry, per cu. yd.....	10 50
Tunnel excavation, per cu. yd.....	4 00
Timbering in place, per 1,000 ft. B. M. ....	28 00

#### River Crossing.

Excavating earth, per cu. yd.....	\$ 2 00
Excavating rock, per cu. yd.....	4 00
Concrete masonry, per cu. yd.....	10 50
Kalemein pipe, per lin. ft.....	2 00
Steel pipe, per lin. ft.....	24 00
Blow-offs, in place, each.....	100 00"

This was accepted by the city as the lowest bid, and thereupon a written contract was entered into accordingly.

Green river flows in a westerly direction where the work involved in this contract is located. The headworks consist of a concrete dam across the river, and intake on the north side of the river, a tunnel at the intake, approximately 100 feet long, through a point of rock, forming a natural wall at the edge of the river, and a settling basin at the westerly end of the tunnel. This tunnel is known as tunnel No. 1. Other work within the contract consists of tunnel No. 2, 1,200 feet long, tunnel No. 3, 275 feet long, conduits several hundred feet long between the settling basin and tunnel No. 2, and between tunnels No. 2 and No. 3, all on the north side of the river, and also a conduit across the river from the westerly end of tunnel No. 3 to the southerly side of the river. The work was under the supervision of the city's commissioner of light and water and his authorized representatives upon the ground. The specifications for the work contained the following:

"The city shall have the right to make any changes in lines, grades and plans that may be deemed advisable by the commissioner after the work is started and the contractor shall make such changes upon the order of the commissioner. No allowance shall be made the contractor on account of such changes, except where the quantities of mate-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rials are increased and in such cases the contractor shall be paid at the contract prices for the additional amount of material furnished and work done. The contractor shall be paid at the contract prices for only the actual amount of material furnished and work done, regardless of the approximate quantities as stated herein."

The contract proper contained the following:

"Witnesseth that the said contractor, in consideration of the covenants, agreements and payments hereinafter mentioned to be performed and made by said city, hereby covenant and agree under the penalty expressed in the attached bond bearing even date herewith, to furnish all the material and construct the headworks, tunnels and river crossing for a gravity water supply system on the Green river for the city of Tacoma in accordance with the attached proposal and specifications which are hereby declared and accepted as parts of this agreement, and to accept payment for the actual amount of material furnished and labor performed at the prices named in said proposal as full compensation under this contract.

"The contract prices shall include the furnishing of all machinery, appliances and tools, and all materials and labor and all other expenses necessary to construct the headworks, tunnels and river crossing complete according to the maps, profiles, plans and specifications on file in the office of the commissioner of light and water of said city, and the expense of maintaining the work in good condition until it is accepted by the commissioner. All items of labor, material and expense necessary to finish the headworks, tunnels and river crossing complete that are not enumerated in the schedule shall be included in the prices bid for the different classes of work.

#### "Extra Work.

"Whenever during the progress of the work of said contract any work or material not contained in the plans and specifications therefor shall be ordered by resolution of the city council, the same shall be done or furnished by the contractor at actual cost and ten per cent. added. \* \* \*

"Payments shall be made in cash to the contractor monthly for work and materials actually done or put in place in construction, upon estimates issued by the engineer and approved by the commissioner of light and water; to the extent of 85 per cent. of such work and materials; the remaining 15 per cent. shall be delivered to the contractor when his contract has been fully completed and accepted by said city, after a thirty days' operating test."

Appellant's bid, computed upon the estimate of approximate quantities made by the city, would have totaled about \$65,500, but

owing to changes requiring additional work, authorized by resolution of the city council, and agreed to be done by appellant at certain fixed prices, additional work which appellant was entitled to pay for, measured by cost and 10 per cent. added, commonly called "force account," and errors in the estimate of approximate quantities, resulted in the city actually paying to appellant for work done the sum of \$219,963.48, to which \$1,041.18, upon payment of this judgment, will be added.

Appellant's claim of balance due is rested largely upon the theory that certain changes made by those in charge of the work in behalf of the city from that specified in the original plans were so radical as to fall entirely without the terms of the contract and entitle appellant to compensation therefor, measured by the reasonable value of such work rather than by the prices named in the contract. One of the largest items so claimed by appellant upon this theory relates to tunnel No. 1. As originally planned, this tunnel was to be 18x20 feet in size. For reasons deemed sufficient by those in charge for the city, this tunnel was reduced to 8x10 feet in size. Appellant proceeded to construct the tunnel as directed; no specific understanding as to the compensation appellant was to receive therefor being had aside from the contract. We assume, for argument's sake, that those in charge for the city had authority to direct this change, though it does not seem to have been made by authority of a resolution of the council. This particular work was excavation at \$3 per cubic yard, and concrete masonry at \$10.50 per cubic yard, providing compensation therefor is to be measured by prices named in the contract. Manifestly it must be so measured, unless the change was so radical that the work may be said to be entirely different from that contemplated by the contract. Counsel for appellant argue that the diminished size of the tunnel rendered it much more difficult and expensive per cubic yard to remove the material therefrom than from a tunnel of the size originally planned. Touching this contention, the trial court found as follows:

"With reference to plaintiff's claim for \$3,551.25 on account of changes in the plans of tunnel No. 1, intake and settling basin, and more expensive work necessitated thereby, there was no sufficient evidence upon which to determine the amount of increase in the cost of the work or upon which to base a charge against the defendant."

There is evidence tending to show that the driving of a tunnel 8 feet by 10 feet is proportionately somewhat more expensive than the driving of one 18x20, but a review of the evidence to which our attention has been called convinces us that in this particular instance the evidence was not such as to enable the court to say that the change was so radical as to take the construction of this particu-

lar tunnel out of the terms of the contract, so far as compensation therefor is concerned. We think the evidence as a whole calls for the finding made by the court upon this subject, and that the court was not in error in ruling that compensation for this work is not to be measured by reasonable value, but by the quantity prices named in the contract. Clearly it was not referable to force account, since it does not appear to have been ordered by the city council as extra work.

[1] Another of the large items claimed by appellant of a similar nature is for excavation in the construction of the dam intake and settling basin. This claim, sought to be measured by reasonable value of the work, is rested upon the theory of excessive quantity of excavation required over that stated in the estimate of approximate quantity. In the original estimate, this quantity was stated to be approximately 450 cubic yards, when in fact it proved to be some 3,500 cubic yards. So far as appellant's claim is rested upon this increased quantity, the evidence plainly indicates that a reference to the plans accompanying the specification and a computation which could readily have been made therefrom would show that the quantity of excavation required was about 3,500 cubic yards. We think this of itself is enough to warrant the conclusion that appellant is not entitled to other than the contract price per cubic yard, so far as such claim is rested upon the excess of quantity over that stated in the city's estimate of approximate quantities. It is further argued by counsel that changes made in the settling basin and the excavation for the foundation of the dam were such as to render such excavation proportionately much more expensive than that shown by the original plans. The evidence upon this subject indicates that the changes in the quantity of excavation in fact were such as to render it proportionately less expensive, but there was other evidence indicating that it may have been somewhat more difficult, by reason of this change, to take care of the water in the river during the construction of the dam. Taking the evidence as a whole, we agree with the trial court that the expense of this excavation per cubic yard, including the construction of the dam and settling basin, did not increase the cost of the work per cubic yard to appellant. We are of the opinion that the court was warranted in measuring appellant's compensation for this work by the prices fixed in the contract. The questions involved in all of these claims are almost wholly questions of fact.

[2] So far as they are governed by principles of law, we think the following observations in 2 Dillon, *Municipal Corporations* (5th Ed.) § 813, are applicable:

"If a municipal corporation by its own act causes the work to be done by a contractor under a contract for an improvement to be

more expensive than it otherwise would have been according to the terms of the original contract, or if the municipality orders and directs the contractor to perform work or furnish material or labor which is not within the contemplation of the original contract, it is liable to him, in the absence of stipulations to the contrary, for the increased cost or for the extra work. But, to justify a recovery for extra work, the claim must not be inconsistent with the provisions of the contract when fairly and reasonably construed. If, upon such a construction, it appears that the work was intended to be compensated by the compensation provided thereby, there can be no recovery, or, if it is within a provision of the contract specifying the rate to be charged for extra work of that nature, then the recovery, if any, is under the contract, and the amount is limited to the rates specified by the contract."

Our decision in the late case of *McHugh v. Tacoma*, 135 Pac. 1011, also lends support to the conclusions we here reach.

[3] Another of the large items of appellant's claim is that of a 6 per cent. overcharge upon force account; that is, a claim of 6 per cent. upon the total of the force account in addition to the 10 per cent., for appellant's office expenses, its officers' salaries, insurance, etc., which it insists is a part of the cost to it of the force account work. This work was less than one-fifth of the whole. We have noticed that, for work of this character, the contract provides that "the same shall be done or furnished by the contractor at actual cost and ten per cent. added." If the contract had provided for appellant's entire compensation, to be measured by force account, and such work had been thereby other than incident to the contract as a whole, there might be some ground for appellant's contention. Upon the theory that the contract was ambiguous in this respect, some expert testimony was received upon the subject. This testimony is not wholly free from conflict, but that which evidently seemed to the trial court most weighty, as it does to us, was to the effect that, where force account is simply auxiliary to the contract for the purpose of providing a measure of compensation for unforeseen things, the actual cost of such work does not include overhead expense of the nature here claimed. We agree with the trial court that in view of the incidental nature of this force account work, and the amount of it as compared with the whole, it should not be held to include the items claimed by appellant. The authorities do not furnish much light upon this subject. The following, however, seem to lend support to the view we have here expressed: *Savannah, A. & N. Ry. Co. v. Oliver*, 174 Fed. 140, 98 C. C. A. 174; *Lexington, etc., R. Co. v. Fitchburg R. Co.*, 9 Gray (Mass.) 226; *Isaacs v. Reeve* (N. J. Ch.) 44 Atl. 1.



[4] It is contended by counsel for appellant that the trial court erred in allowing the city deductions from previous payments made to appellant. This contention is rested principally upon the theory that the payments from which such deductions were allowed the city were made upon monthly estimates of the city's engineer, approved by the commissioner, and were therefore conclusive upon the city. These deductions were claimed in the city's counterclaim and partially allowed by the court upon the theory that the previous excess payments were based upon mistakes made in the estimates upon which the previous payments were made. If such estimates are held to be final and conclusive upon the city, it is only because of an inference to be drawn from the terms of the contract touching payments; there being nothing therein specifically so providing. We are quite unable to understand upon what theory of right the city shall be prevented from having such mistakes corrected, in an action of this nature. The authorities are not wholly in harmony upon the subject, but we apprehend that such lack of harmony is more apparent than real. We are not able to see any element of estoppel in this case as against the city. Plainly appellant was not misled to its prejudice, so far as this record shows. No evidence is called to our attention indicating that appellant was, by such estimates, led to settle with any subcontractor or for its supplies upon the basis of such estimates. The evidence indicates nothing more than the fact that appellant received more compensation than it was entitled to receive because of the erroneous estimates. We think the trial court was clearly right in its rulings upon this subject. *Wait, Engineering and Architectural Journal*, § 482; *Dyer v. Middle Kittitas Irrigation District*, 40 Wash. 238, 82 Pac. 301.

Other items claimed by appellant and disallowed by the trial court are involved in this appeal. The correctness of the court's conclusions thereon, however, involve, in the last analysis, only questions of fact. Indeed, there is little else in any of the questions presented in this case. A somewhat painstaking review of all the evidence to which our attention has been called convinces us that the trial court's disposition of the case came as near rendering exact justice as was possible under the circumstances. The questions are much involved, the record very voluminous, and we are impressed with the fact that the learned trial judge gave to the case very painstaking consideration. We do not feel called upon to discuss the case in greater detail.

The judgment is affirmed.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

# MATTSON v. EUREKA CEDAR LUMBER & SHINGLE CO. (No. 11,555.)

(Supreme Court of Washington. April 27, 1914.)

## 1. APPEAL AND ERROR (§ 523\*)—RECORD—MOTION FOR CONTINUANCE—AFFIDAVITS.

Unless affidavits supporting a motion for a continuance are clearly identified by the motion, and the appellate court can fairly infer from the order denying the continuance that no other affidavits were considered by the trial court, the appellate court will not consider the affidavits unless they are made a part of the statement of facts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2372-2374; Dec. Dig. § 523.\*]

## 2. CONTINUANCE (§ 7\*)—DISCRETION OF TRIAL COURT.

A motion for a continuance is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.\*]

## 3. RELEASE (§ 57\*)—FRAUD—EVIDENCE.

Evidence held to sustain a finding that a release of a claim for damages for personal injuries was signed by an employé through fraudulent representations.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-108; Dec. Dig. § 57.\*]

## 4. RELEASE (§§ 57, 58\*)—VALIDITY.

A contract of settlement for personal injuries can only be impeached for fraud by clear and convincing evidence; but, where the evidence on the question of fraud is conflicting, it is for the jury to determine whether the evidence is clear and convincing.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-114; Dec. Dig. §§ 57, 58.\*]

## 5. RELEASE (§ 57\*)—ADEQUACY OF AMOUNT.

Evidence, in an employé's action for personal injuries, held to show that the \$250 accepted by plaintiff upon signing a release in full of his claim was wholly inadequate to compensate him for his injuries.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-108; Dec. Dig. § 57.\*]

## 6. RELEASE (§ 57\*)—FRAUD—EVIDENCE.

The fact that the amount received by an injured employé in consideration of the execution of a release is wholly inadequate to compensate him for his injuries is some evidence that the employé did not understand the extent of his injuries or the nature of the instrument, when he executed the release.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-108; Dec. Dig. § 57.\*]

## 7. MASTER AND SERVANT (§ 276\*)—INJURIES—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

Evidence, in an employé's action for personal injuries by lumber falling upon him, held to sustain a finding that the lumber fell because insecurely piled and braced, and because of the vibration of the shed due to the machinery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

## 8. MASTER AND SERVANT (§§ 101, 102, 124\*)—SAFE PLACE OF WORK.

An employer must exercise reasonable care to furnish a reasonably safe place of work and maintain a reasonable inspection thereof.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192, 235-242; Dec. Dig. §§ 101, 102, 124.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**9. MASTER AND SERVANT (§ 103\*)—MASTER'S DUTY—SAFE PLACE OF WORK—DELEGATION.**  
An employer's duty to furnish a safe place of work is nondelegable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**10. MASTER AND SERVANT (§ 219\*)—RISKS ASSUMED.**

An employé who is put to work in a particular place by the master does not assume the risk of any dangers not so open and apparent as to be discoverable by ordinary observation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

**11. MASTER AND SERVANT (§ 286\*)—INJURIES—JURY QUESTION—SAFE PLACE OF WORK.**

In an action for injuries to an employé by lumber falling upon him, claimed to have been caused by the lumber having been insecurely piled and by the vibration of the shed, evidence *held* to make it a jury question whether plaintiff was furnished with a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**12. MASTER AND SERVANT (§ 289\*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.**

In an employé's action for injuries by piled lumber falling upon him, evidence *held* to make it a jury question whether plaintiff exercised due care in working without inspecting the lumber to determine the safety of the place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**13. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.**

There was no error in refusing requested instructions which, so far as not positively erroneous, were covered by instructions given without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Mat Mattson against the Eureka Cedar Lumber & Shingle Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Morgan & Brewer, of Hoquiam, for appellant. A. M. Abel, of Aberdeen, and W. H. Abel, of Montesano, for respondent.

ELLIS, J. The plaintiff brought this action to recover for personal injuries received by him while at work as a common laborer in the defendant's sawmill. The plaintiff is a Finn and cannot speak, read, write, or understand the English language. He had been working for the defendant for about two weeks, during which time he was engaged in loading cars. On the morning of July 31, 1911, the defendant's foreman took him to the shipping shed, where lumber is piled to await shipping, and directed him to work there piling lumber, indicating the place where he was to work. There were already many piles of lumber in this shipping shed; the piles being constructed in the following manner: The lumber, which consisted

of flooring of various lengths, was assorted, tied in bundles of six boards each, and leaned against the wall of the shed; the upper end resting against the wall. Against these other bundles of the same length were leaned, and so on, forming piles according to the lengths of the lumber in the bundles. The plaintiff, at the time of the accident, was engaged in taking bundles from trucks as they were brought into the shed, assorting them as to length, and leaning them against the appropriate piles. He was engaged in taking bundles of lumber from a truck when a part of one of the piles fell on him, inflicting the injuries complained of. The evidence showed that the shipping shed was built upon a wharf constructed upon piling driven into the mud. Upon the same wharf, and at a distance variously estimated at from 40 to 150 feet from the shed, was the planing mill. The evidence is conclusive that when the planing mill was in operation the vibration of the machinery shook the wharf and caused the shipping shed to vibrate with considerable violence. There was evidence that, in the absence of braces to secure the piles of lumber standing on end in the shed, the vibration would cause them to slide and fall. There was evidence that such braces were supplied between the piles, extending from the wall a distance of about six feet. The evidence further shows that the pile which fell upon the plaintiff extended some ten feet from the wall. The negligence charged was that the defendant failed to furnish to the plaintiff a safe place to work, in that it negligently caused to be piled and maintained an unsafe, unsecured, and unstable pile of lumber not braced. No one save the plaintiff was present at the time of the injury. The plaintiff testified that he had not touched the particular pile of lumber which fell upon him. He was injured late in the afternoon of the same day in which he was first set to work in the shed. After his injury, he was taken to the Hoquiam general hospital with which the defendant had a contract for the care of its injured employes. Dr. McDonald, a member of the hospital staff, who treated all persons injured at the defendant's mill, treated the plaintiff for his injuries. After the plaintiff had been at the hospital for a few days, the defendant's manager called upon him with a view to securing a settlement for his injuries, but apparently the plaintiff could not understand what was said to him, and no agreement was reached. On the 10th of August, about ten days after the plaintiff was taken to the hospital, the manager, another man, and an interpreter came to the hospital, and, after some conversation had been carried on through the interpreter, the plaintiff accepted \$250 and signed a release in full for his injuries. The plaintiff admitted the signing of the release, and that he received the money, but alleged that he was induced to do so through fraudulent rep-

representations of the defendant's manager and did not, in fact, know that it was a release. The cause was set for trial on the 10th day of June, 1913. On June 4th, the defendant moved for a continuance on the ground that the defendant's foreman at the time of the accident was no longer in the defendant's employ, and that it was necessary to secure his testimony before proceeding to trial. The motion for a continuance was denied. At the close of the plaintiff's evidence, motions for a nonsuit and for a directed verdict were interposed. These were overruled. At the close of all the testimony, the motion for a directed verdict was renewed and was again overruled. The jury returned a verdict for the defendant in the sum of \$3,906.50. The defendant moved for a new trial. This was denied. Judgment was entered upon the verdict. The defendant appealed.

[1, 2] Preliminary to the discussion of the case in general, the appellant urges that the court committed error in refusing the continuance. The motion for a continuance was supported by certain affidavits, which, it is claimed, were attached thereto. The motion, however, does not identify these affidavits either by reference to the names of the affiants or by reference to their contents. The order denying a continuance makes no reference whatever to the affidavits. The affidavits are not included in nor made a part of the statement of facts, nor is there any certificate of the trial court that his order was based upon these affidavits, or that no other affidavits were considered by him in passing upon the motion. These affidavits are only brought up by inclusion in the transcript. The respondent has interposed a motion to strike them. These affidavits do not fall within the rule announced in *State v. Vance*, 29 Wash. 435, 70 Pac. 34, upon which appellant mainly relies, much less within that rule as circumscribed by subsequent decisions.

We have repeatedly refused to extend that rule or to apply it to any situation not a positive parallel, and have definitely declared that, unless affidavits are clearly identified by the motion, and unless we can fairly infer from the order of the court that no other affidavits were considered by the trial court, we will decline to consider such affidavits unless embodied in and made a part of the statement of facts, duly certified. *Haines & Spencer v. Kelley*, 57 Wash. 219, 106 Pac. 776; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Spoar v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190; *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 964. As pointed out in *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28, we have repeatedly held that, where there is nothing in the record to show that evidence other than an affidavit attached to a motion was not considered by the court in ruling upon the motion, the action of the trial court will not be reviewed. In that case we

said: "For the guidance of the bar, we now announce the rule to be that this court will not in any case say that the judgment of the trial court is wrong upon questions of fact unless it has before it all the evidence upon which that court passed judgment, and this fact must affirmatively appear upon the record." See, also, the more recent cases of *Powers v. Washington Portland Cement Co.*, 139 Pac. 615, and *Agens v. Powell*, 139 Pac. 873, just decided. These decisions indicate a steady rescission from the broad rule announced in the *Vance* Case and state what we are now persuaded is the only safe and reasonable rule. These affidavits cannot be considered. The motion for a continuance being addressed to the sound discretion of the trial court, and there being nothing properly in the record upon which to base an intelligent review of its action, we cannot say that the court committed error in denying the continuance.

The appellant contends that its motion for a nonsuit at the close of respondent's evidence and, in any event, the motion for a directed verdict at the close of all the evidence, should have been granted for the following reasons: (1) That there was no evidence impeaching the respondent's settlement and release of his claim for damages; (2) that there was no evidence to show what caused the accident or that it was due to any negligence on the appellant's part, while there was evidence that the respondent assumed the risk and that his injury resulted from his own negligence. It is also contended (3) that a new trial should have been granted because of insufficiency of the evidence to sustain the verdict, and because of the refusal of the court to give certain instructions requested by the appellant.

[3] 1. The evidence shows that the respondent could neither read, write, nor speak the English language, and had but little understanding of it. He testified that the appellant's manager represented to him through the interpreter that the company was giving him \$250 as a sick benefit for loss of time; that at that time he did not know how badly he was hurt; and that the appellant's manager, through the interpreter, represented that the doctor had told him that there was nothing the matter with the respondent's leg, that no bones were broken, and that he would be able to work after two weeks' time. The interpreter, through whom the settlement was accomplished, testified to the effect that, upon the manager's direction, he told the respondent that the doctor had told the manager that the respondent's leg was not broken, but just sprained, and that it would be all right in a couple or a few weeks; that the manager represented to the respondent, through the interpreter, that he would be making "easy money"—easier than working in the mill. The interpreter also testified that he did not read the release to the respondent before it was signed by mark, but

merely explained to him its contents. The respondent testified that he did not learn until a month and a half afterward, when so told by a nurse in the hospital, that his hip was broken. As opposed to this, the testimony of the appellant's manager is unsatisfactory, and, in places, contradictory. For example, he testified that "the conversation was as to how much money he would take to settle, to get him in shape so he would get in shape to work again. He said he would be satisfied with \$250." On cross-examination, he testified as follows: "Q. You said something on direct examination about getting in shape to work again. Was the subject of his working again mentioned? A. No. Q. What did you refer to then when you said that—his getting in shape to work again? A. I never said so. Q. You didn't say so? A. No, your honor, I never said so." He also testified that before August 11th he had never had any talk with the doctor about the nature and extent of the respondent's injuries. If the jury believed this testimony, and, further, believed the testimony of the respondent, and the interpreter, which was positive to the effect that the manager represented that the doctor had told him that the leg was not broken and that the respondent would be able to work in a couple or a few weeks, then the jury was justified in finding that the settlement was induced by fraudulent representations. It is significant that the physician was not placed upon the stand, and the evidence is clear that, at the time of the settlement, the respondent did not know the nature or extent of his injuries.

[4] It is true, as stated in *Nath v. Oregon Railroad & Navigation Co.*, 72 Wash. 684, 131 Pac. 251, that a contract of settlement, like any other written contract, can only be impeached for fraud by clear and convincing evidence; but it is also true that, where the evidence is conflicting, it is for the jury to determine whether the evidence adduced is, in fact, clear and convincing. *Sanford v. Royal Insurance Co.*, 11 Wash. 653, 40 Pac. 609; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439, 77 Pac. 727, 1 Ann. Cas. 443; *Pattison v. Seattle, Renton & S. R. Co.*, 55 Wash. 625, 104 Pac. 825; *Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526.

[5, 6] Moreover, the evidence clearly establishes the fact that the respondent suffered a fracture of the hip, the head of the femur being broken; that the leg is materially shortened; and that there is little prospect of his ever recovering its full use. It is clear that the sum paid in settlement was wholly inadequate to compensate for the injury. This, as we have held, is some evidence that the respondent either did not know the extent of his injuries or did not realize the full purport of the paper when he signed it. *Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526, and authorities there cited. Whether the release was understandingly

signed by respondent, and whether it was induced by fraudulent representations, were questions for the jury.

[7-10] 2. The respondent contends that the cause of the accident was purely speculative. We think not. The manner in which the lumber was deposited, reclining against the wall of the shed, the fact that the shed violently vibrated with the operation of the planing mill which was situated upon the same wharf, the fact that the braces securing the lumber did not, at least in the instance of the pile which fell, extend to the outer edge of the pile, and that other piles had before fallen because of the vibration, were all established by what we deem a preponderance of the evidence. While much of this evidence was contradicted, its weight was for the jury. If the jury believed these things, it was justified in finding that the lumber fell because of the insecure manner in which it was piled and braced, and because of the vibration of the shed. No other cause was suggested save that the respondent himself might have caused the fall by placing other bundles of lumber upon the pile. This he positively denied, his testimony indicating that he had not touched the pile which fell upon him, thus negating the only other theory advanced which would account for the fall of the lumber. The law applicable to this state of facts is elementary. It is too well established to require citation of authority that there was a duty upon the part of the appellant to exercise reasonable care to furnish to the respondent a reasonably safe place in which to work. This is a positive nondelegable duty which carries with it the duty of reasonable inspection. It is also well established that, when a servant proceeds to work in a given environment under a direct order from the master or the master's representative, he does not assume the risk of any dangers not so open and apparent as to be detected by ordinary observation.

[11, 12] Applying these principles, it is clear that the questions whether the appellant had met its duty to furnish the respondent a reasonably safe place in which to work, and whether the respondent pursued the rule of reasonable prudence in proceeding to work without inspecting the piles of lumber to determine the safety of the place, were, under the evidence, questions for the jury. The following decisions of this court are closely analogous on the facts, and exemplify the application of the principles of law involved: *Zintek v. Stimson Mill Co.*, 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055; *Zintek v. Stimson Mill Co.*, 9 Wash. 395, 37 Pac. 340; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34, 74 Pac. 1009; *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 116 Pac. 1091.

[13] 3. Finding, as we do, that there was sufficient evidence upon every controverted question of fact to require its submission to the jury, it is manifest that we cannot say

that the trial court abused its discretion in refusing to grant a new trial for insufficiency of the evidence to sustain the verdict. Nor do we find that the court erred in refusing to give the instructions requested by the appellant. In so far as they were not positively erroneous, they were covered by the instructions given to which no exceptions were taken. We have examined the instructions given and find that they state clearly and succinctly the law applicable to the facts involved. The appellant has had a fair trial. We find nothing in the record warranting a reversal.

The judgment is affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

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**HURLEY-MASON CO. v. STEBBINS,  
WALKER & SPINNING.**  
(No. 11,311.)

(Supreme Court of Washington. April 29, 1914.)

**1. SALES (§ 168\*)—PERFORMANCE OF CONTRACT—INSPECTION OR TEST—PARTY BY WHOM MADE—TIME AND PLACE.**

Under a contract for the construction of a railroad station, providing that tests for cement were to be made either at the mill or the site, where the contractor purchased of a dealer a large quantity of cement, by a contract making it "subject to" tests specified by the railroad's architect as to fineness, initial and final set, soundness, and neat tensile test, the duty of making the tests was on the buyer prior to acceptance and use; he might select his own place for making the test; and, where no time was specified in the contract, he had only a reasonable time after delivery and before use in which to make such tests.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.\*]

**2. SALES (§ 168\*)—PERFORMANCE OF CONTRACT—SALE OF TESTED ARTICLE—PARTY MAKING TEST.**

A sale of inspected or tested articles, in the absence of stipulation to the contrary, places the duty of inspection or test upon the seller prior to delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.\*]

**3. SALES (250\*)—WARRANTY—WARRANTY AS DISTINGUISHED FROM CONDITION OF CONTRACT.**

In a contract for the sale and delivery of cement to a contractor for a railroad station, the provision that it was sold "subject to" tests as to fineness, soundness, etc., specified by the architect, was a condition of the contract giving the contractor a reasonable time after delivery to make the tests and to accept or refuse it, in which case there would be no sale, and not a collateral warranty that the cement would meet the tests, since a sale subject to tests should never be construed as a warranty against defects which such tests would disclose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 709; Dec. Dig. § 250.\*]

**4. SALES (§ 246\*)—"WARRANTY"—WHAT CONSTITUTES.**

A "warranty" is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though

part of the contract, collateral to the express object of it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 706, 711; Dec. Dig. § 246.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7396-7404, 7833.]

**5. SALES (§ 250\*)—WARRANTY—DISTINGUISHED FROM OTHER CONDITIONS.**

In determining whether certain duties, liabilities, or stipulations on one side, either express or implied, are strictly conditions essential to the liability of the other party to a sale, or are only independent and separate warranties, the breach of which may give a right of action or counterclaim, but does not extinguish a cause of action against the other, it is always a question of the intention of the parties, manifested by the expressions they have used as applied to the subject-matter of the contract, and read in the light of surrounding circumstances.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 709; Dec. Dig. § 250.\*]

**6. SALES (§ 261\*)—WARRANTY—ACCEPTANCE—SURVIVAL OF REMEDY.**

An executory contract for the sale of an article, tested to a given standard, is a collateral warranty placing the consequences of its failure to meet such standard upon the seller, so that the purchaser's remedy survives his acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.\*]

**7. SALES (§ 179\*)—PERFORMANCE OF CONTRACT—INSPECTION—WAIVER OF DEFECTS.**

An executory sale, made subject to inspection, makes such inspection a condition precedent to acceptance, and furnishes its own remedy—a rejection if not meeting the test—and an acceptance by the buyer with or without inspection, and without notice to the seller of any defects or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon ordinary inspection, in the absence of an express warranty intended to survive acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456-468; Dec. Dig. § 179.\*]

**8. SALES (§ 273\*)—WARRANTY—IMPLIED WARRANTY OF FITNESS.**

Upon a contract with a contractor for a railroad station for the sale and delivery of cement, subject to tests as to fineness, soundness, etc., specified by the railroad's architect, which had no latent defects not discoverable by such tests, there was no implied warranty that the cement furnished would be fit for the purposes for which it was to be used, since, in the absence of an express warranty of fitness, it would be assumed that cement meeting such tests would have met the contractor's purposes, and that a warranty of fitness merged in such tests.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.\*]

**9. SALES (§ 273\*)—WARRANTY—IMPLIED WARRANTY OF FITNESS—MANUFACTURER OR DEALER.**

Upon an executory sale by a manufacturer, there is an implied warranty of fitness for the purpose intended, and of freedom of defects not discoverable by ordinary inspection and test, while, on a sale by a dealer, there is no such implied warranty of fitness, but all that is required of him is good faith and fair dealing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. § 273.\*]

Department 1. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by the Hurley-Mason Company against Stebbins, Walker & Spinning. Judg-

ment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

B. S. Grosscup and W. C. Morrow, both of Tacoma, for appellant. T. L. Stiles, of Tacoma, for respondent.

ELLIS, J. Action to recover damages for an alleged breach of an executory contract for the sale of cement. The plaintiff had a contract with the Northern Pacific Railway Company to construct a passenger station in the city of Tacoma, in accordance with certain plans and specifications. Much of the work consisted of reinforced concrete walls, which the plaintiff's contract with the railway company required should be built of Portland cement of a quality specified in the contract as follows: "Cement, when not otherwise specified, shall be Portland of the Vulcanite, Atlas, Lehigh, Alpha, Saylor or other brands, from approved manufacturers, that will fulfill the standard tests of the architects. It shall be inspected by a firm approved by the architects, either at the mill or at the site, and five (5) cents per barrel shall be allowed by the contractor for this inspection." Then follow tests substantially the same as those hereinafter set out in the plaintiff's order for the cement from the defendant. The contract for the purchase of the necessary cement is evidenced by the following written order, counter offer, and acceptance:

"Aug. 20, 1909.

"Messrs. Stebbins, Walker & Spinning, Tacoma, Wash.—Gentlemen: We herewith confirm our order for fifteen thousand barrels or more of Atlas cement to be delivered to us in the care of the Northern Pacific Railroad at St. Paul, for \$1.40 per barrel less 30¢ per barrel for empty sacks. This cement is purchased subject to the following tests as specified by the architects for the Tacoma depot:

"(b) Tests:

"(1) Fineness: On #100 sieve of 10,000 meshes per square inch (Stubbs wire gauge) 92% must pass through.

"(2) Initial Set: Initial set as determined by time required for cake of plastic neat cement to bear wire  $\frac{1}{2}$  inch diameter loaded to weigh four ounces without appreciable imprint; shall not be less than 45 minutes from time of adding water.

"(3) Final Set: Final set as determined by the time required for cake of plastic neat cement to bear  $\frac{1}{24}$  inch diameter loaded to weigh one pound without appreciable imprint, shall not be more than five hours from time of adding water.

"(4) Soundness: Cold water test. Pats of plastic paste about three inches in diameter by  $\frac{1}{2}$  inch thick at center with thin edges, kept in moist air until final set and for the balance of 28 days in water of temperature approximately 65 degrees Fahr. shall not crack, warp nor soften.

"(5) Neat Tensile Test: Briquets of ce-

ment paste, mixed five minutes with minimum amount of water necessary to make mortar thoroughly soft and plastic at the end of 24 hours, break at not less than 125 lbs. per square inch and at the end of 7 days, break at not less than 400 lbs. per square inch.

"Please wire immediately and have the company ship 1,000 barrels at once.

"Yours truly,

"Hurley-Mason Company,

"By Chas. B. Hurley."

"Tacoma, Sept. 21, 1909.

"Hurley-Mason Co., City—Gentlemen: As per verbal agreement between your Mr. Hurley and the writer, we propose to deliver to you Atlas Portland cement under the following conditions:

"The Hurley-Mason Co. shall be known as the purchaser and Stebbins, Walker & Spinning shall be known as the seller in the following paragraphs:

"First. The seller agrees to furnish the purchaser and said purchaser agrees to accept from the seller the Atlas Portland cement herein specified in the quantity of fifteen thousand (15,000) barrels to be delivered as hereinafter set forth. It being understood and agreed between the parties herein that the seller is to be under no obligation to make shipment in excess of five thousand (5,000) barrels in any one month. Shipment of cement herein specified to be made in car load lots. Entire quantity required to be ordered forward in time for shipment prior to April 1st, 1910. \* \* \*

"Second. That the seller will furnish under this contract Atlas Portland cement that will conform to the requirements of the specifications covered by your letter of August 20th, 1909, to the seller which becomes a part of this contract. All claims of the purchaser upon the seller must be made in writing, and filed with the seller within five (5) days after the cement is received; failure to file a claim within the time allowed will be acknowledgment by the purchaser of the receipt of the cement in good condition and in the quantity specified in the bill of lading and invoice.

"Third. That the seller will furnish Atlas Portland cement required under this agreement at the following price, to wit: f. o. b. cars, St. Paul, Minn., one dollar forty-five cents (\$1.45) per barrel in cloth bags.

"Fourth. That the seller will purchase Atlas cloth bags at seven and one-half cents each, subject to the following conditions: [No question arises from the conditions which follow. We omit them.]

"Yours very truly,

"Stebbins, Walker & Spinning,

"Per L. R. Walker.

"The purchaser agrees to accept from the seller Atlas Portland cement subject to the conditions set forth above.

"Hurley Mason Co.,

"By Chas. B. Hurley, Prest."

The defendant began delivering the cement about the middle of September; the same being tested at the mill of the Atlas Cement Company, the manufacturer, at Hannibal, Mo., by Hunt & Co., the testers approved by the architects of the railroad company under the plaintiff's contract with the railroad company. It appears that the plaintiff made no tests at all, but relied upon the tests made by Hunt & Co., at the mill. By the latter part of November, about 2,500 barrels of cement had been accepted and used on the work with satisfactory results. About November 20th the plaintiff claims that it used about 444 barrels of the cement then arriving in Tacoma which, upon pouring the concrete into the forms, would not set soon enough, and, though allowed to remain until December 7th, never solidified. On the latter date, by order of the inspector for the railway company on the work, this concrete was taken out. At about the time that this cement was being used, the plaintiff received a telegram from the engineer for the railway company, stating that three car loads of cement had been shipped without testing. The remainder of the cement then on hand being under suspicion, which, it seems, was about 600 barrels, was loaded onto cars, sent to the Commercial dock in Tacoma, where subsequently samples were taken from it for the purpose of making tests on behalf of the various persons interested, namely, the railway company, the plaintiff, the defendant, and the Atlas Cement Company, the manufacturer. The evidence details the manner in which these samples were taken and the results of the tests made by different experts for the various interests represented in the transaction. These tests did not agree. The plaintiff claims that this evidence showed that the cement in question did not meet the tests prescribed in the contract, while the defendant claims exactly the contrary.

The plaintiff claimed damages in the sum of \$4,114.66, including the cost of new cement, sand, and gravel used in replacing the concrete taken out, the labor of tearing it out, the expense of building new forms, charges for superintendence, use of plant, insurance, wages of watchman and timekeeper, and freight paid upon the cement used in the concrete taken out, and also on the cement ordered off the work, and the cost of testing. The plaintiff also claimed \$2,339.62 for sacks returned to the defendant not paid for. Against this the plaintiff admitted that the defendant has a valid offset of \$2,900 for 2,000 barrels of cement furnished. The court made findings in favor of the plaintiff and entered judgment against the defendant in the sum of \$3,520.91, with costs. The defendant appeals.

In our discussion we shall proceed upon the assumption that the cement, for the damages occasioned by the use of which the respondent sped, would not have met the tests prescribed in the contract at the time it was

delivered to the respondent at Tacoma. We shall assume that this was sufficiently shown by the tests of the remainder of the cement made after the rejection of the work by the railroad company's architect. Such was the effect of the court's finding. The view which we take of the law of the case makes it unnecessary to review the evidence upon which this finding was based.

On the law of the case, appellant contends that the facts do not establish a warranty, but merely a sale of cement to be accepted upon a test by the purchaser. The respondent contends that the judgment should be sustained upon two elements of warranty: An express warranty that the cement would comply with the five tests specified in the contract, and an implied warranty that the cement would be reasonably fit for the known purpose for which it was purchased. These contentions present three questions, the solution of which must be determinative of this case. They are these: (1) Upon whom, as between appellant and respondent, was the duty of making the tests, and when and where? (2) Was the provision that the sale was subject to the given tests a warranty collateral to the contract, surviving acceptance of the cement, or was it a condition of the contract, satisfied by acceptance? (3) Was there any implied warranty that the material would be fit for the purpose for which it was purchased?

[1, 2] 1. In determining who, as between the appellant and respondent, was to make the tests, and when and where the tests should have been made, we must look to the terms of their contract and to the situation of the parties and of the subject-matter. The contract provided: "This cement is purchased subject to the following tests as specified by the architects for the Tacoma depot." The five specified tests are then set out. These words were the words of the respondent. They were contained in its order. They were used for its own protection, and must be construed with reference to that purpose. The respondent knew that it was obligated to use no cement that would not meet these tests. It knew that it was obligated by its contract with the railway company to pay for an inspection by the application of these tests at the rate of five cents a barrel. It knew that under its contract with the railway company these tests were to be made "either at the mill or at the site" of the depot "by a firm approved by the architects." It knew that an inspection by the appellant would not be binding upon the railway company, and would be no protection to the respondent. It therefore purchased the cement subject to the tests for which it was already, and in any event, obligated to pay. On the other hand, the appellant was not a manufacturer but a dealer. The contract was executory. The cement was not at hand. It is fairly inferable that it was not then even in existence. The cement was not in the

appellant's possession, and both parties knew that it never would be prior to its delivery to the respondent. Respondent knew that the cement was to be made at the mill of the Atlas Portland Cement Company at Hannibal, Mo., and furnished to the respondent "f. o. b. cars St. Paul, Minn." The appellant would have no opportunity to test the cement. It therefore sold "subject to" the tests specified, which is a very different thing from an agreement to make the tests itself. A sale of an article subject to inspection or test is a very different thing from the sale of an inspected or tested article. In the absence of stipulation to the contrary, the one places the duty of inspection or test upon the purchaser prior to acceptance and use, and the other places that duty upon the seller prior to delivery. When the terms and purpose of the contract, the situation of the parties and of the subject-matter, are considered, there can be no question that the respondent assumed the duty of making the tests. In practice it made the inspector approved by the railway company's architect its agent for the inspection.

As to the place of the tests, it is obvious that the respondent could select its own place. The appellant could not insist upon these tests being made prior to its delivery of the cement to the respondent. To that extent it took the risk of the rejection of the cement after its delivery. The respondent, however, could not select its own time for making the tests. No time being specified in the contract, it had only a reasonable time after delivery. It was certainly contemplated that the tests should be made before the use of the cement, since it is obvious that the use of the cement would render the specified tests impossible. The appellant contends that these tests should have been made within five days after the cement was received, because the contract provides that all claims of the purchaser upon the seller must be made within that time. This provision, however, applied only to the condition in which the cement was received, not to its quality. It could not apply to a failure to meet the tests, since some of the tests required a longer time than five days for the making.

[3] 2. Was the provision that the sale was subject to the tests a warranty collateral to the contract, or was it a condition of the contract? The respondent contends that it was a warranty of quality. We do not so construe it. The sale was made "subject to" the tests. If an inferior article was shipped, the respondent had a reasonable time for inspection and test, and an acceptance or refusal to accept. The sale being subject to the tests, if the material delivered did not meet the tests, then there was to be no sale. This is a very different thing from a collateral undertaking that all cement delivered should meet the tests. A sale subject to inspection should never be construed as a warranty against defects which the inspection

contemplated would disclose. Much confusion will be avoided by observing this distinction, which inheres in the very nature of the undertaking on the one hand and in the remedy for its breach on the other. Respondent admits that "the mention of tests in the contract was nothing more than a further description of the required quality." This is true so far as it goes, but it also furnished the specific means to the respondent to determine that fact prior to acceptance.

[4] Benjamin on Sales, after pointing out the fact that much confusion has arisen from the habit of treating conditions precedent as warranties, quotes from Lord Abinger as follows: "A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, collateral to the express object of it. But in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill." The author adds: "There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and, if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to recover the price as money had and received for his use, whereas, in case of warranty, the rules are very different." Benjamin on Sales (7th Ed.) § 600.

[5] The American note to the text points out the difficulty of laying down any definite rule for determining when a stipulation is a condition of the contract itself and when an independent warranty collateral to the agreement, as follows: "In determining whether certain duties, liabilities, or stipulations, either express or implied, on the one side, are strictly conditions essential to the liability of the other party on his stipulations or promises, or are only independent and separate covenants, the breach of which may give a right of action, or counterclaim, but which does not prevent or extinguish a cause of action against the other, no other rule, worthy of the name of rule, can be laid down than that it is always a question of the intention of the parties, manifested by the expressions they have used as applied to the subject-matter of the contract, and read in the light of surrounding circumstances." American note to Benjamin on Sales (7th Ed.) p. 595.

Judged by the situation of the parties and their relation to the subject-matter, it is clear that the provision for tests in the contract before us is a condition of the contract and not a collateral warranty. The terms of the contract lead inevitably to the same conclusion.



[§] An executory contract for the sale of an article tested to a given standard is a very different thing from an executory contract for the sale of an article subject to given tests. The one is a collateral warranty placing the consequences of a failure of the article to perform to the given standard upon the seller, so that the purchaser's remedy survives his acceptance. The other is a condition of the contract precedent to acceptance, placing the consequences of the failure to inspect or make the tests upon the purchaser. It furnishes its own remedy, namely, a rejection of any article not meeting the tests as not fulfilling the contract. Obviously the remedy on such a condition precedent cannot survive acceptance. The purchaser failing to make the tests prior to acceptance has no remedy for defects which the tests would have disclosed, in the absence of further words constituting an express warranty or circumstances raising an implied warranty that the article will be fit for the purpose for which it was purchased. *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422. An executory sale subject to tests involves the same principles as an executory sale subject to inspection. The prescribed tests are but the mode of inspection appropriate to the nature of the given article. Where an executory sale is made with the provision that the article is subject to inspection, whether written into the contract or implied from the custom of the trade, such a provision is held, by what we conceive to be the better considered authorities, a condition precedent and not a warranty.

In *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, the action was for a breach of an executory contract to sell and deliver a crop of tobacco growing on the defendant's land. The contract contained a condition that the tobacco should be well cured and boxed and in good condition. The tobacco, when delivered, was in bad condition, had not been properly cured, and was wet, sweaty, and rotten. It was accepted and retained without notice to the defendant of its defects, without return or offer of return, and without any request that it be taken back. Some months after acceptance, the plaintiffs brought the action to recover damages for the failure of the article to comply with the contract. The court said: "But the stipulation in respect to the quality and condition of the article, when delivered, constituted no express warranty. The contract was executory, for the sale of a growing crop of tobacco, to be delivered the spring following, well cured and in good condition. The article bargained for, and to be furnished in the future, was a merchantable crop of tobacco; this was what the vendor agreed to sell and the vendee to purchase. It was the sale of a particular thing by its proper description merely; and the descriptive words used for defining the thing agreed to be sold were of the

substance of the contract, not collateral to the main object of it. \* \* \* In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages, on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property; the retention of the property by the vendee is an assent, on his part, that the contract has been performed. The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee; the parties understand that the vendee is not bound to accept the property tendered, except upon this condition. This the vendee is to determine upon the receipt of the property."

It has sometimes been intimated that the foregoing decision was overruled by the same court in the case of *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719, but we do not so read that case. In *Day v. Pool*, there was a sale of the rock candy syrup with an express warranty that it would not "crystallize or the sugar fall down." There was nothing to indicate that the sale was made subject to inspection or test. The court held the provision in the contract as to the character of the syrup an express warranty surviving acceptance and not a condition satisfied by acceptance. Referring to *Reed v. Randall*, supra, the court said: "That case would have been decided the other way, had there been an express warranty as to the quality of the tobacco,"—thus clearly distinguishing that case rather than overruling it. The authority of *Reed v. Randall* is recognized in the comparatively recent case of *Carleton v. Lombard, Ayres & Co.*, supra.

In *Waeber v. Talbot*, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712, the action was brought to recover damages for breach of an alleged warranty on an executory sale of a number of cases of "Talbot Extra Fine Peas, Sieve 23-24." It appeared that such sales were, by the custom of the trade, made subject to inspection. The plaintiffs, on delivery, accepted the goods, some ten days later discovered their defective quality, but continued to handle them for some months, when they offered to return the remainder of the peas. The defendant refused to receive them. The court said: "The defendants were bound to deliver the quality of goods called for by the contract, which was the highest grade they packed; and, if an inferior article was shipped, the plaintiffs had a reasonable time for inspection, rescission, and offer to return. This action does not fall within that class of cases where a dealer sells an article, describing it by a name of commerce, the identity of which is not known to the purchaser, and which he

cannot ascertain by inspection, and where a warranty is therefore implied that the article sold is that described." After considering many decisions pointing out the distinction between a condition of the contract and a collateral warranty, the court concluded: "Treating the general description in the case before us as a part of the contract of sale, the plaintiffs were abundantly protected; and, if they failed to inspect, rescind, and return the goods, it is because they neglected to avail themselves of the remedies which the law afforded them. In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished fails to correspond with the contract does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect."

[7] It seems to us a sound rule, deducible from the authorities, that, where an executory sale is made subject to inspection, an acceptance by the buyer, with or without inspection and without notice to the seller of any defects or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon inspection by any ordinary tests or by the tests prescribed by the contract, in the absence of an express warranty intended to survive acceptance. *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; *McCormick v. Sarson*, 45 N. Y. 265, 6 Am. Rep. 80; *Mason v. Smith*, 130 N. Y. 474, 29 N. E. 749; *Norton v. Dreyfuss*, 106 N. Y. 90, 12 N. E. 428; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; *Savercool v. Farwell*, 17 Mich. 308; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150; *Locke v. Williamson*, 40 Wis. 377; *Barry v. Danielson*, 139 Pac. 223. In the case last cited there was also an additional express guaranty which would have survived acceptance. Such acceptance is an admission that the contract has been performed (*Beck v. Sheldon*, 48 N. Y. 365), in the absence of fraud of the seller preventing or interfering with inspection by the purchaser (*Dutchess Co. v. Harding*, 49 N. Y. 321), and in the absence of latent defects not discoverable by inspection or prescribed tests (*Carleton v. Lombard*, *Ayres & Co.*, 149 N. Y. 137, 153, 43 N. E. 422).

[8, 9] The respondent contends that there was an implied warranty that the material furnished would be fit for the purpose for which it was purchased. It is not claimed, however, that the cement furnished possessed latent defects not discoverable by the stipulated tests, but only by actual use. The respondent, in making this contract, prescribed the tests. It must be held to have assumed, since it exacted no specific warranty of fitness, that cement meeting these tests would have met the respondent's purpose. Under the circumstances, it is clear that the specific stipulation of tests involved no warranty of

what cement meeting those tests would do or produce when placed in a wall.

In *Beck v. Sheldon*, 48 N. Y. 365, 371, the defendant ordered certain iron by a specific brand and numbers for the making of stoves. The iron furnished bore those numbers, and there was no evidence that it was improperly branded. The iron was delivered and used. None was returned nor a return offered. In an action for the purchase price, the purchaser claimed damages for the poor quality of iron delivered, insisting that the iron should have been suitable for the purpose intended. The court said: "It is said that the fracture showed a grain or crystallization, and a character of iron which was not sustained by its result when smelted. So the judge finds, and such was the evidence. He finds also that the only contract was that Poughkeepsie pig iron Nos. 1 and 2 should be furnished, and that the pig iron, according to the contract, was duly delivered by the plaintiff to the defendants. There was therefore no contract either that iron should produce particular results when smelted, or that the actual result should be the same with that indicated by the fracture. On this point also the defendants acted upon their own judgment, receiving neither guaranty or representation from the seller. If their expectations are not realized, they must themselves bear the loss."

In *International Pavement Co. v. Smith-Beggs Machinery Co.*, 17 Mo. App. 264, the plaintiff purchased certain boilers which the defendant undertook to deliver tested to 200 pounds to the square inch and furnish the testers' certificate before shipment. The certificate was furnished. The plaintiff contended that the contract implied a warranty that the boilers were reasonably fit for the purpose for which they were purchased. The court said: "The matter of implied warranty which the plaintiff assumes is itself an integral element of the express warranty, into which it is merged, and by which its effect is circumscribed. The plaintiff's complaint is that the boilers were not strong enough, or sufficiently capable of sustaining pressure, for the purposes to which they were to be applied. It was to this specific quality of strength that the express warranty was directed, and in which the extent of the defendant's liability was limited by the words used."

While in the case just quoted the contract contained an express warranty placing the duty of testing upon the seller, we can see no reason why a sale subject to test by the purchaser would not also exclude any implied warranty as to things which the test would disclose. See, also, *Thompson v. Libby*, supra. According to the great weight of authority, there is a distinction between executory sales by manufacturers and executory sales by dealers; the rule being that, on a sale by a manufacturer, there is an implied

warranty of fitness for the purpose intended, and of freedom from defects not discoverable by ordinary inspection and tests, while, on a sale by a dealer, there is no such implication, in the absence of a specific warranty to that effect. All that is required of a dealer is an exercise of good faith and fair dealing. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 587, 28 L. Ed. 86; *Farrow v. Andrews & Co.*, 69 Ala. 96; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Remy, Schmidt & Pleissner v. Healy*, 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139, 21 Ann. Cas. 74; *Bierman v. City Mills Co.*, 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422.

In the case before us, the appellant was not a manufacturer, but a dealer. It sold the cement subject to inspection, according to tests prescribed by the purchaser. The purchaser failed to make the tests, though it was fairly inferable from the record that it knew the appellant was not making the tests and had not tested any of the cement. It is probably true that on a sale even by a dealer without specific warranty, and not subject to inspection or test, there is an implied undertaking that the thing sold shall be reasonably fit for the purpose intended, where that purpose is known to the seller, but, on the record here, there is no room for the application of such a rule.

The authorities cited by the respondent are clearly distinguishable from the case here. In *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890, there was involved a sale of bricks by the manufacturer for the construction of coke ovens. The sale was not expressly subject to inspection or test, and the order for the bricks negatived any implication to that effect. It contained the caution: "I want you to be very careful about the quality. Do not send anything but what is A No. 1, and send quick as possible." And again: "This is a trade you will want to hold and you can only do it by sending nothing but the best." The court held that the manufacturer, in filling this order, did so under an express warranty of the quality of the bricks. While recognizing the rule, as sustained by the New York and Wisconsin authorities, that, in the absence of a warranty and a breach, the vendee's right to recover damages does not survive the acceptance of the property after an opportunity to discover defects, unless notice has been given to the vendor or the vendee returns or offers to return the property, the court points out the fact, which we have also noted, that this rule does not apply in cases of express warranty of quality. In that case, moreover, the evidence tended to show that there was no method of ascertaining whether the bricks were fit for the purpose intended other than actual use. Had there been some well-known test, and had the pur-

chaser bought subject to such test without any express warranty of quality, there can be little question that the decision in that case would have been different. A review of the cases cited from other jurisdictions discloses an equal inapplicability. In *Buffalo Barb-Wire Co. v. Phillips*, 67 Wis. 129, 30 N. W. 295, the defects complained of were latent defects which could not be discovered by ordinary inspection. In *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455, there was an express warranty that the goods should be "as per sample" and "of second quality." In *Shav v. Smith*, 45 Kan. 334, 25 Pac. 886, 11 L. R. A. 681, there was a sale of flax seed for planting, with a stipulation that the seller would purchase the crop when grown. Whether the seed would grow or not could not be determined by ordinary inspection. It was held that there was an implied warranty that they were fit for the purpose for which they were sold.

We are driven to the conclusion that, under the contract here in question, the duty of applying the tests prescribed was upon the respondent; that the provision that the sale was subject to test was a condition precedent, the remedy upon which did not survive acceptance; and that there was no implied warranty that the cement was fit for the purpose for which it was bought.

The appellant admits that it owes the respondent \$494.76 for freight on certain of the cement from Hannibal, Mo., to Minneapolis, Minn., and the further sum of \$2,339.62 for sacks returned. The court found that these sums have never been paid. The respondent admits a counterclaim in favor of the appellant of \$2,900. The court found this amount as \$2,913.37. Eliminating from the court's findings the consequential damages which we hold under the contract the respondent cannot recover, there is apparently due to the appellant a balance of \$79.

The judgment is reversed, and the cause is remanded, with direction to enter judgment in accordance with this opinion.

CROW, C. J., and MAIN, GOSE, and CHADWICK, JJ., concur.

STATE ex rel. LEACH v. FISHBACK, State Ins. Com'r. (No. 11,746.)

(Supreme Court of Washington. April 27, 1914.)

1. INSURANCE (§ 21\*)—CONTROL AND REGULATION—FOREIGN COMPANIES—DEPOSIT OF SECURITIES.

The Insurance Code (3 Rem. & Bal. Code, § 6059—22) provides that an alien insurance company shall not be permitted to do business in the state unless it shall have securities to the amount of \$200,000 on deposit with insurance departments in the United States. Section 6059—24, para. 1, 2, provide that a foreign insurance company shall deposit securities

to the amount that the state, where it was incorporated, requires; paragraph 3 provides that a domestic company shall deposit \$50,000 in securities before receiving its certificate, and the balance, to the amount of the requisite minimum capital, within one year; and paragraph 4 provides that every insurance company required to have a cash capital shall keep on deposit securities equal to the required minimum cash capital. *Held* that the plain intent of the act was to require a foreign insurance company to keep not less than \$200,000 in securities on deposit with the insurance department of this state or the state where it was incorporated, and the fact that such a company was not required to make any deposits by the laws of the state where incorporated, did not relieve it from making the deposit required by subdivision 22.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 23; Dec. Dig. § 21.\*]

**2. INSURANCE (§ 21\*)—CONTROL AND REGULATION—FOREIGN COMPANIES—DEPOSIT OF SECURITIES.**

There is no such conflict between the Insurance Code (3 Rem. & Bal. Code, § 6059—24) paragraph 4 and paragraphs 1 and 2, as to require an investigation of the history of the act to determine whether paragraph 4 ought not be disregarded as in conflict with paragraphs 1 and 2.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 23; Dec. Dig. § 21.\*]

**3. INSURANCE (§ 21\*)—CONTROL AND REGULATION—FOREIGN COMPANIES—DEPOSIT OF SECURITIES.**

It cannot be considered that the Legislature, in enacting the Insurance Code (3 Rem. & Bal. Code, § 6059—24) intended to allow a foreign insurance company to do business in the state without depositing securities, as required of domestic companies, though such deposits be not required by the laws of the state where it was incorporated, as that would directly violate Const. art. 12, § 7, providing that foreign corporations shall not be allowed to do business within the state on more favorable terms than domestic corporations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 23; Dec. Dig. § 21.\*]

**4. INSURANCE (§ 21\*)—CONTROL AND REGULATION—FOREIGN COMPANIES—DEPOSIT OF SECURITIES.**

The insurance commissioner's construction of the Insurance Code (3 Rem. & Bal. Code, § 6059—24), as permitting foreign insurance companies to do business in the state without depositing securities, will not be adopted by the court, in face of the manifest intention of the Legislature to require such deposits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 23; Dec. Dig. § 21.\*]

**5. STATUTES (§ 219\*)—CONSTRUCTION—CUSTOM AND USAGE.**

Where a construction has been placed upon a statute by a department of the government, and property interests have been acquired by long usage, such construction should be adopted by the court, but the rule is not applicable, where the statute is clear and free from doubt as to its meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.\*]

**6. CONSTITUTIONAL LAW (§ 296\*)—INSURANCE (§ 21\*)—DUE PROCESS—CONTROL AND REGULATION—FOREIGN COMPANIES—DEPOSIT OF SECURITIES.**

The construction of the Insurance Code (3 Rem. & Bal. Code, §§ 6059—22, 6059—24), as requiring foreign insurance companies to keep at least \$200,000 in securities on deposit as therein provided, though the laws of the

state of their incorporation do not require deposits, is not in conflict with the fourteenth amendment of the federal Constitution, nor with the state Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825—838, 840—846; Dec. Dig. § 296.\* Insurance, Cent. Dig. § 23; Dec. Dig. § 21.\*]

**Department 2.** Mandamus by the State, on the relation of Walter C. Leach, against H. O. Fishback, to compel respondent, as insurance commissioner of the state, to issue a license to the Northwestern Fire & Marine Insurance Company. Peremptory writ denied.

Geo. D. Emery, of Seattle, for relator. W. V. Tanner and L. L. Thompson, both of Olympia, for respondent.

**MOUNT, J.** This is an application for a peremptory writ of mandate to the insurance commissioner of this state to issue a license to the Northwestern Fire & Marine Insurance Company, a corporation of the state of Minnesota, upon its compliance with the requirements of the Insurance Code of Washington, other than the deposit of securities as required by section 6059—24, 3 Rem. & Bal. Code.

[1] It appears from the petition that the Northwestern Fire & Marine Insurance Company is a stock company of the state of Minnesota. This company was incorporated several years prior to the adoption of the Insurance Code of this state, but did not apply for a license to do business in this state until after the adoption of the Code. The laws of the state of Minnesota, where the insurance company was incorporated, make no requirements as to the deposit of securities by such corporations, either foreign or domestic. Upon an application for a license to do business in this state, the same was refused by the insurance commissioner, unless the insurance company would deposit securities to the amount of \$200,000 with the state treasurer of Washington. A petition was thereupon filed in this court praying for the writ.

The Insurance Code (3 Rem. & Bal. Code, § 6059—22) provides: "Each alien insurance company admitted to do business in this state, shall not transact any business of insurance in this state, unless it shall have within the United States deposited with insurance departments, or held in trust as hereinafter provided, not less than two hundred thousand dollars invested in like manner as the capital of a similar domestic insurance company is required to be invested; \* \* \* that no alien company, except co-operative life and fraternal beneficiary insurance companies, shall transact any business of insurance in this state, unless, if it transact fire insurance in this state, it has deposited with the proper insurance department or legal custodian of such deposit in this or any other state or states or district of the United States, for the benefit and security of its pol-

licy holders in the United States, a sum not less than two hundred thousand dollars, invested as in this act required; or if it transact in this state one or more of the other kinds of insurance business permitted by the provisions of this act to be transacted by any such company, it has deposited with the insurance department or legal custodian for like purposes, such amount as may be required of domestic insurance companies doing the same kind of business."

Section 6059—24 provides:

"Every foreign insurance company doing business in this state and required by this act to have a cash capital, shall deposit and keep on deposit with the state treasurer, through the office of the insurance commissioner of this state, the same amount and character of securities which a like domestic company is required to deposit with the depository for securities of insurance companies of the state by which laws such insurance company is incorporated.

"When any state shall require insurance companies of other states to deposit with some officer of such other state securities in trust for policy holders of such company as a prerequisite to their transacting business in such state, the treasurer of this state shall receive on deposit from any domestic insurance company the securities required by the laws of such other state.

"Every domestic insurance company required by this act to deposit securities to the amount as provided by this act shall deposit such securities with the state treasurer, and any domestic insurance company may deposit such securities with the state treasurer for the protection of all policy holders of such company. Every domestic insurance company hereafter organized shall deposit with the state treasurer authorized securities in the sum of fifty thousand dollars at or prior to the time it receives a certificate of authority to commence effecting insurance, and the commissioner shall within one year thereafter require such company to make further deposits of such securities sufficient to equal in the aggregate the amount of the minimum capital required by this act of such company.

"Every insurance company, required by this act to have a cash capital, shall, on or before the first day of January, nineteen hundred and twelve, deposit and keep on deposit, with the state treasurer through the office of the commissioner, its funds and securities equal in amount and value to the minimum cash capital required by this act of such company, and which deposits shall be exchanged for investments authorized as provided by this act."

It is apparently conceded by the relator that if the last paragraph of subdivision 24 above quoted is properly a part of that section, that the writ must be denied. But it is argued that this paragraph is not properly a part of the statute, because it was inserted and passed by the Legislature through

mistake and inadvertence. It is contended that this paragraph is in conflict with the first two paragraphs of subdivision 24 above quoted, and, so being, it must be disregarded.

[2] We are referred to the House and Senate Journals of the Legislature of the session of 1911 when the act was passed, to show that the first three paragraphs of this subdivision were inserted by amendment, and were intended to take the place of the fourth paragraph. There is no doubt some ground for the contention of the relator upon this question, and, if subdivision 24 of section 6059 stood alone, it might be necessary to enter into a discussion of the method by which this paragraph was passed by the Legislature. In *State ex rel. Aetna Life Ins. Co. v. Schively*, 68 Wash. 503, 123 Pac. 784, we said: "Where the act as passed contains an ambiguity, either latent or patent, reference may be had to the history of the bill before the Legislature, beyond the enrolled bill, to ascertain the legislative intent (*Scouten v. Whatcom*, 33 Wash. 273, 74 Pac. 389); but the intent of an act fair on its face must be ascertained from the language of the act itself." By reading the act as a whole, in so far as it relates to the right of foreign companies to do business in this state, it seems plain to us that the Legislature intended that foreign insurance companies are required to deposit with the insurance department of this state, or the state where the company is incorporated, not less than \$200,000, invested in like manner as the capital of similar domestic insurance companies is required to be invested, and that the fourth paragraph of subdivision 24 is simply a restatement in another form of that idea, and fixes the time when the deposit shall be made. The first two paragraphs of subdivision 24 are reciprocal in their nature, and provide, in substance, that the same amount and character of securities which a like domestic company of this state is required to deposit with the depositories of other states shall be deposited in this state by insurance companies organized in other states.

[3] We are satisfied that it was not the intention of the Legislature, when it inserted these provisions to permit foreign companies to do business in this state under more favorable conditions than domestic companies of the same kind were permitted to do business. If so, then clearly these provisions are unconstitutional, because the Constitution of this state provides at section 7 of article 12: "No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." The third paragraph of this subdivision expressly provides that every domestic insurance company hereafter organized shall deposit with the state treasurer authorized securities in the sum of \$50,000 at or prior to the time it receives its

certificate of authority to commence effecting insurance, and the commissioner within one year thereafter shall require such company to make further deposits of such securities sufficient to equal in the aggregate the amount of the minimum capital required by the act. So it is apparent that if foreign companies organized outside the state in a state which makes no requirements of the deposit of securities by such corporations, either foreign or domestic, shall be allowed to do business in this state without the deposit of securities which domestic companies doing a like business are required to deposit, then such foreign companies are authorized to do business in this state under more favorable conditions than are prescribed by law for similar corporations of this state, in direct conflict with the constitutional provision above quoted. When all these provisions of the statute are read together, we are satisfied that there is no such ambiguity or inconsistency as to require us to determine whether the fourth paragraph of subdivision 24 was inadvertently adopted or not. The statute is fair upon its face, and must be construed as we find it. It was presumably at least passed by the legislative department and approved by the Governor, as it appears upon its face to have been passed, and speaks the intention of the legislative department. This paragraph we think is in accord with the first and sixth paragraphs of subdivision 22 above quoted, and so far as this relator is concerned, adds nothing that is not required by the provisions of subdivision 22 of section 6059. We are satisfied from the provisions of the Insurance Code, above quoted that it was the legislative intent that all insurance companies, whether domestic or foreign, seeking the right to do business in this state after the passage of the act, are required to make the deposits therein stated, either in this state or in the state where the company is organized.

[4, 5] Counsel for the relator argue that because the insurance commissioner has heretofore construed the statute so as to permit foreign insurance companies to do business in this state without making the deposit required by the act, that construction should be adopted by this court. This is no doubt true where a departmental construction has been placed upon an act and property interests have been acquired by long usage. But this rule is subject to modification. In Black, Interpretation of Laws (2d Ed.) p. 295, the rule is stated as follows: "Again, it must not be forgotten that usage, like all other extraneous aids in statutory construction, may be resorted to only when

the meaning of the statute is involved in doubt or obscurity. If the act is so plain and clear in its terms as not to admit of any substantial doubt, the courts are bound to put upon it that construction which its terms demand, and to disregard any and all contrariant usages or popular opinions." And this is no doubt the correct rule. We think there can be no doubt that the Legislature did not intend that companies situated as this company was should be permitted to do business in this state upon more favorable terms than domestic companies.

[6] Counsel for the relator further argue that the construction placed upon subdivision 24, is in violation of the fourteenth amendment to the federal Constitution. But we are satisfied that this act is not in violation of that provision of the Constitution. It is within the power of the state to make such reasonable limitations upon the right of foreign companies to do business in this state as it deems proper. It was said by Judge Field in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357: "The corporation being the mere creation of local law can have no legal existence beyond the limits of the sovereignty where created. \* \* \* The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." We are satisfied, therefore, that these provisions are not in conflict with the federal Constitution, and as we have construed them above, are not in conflict with the Constitution of this state, and that the insurance commissioner properly refused the application, unless the insurance company should deposit the securities demanded.

The writ is therefore denied.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

## BOARD OF DIRECTORS OF QUINCY VALLEY IRR. DIST. v. SCOTT.

(No. 11,897.)

(Supreme Court of Washington. April 29, 1914.)

## 1. APPEAL AND ERROR (§ 173\*)—DEFENSES NOT URGED BELOW.

Where the directors of an irrigation district petitioned, under Rem. & Bal. Code §§ 6489-6494, to have the proceedings for the formation of the district and for an issue of bonds examined and approved, and in their petition set forth in detail the proceedings, including their determination of the amount of bonds needed, and defendant demurred to the petition for want of facts, and, when that was overruled, refused to plead further, defendant cannot on appeal urge that the bond issue proposed was too large, and that the tax necessary would amount to confiscation of his land; that question not having been raised below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

## 2. WATERS AND WATER COURSES (§ 230\*)—IRRIGATION DISTRICT—PROCEEDING TO CONFIRM ORGANIZATION AND BONDS—SUFFICIENCY OF PETITION—DESCRIPTION.

Such petition containing a direct reference to the order of the board of county commissioners in which the district was described, though it did not itself describe the boundaries was sufficient, in view of the maxim that "that is certain which can be made certain."

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. § 230.\*]

## 3. WATERS AND WATER COURSES (§ 230\*)—IRRIGATION DISTRICT—PETITION FOR CONFIRMATION—SUFFICIENCY.

Such petition, reciting that notices of the election on the formation of the district were posted in three public places in each election precinct, a convenient number of which had been established by the county commissioners in an order filed with the county auditor, was good as against a general demurrer on the ground that it did not allege the establishment of such precincts sufficiently to permit proof thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. § 230.\*]

## 4. WATERS AND WATER COURSES (§ 231\*)—ESTABLISHMENT OF IRRIGATION DISTRICT—ESTIMATE—STATUTE.

Under the statute which does not forbid the directors of an irrigation district from taking the advice of a competent engineer in making their estimate of the amount of money to be raised, but merely requires that they make the estimate, their estimate, made in good faith and approved by the qualified electors of the district, is sufficient.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. § 231.\*]

## 5. STATUTES (§ 141\*)—VALIDITY—SUBJECT AND TITLE—AMENDMENT.

Act March 22, 1913 (Laws 1913, c. 165), entitled "An act relating to the organization and government of irrigation districts, and amending sections \* \* \*" of Rem. & Bal. Code, was not invalid for want of a sufficient title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

Department 2. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Petition of the Board of Directors of the Quincy Valley Irrigation District for the examination, approval, and confirmation of the proceedings for the formation of the district and the issue and sale of its bonds, in which E. M. Scott appeared and demurred. Proceedings approved and confirmed, and Scott appeals. Affirmed.

Wm. M. Clapp, of Ephrata, for appellant.  
John P. Hartman and Arthur E. Nafe, both of Seattle, for respondent.

FULLERTON, J. On December 1, 1913, the board of county commissioners of Grant county entered an order declaring certain territory situated in that county duly organized as an irrigation district under the name and style of Quincy Valley Irrigation District. The district was organized pursuant to the provisions of chapter VII of title XLVIII of Rem. & Bal. Code and the acts amendatory thereof. Thereafter a board of directors of such district was elected, which board on December 10, 1913, determined by resolution that for the purpose of constructing necessary irrigating canals and works and acquiring the necessary property and right of way therefor and otherwise carrying out the purposes of the organization, it was necessary to raise money, estimating and determining the amount necessary to be raised at \$160,000. To that end the board called a special election to be held in the district on a date named for the purpose of submitting to the electors of the district the question whether or not bonds of the district in that amount should be issued. An election was held pursuant to the call at which the required number of electors voted in favor of issuing such bonds. The directors afterwards canvassed the vote, and, finding that a majority favored the issuance of bonds, entered an order on the minutes of the board declaring the result of the election to be in favor of the issuance of such bonds. Thereafter, and on January 13, 1914, the board of directors of the district commenced a special proceeding in the superior court of Grant county under the provisions of sections 6489-6494 of the act before cited, for the purpose of having the sufficiency of the proceedings had in the formation of the district and in the issuance of bonds "judicially examined, approved, and confirmed." The petition filed by the directors for such purpose set forth the entire proceedings in substantial detail, and particularly set forth the facts showing the proceedings had for the issuance of the bonds, and prayed that the court fix a time and place for hearing the same, direct that notice thereof be given as required by law, and that at such hearing the proceeding be judicially examined, approved, and confirmed. At the time the petition was filed the court fixed a day for the hearing thereof, and

directed that notice be given in the manner and for the time required by the statute. Notice was so given, and on the day appointed for the hearing the appellant, E. M. Scott, appeared and demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action, or facts sufficient to warrant the relief sought for in the petition. His demurrer was overruled by the court, whereupon he refused to plead further. The court thereupon entered judgment against him to the effect that he take nothing by his demurrer. Certain other property owners in the district also appeared, and by answer set forth that lands owned by them, which had been included in the boundaries of the district were not capable of being irrigated by the same system of works applicable to the other lands of the district, as such lands lay above the common level of the gravity system of irrigation the directors of the district purposed to install. The court thereupon entered upon an inquiry into the proceedings and, finding that the allegations of the answering defendants were true, ordered the tract described stricken from the boundaries of the district. The court then inquired into the proceedings had with reference to the organization of the district, and with reference to the proposed issuance of bonds, and, finding that such proceedings were had in accordance with the statute, entered a decree approving and confirming the same. From the decree Scott appeals.

[1] The first contention of the appellant, if we correctly gather it from his argument, is that the bond issue is too large, and that the special tax, which it will be necessary to levy in order to pay the accruing interest and principal upon the bonds, will confiscate his property. But we think the record is not sufficiently complete to enable us to determine this question. Had the appellant answered the petition and made the matter an issue, it is possible that under the provisions of section 6493 of the Code he could have had it inquired into by the court. But he rested on the record as made by the petitioners, and this record shows that the board of directors of the district in their estimate, and the electors approving the estimate, determined that the sums proposed to be raised were reasonable, and did not exceed the requirements of the district. Because of want of allegation and evidence to the contrary this was conclusive upon the trial court, and of course conclusive here.

[2] He next contends that the petition filed in the superior court is fatally defective because it does not in itself contain a description of the boundaries of the irrigation district. But while the petition did not set forth the description, it contained a direct reference to the order of the board of county commissioners in which the description is found. This we think sufficient. It would no doubt conduce to convenience as a mat-

ter of reference for the petition to contain a description of the boundaries of the district, but the petition is not indefinite or uncertain because of the omission. It is a rule of logic as well as a maxim of equity that "that is certain which can be made certain," and no difficulty arises from an attempt to make certain the boundaries to which the petition refers.

[3] The petition as filed, after reciting certain of the proceedings had by the board of county commissioners in the formation of the district, further recites: "And notices of the said election were posted in three public places in each election precinct in Quincy Valley Irrigation District, a convenient number of which election precincts had been established and confirmed by the board of county commissioners of Grant county in their order of November 3, 1913, which is filed with the county auditor of Grant county." It is urged that this is not a sufficient allegation of the establishment of such precincts by the board of county commissioners to permit the introduction of proof of the fact at the hearing before the superior court, and that the petition is fatally defective because of a want of a sufficient allegation in this respect. But while the petition may have been subject to a motion to make it more definite and certain for want of a more positive allegation in this regard, it is clearly sufficient as against a general demurrer.

[4] It is objected also that the petition is fatally defective in that it fails to allege that the estimate of the amount of money necessary to be raised to carry into effect the enterprise, made by the board of directors of the district, was made on the advice and with the assistance of a competent engineer. The statute, however, while it does not forbid the taking of such advice by the directors, does not specifically require it. The requirement is that the board of directors shall make the estimate, and when they in good faith make such an estimate, and their estimate is approved by the qualified electors of the district, all is done that is necessary to constitute a compliance with the statute. *Hanson v. Kittitas Reclamation District*, 75 Wash. 297, 134 Pac. 1033.

[5] The petition for the organization of the irrigating district was presented and heard at a special meeting of the board of county commissioners of Grant county, called especially for that purpose. The statute as it was originally enacted required a petition for the organization of an irrigating district to be presented at a regular meeting of such board. *Rem. & Bal. Code*, § 6417. By the act of March 22, 1913 (*Laws 1913*, p. 558) the statute was amended in this particular, and the board of county commissioners in the present instance acted under the amended act. The appellant concedes their action was regular, if the amendment is valid, but he insists that the amendment is invalid for



want of a sufficient title. The act is entitled "An act relating to the organization and government of irrigation districts, and amending sections," etc., enumerating certain sections of Remington & Ballinger's Code. But without following the argument of the appellant we are clear that the title is sufficient under the rule of the cases of *State v. Scott*, 32 Wash. 279, 73 Pac. 365, and *Whitfield v. Davies*, 138 Pac. 883.

Other objections are made to the proceedings, but we do not find that they merit special consideration. The record shows that the proceedings had with reference to the formation of the district and the subsequent proceedings with reference to the issuance of bonds are in substantial accord with the statute, and we find no reason to disturb the decree of the trial court. The decree will therefore stand affirmed.

CROW, C. J., and PARKER, MOUNT, and MORRIS, JJ., concur.

**NATIONAL LAUNDRY CO. v. MAYER et al.**  
**OREGON-WASHINGTON R. & NAVIGATION CO. v. NATIONAL LAUNDRY CO.** (No. 11,873).

(Supreme Court of Washington. April 25, 1914.)

**1. LANDLORD AND TENANT (§ 25\*)—LEASES—ACKNOWLEDGMENT—ACKNOWLEDGMENT BY LESSEE.**

Under Rem. & Bal. Code, §§ 8745, 8746, 8802, requiring leases for a longer period than one year to be acknowledged, etc., a lease acknowledged only by the lessee is invalid; acknowledgment by both parties being necessary.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 66-75; Dec. Dig. § 25.\*]

**2. FRAUDS, STATUTE OF (§ 129\*)—LEASES—ACKNOWLEDGMENT—FAILURE TO ACKNOWLEDGE.**

Even if the making of improvements by the lessee would prevent an unacknowledged, five-year lease, with the privilege of extension for five years upon adjusting rentals, from being invalid as to the first five years, it would not validate it as to the renewal five years, since the renewal involved the making of a new contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 308-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Consolidated actions by the National Laundry Company against Sol H. Mayer, executor of Simon Rosenhaupt, deceased, and others, and by the Oregon-Washington Railroad & Navigation Company against the National Laundry Company. From judgments for the Laundry Company in each case, the other parties appeal. Reversed and remanded, with directions to enter judgment as stated.

Lloyd E. Gandy, Hamblen & Gilbert, and Cohn, Rosenhaupt & Grant, all of Spokane, for appellants. Zent, Powell & Redfield, of Spokane, for respondent.

MORRIS, J. These two actions were consolidated in the court below for the purpose of trial, and are so treated on this appeal. The first is an action to quiet a leasehold interest in the premises in controversy, and was commenced in July, 1910. Subsequent to the execution of the lease hereinafter referred to and the commencement of the first action, the railroad company acquired the fee in the property by purchase, and on November 14, 1912, served a notice to quit upon respondent, requiring the surrender of the premises at the expiration of the first five-year period named in the lease, and on December 3, 1912, commenced a condemnation suit to fix the damages to the leasehold interest, if it should be held that such existed. Under a stipulation between the parties through which all parties preserved their rights, the respondent remained in possession of the premises until some time in February, 1913, when it surrendered possession to the railroad company, leaving the question of its damages to be determined in the condemnation suit. The lower court sustained the right of action in the first suit, and \$4,200 was awarded respondent in the second suit. The appeal is from both judgments.

On July 3, 1907, Simon Rosenhaupt and wife were the owners of the premises involved in these two suits. On that day Simon Rosenhaupt entered into an agreement with I. M. Foster and Hiram W. Moseley, predecessors in interest of the respondent, as follows: "Spokane, Wash., July 3d, 1907. Received of I. M. Foster and Hiram W. Moseley, twelve hundred (\$1,200.00) dollars, being payments of rent for six months for lease of building to be erected on lots 4 and 5 of block 6 of resurvey and addition to Spokane. Said lease to be for a period of five years from the time said building is completed ready for occupancy, at a monthly rental of \$200.00 per month. Said lease to be made to above named parties or at their request to company to be formed by them and associates. [Signed] Simon Rosenhaupt." In accordance with this agreement the Rosenhauts constructed a three-story brick building with basement, and upon the completion of the building the laundry company moved in, occupying the basement and first and second stories for laundry purposes, installing the customary and necessary machinery. On the 15th day of December, 1907, a formal lease was drawn up between the Rosenhauts and the laundry company, and signed by all the parties, but not acknowledged at this time by any of the parties thereto. The lease was never acknowledged by Simon Rosenhaupt or his wife, nor was any demand ever made upon them for such acknowledgment previous to the commencement of the first suit. On January 19, 1910, the laundry company caused the lease to be acknowledged by its then president and secretary, and commenced the first of these

actions to have its leasehold interest quieted. The demising clause of this lease is as follows: "Witnesseth: That the said parties of the first part do by these presents lease, let and demise unto the said party of the second part the first and second floors and basement, situated at No. 314 Stevens street, in the city of Spokane, and state of Washington, with the appurtenances for the term of five years (5 years), with privilege of five more years, but rentals readjusted, from the 15th day of December, one thousand nine hundred and seven, at the monthly rent or sum of two hundred (\$200.00) dollars, payable in gold coin of the United States, monthly in advance, on the 15th day of each and every month during the said term of five years (5 years)."

[1] We have repeatedly held, under sections 8745, 8746, and 8802, Rem. & Bal. Code, that an unacknowledged lease for more than one year is void so far as the duration of the lease is concerned, and shall be construed only as a tenancy from month to month or from period to period on which rent is payable. *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Richards v. Redelsheimer*, 38 Wash. 325, 78 Pac. 934; *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 109 Pac. 312, Ann. Cas. 1912A, 1093; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499; *Koschnitsky v. Hammond Lumber Co.*, 57 Wash. 320, 106 Pac. 900; *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890; *Hockersmith v. Sullivan*, 71 Wash. 244, 128 Pac. 222.

It was also held in the *Forrester* Case that an acknowledgment by the lessee alone is not an acknowledgment within the meaning of the statute. Under these authorities, this lease was invalid, unless the facts furnish some reason why they are not decisive. Respondent seeks to find such an exception in certain improvements it has made upon the premises, which operated as such a part performance of the lease as to estop the landlord from disputing its validity. We do not think that it is necessary that we should discuss the rule of part performance as affecting the validity of an otherwise invalid lease, or whether or not the facts of this case will support such a rule.

[2] Assuming that such a rule exists, its applicability here would be limited to the right of respondent to continue in its occupancy of the premises under the lease for the full term of five years. The only force of such a rule would be to estop the landlord from denying the contract then in existence. It would not make a new contract between the parties and extend the lease for a further period of five years, for the reason that, before that provision of the lease could be enforced, it would be necessary for the minds of the parties to meet upon a new contract on which the lease as drawn is silent, and that

is the rental value of the premises for the second period of five years. The language of the lease is: "With the privilege of five more years, but rentals readjusted." The lease itself furnishes no rule for such an adjustment of rentals, and it is clear that it could be accomplished only by an arrangement between the lessor and the lessee. For the purposes of the trial it was stipulated in open court that the rental value of the premises for the second five-year period would be \$200 per month. Such stipulation, however, does not affect the question we are now discussing. While, therefore, the part performance of the lease might have validated the lease for the first period of five years, the same reason could not operate in favor of its validity for the second period of five years. Since the lease is invalid for a greater period than one year, the provision for the second period of five years is of no more force than an oral agreement to execute a lease which is as much within the statute of frauds as the lease itself. *Richards v. Redelsheimer*, supra; *Anderson v. Frye & Bruhn*, supra. We therefore conclude that respondent had no leasehold or other interest in the premises subsequent to December 16, 1912, the expiration of the five-year period first provided in the lease.

The judgments of the lower court are reversed, and the causes remanded, with instructions to enter judgments in accordance with the views here expressed.

CROW, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

#### FAIRBANKS STEAM SHOVEL CO. v. HOLT & JEFFERY. (No. 11,516.)

(Supreme Court of Washington. April 29, 1914.)

#### 1. EVIDENCE (§ 400\*)—PAROL EVIDENCE—INCOMPLETE CONTRACTS.

A written instrument reading: "Order to A. H. H., Spokane, Washington. Charge to name: H. & J., Seattle, Washington \* \* \* one and one-half yard Fairbanks Dredge"—followed by provisions stating the price and terms of payment and the time for delivery, and signed by H. & J., was a complete contract, and not within the rule that, where a part only of a contract is in writing, the part not in writing may be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. § 400.\*]

#### 2. SALES (§ 266\*)—IMPLIED WARRANTIES—SECONDHAND GOODS.

There is no implied warranty in the sale of secondhand goods and machinery, though there may be an express warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743, 746, 747, 754-759; Dec. Dig. § 266.\*]

#### 3. SALES (§ 266\*)—IMPLIED WARRANTIES—SECONDHAND GOODS.

An agreement by the seller, in a contract for the sale of a secondhand dredge, to overhaul it and put it in first-class shape, was a warranty

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the dredge was reasonably certain, when properly handled, to do the work intended, and was free from structural defects, where the seller knew the purpose for which it was purchased, and the buyer knew that it had previously been operated.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743, 746, 747, 754-759; Dec. Dig. § 266.\*]

#### 4. SALES (§ 284\*)—WARRANTY—BREACH.

The seller of a secondhand dredge was liable on its warranty that the dredge would do the work intended and was free from structural defects, where the boom stick was rotten on the inside or in the inner timbers, which could have been discovered by a proper inspection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803-805; Dec. Dig. § 284.\*]

#### 5. SALES (§ 442\*)—BREACH OF WARRANTY—MEASURE OF DAMAGES.

The measure of recovery for breach of warranty of a secondhand dredge was not necessarily the amount paid by the buyer for a new boom stick, where that furnished with the dredge was rotten.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Fairbanks Steam Shovel Company against Holt & Jeffery. From a judgment for plaintiff, both parties appeal. Modified and remanded, with directions.

Holzheimer & Herald and Hodgson & Thompson, all of Seattle, for appellants. Preston & Thorgrimson, of Seattle, for respondent.

CHADWICK, J. [1] Plaintiff sold defendant certain dredging machinery under the terms of the following writing: "6-12-11 Order to Al H. Hoffman, Spokane, Washington. Charge to name: Holt & Jeffery, Seattle, Washington \* \* \* One one and one-half yards Fairbanks Dredge with fifty foot boom, and iron for vertical spuds complete, f. o. b. Marion, price \$6,050.00. Machinery to be overhauled at factory and put in first class shape. Delivery of machinery from factory to cars not later than sixty days from date. Plans to be furnished for scow immediately. Delivery of machinery from factory not later than sixty days from date. Boiler to pass Seattle inspection. This is a secondhand dredge that operated in Missouri. Terms: \$1,000.00 when equip't. arrives at Seattle. One-half of the balance 60 days and balance 60 days later, 6 per cent. This order is taken with the understanding that old bank spuds iron are included. Salesman: E. L. Kelzer. Signed by: Holt & Jeffery, by J. C. Jeffery, Sec."

Plaintiff brought suit to recover the balance due, and was met by certain defenses and counterclaims. The court entered a judgment for plaintiff in the sum of \$749.38, and disallowed claims of both parties, and both sides have appealed. The judgment of the court depends in part upon the character

of the instrument quoted above. It was held that it was not a contract; that it was a mere "skeleton" or "order," and admitted much testimony which tended to modify and enlarge it. We think this was error. The writing has every essential of a contract—parties, consideration, time, subject-matter, and mutual assent. The property has been delivered and partly paid for. Counsel cite many cases to the point that a contract is not complete where it does not contain all of the representations of the agent making a sale and which induced the sale. We shall not discuss the authorities relied on, with the exception of *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470. We there said: "Where it appears that only a part of the contract is in writing, the part not in writing may be proved by parol, in so far as it is not inconsistent with the written portion." The order or contract in that case was similar to the one before us, but with this very marked difference: No time for delivery was stipulated. The writer of the opinion twice observed this lack of essentiality. He says: "The letter upon its face does not purport to state the whole agreement." And, "But it does not appear upon the face of the letter that it purports to contain the whole contract." It was held that, no time being fixed, the court could refer to collateral matters to determine what, under the circumstances, would be a reasonable time. Such holdings do not destroy contracts or violate the rule against receiving oral testimony to alter or modify them, but are consistent with the rule that, where a writing containing all the essentials of a contract is offered, the law will presume that the parties have culminated their negotiations in it. *Ramming v. Caldwell*, 43 Ill. App. 175. If it were not so, we would be constantly resorting to parol evidence to make an ambiguity or omission, and to like testimony to explain it.

In the case at bar the machine was in use about five months when the boom stick broke and had to be entirely replaced. This brings us to the second proposition of law; that is, the liability of a seller of a secondhand article to answer as upon a warranty of quality. Plaintiff contends: (a) That there is no warranty in the sale of a secondhand article; and (b) that more than a reasonable time elapsed between the delivery of the goods in August, 1911, and January 7, 1913, for examination and acceptance, and that it cannot now be held. Our attention is called to *Smith v. Bolster*, 70 Wash. 1, 125 Pac. 1022, where the court held that representations that a secondhand automobile was "in first-class condition, as good as any new car," was "seller's praise." That case seems to have turned on the words "first-class condition, as good as any new car," the court saying that the fact that the car was sold at

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

21 per cent. less than a new car would have cost, was evidence that it was of less value than a new car; that the words were seller's praise in the light of the vendee's conduct, he having driven the car about 6,700 miles and kept it two seasons. In that case, too, the trial judge found the fact to be that the car was not in first-class condition, upon the sole ground that it had been used as a demonstration car.

[2, 3] The general rule is that there is no implied warranty in the sale of secondhand goods and machinery. 35 Cyc. 408.

The question in this case is whether an engagement to put the dredge in first-class condition is a warranty. Whether words are to be taken in the sense of a warranty is usually a question of mixed law and fact. Here the seller knew the purpose for which the dredge had been purchased. The vendee knew that it had operated in another state. The seller agreed to overhaul and put it in "first-class shape." This is a warranty that the machine was understood to be reasonably certain, when properly handled, to do the work intended, and was free from structural defects. This court has never intended to hold that everything said to induce the sale of a secondhand article is seller's praise. To so hold would be to say there could be no warranty upon the sale of a secondhand article. If a person buys an article secondhand, there is no implied warranty; but there may be an express one. As in all other transactions, it depends on the contract made by the parties themselves. The engagement to put the machine in "first-class shape" was a warranty of quality and fitness.

[4] There can be no question that the boom stick was rotten on the inside or in the inner timbers. It was season checked and had been puttied and painted. We attach no significance to this circumstance, as it is well known that large timbers check and good workmanship demands that they be puttied and painted. Plaintiff insists that it was not required to make more than an ordinary surface inspection, or find any defect that the eye would not reveal; but the testimony upon this point is not in harmony. There is evidence tending to show that the defect was observable around certain bolts, and that the only proper way to test timbers for rot or imperfections is to bore into them.

Our conclusion is that plaintiff is answerable for the defective boom stick; that defendant had a right to rely upon it as one "in first-class condition"; and that 5½ months was not an unreasonable time to use it without discovering the latent but discoverable defect if a physical test had been made.

[5] Defendants claimed the sum of \$2,369.88, the alleged cost of making a new boom stick; it having paid the Seattle Construction & Dry Dock Company \$2,121.88 of that

sum and the difference to others, for freight and material. There is testimony tending to show that the cost of a new boom would not exceed \$843. As between these sums the court arbitrarily allowed the sum of \$1,000. The amount paid out does not in itself furnish a measure of recovery. *Torgeson v. Hanford*, 139 Pac. 648. Nor are we satisfied that the record shows it to have been a reasonable sum. As between the two amounts, we are disposed to and will follow the finding of the trial judge. Bearing in mind these legal conclusions, and without discussing the particular items included or excluded, the judgment of the court will be recast as follows:

For plaintiff, upon its first cause of action .....	\$2,500.00	
Second cause of action .....	479.05	
Third cause of action .....	250.00	\$3,229.05
For defendant, reasonable cost of repairing boom.....	\$1,000.00	
On account of fact that dredger was not fully equipped..	215.62	
Rent for scows.....	450.00	\$1,665.62
Amount due plaintiff.....		\$1,563.43

Remanded, with instructions to enter a judgment for \$1,563.43, with interest.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

#### ELSTON et al. v. McGLAUFILIN et al. (No. 11,718.)

(Supreme Court of Washington. April 28, 1914.)

#### 1. APPEAL AND ERROR (§ 1031\*)—PREJUDICIAL ERROR—PRESUMPTION OF PREJUDICE.

In an action tried to the court, where a view is had by the trial judge without the consent of the parties, and his judgment is partly based on the results of his inspection, it will be reversed on appeal because it cannot be determined whether the court erred in considering what he had before him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.\*]

#### 2. APPEAL AND ERROR (§ 1046\*)—VIEW—RIGHT TO CONSIDER.

Where the court, to whom an action for damages for the negligent construction of a building on defendant's land which plaintiffs claimed caused their property to slide was tried, viewed the premises without the consent of the parties, and, because of his own theory and the result of the view, disregarded defendants' evidence, the judgment for plaintiffs must be reversed, for a party is not only entitled to a fair trial in fact, but one which appears to be fair.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.\*]

#### 3. ADJOINING LANDOWNERS (§ 3\*)—ACTIONS—EVIDENCE.

In an action for damages because of defendant's negligent construction of a building on lower land which caused that of plaintiffs to slide, evidence of the breaking of a retaining wall built by plaintiffs is admissible to show

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the slide was the result of the general character of the soil in that vicinity and not defendants' negligence.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 7-20; Dec. Dig. § 3.\*]

#### 4. ADJOINING LANDOWNERS (§ 3\*)—ACTIONS—DAMAGES.

Where the sliding of plaintiffs' land resulted from the negligent construction of a building on lower land, plaintiffs' measure of damages is the depreciation in the value of their property, and they cannot recover the amount expended for retaining wall, for defendants would not be liable for the amount paid or the amount agreed to be paid for the wall, unless it was reasonable.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 7-20; Dec. Dig. § 3.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Edwin E. Elston and another against Nellie G. McGlauflin and another. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Morgan & Brewer, of Hoquiam, and C. R. Barney, of Seattle, for appellants. Skeel & Whitney, of Seattle, for respondents.

CHADWICK, J. This case was brought by plaintiff to recover damages alleged to have been suffered by reason of the negligent construction of an apartment house upon an abutting lot. The property is situate upon a steep hillside. It is alleged that defendants made a cut into the hill without supporting it in any way, and thereafter, when the land began to slide, put in an insufficient support. The testimony of defendants tended to show that the slide resulted because of an insufficient retaining wall which plaintiffs had erected upon their own property and against which earth had been filled to a depth of four or five feet, and that the slide was caused by the slipping of the blue clay formation in consequence of heavy rains; that it was not confined to the property of the parties to this action, but was general in that locality. The case went to trial. There was a decided conflict of testimony, both as to the physical facts and the testimony of the expert witnesses; the opinions of Hon. Geo. F. Cotterill, John L. Hall, and W. H. Fritch being offered by plaintiffs, and that of Hon. R. H. Thompson by the defendants. All of these men are engineers of standing and experience. A judgment was entered in favor of the plaintiffs. It is unnecessary to review the testimony or determine the weight of the evidence, for we are met at the threshold by a circumstance that will, in our judgment, compel a reversal of the case.

[1, 2] From the remarks of the judge when deciding this case it is plain that he had theretofore made some investigations, advanced some theories, and drawn some conclusions with reference to sliding ground in

that vicinity. While the trial was in progress and without the knowledge of either side, the judge went upon the property and made an independent investigation. The trial occurred 2½ years after the slide and after walls had been rebuilt and the property practically restored. In deciding the case the court said: "Now the facts in the case I do not think—the physical facts are very much in dispute. There is a slide there which was a damage to both plaintiff and defendant. The theory upon which the decision is to be made in part is as to what caused that slide. In arriving at that conclusion I have listened carefully to all the testimony. I went out last evening after the trial and thoroughly investigated the surface of the ground and the lots of the adjoining premises, and I have also had recourse to my own observation and experience and to the common sense appeal to such expert testimony. My residence in the city here has covered a large number of years, and I have at times owned property in sliding districts. I think it is only fair to use my own judgment and common sense. At one time I lived on premises parallel to the claim here, having erected a house on a side hill and put in a bulkhead, and an excavation was made lower down the hill. My bulkhead settled, slipped onto my neighbor, and the following year my residence did the same. At that time I listened to the theories of Mr. Thompson on one side and way down to a mechanic's on the other, and I studied the theory of slides as effectively as I could at that time. I respect the opinion of Mr. Thompson very much; I did at that time, and I still do, as an expert. He has studied the situation, but I do not agree with him on his conclusions. Now this theory that there has been, as he states in his lecture—you might call it so, because I have heard it repeatedly—it is true that there have been areas that have slid and are still sliding; but his theory, it seems to me, is applicable only in large areas of wild land where the drainage has never been caught and the country has not been roofed over. But here is an area in the city that has been in a large measure roofed over, the streets graded and sewers cut, and as I observed it last night, and as I have seen it for years, it looked to me that the whole district had reached the point where slides would stop when the country is roofed over. It has been pretty thoroughly roofed over, and those are not the same conditions that exist in raw land where the slide from an uncompleted action of nature exists. \* \* \* My observation of the holding of the hillside, there is an angle of repose at which the land ultimately settles, and I believe that land had settled to that angle of repose at the time that this apartment house of the defendant was constructed. \* \* \* Now Mr. Thompson's testimony is expert. He

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thoroughly understands the question of slides. Mr. Thompson has not in my judgment reached the seat of this difficulty when he states that this was a part of a general slide. \* \* \* Mr. Clapp testified here as to the value of the cubic yards of wall at that time on these premises. As against his opinion testimony, we have testimony of the contractor and the owner as to what was actually paid for the walls. That must be conclusive. I realize that these things are somewhat exaggerated at times, and I think that the plaintiff is reasonably damaged in the sum of \$900."

Without denying the right of a trial judge to inform himself by a view of property, not to prove some *res gestæ* fact, but in order to clear up or harmonize the testimony, or that he may draw a proper conclusion when beset by the conflicting opinions of experts, we nevertheless feel that the motion for a new trial should have been granted. The language of the court makes it most likely that, however honest his intention, his view was not made for the purpose of clearing any doubt that may have been in his mind, but to verify a theory of his own and a preconceived notion of physical facts. It is clear that, because of former experiences and independent investigations, he had an unconscious prejudice against the testimony of Mr. Thompson. This is indicated by the whole tenor of his remarks, and his rejection of Mr. Thompson's theories in toto, notwithstanding his offering that he had "lived on premises parallel to the claim (lot) here," and that a slide had occurred, to his damage, whereas, a slide upon parallel ground seems to us to give strong support to Mr. Thompson's opinion that the slide was the result of natural causes, was general, and likely to occur anywhere in that vicinity. The resort of the judge to inspection and the application of his own theories gathered from personal experiences is sufficient to create a doubt in the minds of the defendants, and would, in the event of affirmance, make them wonder for all time whether they had had a fair trial.

Where a view is had by a trial judge, and it appears that his inspection and observation are made an integral part of his judgment, and the parties have not consented thereto, his judgment will be rejected on appeal (Chamberlayne *Modern Law of Evidence*, vol. 1, p. 574; *Denver Omnibus & Car Co. v. J. R. Ward Auction Co.*, 47 Colo. 446, 107 Pac. 1073), because "it is difficult for this court to determine whether he erred or not, considering what he had before him" (*Atlantic & B. Ry. Co. v. City of Cordelia*, 125 Ga. 373, 54 S. E. 155).

A defeated litigant is entitled not only to a fair trial, but to the semblance of a fair trial. He has a right to the free judgment of a court or jury, unclouded by bias, prej-

udice, or fixed or preconceived opinion. Without this the judgments of courts would no longer command or deserve public confidence, and without confidence courts have no function to perform. Clearly, the judge would have been rejected as a juror upon a challenge for cause, had the remarks quoted been brought to the attention of the court, and for like reason the case should have been referred by him to another judge for a new trial.

We do not want to be misunderstood in this case, nor should it be confused with those cases where the case has been fairly tried before a jury, a verdict returned, and a judgment entered, and the court, when passing upon a motion for a new trial, says that had he been a juror he would have decided the case differently, or made some equivalent expression. See cases collected in *Brown v. Walla Walla*, 139 Pac. 36. In such cases, it would be manifestly wrong, after a fair trial before an impartial jury, to set aside a verdict because of the personal opinion of the judge. In this case the opinion of the judge inheres in the judgment. It became an integral part thereof. The court unwittingly became a witness in the case and in some degree, at least, based his judgment upon his own independent experience and preconceived opinion. In doing so, he denied, perhaps unintentionally, the probative force of the opinions of defendant's witnesses.

[3] The court rejected evidence proffered to show that a third wall, built by plaintiff under the direction and plans of Mr. Cotterill after the slide and after defendants had built an area wall below, had broken. This was error. It was competent as tending to support defendant's theory and Mr. Thompson's opinion that the slide was referable to the general character of the soil in that vicinity, and not to the cut below; and in support of defendant's theory that the break was because plaintiff's wall was insufficient to sustain the weight that had been put against it, and also as tending to impeach the expert opinion of Mr. Cotterill that plaintiff's wall was sufficient, and that the slide was caused by defendant's excavating below it.

[4] As to the measure of damages, plaintiffs claim the amount they had paid out for a new wall. If plaintiffs recover, the measure will be the depreciation in value of the property—its worth immediately before and immediately after. *Olson v. Goerig*, 45 Wash. 541, 88 Pac. 1017. The reasonable cost to be allowed for a new wall might be considered in estimating such depreciation; but defendants would not be bound to meet an amount paid or agreed to be paid, unless it was made to appear that it was the reasonable cost thereof. *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 140 Pac. 394.

(just decided); *Torgeson v. Hanford*, 139 Pac. 648 (just decided).

Reversed and remanded for a new trial.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

**MAY v. ROBERTS.** (No. 3,972.)  
(Supreme Court of Oklahoma. April 14, 1914.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 356\*)—TIME FOR TAKING PROCEEDINGS—DISMISSAL.**

The syllabus in *Gaskin v. Cleveland Woolen Mills*, 38 Okl. 229, 132 Pac. 821, is made the syllabus here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]

Error from County Court, Jackson County; B. N. Woodson, Judge.

Action between J. W. May and Eugene Roberts. Judgment for Roberts, and May brings error. Dismissed.

O. B. Reigel, of Snyder, for plaintiff in error. Guy P. Horton, of Altus, for defendant in error.

**PER CURIAM.** This case was tried in the county court of Jackson county on November 3, 1911. Judgment was rendered for defendant in error, Eugene Roberts. A motion for a new trial was duly filed and overruled on November 8, 1911. Petition in error and case-made was not filed in this court until May 14, 1912. Counsel for plaintiff in error filed motion to dismiss, because proceedings in error were not commenced in this court within six months from the rendition of the judgment or final order complained of. In view of the provisions of chapter 18, p. 35, Sess. Laws 1910-11, wherein it is provided that all proceedings in error for reversing, vacating, or modifying judgments or final orders shall be commenced within six months from the rendition of the judgment or final order complained of, the motion must be sustained. *Gaskin v. Cleveland Woolen Mills*, 38 Okl. 229, 132 Pac. 821.

**AMERICAN NAT. BANK v. HALSELL et al.**  
(No. 3377.)

(Supreme Court of Oklahoma. April 14, 1914.)

*(Syllabus by the Court.)*

**1. BILLS AND NOTES (§ 160\*)—NEGOTIABILITY—PROVISION FOR ATTORNEY FEES—DEFENSES.**

A note executed prior to the act taking effect June, 1911, containing a provision for attorney fees, is nonnegotiable and therefore subject to all the equities existing between the original parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 403; Dec. Dig. § 160.\*]

**2. APPEAL AND ERROR (§ 1001\*)—VERDICT—EVIDENCE.**

In a suit to enforce the payment of a note, where the maker pleads a failure of consid-

eration, alleging that his execution of the note was caused by the false and fraudulent representations of the payee and indorsee and with notice of the inducing fraud to the holder before his purchase, *held* that, where there is sufficient evidence to take the case to the jury and reasonably tending to support their finding, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**3. APPEAL AND ERROR (§ 1001\*)—VERDICT—EVIDENCE—FRAUD.**

As fraud in all its shapes is as odious in law as in equity and where the evidence of fraud is sufficient to satisfy the mind and conscience of the wrongful conduct charged, the finding in this matter will not be disturbed. In such cases this court will not review the evidence to ascertain where the weight lies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**4. APPEAL AND ERROR (§ 757\*)—BRIEF—REQUISITES.**

Rule 25 adopted by this court (137 Pac. xi), requiring that, "where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portion to which he objects or may save exceptions," must be complied with to warrant a review of the same by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.\*]

**5. BILLS AND NOTES (§ 277\*)—NONLIABILITY OF MAKER—EFFECT ON LIABILITY OF INDORSEER.**

A motion for judgment non obstante, etc., by a defendant payee of a note against whom a verdict is rendered and by the same jury a verdict is rendered in favor of his codefendant, the maker of the note, upon the grounds that the note is without consideration as to the maker and therefore no liability as to him (payee), *held*, no error in overruling such motion where the proof reasonably shows that such payee colluded with an indorsee and practiced a fraud to obtain said note from the maker, to use the same to discharge his indebtedness to the indorsee, and was benefited by such transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 626; Dec. Dig. § 277.\*]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action of the American National Bank, a corporation, against E. L. Halsell and C. M. Bradley. Judgment for defendant Halsell and for plaintiff as to defendant Bradley, and plaintiff brings error. Affirmed.

Plaintiff in error (plaintiff below) sued E. L. Halsell and C. M. Bradley upon the promissory note executed by Halsell payable to Bradley. The note is Exhibit A, which is as follows: "Muskogee, Okla., Dec. 24th, 1907. On or before three years after date, I, we, or either of us promise to pay to C. M. Bradley, or order, fifty-two hundred thirty-five <sup>00</sup>/<sub>100</sub> dollars for value received, at the Bank of Commerce of Muskogee, Oklahoma, with interest after date at eight per cent. per annum until paid, and ten per cent. on the entire amount as attorney's fees, if placed in the hands of an attorney for collection or suit is filed thereon. The makers and indorsers

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hereby severally waive protest, demand and notice of protest and nonpayment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity without prejudice to the holder. Interest payable annually. E. L. Halsell." Allying: That prior to the maturity of said note, C. M. Bradley, payee, assigned the same in the usual course of trade, for value, without notice, to one W. E. Rowsey by blank indorsement of the note. That on the 9th day of December, 1910, and before the maturity of said note, the said Rowsey sold and delivered the same to the plaintiff herein, for a valuable consideration, without notice, in the usual course of trade, and the plaintiff thereby became the holder, etc. The suit is also for interest at 8 per cent. from the 24th of December, 1907, and \$675 attorney's fee; and that payment has been demanded but refused.

To this petition the defendant C. M. Bradley answered by general denial.

The defendant E. L. Halsell, in his amended answer, admits the execution of the note, but pleads failure of consideration, and that he was induced to execute the note because of the fraud practiced upon him by Rowsey and Bradley; the latter being the payee and the former the immediate indorsee of the note. We will not state in extenso the pleadings of the defendant Halsell, because the opinion sufficiently states the character of fraud and deceit practiced, as alleged, upon Halsell, by Rowsey and Bradley.

Plaintiff filed its reply to the answer of Halsell in which is denied each and every allegation therein contained which is not an express denial or admission of the allegations set forth in the petition. The plaintiff further says that, at the time of the execution of the note in question by defendant Halsell to Bradley and indorsed in blank and delivered to one W. E. Rowsey, the defendant Bradley was indebted to the defendant Rowsey in the sum of \$5,235.60, which note was held by W. E. Rowsey against Bradley and was secured by certain stock in the said land company and held as collateral to secure Bradley's note to Rowsey. It says: That, both Halsell and Bradley being desirous of having the Bradley stock of the land company which was held as collateral security by Rowsey released so that Bradley could sell and transfer the same to Halsell, it was understood between Rowsey, Bradley, and Halsell that, if Rowsey would surrender the stock and the note that it was given to secure, they would give him (Rowsey) the note of Halsell to Bradley (being Exhibit A), and upon receiving said note from Halsell the said Bradley was to indorse the same and deliver it to him (Rowsey), and in consideration of which Rowsey would surrender the collateral stock held as aforesaid and surrender the note of Bradley canceled and paid, which it is alleged he did do. That

the consideration of the note sued on was the surrender and cancellation of said note from Bradley to Rowsey and the surrender of said stock in the land company and other valuable considerations from Bradley to Halsell. That the note Bradley gave to Rowsey originally was executed in consideration of borrowed money for which he put up the stock as collateral, and that by surrendering said stock and note Rowsey surrendered all his security and said note and has no other evidence of indebtedness represented by said note. That simultaneously upon the execution of the Halsell note to Bradley (Exhibit A), it was indorsed by Bradley and delivered to Rowsey as the joint and several obligation of the said Halsell and Bradley.

The plaintiff did not sue its immediate indorsee, Rowsey.

The cause went to trial to a jury, and two verdicts were returned as follows, omitting the caption and trial number: "We, the jury in the above-entitled action, duly impaneled and sworn, upon our oaths find the issues for the defendant E. L. Halsell." This was signed by eleven jurors, including the foreman.

The next verdict, omitting the caption and trial number, is as follows: "We, the jury in the above-entitled action, duly impaneled and sworn, upon our oaths find the issues for the plaintiff against the defendant C. M. Bradley in the sum of \$6,643.37. E. C. Alley, Foreman." Upon those two verdicts the court rendered judgment that as to the defendant E. L. Halsell the plaintiff take nothing by this suit, and that he recover from the plaintiff all of his costs, etc. To which plaintiff excepted. It is further adjudged that the plaintiff have and recover of and from the defendant C. M. Bradley the sum of \$6,643.37 with interest at the rate of 8 per cent. from date of judgment until paid and all its costs in this behalf laid out and expended. To all of which the defendant Bradley excepted.

The case was submitted on May 6, 1911, and verdicts rendered on the same day, and journal entry of judgment on the same date. Within the time required by the statute, the bank and Bradley filed separate motions for a new trial. Subsequently, the attorneys for the defendant Bradley filed "motion for judgment notwithstanding the verdict"; the first and second grounds being because the verdict is contrary to law and contrary to the evidence, and the third ground is as follows: "Because the jury, having found by its verdict that the note sued on in this case was executed by the defendant E. L. Halsell in favor of this defendant (Bradley) and indorsed in blank by this defendant and delivered by him to W. E. Rowsey in settlement of a prior existing debt, was void and was obtained by fraud, and that the defendant Halsell was not liable upon the same, it must follow necessarily that there being no liability



upon the part of defendant Halsell to W. E. Rowsey or to the American National Bank, the assignee of said note, there could be no liability upon said note against this defendant (Bradley)." All of the motions were by the court overruled and exceptions reserved. The bank, as plaintiff in error, brings the case here, with Halsell and Bradley as defendants in error, and is filed in time. Petition in error by C. M. Bradley, as plaintiff in error, against the American National Bank and E. L. Halsell as defendants in error was filed December 7, 1911, but not attached to a case-made. Briefs for plaintiff in error and for E. L. Halsell, one of the defendants in error, have been submitted; but no brief for Bradley appears.

W. W. Noffsinger, of Muskogee, for plaintiff in error. Samuel M. Rutherford and Preston C. West, both of Muskogee, for defendant in error E. L. Halsell.

RUSSELL, J. (after stating the facts as above). Briefly stated, the suit of plaintiff in error, plaintiff below, was based upon a promissory note executed and delivered by defendant in error Halsell to Bradley, and by Bradley indorsed to Rowsey, and by the latter indorsed and delivered to the American National Bank with the allegation that it was transferred before maturity, without notice, and for value.

With like brevity of statement, the contention of the defendant in error Halsell is that he gave the note in question to Bradley, and the consideration being that he received a considerable number of shares of stock in the International Land Company; that he was induced to execute and deliver said note (Exhibit A), upon the representations and misrepresentations and fraudulent statements of C. M. Bradley and W. E. Rowsey, acting together, that the stock for which he executed his note was known to them to be very valuable and worth at least three and four times its face value; and that he being ignorant of the conditions and relying upon their statements executed the note sued on; and that said statements and representations made by Rowsey and Bradley to him, which induced the execution of the note, were false and fraudulent and known by them to be false and fraudulent; and that said shares of stock were worthless and without value; and that such facts were known to them when they induced him to execute the note to Bradley and unknown to him, and for this cause there was a failure of consideration, etc.

The briefs of counsel have been prepared with great care and circumspection, and each have exhausted the force of argument and propositions of law in support of their respective contentions. Notwithstanding the elaborateness of their briefs, the various and numerous authorities cited by each, under

the pleadings and proof, the cause can be narrowed down to practically one proposition; and the conclusion reached as to this proposition disposes of the case as to Halsell and determines the status of Bradley in the cause. The pivotal question presented in the original brief hinges upon the sufficiency of the evidence to support the finding.

As the laboring oar is upon the defendant Halsell to maintain his position in this case, it may be better to consider the evidence and its effect in support of his allegations of fraudulent representations and deceitful conduct that induced him to sign the note. His pleadings are strictly affirmative, covering with precision every necessary allegation that would constitute representations that would induce an involuntary act, and it follows that if this evidence and attendant circumstances in support thereof were reasonably sufficient in the belief of the jury to sustain his pleading he was entitled to a judgment. The honorable trial court, by its instructions to the jury, manifested a clear understanding of the issues that were presented, and considered as a whole, and especially those features which bear upon the question of fraud and deceit and misrepresentations and the result of such and the means of knowledge of either or all the parties to the transaction, make it appear that the issues pro and con were submitted. It is our opinion that the law applicable was given the jury, and in such intelligible language as a jury of laymen would understand and be able to apply the evidence thereto.

[1] The note in question in this action is clearly a nonnegotiable instrument under the laws in force at the time of its execution, for it has been repeatedly held that a note containing a provision for a reasonable attorney's fee if collected by suit was not negotiable, yet this was changed by the act taking effect June, 1911. That being the case, it necessarily follows that it is subject to all the equities existing between the original parties. *Clowers v. Snowden et al.*, 21 Okl. 476, 96 Pac. 596; *Clevenger v. Lewis*, 20 Okl. 843, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56, and authorities cited therein.

[2] In addition to this, the defendant Halsell testified that the bank, being the plaintiff, had notice before it purchased the note of the fraud practiced upon him and his refusal to pay it. This was denied, yet the issue being left to the jury, and that fact was clearly left for them to determine, and if believed it carried, in addition to the provision in the note, actual notice to the plaintiff of the fraud and the disability of the note.

The issue upon which the defendant Halsell bases his cause of action is the charge that Bradley and Rowsey, by fraudulent acts, misstatements, and misrepresentations, induced him to execute the note in controversy for a worthless consideration, and that those facts were known to the plaintiff before it became the purchaser of the note.

We are told by Justice Story, in 1 Eq. Jur. § 186, that "fraud, actual or positive, includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent, cheat, or deceive another." The intention to deceive, the cunning and deception used to circumvent, cheat, and deceive are fully alleged, and the proof in support thereof was the issue for the jury to determine. The question is presented whether there were such fraud and misrepresentations as to have been the determining cause of the execution of the note, and this depends upon the evidence; the allegations being complete. It seems to be the accepted theory of the law that when one person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or if also within the reason of the other party, is to deceive or to induce him to refrain from inquiry, and if it is shown that concealment or other deception was practiced with respect to the particular transaction, such transaction is void on the ground of fraud.

[3] We do not think there is a controlling distinction in transactions amounting to fraud in equity or in law, for, as is well said by a distinguished writer, "fraud in all its shapes is as odious in law as in equity." In the case of *Bottoms v. Neukirchner*, 29 Okl. 104, 116 Pac. 434, Mr. Justice Kane, speaking for the court, it being a suit in equity to cancel a deed made by the plaintiff, says: "It seems that a lesser degree of proof is required to establish fraud in equity than in law"—citing *Moore v. Adams et al.*, 26 Okl. 48, 108 Pac. 392, and other authorities. "In equity it suffices to show facts and circumstances from which it may be presumed." Justice Williams, in *Moore v. Adams et al.*, 26 Okl. 48, 108 Pac. 392, quoting from the case of *Myrick v. Jacks*, 33 Ark. 425, says that: "Fraud must be shown and proven at law. In equity it suffices to show facts and circumstances from which it may be presumed." It is held in *Moore v. Adams*, supra: "In cases where fraud is alleged in the procuring of the execution of written instruments or deeds, the proof must sustain the allegations by a preponderance of the evidence so great as to overcome all opposing evidence and repel the opposing presumptions. It should be of such weight and exigency as to satisfactorily establish the wrongful conduct charged; honesty and fair dealing as a rule being presumed." In the case of *Insurance Co. v. Rammelsberg*, 58 Kan. 531, 50 Pac. 446, an opinion delivered by Mr. Chief Justice Doster, in discussing the question of proof necessary to establish the fraud, says: "It should be of such weight and cogency as to satisfactorily establish the wrongful conduct charged." This seems to be an appropriate test, and, if the evidence presented in the opinion of those to whom the facts are presented is of sufficient weight and cogency to satisfactorily establish the wrongful conduct

charged, that finding ought not to be disturbed on appeal.

As we have stated, this question has not been definitely determined in this jurisdiction, but without regard to such distinction, if any, it is not necessary to a determination of this case. The safe rule to determine the question whether or not fraud existed as the inducement to action—that is, where deception and false representations known to be false are practiced to the injury of another—is the evidence sufficient to satisfy the mind and conscience of the wrongful conduct charged. If this is a good test, and we deem it is, it is our opinion that in all cases where the evidence is sufficient to take the case to the jury on the question of fraud their finding upon such matter should be conclusive on this court. It is held in the case of *Howe et al. v. Martin et al.*, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840, that: "A party is guilty of fraud and deceit where, with intent to induce another to enter into a contract, he makes a positive assertion which is material in a manner not warranted by his information, or where he is not shown to have reasonable grounds for believing it true, \* \* \* even though believed by the party making it." Where the evidence is conflicting, this court will not review the evidence to ascertain where the weight of the evidence lies, and, if there is evidence reasonably tending to support the verdict, it will not be set aside. By Justice Hayes, *Harrill v. Parkinson*, 27 Okl. 528, 112 Pac. 970: "Where the jury is properly instructed upon an issue of fact joined by the pleadings, and there is evidence reasonably tending to support their finding on that issue, their verdict will not be disturbed by the Supreme Court." Justice Kane, *Burns v. Vaught*, 27 Okl. 711, 113 Pac. 906, affirms this statement of the rule. And the same is held in *Hobbs v. Smith*, 27 Okl. 831, 115 Pac. 347, 84 L. R. A. (N. S.) 697. In *Binion v. Lyle*, 28 Okl. 431, 114 Pac. 618, by Chief Justice Turner, the same doctrine is asserted. The same rule is prescribed in *Fairfax v. Giraud*, 35 Okl. 659, 131 Pac. 159, by Justice Dunn.

[4] While it is true the plaintiff in error makes numerous assignments of error which refer to the giving of certain instructions and the refusal of certain instructions, yet nowhere in the extensive brief does he, by argument or authority, complain of the instructions or set forth any of them that we have been able to ascertain from a careful reading thereof.

It is necessary to a review of instructions given or refused that rule 25 adopted by this court (137 Pac. xi) should be complied with, which is: "Where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portion to which he objects or may save exceptions."

The assignments of error that the court

committed error in giving instructions numbered 1 to 10, inclusive, and refusing instructions asked by plaintiff without the instructions complained of being set out in the brief, is a failure to comply with the rule and the opinions of this court affirming it. However, we will add that we have examined the case-made and fail to find a record of the requested and refused instructions.

We deem it proper to say that, but for the repeated admonitions of this court, the issues raised in the court below in order to be reviewed here must be presented as the rules require, else we might feel more or less regret at our inability to review what counsel deem worthy of attention.

The contention of plaintiff in error on the matter of rescission, and which he has elaborately argued with citations of authority as to the duty imposed upon Halsell, the defendant in error, to bring himself within such rule, etc., has been carefully looked into. On this matter, the conclusion we have reached is that his argument and authorities, while good and bearing the earmarks of elementary principles, are totally inapplicable to the theory of the defendant Halsell as made by the pleadings and proof in this case. Counsel have assumed very ingeniously that the theory of Halsell rested upon the authorities and principles announced by him. It is sufficient to dispose of this matter by saying that Halsell's defense was that the note given was without consideration and induced by fraudulent representations and overreaching. This was the real theory upon which the case was fought out and determined by the court and jury.

The defendant below C. M. Bradley is in this court by petition in error, but without a brief. The record shows that, after the trial resulting in the verdicts and judgments stated (*supra*), he made a motion for judgment non obstante verdicto based upon the reasons shown in the statement of this case. While the matter presented by plaintiff in error Bradley is not in this court in the definite manner the rules require, yet we will consider and dispose of his contention. In this connection we will observe that one of the grounds set forth in plaintiff in error's (American National Bank) reasons for a new trial is that there is an inconsistency in the verdict in favor of Halsell and against Bradley. We are loath to regard this as a grievance of which the bank should or could complain.

[5] We do not think there is any merit in Bradley's motion for judgment non obstante verdicto for at least two reasons: (1) The jury evidently believed that Bradley and Rowsey were parties to the transaction which Halsell pleaded and proved was fraudulent and without consideration, and such was the issue. (2) It is not denied that Bradley was indebted to Rowsey in a similar amount to

that of the note sued upon, and for which indebtedness Rowsey had Bradley's note with collateral as security. It was evidently the opinion of the jury that Bradley, by joining with Rowsey to inveigle Halsell in the giving of the note sued upon, received in return a cancellation of his own note to Rowsey and the return of his collateral stock. It is clear that if the finding of the jury is the true status of affairs, and we in this forum have no right to question that, then it is tantamount to a finding that Bradley cannot take advantage of his own wrong to Halsell, even though in the conception of and perpetration of that wrong his payee, Rowsey, assisted. The premises found by the jury, if true, the two verdicts rendered by them, show both a moral and legal discrimination as to the liability between Bradley and Halsell.

This is a voluminous record, and briefs and reply briefs equally voluminous, and the points that counsel are entitled to a hearing on in this court, as well as those that do not permit review here, have not only been intelligently, but insistently presented, and, notwithstanding the zeal and ability manifested, we are not able to discover the errors asserted, and in our attempt to do so feel that we have treated the record with the consideration it deserves.

Under the pleadings and proof, the court being the judge of the sufficiency of the pleadings and the jury being the judges of the sufficiency of the facts, it is our opinion that no error appears of record, and the judgment of the superior court of Muskogee county is in all things affirmed. All the Justices concur.

FRANKLIN et al. v. WRIGHT, Sheriff, et al.  
(No. 3264.)

(Supreme Court of Oklahoma. April 17, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1011\*)—JUDGMENT—EVIDENCE.

The judgment of a trial court, based upon conflicting testimony as to an issue of fact and reasonably supported by the evidence, will have the same force and effect with this court as the verdict of a jury in such cases.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Action by Moody Franklin and others against John Wright, Sheriff, and others, for an injunction. Judgment for defendants, and plaintiffs bring error. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiffs in error. H. A. Ledbetter, of Ardmore, for defendants in error.

HARRISON, C. This was an action to enjoin an execution issued out of the district

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

court. The material facts which gave rise to the suit are substantially as follows: Two actions were pending in the district court. The same firm of attorneys appeared for plaintiffs in both actions, and the same firm appeared for defendants in both actions. One of the cases was called for trial, and judgment rendered, and steps taken to perfect an appeal from such judgment to the Supreme Court. It was thereupon agreed between the two firms of attorneys that the same question of law involved in the case in which judgment was rendered would be involved in the other case, and that the final judgment in the case appealed to the Supreme Court, on such question of law, should be the judgment in the other case. The misunderstanding in the matter arose as to whether the case which had not been tried should be continued until the appealed case had been passed on by the Supreme Court, or whether judgment should be rendered in both cases and the final decision of the Supreme Court be the judgment in the case not appealed. Whatever the agreement may have been, the attorneys for plaintiff took judgment and prepared journal entries in both cases, which were thereafter signed by the court. The attorneys for the defendants, claiming to have acted upon their understanding of the agreement that the untried case should be continued until the appealed case was finally determined by the Supreme Court, took no steps to perfect an appeal from the judgment in such case. On the other hand, the attorneys for the plaintiffs in both cases, claiming to have acted upon their understanding of the agreement that the untried case should not be continued, but that the judgment should be rendered and be the same in both cases, prepared journal entries in each case, which were signed by the judge and spread upon the journals of the court. Thereafter, no steps having been taken to appeal from the judgment in the untried case, the attorneys for the plaintiffs procured the issuance of an execution against defendants in such case. Whereupon attorneys for defendants in the untried case procured a temporary restraining order, against enforcement of the execution, upon the grounds that the agreement between the attorneys in the two cases had been that the untried case should be continued until final determination of the appealed case by the Supreme Court, and that attorneys for plaintiff, in violation of such agreement, had had judgment rendered in the untried case and journal entry of such judgment placed of record, and in the course of time, in further violation of such agreement, had procured the issuance of an execution, and from the judgment of the trial court, dissolving the temporary restraining order, defendants in the untried case appeal to this court, upon the proposition that

the court erred in dissolving the temporary injunction.

The issue presented to the trial court was simply an issue of fact as to whether the agreement between the respective firms of attorneys was as claimed by attorneys for plaintiffs in error or was as claimed by the attorneys for defendants in error. There was a decided conflict in the testimony of the attorneys and other witnesses as to what the agreement was. Affidavits were submitted and witnesses introduced. The court heard and weighed the testimony of the respective parties, and upon such testimony rendered judgment dissolving the temporary injunction, upon the theory that the agreement between the firms of attorneys was that claimed by the attorneys for plaintiffs in both cases, to wit, that the judgment should be rendered in both cases and the judgment in the case that was not tried should be the same as in the case that was tried and appealed.

We have no means of ascertaining whether the court erred in weighing the testimony of the respective parties, and therefore refrain from saying whether or not we would have weighed it differently; but it is a settled rule, repeatedly announced by this court, that the judgment of a trial court, based upon conflicting testimony as to an issue of fact and reasonably supported by the evidence, will have the same force and effect with this court as the verdict of a jury in such cases. See *W. Albert Cook v. George Bullette*, 32 Okl. 766, 124 Pac. 59; *Kirby v. Hardin*, 134 Pac. 854; *Semple v. Baken*, 135 Pac. 1141; *Thigpen v. Risby*, 136 Pac. 418; *Wattah-noh-zhe v. Moore*, 36 Okl. 631, 129 Pac. 877; *Cornelison v. Blackwelder*, 38 Okl. 1, 131 Pac. 701.

Hence, under this rule and for the reasons above stated, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

WM. CAMERON & CO. v. HENDERSON.  
(No. 3355.)

(Supreme Court of Oklahoma. April 14, 1914.)

(Syllabus by the Court.)

1. TRIAL (§ 139\*)—DEMURRER TO EVIDENCE.

Where the evidence is sufficient to reasonably tend to support the allegations of a petition that states a cause of action, a demurrer to such evidence should be overruled.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

2. TRIAL (§ 156\*)—DEMURRER TO EVIDENCE—EFFECT AS ADMISSION.

It is a settled rule that a demurrer to the evidence admits all the facts which the evidence in the slightest degree tends to prove, and all

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

inferences or conclusions that may be reasonably and logically drawn from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 153.\*]

Error from District Court, Greer County; G. A. Brown, Judge.

Action by William Cameron & Co., a corporation, against R. B. Henderson. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

This is a proceeding in error from the district court of Greer county, wherein plaintiff in error (plaintiff below) alleges that he furnished the lumber and other material to be used in the erection of improvements upon some raw land owned by Arthur Boone at the time the lumber was furnished; that the contract for the material was made with Arthur Boone, and the lumber hauled by him to his place (being the land described) and was used in the erection of the buildings, the land being the W.  $\frac{1}{2}$  and S. E.  $\frac{1}{4}$ , both of the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 5, township 4 north, of range 23 west, I. M., and to foreclose a materialman's lien thereon.

A disposal of one of the questions presented disposes of the case, and that is the first assignment of error raised by the plaintiff in error, which is that the court erred in sustaining the demurrer of said defendant to the evidence submitted by plaintiff in error.

The case was brought against Arthur Boone, the original owner of the land, and to whom the material was furnished, and Henderson, who afterwards purchased the land. At the trial, after plaintiff rested his case, the defendant R. B. Henderson demurred to the sufficiency of the evidence in this case, and the court after announcing that it would sustain the demurrer, plaintiff's counsel asked to withdraw their announcement for trial for the purpose of getting other testimony, to which the court said it did not have the time, and that "we cannot wait for you," and, then upon plaintiff's motion to take a nonsuit, the court, over the objections of defendant, permitted plaintiff to take a nonsuit. Subsequently the plaintiff's motion to reinstate said cause was heard by the court, and said motion was granted, to which the defendant Henderson excepted. Whereupon the court, after permitting said cause reinstated, sustained the defendant's motion for judgment as to him and gave judgment for plaintiff against Arthur Boone. This proceeding was had upon the action of the court sustaining the demurrer to the evidence without a hearing upon the merits.

The evidence submitted by plaintiff is set forth in plaintiff's brief, and the same is not disputed or traversed in the brief of defendant in error, but the issue, raised by defendant in error in support of the court's action in sustaining the demurrer to the evidence of plaintiff, is that the evidence is not suffi-

cient to prove that the material furnished was actually used in the construction of the buildings upon the land in question. This seems to have been the basis of the court's action in sustaining the demurrer to the evidence of plaintiff and rendering judgment for the defendant Henderson.

J. A. Powers and Percy Powers, both of Mangum, for plaintiff in error. J. L. Carpenter and Eagin & Eagin, all of Mangum, for defendant in error.

RUSSELL, J. (after stating the facts as above). [1] We have carefully examined the evidence offered, and, being uncontradicted, it is our opinion that it is sufficient to show that the material that was furnished was furnished for the purpose of constructing said buildings and that the same was used in the construction of said buildings.

In *Clark et al. v. O'Toole et al.*, 20 Okl. loc. cit. 326, 94 Pac. 550, Justice Turner, with authorities sustaining this position, says: "It is a well-settled rule that 'a demurrer to the evidence admits all the facts which the evidence tends to prove or of which there is any evidence however slight, and all inferences which can be logically and reasonably drawn from the evidence.'" The same rule is announced in *Ziska v. Ziska*, at page 634 of 20 Okl., 95 Pac. 254, 23 L. R. A. (N. S.) 1, that a demurrer to the evidence admits all the facts which the evidence, in the slightest degree, tends to prove and all inferences or conclusions that may be reasonably and logically drawn from the evidence.

[2] It is a settled rule that, where testimony introduced by a plaintiff, whose petition states facts sufficient to constitute a cause of action, in support thereof, tends to establish every material fact alleged, a demurrer to the evidence should be overruled.

The evidence in the case at bar not only proves that the lumber was sold to Boone, but shows that it was bought to build houses on the place in question, and it was testified by Boone that the lumber was furnished to improve the place (meaning the place in question) and furnished to him at his request, and with the evidence of the salesman and attendant circumstances the inevitable and logical conclusion is that the material was used in the construction of the house. This being the legal inference drawn from the evidence, the demurrer should have been overruled. There is absolutely nothing in the evidence from which any other inference or conclusion could be drawn but that the material was used in the buildings.

We hold that the district court erred in sustaining the demurrer to the evidence and rendering judgment for R. B. Henderson, and for which reasons the cause is reversed and remanded. All the Justices concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**MIDLAND VALLEY R. CO. et al. v. STATE**  
(No. 4148.)

(Supreme Court of Oklahoma. April 14, 1914.)

*(Syllabus by the Court.)*

**RAILROADS (§ 9\*)—DECISIONS REVIEWABLE—ORDER OF CORPORATION COMMISSION.**

The second section of the syllabus in *A., T. & S. F. Ry. Co. v. State of Oklahoma* (case No. 3719) 138 Pac. 1026, not yet officially reported, is made the syllabus of this case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. § 9.\*]

Appeal from the State Corporation Commission.

The Midland Valley Railroad Company and another were required by order 557 of the Corporation Commission to build a viaduct on First street in the city of Tulsa, Okla., and they appeal. Dismissed.

J. W. McCloud and Edgar A. de Meules, both of Muskogee, for appellant Midland Valley Ry. Co. Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for appellant Missouri, K. & T. Ry. Co. Charles West, Atty. Gen., and Charles L. Moore, Asst. Atty. Gen., for appellee.

**PER CURIAM.** This is an appeal from Order No. 557 of the Corporation Commission requiring the appellants to build a viaduct over their respective roads at First street in the city of Tulsa. Comes the Attorney General and moves to dismiss, on the ground that said order is not appealable, citing *A., T. & S. F. Ry. Co. v. State of Oklahoma*, 138 Pac. 1026, where we held that an order requiring the railroad company to construct a viaduct over its tracks and right of way in Guthrie was not an appealable order. As no distinction appears to us in the character of the two orders, inasmuch as both are orders requiring the correction of an abuse which affects the people of a particular community disassociated from the use of a railroad for transportation of themselves and their property, the same is sustained on the authority of our opinion in that case.

Dismissed.

**IOWA DAIRY SEPARATOR CO. v. SANDERS.** (No. 3433.)

(Supreme Court of Oklahoma. April 14, 1914.)

*(Syllabus by the Court.)*

**1. PRINCIPAL AND AGENT (§ 22\*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT—COMPETENCY.**

The general rule is that declarations of an alleged agent, standing alone, are incompetent to establish agency; but one of the exceptions to this rule is that, where the suit by the principal is based upon a contract entered into by an assumed agent, his declarations in making said contract are competent testimony.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22.\*]

**2. PRINCIPAL AND AGENT (§ 24\*)—AGENCY—QUESTION FOR JURY.**

Where the facts upon the question of agency are controverted, it becomes an issue to be determined by the jury from all the facts and circumstances.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.\*]

**3. APPEAL AND ERROR (§ 1005\*)—VERDICT—EVIDENCE.**

If there is any testimony reasonably tending to support the verdict of the jury, and the verdict has been approved by the trial court, the judgment will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Error from County Court, Pawnee County; Fred S. Liscum, Judge.

Action brought before a justice of the peace by the Iowa Dairy Separator Company against J. R. Sanders. Judgment for defendant on appeal to the county court, and plaintiff brings error. Affirmed.

W. T. Cleeton, of Cleveland, for plaintiff in error. E. M. Clark, of Pawnee, for defendant in error.

**RIDDLE, J.** Plaintiff in error, plaintiff below, brought this action in a justice of the peace court in the city of Pawnee to recover upon a promissory note the sum of \$60 and interest at 10 per cent. Judgment was rendered in favor of plaintiff in the justice court for the amount sued for. The cause was appealed to the county court of Pawnee county, where judgment was rendered in favor of defendant in error, defendant below.

The facts, as established by the evidence out of which this proceeding grows, are substantially as follows: Defendant purchased a cream separator from one J. J. Hustin, a hardware merchant who handled plaintiff's machines in the town of Pawnee; that said Hustin guaranteed same to be free from all defects and would render satisfactory service. After defendant had given the machine a trial, he found the same did not render satisfactory service; and one Tomilson, the admitted agent of plaintiff, through Hustin, furnished a new bowl for said separator. Defendant then executed his note payable to said Hustin in payment for the cream separator. The note was indorsed in blank, and plaintiff is now the owner and holder of same. Defendant then tried out the machine with the new bowl attached, and said machine would not do the work for which it was represented to do. Tomilson, through Hustin, then delivered another separator to defendant and took up the old one. Defendant also testified that said new machine, after it had been given a trial by Tomilson and Hustin, and after a fair trial by defendant, did not give satisfactory service. It is admitted that said Tomilson was the agent of plaintiff, and that said Hustin sold the machines of plaintiff in error under contract

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

with plaintiff, the terms of which are not brought out in this proceeding.

Defendant in error, for his defense to said note, alleges failure of consideration and breach of warranty. The cause was tried to a jury, who found in favor of defendant. After the evidence had been introduced, plaintiff in error interposed its motion for a directed verdict, which was overruled. The plaintiff in error, in his petition, sets out the following assignments of error: (1) Error in overruling the motion of plaintiff in error for a new trial. (2) Said court erred in overruling plaintiff's motion for a directed verdict. (3) Said court erred in giving the following instructions to the jury, to wit: Nos. 2, 3, 4, 5, 6, and 7. (4) Said court erred in failing to give to the jury the following instructions asked by the plaintiff in error and refused by the court: Plaintiff's instructions Nos. 1, 2, and 3. (5) Said court erred in admitting incompetent evidence on the part of defendant in error. (6) Said court erred in rejecting legal and competent evidence offered on the part of plaintiff in error.

Plaintiff in error relies upon only one proposition in this court for reversal, and, to use counsel's language in his brief, he states the proposition as follows: "We feel that there is but one proposition for the court to decide in this case under the evidence, and that is whether or not there is any competent evidence that should have gone to the jury. If there was not, plaintiff's motion for a directed verdict should have been sustained." In view of the foregoing record and counsel's admission, we feel that this is the only question involved in this appeal.

[1, 2] Counsel takes the position that all the evidence on the part of the defendant regarding agency was incompetent, and therefore, if his objections had been sustained to the introduction of such evidence, there was no other evidence sufficient to authorize submission of the issues to the jury. While it is true, as a general rule, that, until some evidence of agency has been introduced, declarations of an assumed agent, seeking to establish agency, are incompetent. There is an exception to this rule, however, and one of the exceptions is, where the suit is based upon a contract entered into by the alleged agent, the declarations of the agent are admissible and competent testimony. *Williamson v. Tyson*, 105 Ala. 644, 17 South. 336. In the case at bar, in addition to the fact that the suit was based upon a contract entered into by Hustin, the alleged agent, there were other circumstances and testimony tending to prove agency. The testimony of the defendant is that he purchased the machine from both Tomilson, who was the admitted agent of plaintiff, and Hustin; and that the note was not executed until after the transaction with both Hustin and Tomilson, as set

out above. In view of these facts, we are of the opinion that the court did not err in admitting the testimony complained of, and that there was sufficient testimony, warranting the submission of the issues to the jury. Where there is any controversy about the facts, the question of agency is an issue for the determination of the jury. *Wrought Iron Range Co. v. Leach*, 32 Okl. 706, 123 Pac. 419; *Mid. Sav. & Loan Co. v. Sutton*, 30 Okl. 448, 120 Pac. 1007; *Threshing Mach. Co. v. Humphrey et al.*, 27 Okl. 694, 117 Pac. 203.

Instructions of the court examined, and in our opinion, taking all the instructions as a whole, the issues raised were fairly submitted to the jury, and that the court committed no prejudicial error in the instructions given.

[3] We find no prejudicial error in the proceedings and judgment rendered, and the judgment of the trial court is in all things affirmed. All the Justices concur.

#### GANNON, GOULDING & THIES v. HAUSAMAN. (No. 3621.)

(Supreme Court of Oklahoma. April 17, 1914.)

*(Syllabus by the Court.)*

#### 1. FRAUD (§ 34\*)—SALE OF LAND—RIGHT OF ACTION.

Where a person has been induced, through the fraud and false statements of another, to purchase property as clear, which in fact is incumbered by a valid enforceable lien, such defrauded person, in an action for damages because of the fraud and deceit, may recover the amount of the incumbrance by way of damages, except as it may exceed the value of the property, and without having suffered a foreclosure, ouster, or having paid it off, because he ought to be considered presently damaged in a sum which the fraud of another has made it inevitable he shall pay to protect his property.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 29; Dec. Dig. § 34.\*]

#### 2. FRAUD (§ 13\*)—FALSE REPRESENTATIONS—KNOWLEDGE.

A false and fraudulent representation, by one who assumes to have personal knowledge, to the purchaser of real estate that there is no incumbrance thereon, and upon which representation the purchaser relies and acts to his injury, will sustain an action for the tort, although the purchaser might have discovered the fraud by searching the public records. A man cannot state falsely to another in such cases and then complain because he was believed.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 3-5; Dec. Dig. § 13.\*]

#### 3. PARTNERSHIP (§ 153\*)—FRAUD OF PARTNER—EXCHANGE OF LAND—LIABILITY.

Where one partner, while acting for the firm, makes an exchange of lands by means of false representations, the other partners are liable for the fraud, though they personally take no part in the transaction, and are ignorant of the fraud.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 274-277; Dec. Dig. § 153.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Garfield County; Winfield Scott, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Effie D. Hausaman against Gannon, Goulding & Thies. Judgment for plaintiff, and defendants bring error. Affirmed.

Rush & Smith, of Enid, for plaintiffs in error. Parker & Simmons, of Enid, for defendant in error.

BREWER, C. The defendant in error sued the plaintiffs in error in the county court for damages alleged to have occurred because of fraud and deceit and false and fraudulent statements made by defendants in regard to a land trade. After alleging that defendants, Gannon, Goulding & Thies, compose a partnership, engaged in the real estate, loan, and abstract business, and that in such capacity they negotiated with her the terms of a trade by which she exchanged certain lands for city real estate, she avers: "That plaintiff thereupon, and by and through her duly authorized agent, R. J. Hausaman, demanded of the said H. W. Thies, one of said defendants, and who was acting as agent in said transaction for the said Catherine King and J. J. King, an abstract of title to said lot No. 11 of block No. 7, above described; and plaintiff alleges: That, in and about the making of said transfer and all matters pertaining thereto, the said defendants were the duly authorized agents of the said Catherine King and J. J. King. That plaintiff objected to closing said deal until she was furnished with an abstract as provided for by said contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof, and which said abstract was to show that said real property that was being conveyed to her was free and clear of all taxes, assessments, etc., and had a clear title except for the incumbrance of \$1,600 above referred to. That thereupon, and for the purpose of inducing the said plaintiff to close said deal and accept the transfer of said property without said abstract, said defendants personally, and also by and through the said H. W. Thies, stated to this plaintiff that the said H. W. Thies knew that said property was free and clear of all liens, incumbrances, assessments, and charges of every kind whatever, and had a perfect title save and except for the mortgage of \$1,600 above referred to, and the said defendants and the said H. W. Thies stated to the plaintiff and her said agent, R. J. Hausaman, that he, the said H. W. Thies, was a bonded abstractor and engaged continually in the making of abstracts, and that he was familiar with the title of this particular piece of property, and that the abstract which had originally been made to this property was in the hands of the loan company that had said \$1,600 mortgage on it, and that he would in a few days prepare a new abstract for plaintiff to said property, and that said abstract would show that said property was free and clear of all liens and incumbrances of whatsoever nature save and except said

mortgage of \$1,600, and that plaintiff would be perfectly safe in accepting said transfer in reliance upon his statements, and in furtherance of said design to deceive plaintiff and her agent, R. J. Hausaman, said H. W. Thies took the said R. J. Hausaman to the courthouse in the city of Enid and pretended to show him certain books and records the nature of which the said R. J. Hausaman did not understand, which the said H. W. Thies claimed and pretended to the said R. J. Hausaman showed that said property was free and clear of incumbrances, taxes, and liens of every kind save and except said \$1,600 mortgage. That, by reason of the fact that the said H. W. Thies and the said defendants were engaged in the business of making abstracts, and of the positive and affirmative statements made to the said plaintiff and her agent, R. J. Hausaman, by the said defendants and the said H. W. Thies, that he knew the said property was free and clear of incumbrances save and except said \$1,600 mortgage, and, upon their promise and assurance that within a few days he would make said abstract which should show said facts and furnish it to the plaintiff, and in reliance upon said representations and statements, the plaintiff consented to close said deal," etc. She then avers the exchange of deeds; the one she received having been written by Thies, and stipulating there was no incumbrance save the one for \$1,600, etc. That in fact there was another mortgage for \$380 and accrued interest. That she would not have made the trade but for her reliance and faith in the positive representations and statements made to her. That the statements were false and untrue, and were made to induce the plaintiff to exchange and deed her property, and part with the title thereto, before she could learn of the incumbrances which had been concealed, etc. She then avers that the defendants were to receive for their services a commission of 2½ per cent. to be paid by her on the value of her property, etc. Answers were filed in which the partnership was denied under oath, and all other allegations denied generally, etc. On the issues thus formed the case was submitted on the evidence to a jury, and a verdict was returned in favor of the plaintiff for damages. Judgment was entered accordingly, and the cause comes here on case-made.

These questions are urged in the brief: First. That plaintiff failed to show in her petition or in her proof that she had been ousted or had paid out any sums on account of the incumbrance. Second. Questions growing out of the issue as to the partnership relation of defendants. Third. Error in certain instructions.

[1] 1. The first error urged is without merit. Counsel seem to be under the impression that this is a suit for breach of covenants against incumbrances contained in a deed, and that the damages would be governed by



section 2892, Comp. L. 1909, which confine same to the "amount which has been actually expended by the covenantor in extinguishment of the principal, with interest thereof." Not so; this is not such a suit. It is one for deceit, and is predicated on the false and fraudulent statements of fact alleged to have been made by defendants, and upon which she relied and acted to her hurt.

Damages are allowed for a deceit practiced on a person. Section 1144, Comp. L. 1909, provides: "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

Deceit is defined as follows in section 1145, Comp. L. 1909: "A deceit, within the meaning of the last section, is either: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true. (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

Actual fraud is defined by section 1052, Comp. L. 1909, thus: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true. (2) The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true. (3) The suppression of that which is true, by one having knowledge or belief of the fact." See *Garvin v. Harrell*, 27 Okl. 373, 113 Pac. 186, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744; *Howe v. Martin*, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840; *Newell & Ross v. Long-Bell Lumber Co.*, 14 Okl. 185, 78 Pac. 104.

The authorities are not in harmony on this proposition (*A. & E. Ency. L.* [2d. Ed.] 145); but we think the better view is that, where a person has been induced, through the fraud and false statements of another, to purchase property as clear which in fact is incumbered by a valid enforceable lien, in an action for damages because of the fraud and deceit, the defrauded one may recover the amount of the incumbrances as damages, except as it may exceed the value of the property, without having suffered a foreclosure, ouster, or having paid off, because a person ought to be considered damaged in a sum that it is inevitable that he must pay to protect his property. Therefore, if the defendants, or one of them so related as to bind them all, made statements purporting to be of facts within the

knowledge of the speaker to induce this woman to part with her property and change her position, and such statements were false, and fraudulently and deceitfully made, and she relied upon and acted upon them to her injury, she was entitled to recover whatever damages she has suffered, and whatever, under the circumstances, it is inevitable that she shall suffer.

The jury found the facts in favor of plaintiff; we have only examined the evidence enough to know that it is in hopeless conflict. In such case we have no right to weigh it and substitute our judgment for that of the jury.

In the case of *Hahl v. Brooks*, 213 Ill. 134, 72 N. E. 727, which is a case very closely in point, the law of the case is stated in the syllabus as follows: "Plaintiff desired to purchase unincumbered land, and was told by one to whom the grantor referred him that the land was unincumbered save by taxes, and, when the deed was handed plaintiff, he asked the vendor's agent to read it; plaintiff not being able to read well. The agent read it, but did not read anything about a mortgage, to which the deed was made subject, and thereafter the grantor read it to plaintiff in the same way. Held to show that plaintiff relied on the false representations and was deceived by them. Where a vendee of land was deceived by false representations of the vendor that the land was not incumbered, he could recover in an action for the deceit, although he had not removed the incumbrance, and although his title had not been swept away by it. In an action by the vendee of land against the vendor to recover damages for false representations of the vendor that the land was unincumbered, the measure of damages was the amount of the incumbrance, if less than the value of the land." *S. W. R. R. Co. v. Papot*, 67 Ga. 675; *Ely v. Stannard*, 46 Conn. 124; 20 Cyc. 135, and note 9.

[2] Nor does the fact that the mortgage on the land was on record prevent the plaintiff from maintaining her suit. In *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798, it is said: "The contention that no recovery can be had because the incumbrance was a matter of record is not sound. A fraudulent representation by one who assumes to have personal knowledge to a purchaser of real estate that there is no incumbrance thereon, and upon which representation the purchaser relies and acts, to his injury, will sustain an action for the tort, although the purchaser might have discovered the fraud by searching the public records. *McKee v. Eaton*, 26 Kan. 226; *Curtis v. Stilson*, 38 Kan. 302 [16 Pac. 678]; *Matlack v. Shaffer*, 51 Kan. 208 [32 Pac. 890, 37 Am. St. Rep. 270]; *David v. Park*, 103 Mass. 501; *Bristol v. Braidwood*, 28 Mich. 195; *Babcock v. Case*, 61 Pa. 427 [100 Am. Dec. 654]; *Linn v. Green*, 5 McCrary, 380 [17 Fed. 407]." In 14 *A. & E.*

Ency. L. (2d Ed.) at page 130, it is stated in the text: "By the weight of authority, a representation by the vendor, lessor, or mortgagor of real property, or by a third person, as to the title to the property, or as to the existence of incumbrances thereon, if it does not amount to a bare assertion that the party has a good title, but is made as a positive statement of fact, and with the intention that it shall be relied upon, may be relied upon without further inquiry by the person to whom it is made; and this is particularly the case when the latter has not equal means of knowledge, or when there is a relation of confidence between the parties." And in the same volume at page 132 the general rule is stated to be: "By the decided weight of authority, where a positive representation is made by the vendor, mortgagor, or lessor of real or personal property, or by a third person, as to the title, incumbrances, boundaries, location, etc., with a view that it shall be relied upon, ordinary diligence does not require that the other party shall examine the records to test the truth of the representation, if no fact or circumstance is disclosed which is calculated to suggest a doubt as to the truth of the representation, and thus to put him on inquiry." *Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; *Lamm v. Port Deposit*, etc., 49 Md. 233; 20 Cyc. 57, and note 44. See, also, *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170, and *Reynolds v. Franklin*, 39 Minn. 24, 38 N. W. 636, as instructive cases on this subject.

[3] 2. There was ample evidence to show that there was a partnership existing between these defendants, at least that there was such a relation between them relative to this particular transaction as would bind and render all of them liable for the fraud and false statements of the man Thies. The stationery used by the firm as shown in the evidence recited: "Office of Gannon, Goulding & Thies, Real Estate and Loans, Insurance Rentals, and Abstracts of Title. Oldest in Enid. Established September 16, 1893," etc.

Mr. Gannon as a witness stated, when asked as to the relation: "Gannon & Goulding as real estate, and Mr. Thies as abstractor. Q. Did he [Thies] have any interest in real estate and loans? A. He made real estate, and so did we; but in this particular trade we were both mixed up. Q. Explain to the jury, Mr. Gannon, how Mr. Thies came to be interested in this? A. In the first place Mr. Thies and Gannon and Goulding are partners only in the abstract business. Mr. Goulding being out of town, I got Mr. Thies to assist me in this trade and go with Mr. King to see the land."

Another witness said: "A. There is several signs tacked in front of their office on the telephone poles: 'Gannon, Goulding & Thies,

Real Estate and Loans. Money had low rate and no red tape. Enid, Oklahoma.' Q. Have they got signs on the stairs? A. The same signs on tin leads all the way upstairs."

If these three defendants were general partners in this matter, the action of one was the action of all. If they were not general partners, and Mr. Thies was acting for the other two gentlemen and himself in this transaction in which they all three were to receive benefit, they are all responsible. In *Stanhope v. Swafford*, 80 Iowa, 45, 45 N. W. 403, it is said: "Where one partner, while acting for the firm, makes an exchange of lands by means of false representations, the other partner is liable for the fraud, though he personally takes no part in the transaction, and is ignorant of the fraud." In 14 A. & E. Ency. L. (2d Ed.) 156, it is stated in the text: "It is well settled that a person is responsible for a false and fraudulent representation made by his agent, if authorized by him, or, though not expressly authorized, if made by the agent in the course of his employment. And the same is true of an agent's concealment of facts. One is also responsible for the fraud of a person who has assumed to act for him without authority, if he ratifies his act by accepting the benefit of it or otherwise."

3. Several instructions are complained of in a very general way, without the citation of authorities to sustain the contention made; but we have gone over the declaration of law made by the court and find the same substantially correct under the view expressed herein of the law of the case. Several instructions were given as asked by defendants, and were more than favorable to them. Upon the whole there is no substantial error in the case.

The jury found all the controverted questions of fact in plaintiff's favor, and there was evidence on all the issues fully supporting the findings of the jury.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

HAZLETT et al. v. WILKIN. (No. 3461.)  
(Supreme Court of Oklahoma. April 17, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1050\*)—EXCLUSION OF IMMATERIAL EVIDENCE.

It is never reversible error to refuse immaterial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

2. SET-OFF AND COUNTERCLAIM (§ 31\*)—DAMAGES FROM TORT—ACTION ON CONTRACT.

Damages arising out of an actionable tort in a land trade, cannot be set off or counterclaimed, in a suit on a contract which was sep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

arate, distinct, and apart from the transaction in which the tort was committed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 52; Dec. Dig. § 31.\*]

### 3. FRAUD (§ 11\*)—EXPRESSION OF OPINION.

A purchaser of land cannot predicate fraud upon statements made by the vendor which, either by reason of their form or subject-matter, show to be mere expressions of opinion. A purchaser is not justified in relying upon the accuracy of such statements, and if he does, and the opinion turns out wrong, the purchaser has no action because thereof.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by R. L. Wilkin against C. W. Hazlett and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Grant, of Oklahoma City, for plaintiffs in error. John Roaten, John H. Wright, and Clarence J. Blinn, all of Oklahoma City, for defendant in error.

BREWER, C. The defendant in error, R. L. Wilkin, sued the plaintiffs in error, C. W. Hazlett, and his wife, Caroline, in the district court of Oklahoma county, and asked for judgment on their promissory note in the sum of \$2,174 and the foreclosure of a mortgage on certain lots in Oklahoma City. In their last amended answer the defendants admit the execution of the note and mortgage, and then for further defense and for their cross-petition allege that the note and mortgage had been procured through the fraud and deceit of plaintiff, and because of certain false and fraudulent statements of plaintiff, upon which defendants relied and acted, and without which they would not have made the trade resulting in the note and mortgage, and because of which they had been damaged in a sum in excess of the note and mortgage. Defendants pray for a cancellation of the note and mortgage, for their costs and damages in excess thereof. To the allegation of the cross-petition the plaintiff filed a general denial for a reply. A jury was impaneled to try the issues thus presented, and at the close of all the evidence the court, upon motion of the plaintiff, withdrew the cause from the jury, and rendered judgment for plaintiff for the amount of the note sued on and for a foreclosure of the mortgage securing the same. The cause comes here by case-made, properly certified, and the plaintiffs in error, in the discussion hereafter referred to as defendants, present two grounds for a reversal: First, that the court refused to admit competent evidence; second, that the court erred in withdrawing the cause from the jury and rendering judgment for plaintiff.

The facts out of which this controversy arose, briefly summarized, are: That the de-

fendant Hazlett some time in the fall of 1907 made a trip to the western part of the state for the purpose of buying a farm. Not finding one to suit him on this trip, he returned to Oklahoma county and enlisted the services of a real estate agent named Doxsle, who had been handling property for him, to go with him in search of a suitable place. They went to Roger Mills county about the 4th of December, 1907, to the home of the plaintiff, arriving after night, and with whom they passed the night. It does not appear that Wilkin previously knew of their coming, or had been in any negotiations with either of them relative to selling the defendant his farm. That next morning, however, a trade was mentioned, and the plaintiff priced his farm of 390 acres at \$8,500, offering to take a small payment in cash, the assumption of a certain mortgage then on the farm, and the remainder of the purchase price to be closed up by note and mortgage. After looking at other farms in the vicinity the defendant accepted the terms offered and bought the farm. On the same trip and thereafter the defendant bought a large amount of live stock, feed, farming machinery, and utensils then on the farm, at certain agreed prices for the various items, and a month later executed the note and mortgage in suit on the Oklahoma City property, for the purchase price of this personal property. Some months afterwards the defendant, not having been able to obtain as large and as advantageous a loan on the lands he had bought as he desired, rescinded the land trade by mutual agreement with plaintiff, and deeded the land back.

The claim of fraud made by defendant relates solely to the land trade. It consists in the claim that plaintiff and the man Doxsle whom defendant avers was plaintiff's agent, but who in fact came into the matter at defendant's instance, had represented to him that he could obtain a loan from the state school land department in the sum of \$5,000, with interest rate of 5 per cent. on the lands he was buying, and that, relying upon this representation, he bought the land, and that the representations were false and untrue; that there were certain irregularities in the title to the land which were objected to by the school land department, and that under its rules and regulations it would not loan more than \$2,500 to any one borrower regardless of the value of his property. The defendant then claimed that the purchase of the personal property was a part and parcel of the land trade; and that he agreed to give double the value of the personal property, or nearly so, because he thought he was getting the land cheap; and that he would not have bought the personal property at the price, except for the fact of the land trade; and that he would not have made the land trade but for the fraudulent

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

representations of plaintiff relative to the loan he could obtain on it; and that because of all these things, the note and mortgage in suit was fraudulently obtained and was without consideration, and ought to be canceled and held for naught.

[1] 1. The plaintiff in error complains that an objection was sustained to a question asked of the plaintiff, which was intended to show that he would not have received back the personal property for which the note was given, had a return been offered. As a matter of fact the question was answered as desired by defendant, regardless of the fact that the objection to it had been sustained, and the answer was not stricken or withdrawn from the jury. But, as we view the case, the evidence never developed to a point at which this question became material. If the defense failed for want of proof, and we think it did, the offer to return was quite unimportant.

[2] 2. We have examined the evidence, claimed in the briefs to be material, and think the court was quite right in withdrawing the case from the jury and rendering judgment for plaintiff. There was no valid defense shown by the evidence, nor was the right to recover damages made to appear. The evidence fails for at least two reasons: First. It shows that the purchase of the personal property was a distinct and separate transaction from that of the purchase of the farm. It is clearly shown that the land transaction had been completed without reference to, or mention of, a sale of the personal property. While the defendant says he would not have needed or bought the personal property if he had not had the farm, yet his own evidence shows that the land trade had been fully agreed upon, and the live stock trade came up later as a distinct and independent matter. This being the case, even if there was an actionable tort in the land trade, damages arising out of it cannot be set off or counterclaimed, in a suit on a contract, which was separate, distinct, and apart from the matter in which the actionable tort was committed. First National Bank of Lawton v. Thompson, 137 Pac. 668, and cases cited; St. L. & S. F. Ry. Co. v. Bradford, 18 Okl. 154, 88 Pac. 1050; sections 4745-4747, Harris-Day Code, and citations; Nation v. Planters' & Mechanics' Bank, 29 Okl. 819, 119 Pac. 977.

[3] But aside from the unavailability of the claim for damages, the evidence of statements made by plaintiff to induce the trade fails to make a case of fraud and deceit. The evidence in its strongest light is that plaintiff and Doxsie told defendant that the officers of the school land department of the state government, who handle the school funds, would loan him \$5,000, at 5 per cent. interest, on the farm. It is not claimed that plaintiff or Doxsie were officers of, or in any way connected with, the school land department, or

the loaning of the school funds, or that they had any greater or other knowledge of what the officials might, could, or would do, in the matter of making a loan, than defendants or other citizens had. The loaning of school funds by the officers charged with that duty involves the exercise of discretion and judgment to be applied to each application for a loan. No man has a right to believe and rely upon the guess of another as to what the judgment and decision of another man may be in a given case calling for discretion, judgment, and decision. This leads us to say, without hesitation, that if the statements were made as charged, it was, and could be, under the circumstances, nothing more than a statement of opinion. And defendant had no right to receive or believe it to be other or greater than that. It must appear to any one that the facts it is claimed were stated were not and could not have been within the personal knowledge of plaintiff. We do not feel like passing this question by, however, without saying that both Wilkin and Doxsie deny making the statements in the manner attributed to them. Wilkin denies saying anything about it. Doxsie says he merely stated, in discussing the probability of a loan by the department, that he thought the tract of land to be of sufficient value to justify a loan of \$5,000. This is the more reasonable and probable view of what did occur.

In 20 Cyc. 51, it is said: "According to the principles before stated, if the vendor's statement, either by reason of its form or subject-matter, is merely the expression of an opinion, it is one on which the purchaser is not justified in relying, and therefore is not actionable." See note 15. Century Digest, vol. 23, § 12, p. 1668, tit. Fraud (and numerous illustrating cases cited and digested).

The cause should be affirmed.

PER CURIAM. Adopted in whole.

ELWELL v. PURCELL. (No. 3233.)  
(Supreme Court of Oklahoma. April 17, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002\*) — FINDINGS OF FACT—CONFLICTING EVIDENCE.

Where there are controverted issues of fact and conflicting testimony as to their existence, the findings of the jury in reference thereto under instructions not complained of should be binding on this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

2. WITNESSES (§ 255\*) — RIGHT TO REFRESH MEMORY—REFERENCE TO MEMORANDA.

Upon an issue as to the number of acres in a tract of land, a witness who stepped the land and made a memoranda of its dimensions in steps at the time will be allowed to refresh his memory as to the number of steps by reference to such memoranda.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Commissioners' Opinion, Division No. 2. Error from County Court, Pawnee County; Fred S. Liscom, Judge.

Action on a contract by W. M. Purcell against J. C. Elwell. Judgment for plaintiff, and defendant brings error. Affirmed.

Blake & Hazlett, of Cleveland, for plaintiff in error. Goodwin & Hayes, of Cleveland, for defendant in error.

**HARRISON, C.** This was an action by W. M. Purcell against J. C. Elwell for \$60, an alleged balance due on a rent contract. The action was originally brought in the justice court, and judgment rendered in favor of Purcell. Elwell appealed to the county court, where judgment was again rendered in favor of Purcell, and, from such judgment, the defendant, Elwell, appealed.

Only two assignments of error are urged in the brief, to wit: That there was an improper joinder of parties; and error in permitting the plaintiff, Purcell, to refer to certain memoranda in order to refresh his memory as to certain facts. The first contention is based on the allegations in the answer and the assumption of counsel that the defendant below was a tenant in common with others, and that under the law cotenants should be sued jointly. The contention of plaintiff in error as to the law on this subject is correct, and the authorities cited in support of such contention announce the correct doctrine; but that issue is not before this court.

[1] The plaintiff below brought his action for \$60, alleged to be a balance due on a rent contract wherein the plaintiff had leased or rented to defendant the sum of 25 acres to be farmed at a cash rental value of \$3 per acre, \$15 of which had been paid by defendant to plaintiff on such contract; the balance, \$60, remaining due and unpaid. And while the issue as to liability of cotenants was raised in the answer, yet the theory upon which plaintiff below based his cause of action was that plaintiff, being in control of the land in question, and having authority to rent same, did rent 25 acres to the defendant at an agreed cash price of \$3 per acre, and that defendant owed a balance of \$60 to plaintiff on such contract. The issues whether the defendant owed plaintiff said balance on a contract with plaintiff, or whether there were other cotenants who were liable for a portion of the balance due, were submitted to the jury under instructions from the court, of which no complaint is made here, and the findings of the jury and the judgment of the court thereon upon the controverted issues of fact should be binding with this court.

As to the other contention, we find no material error in the record in the fact that the court permitted plaintiff to refresh his memory by reference to certain memoranda. There was an issue of fact as to the amount

of land, as to the number of acres involved, the plaintiff claiming the amount to be 25 acres, the defendant claiming it to be only 17; and the plaintiff was permitted to refer to a memoranda, which he had made at the time the land was stepped off by himself in company with defendant, in order to refresh his memory as to the dimensions of the land in steps, the memoranda disclosing that certain lots of the land in question were so many steps by so many steps.

[2] The doctrine of allowing a witness to refer to written memoranda in order to refresh his memory as to facts is well settled in McKelvey on Evidence, pp. 391, 396, and the texts therein announced amply supported by the decisions cited. The same doctrine is announced in 17 Cyc. 399, and Underhill on Evidence, 477. In fact, we know of no work on evidence which purports to deny a party that privilege under proper conditions, and we think under the record presented that the plaintiff below brought himself sufficiently within the rule for allowing a witness to refresh his memory by reference to a memoranda of this character, and, that upon the record before us, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

HENRY v. MORRIS & CO. (No. 3256.)

(Supreme Court of Oklahoma. April 17, 1914.)

(Syllabus by the Court.)

1. EVIDENCE (§§ 513, 539\*)—WITNESSES—EXPERT TESTIMONY.

In an action for injuries caused by the negligent construction of the framework of a building, where it is necessary for the jury to understand how it is constructed in order to determine whether it is negligently done, and such framework is so complicated that the jury cannot understand how it is constructed without the testimony of an expert, it is not improper to admit expert testimony; and, in such case, architects, carpenters, and builders, if their experience and observation are shown to be sufficient, are competent to testify.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318, 2349-2352; Dec. Dig. §§ 513, 539.\*]

2. INSTRUCTIONS APPROVED.

Instructions examined and held to contain no material error.

3. APPEAL AND ERROR (§ 1004\*)—VERDICT—INADEQUATE RECOVERY.

A judgment will not be reversed because of the smallness of the verdict, where it does not appear from the record that the verdict is less than the actual pecuniary loss sustained, nor that the jury was wrong in its estimate of the extent of the injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Hayden Henry against Morris & Co., for damages. Judgment for plaintiff, and plaintiff brings error. Affirmed.

Moss, Turner & McInnis, of Oklahoma City, for plaintiff in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error.

HARRISON, C. This was an action by Hayden Henry against Morris & Co., for damages sustained from a fall. Henry was a carpenter in the employ of Morris & Co., in the construction of its packing plant. At the time of the fall and the injuries complained of, he was engaged in removing a temporary floor, and, while doing this work, he was standing on a joist or crossbeam, and, while in the act of raising a piece of lumber, the joist or crossbeam on which he was standing turned, throwing him head foremost some 10 or 12 feet into the basement beneath. The action is based upon the defective and negligent construction of the joist in that it was not sufficiently braced or nailed to constitute a safe place upon which to stand while doing the work he was engaged in doing. The defendant company denied any negligence, and charged plaintiff with contributory negligence in failing to use ordinary care and prudence in the premises, and the cause was tried upon the question of negligence on the part of the company and contributory negligence on the part of the plaintiff and on the question of the extent of the injuries sustained. The jury returned a verdict in favor of plaintiff in the sum of \$1, and plaintiff appeals upon the ground that the court erred in refusing to set the verdict aside and grant a new trial because of errors in the admission of certain expert testimony, and errors in certain instructions, and upon the further ground of error in refusing to set aside the verdict because of the smallness thereof.

[1] While, under the peculiar circumstances of this case, we think we might properly hold that the actions of the court in the admission of the testimony complained of, and giving of the instructions complained of, if erroneous, were harmless for the reason that plaintiff obtained a verdict in his favor and got everything he asked for except the amount of damages he claimed, and no complaint is made of the instructions of the court as to the measure of damages, yet, from its character under the circumstances, we feel it proper to hold that no error was committed in the admission of the testimony complained of. The testimony in question was that of experienced carpenters, builders, and contractors. The condition of the framework of the structure, the number of beams and joists, and the purpose for which they were put in, and the support they were intended to give, the weight they were intended to bear, and uses for which they were put in were so complicated that it would have been extremely difficult, if not wholly impos-

sible, for the jury to have understood just what the facts were without some explanation by parties who knew, and the case does not fall within the rule announced in *Hicks v. Davis*, 32 Okl. 195, 120 Pac. 260, for in that case the facts were so plain and simple, and all the conditions being such as to be matters of such common understanding as to be put before the jury without the necessity of expert explanation. The opinion of experts in that case would not have given the jury any additional light as to what the facts actually were, and in such cases the authorities have generally rejected expert testimony. While, on the other hand, whenever conditions are such that the jury cannot understand just what the facts are, or in cases where they may be materially enlightened as to what facts existed, experts have been allowed to testify, and, as a general rule, architects, carpenters, and builders, if their experience and observation are shown to be sufficient, are qualified as experts.

The rule is stated in 12 Am. & Eng. (2d Ed.) 430, as follows: "A builder may give his expert opinion as to whether the walls of a building were sufficient to sustain it. Builders have been held competent to give an opinion as to whether the floor and joists of a grand stand in a park were sufficiently strong to endure the strain which they were intended to bear. The effect of a knot or crossgrain upon the strength of a piece of timber, the character and strength of hemlock as a scaffolding material, the strength, toughness, and durability of certain anchoring strips, and the length of time bridge timbers had been decayed are all proper subjects of expert testimony by carpenters and builders."

In 17 Cyc. 228, the rule is stated as follows: "Witnesses, like architects, builders, contractors, or engineers, who are shown to have adequate experience of the trade at a period which would make their knowledge relevant and to be adequately qualified to form a judgment as to the matter of which they purported to speak, may testify as to the cost of houses or other structures, and as to the effect, propriety, safety, or time required for particular operations. The strength of particular forms of construction and whether sufficient for an intended use. \* \* \*

Practically the same rule is announced in *Chamberlayne on Mod. Ev.* § 2382, and supported by an ample list of authorities. Hence we must hold that no error was committed in this regard.

[2] Also, from an examination of the court's instructions, we cannot say that any material error to plaintiff's prejudice is to be found in the charge. Considered as a whole, as one entire charge upon the material issues involved, we think the law was stated with reasonable fairness and correctness.

[3] As to the other question, namely, that the verdict is too small, we cannot say, as a

matter of law that the court erred in refusing to set the verdict aside on this ground, nor do we feel justified in saying that as a matter of fact, under the evidence, the jury was wrong in their estimate of the injuries he sustained. They heard and weighed the testimony as to the extent of his injuries, and under proper instructions from the court determined such issue, and we cannot say, from an examination of the record, that his injuries were greater than those found by the jury, nor that, as a matter of law, the judgment should be reversed, and the cause sent back for another trial.

We believe the judgment should be affirmed.

PER CURIAM. Adopted in whole.

ALFRED v. ST. LOUIS, I. M. & S. RY. CO.  
(No. 3309.)

(Supreme Court of Oklahoma. April 17, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1002\*)—TRIAL (§ 260\*)  
—VERDICT—EVIDENCE—REFUSAL OF INSTRUCTIONS COVERED.

A judgment will not be reversed for refusal to give a requested instruction, although such requested instruction may correctly state the law, if the law applicable to the facts involved is correctly covered by the court's charge, nor will a verdict based upon conflicting testimony be set aside, where the evidence reasonably tends to support such verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002; Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by John A. Alfred, as administrator of the estate of Luther Woodring, deceased, against the St. Louis, Iron Mountain & Southern Railway Company, for damages. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Browne and T. F. Shackelford, both of Sallisaw, for plaintiff in error. Thos. B. Pryor and Vincent M. Miles, both of Ft. Smith, Ark., for defendant in error.

HARRISON, C. This was an action by the administrator of the estate of Luther Woodring against the defendant railroad company for damages resulting from the death of Woodring, alleged to have been caused by an assault upon Woodring by a brakeman on a passenger train on defendant road. The plaintiff alleged that Woodring was wrongfully and unlawfully assaulted by the brakeman and beaten with a lantern into a semiconscious state, which caused him to fall off of the train, from which fall death resulted. The defendant answered and defended the action on the ground that deceased was drunk and disorderly and, upon being remonstrated with by the brakeman

for his bolsterous and disorderly conduct, assaulted the brakeman, and that the brakeman acted in self-defense in the affray, and on the further ground that his falling off the train was not the result of being struck by the brakeman but was the result of his own state of drunkenness. The cause was tried and verdict rendered upon the testimony adduced at the trial. No witness for the plaintiff knew just how the affair arose further than that, upon hearing a row or noise in that end of the car, they turned and saw the brakeman striking Woodring over the head with his lantern. The witnesses for the defense testified: That Woodring had been drunk and bolsterous, having a bottle, which they supposed to be a quart bottle of whisky, in his pocket. That he had gone into the toilet, leaving the door open, and while in there the brakeman came through the train and attempted to close the toilet door. Whereupon deceased came out of the toilet and began cursing the brakeman, threatening what he would do to him, and either struck at him or caught at his collar, whereupon the brakeman struck him two, three, or four times with his lantern, breaking the lantern over his head and face, but that the difficulty ended, the brakeman passed on through the car, and Woodring stepped out upon the platform, and, when last seen by any witness, was reaching forward as though to take hold of the handholds on the platform. When discovered along the track he was dead, but the physician who was called in attendance testified that he had no cuts or abrasions about his head and face, such as would render a man senseless from the strokes. Upon these issues and the testimony adduced, the jury returned a verdict in favor of the railroad company, and, from the judgment rendered thereon, the case was appealed here.

Only two propositions are urged for reversal, to wit: The giving of certain instructions by the court, and the refusal to give certain instructions offered by the plaintiff. After an examination of the record, we do not feel justified in reversing the judgment upon either ground. The issues involved were very fairly and fully given to the jury in the court's charge, in a charge which impresses us as being altogether favorable to the plaintiff. It is not necessary to pass upon the question whether the instructions offered by plaintiff correctly stated the law or not, as all the material issues involved in the case and the law applicable thereto were given to the jury with reasonable fairness, fullness, and correctness. In such cases a judgment will not be reversed for refusal to give an offered instruction, although such offered instruction may correctly state the law. See *Enid City Ry. Co. v. Addle Reynolds*, 34 Okl. 405, 126 Pac. 193; *McMaster v. Bank*, 23 Okl. 550, 101 Pac. 1103, 138 Am. St. Rep. 831; *Finch v. Brown*, 27 Okl. 217, 111 Pac. 391; *Ellet-Kendall Shoe Co. v. Ross*,

28 Okl. 697, 115 Pac. 892; Pioneer Telegraph & Telephone Co. v. Davis' Adm'r, 28 Okl. 783, 116 Pac. 432; Gulf, Colorado & Santa Fé Ry. Co. v. L. R. Taylor, 37 Okl. 99, 130 Pac. 574.

And upon the testimony, and under the court's instructions, the jury returned a verdict in favor of the defendant, a verdict which, in our opinion, is reasonably supported by the evidence. Hence, under the well-settled and repeatedly announced rule of this court, we do not feel authorized to disturb the verdict nor reverse the judgment based thereon. Covington v. Fisher, 22 Okl. 207, 97 Pac. 615; C., R. I. & P. Ry. Co. v. Mitchell, 19 Okl. 579, 101 Pac. 850; Loeb v. Loeb, 24 Okl. 384, 103 Pac. 570; Bird v. Webber, 23 Okl. 583, 101 Pac. 1052; C., R. I. & P. Ry. Co. v. Broe, 23 Okl. 396, 100 Pac. 523.

Hence, from the entire record and upon the authorities above cited, the judgment of the trial court must be affirmed.

PER CURIAM. Adopted in whole.

**CLEVELAND TRINIDAD PAVING CO. v. MITCHELL et al. (No. 3638.)**

(Supreme Court of Oklahoma. April 17, 1914.)

*(Syllabus by the Court.)*

**1. MUNICIPAL CORPORATIONS (§ 755\*)—DEFECTIVE STREETS—PERSONAL INJURIES—LIABILITY.**

It is the duty of a municipal corporation to use ordinary care and diligence to keep its streets and sidewalks in a reasonably safe condition for public use in the ordinary modes of travel, and a failure to do so renders the municipality liable to one injured by reason of such negligence, providing the party injured exercised ordinary care to avoid the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.\*]

**2. NEGLIGENCE (§§ 4, 136\*)—"ORDINARY CARE"—QUESTION FOR JURY.**

"Ordinary care," as applied to personal injury cases, means that degree of care and caution which might reasonably be expected from an ordinarily prudent person under the circumstances, and is a question of fact for the jury to determine.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 6, 277-353; Dec. Dig. §§ 4, 136.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

**3. MUNICIPAL CORPORATIONS (§§ 788, 821\*)—DEFECTIVE STREETS—NOTICE—QUESTION FOR JURY.**

The notice of a defective street or sidewalk to a city may be actual or constructive. The question of notice is one of fact for the jury to determine.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643, 1646, 1652, 1745-1757; Dec. Dig. §§ 788, 821.\*]

**4. MUNICIPAL CORPORATIONS (§ 809\*)—DEFECTIVE STREETS—PERSONAL INJURIES—LIABILITY OF CONSTRUCTION COMPANY.**

It is the duty of a construction company making street improvements under contract,

when in the course of such improvement it creates a defect in the sidewalk so as to render the same unsafe for ordinary travel and use, to immediately repair such defect and to place such sidewalk in a reasonably safe condition for ordinary use and travel, and a failure to discharge this duty constitutes actionable negligence, on account of which any one injured thereby may maintain an action against it for damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Canadian County; J. G. Carney, Judge.

Action by Celeste Mitchell against the Cleveland Trinidad Paving Company and the city of El Reno. Judgment for plaintiff and the Cleveland Trinidad Paving Company brings error, and the city files cross-errors. Affirmed.

M. D. Libby, of El Reno, for plaintiff in error. John W. Clark, of El Reno, and C. E. King, of Tulsa, for defendant in error. Lucius Babcock, of El Reno, for city of El Reno.

GALBRAITH, C. Celeste Mitchell commenced this action against the city of El Reno and the Cleveland Trinidad Paving Company to recover damages for personal injuries which she claimed to have sustained on account of the negligence of the defendants. It is alleged that the Cleveland Trinidad Paving Company, under a contract with the city of El Reno, was making certain street improvements where Russell street intersects and crosses Macomb avenue in said city; that the street had been excavated, leaving a step-off in the sidewalk at a point almost perpendicular with the level of the ground to a depth of about four feet, and that in an attempt to make the street passable for persons using the same, the paving company had thrown in loose earth against the step-off, in an attempt to place the street in a reasonably safe condition; that on the 26th day of July, 1910, in the early evening on that day, the plaintiff, passing along said street and attempting to pass over the step-off, stepped upon this loose earth, which crumbled away and caused her to fall, from which she received injuries resulting in her being confined to her room for two or three weeks, cutting her head and injuring her arm and body, and causing her great mental worry and suffering, and causing her to expend a large sum for medical expenses, etc. Negligence is charged against the city in permitting this temporary and unsafe approach to remain in the walk, and the paving company is alleged to have been negligent in putting this unsafe crossing at that place, and damages alleged in the sum of \$2,500. Each of the defendants pleaded a general denial and contributory negligence on the part of the plaintiff. The cause was tried to the court and a jury, and a verdict returned for the plaintiff against both of the defendants



in the sum of \$600. To review that judgment appeals have been perfected to this court.

It is insisted that the petition did not state facts sufficient to constitute a cause of action; that the court erred in overruling a demurrer thereto, and further erred in denying the motion for an instructed verdict, and in overruling a demurrer to the evidence at the close of the plaintiff's case, and in giving certain instructions as to the law.

[1, 2, 4] We quote from the very exhaustive brief of the plaintiff in error as to the duty which the city of El Reno and the paving company owed to the plaintiff in this case, as follows: "The city having provided by contract for grading down the roadway of Russell street to an additional depth, to wit, that provided by plans and specifications adopted for the improvement by the city, necessarily knew that an excavation of some four feet in depth at the crossing of Russell street along the line of the sidewalk on the west side of Macomb avenue would be the result. The city had the lawful right to make the excavation, and to provide a temporary means of getting down from the sidewalk to the roadway. It was its duty, however, to exercise care and prudence to provide a temporary approach of such character or plan as would be reasonably safe for such purpose." And as to the duty of the paving company say: "It was the duty of the company as contractor, agent, servant, or employé of the city to construct the approach in accordance with the plans or method prescribed by the city, if any was prescribed, or, if no method or plan was prescribed by the city, but the company was required by the city to maintain temporary crossings of streets undergoing improvement, or acted upon its own initiative to then guard against the danger incident to said excavation, it was the duty of the company to so construct the approach as that it should be reasonably safe for public travel, and thereafter, before completion of the improvement of the street at such crossing, to exercise due care that the approach remain reasonably safe for public travel. The city and company owed these respective duties to the plaintiff; no more no less." This, we take it, is a fair statement of the duties that were due the plaintiff respectively from the city of El Reno and the paving company, and the breach of such duty by one or both of these parties will constitute actionable negligence.

The elements necessary to constitute actionable negligence, as defined by the court in *Faurot v. Oklahoma Wholesale Gro. Co.*, 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136, are as follows: "In every case involving actionable negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a

failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders a complaint bad or the evidence insufficient."

While the petition is unnecessarily verbose, and does not "in simple and unambiguous language" charge the duty imposed upon the defendants by law and its breach by each of them, and the resulting injury to the plaintiff, as should have been done, yet a demurrer did not reach the defects of the petition, since it alleges in a general way the duty imposed upon each of the defendants and a breach thereof and the resulting injury, and as against a general demurrer the petition was good. The demurrer to the plaintiff's evidence was likewise properly overruled, and the motion for a directed verdict was rightly denied. These exceptions are not well taken.

The three elements necessary to maintain an action for negligence were charged in the petition: First, the duty of the city to keep and maintain its sidewalks in a reasonably safe condition for those having occasion to use them. *Fairfax v. Giraud*, 35 Okl. 659, 131 Pac. 159; *City of Purcell v. Stubblefield*, 139 Pac. 290 (not yet officially reported); second, the unsafe condition of the street where the accident occurred; and, third, the injury resulting to the plaintiff, and as to the paving company it charged it with creating the dangerous condition in the sidewalk, and its attempt to remedy the defect by throwing in this loose dirt, and its failure to make the sidewalk reasonably safe, and the resulting injury to the plaintiff.

[3] The evidence shows that the loose dirt was thrown against the embankment left in the sidewalk in lowering the grade of the street about July 8th, and the injury occurred on July 26, 1910. The jury may have found from this that the city had actual notice of the condition of this crossing from the length of time it had existed prior to the accident. *Town of Norman v. Teel*, 12 Okl. 69, 69 Pac. 791. The fact that the accident happened as plaintiff testified was evidence from which the jury may have found that this street crossing was in an unsafe and dangerous condition, and if it was, there was a plain breach of duty on the part of each of the defendants. See *Derr Construction Co. et al. v. Gelruth*, 29 Okl. 538, 120 Pac. 253.

At any rate, whether or not there was a breach of duty on the part of the defendants, and whether or not the plaintiff's negligence contributed to her injury, were questions of fact that were submitted to the jury for determination, and the verdict of the jury, being supported by sufficient evidence, is conclusive on those points.

Complaint is made of certain instructions of the court to the jury. While these instruc-

tions may not be model statements of the law of negligence, still they reasonably state the rules arising upon the issues made by the pleadings in this case, and we can find in them no error prejudicial to the substantial rights of the appellants.

The principal issues arising in the case were issues of fact, and these were for the jury to determine, and since the finding of the jury on these issues is supported by the evidence, we are precluded thereby.

We conclude that the assignments should be overruled, and that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

WOOD, County Treasurer, et al. v. GLEASON et al. (No. 5029.)

(Supreme Court of Oklahoma. June 30, 1913.  
Rehearing Denied April 28, 1914.)

(Syllabus by the Court.)

1. INDIANS (§ 13\*)—ALLOTMENTS—MINISTERIAL ACTS.

After all the requirements of the acts of Congress and the so-called agreements providing for the distribution of Indian lands have been complied with, the title of the allottee becomes fixed and absolute, and the execution and delivery of the patent after the right has become complete are the mere ministerial acts of the officers charged with that duty.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.\*]

2. CONSTITUTIONAL LAW (§ 100\*) — EXEMPTION—INDIAN ALLOTMENTS.

A tax exemption, and not merely an additional guard against alienation, which would fall when the restrictions on alienation were removed, was made by Act June 28, 1898 (30 Stat. 505, c. 517), under which the lands allotted in severalty under that act to the members of the Choctaw and Chickasaw tribes were subjected to various restrictions on alienation, and were to be nontaxable while the title remained in the original allottees. Choctaw and Chickasaw allottees under the Atoka Agreement, embodied in Act June 28, 1898, under which, in part consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by Const. U. S. Amend. 5, from abrogation during that period, as was attempted by Act May 27, 1908 (35 Stat. 312, c. 199); and said exemption applies, whether the patents to such lands were delivered to the allottees and accepted by them prior or subsequent to the passage of the latter act.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 206; Dec. Dig. § 100.\*]

3. INDIAN ALLOTMENTS.

Affirmed upon the authority of *Choate v. Trapp*, 224 U. S. 664, 32 Sup. Ct. 563, 58 L. Ed. 941, and *Gleason v. Wood*, 224 U. S. 679, 32 Sup. Ct. 571, 58 L. Ed. 947.

Appeal from Superior Court, Pittsburg County; W. C. Liedtke, Judge.

Action by Michael H. Gleason and others

against J. I. Woods, County Treasurer of Pittsburg County, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Chas. West, Atty. Gen., for plaintiffs in error. D. C. McCurtain and E. P. Hill, both of McAlester, for defendants in error.

KANE, J. Upon the foregoing cause being remanded to the superior court of Pittsburg county, pursuant to the mandate of the Supreme Court of the United States (*Gleason v. Wood*, 224 U. S. 679, 32 Sup. Ct. 571, 58 L. Ed. 947), the court below overruled the demurrer to the petition, whereupon the defendants filed their answer, which, in part, is as follows: "That by the act of Congress of April 28, 1908, the Congress of the United States enacted (34 Stat. 144) 'that all lands upon which restrictions are removed shall be subject to taxation.' That on May 27, 1908 (35 Stat. 312, c. 199), the Congress enacted: 'That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees, enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions.' And defendants allege that by the provisions of said acts aforesaid all the lands which, on March 1, 1909, were alienable, and the patents to which had not been delivered to and accepted by the allottee prior to April 28, 1906, were subject to taxation for the support of the state, county, and subdivisions of the state for the fiscal year ended June 30, 1910." The superior court sustained a general demurrer to the answer, and, the defendants standing thereon, and not desiring to plead further, judgment was rendered for the plaintiffs, as prayed for in their petition; to reverse which action this proceeding in error was commenced.

[1, 2] The main contention of the Attorney General in behalf of the plaintiffs in error is that the Supreme Court of the United States did not pass upon the question whether the lands involved are taxable where the patents thereto were delivered to the allottees, and were accepted by them subsequent to the passage of the act which attempted to subject such lands to taxation; that the court erroneously assumed that the patents had all been delivered and accepted prior to the passage of said act, whereas, most of the patents were delivered and accepted after the passage of the act of April 26, 1906, which, as well as the act of May 27, 1908, provides that lands on which restrictions were removed are taxable. We can-

not agree with the contention of counsel. In our judgment, the opinion of the Supreme Court of the United States covers all the points raised by the Attorney General in the instant proceeding in error.

Whilst it is true that the record did not contain a copy of any of the patents issued to the plaintiffs, the court was advised of their contents, for the terms of the grant were fixed by prior acts of Congress or agreements with the Indians, of which the courts take judicial notice, one of which, the Atoka Agreement, contained a provision which required the patent, when issued, to be framed in conformity with the terms of the Atoka Agreement, which also contained the exemption now under consideration. The court, therefore, was justified in presuming that the patents conformed to the acts and agreements in pursuance of which they were issued, and therefore the statement that "the patents and the legislation of Congress must be construed together, and, when so construed, they show that Congress, in consideration of the Indian's relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be nontaxable for a limited period," was based upon as full information as if copies of the patents had been incorporated in the record. As the Supreme Court further said: "The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the fifth amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land."

Moreover, the mere ministerial act of delivering the patents cannot be said to affect or change any legal right acquired by the Indians by virtue of the acts of Congress or their agreements with the government, for it is well settled that, when a patent is issued to the lands thus acquired, it relates back to the inception of the right of the patentee. After all the requirements of the acts of Congress and the so-called agreements providing for the distribution of Indian lands have been complied with, the title of the allottee becomes fixed and absolute, and the execution and delivery of the patent after the right has become complete are the mere ministerial acts of the officers charged with that duty. *Ballinger v. Frost*, 216 U. S. 241, 30 Sup. Ct. 338, 54 L. Ed. 464.

The patent is not creative of the right of the allottees, either to the land or to the exemption. If the patent is valid, it is so merely because it is in confirmation of previous existing rights, and not because it created any new rights. In *Godfrey v. Iowa Land & Trust Co.*, 21 Okl. 293, 95 Pac. 792, Mr. Justice Williams, speaking of the effect of the

nonissuance of the patent to a Seminole allotment, says: "We accordingly conclude that the herein allottee, Robert James, a member of the Seminole Tribe, but not of Indian blood, after selecting his allotment, and designating his homestead, and receiving his certificate of such allotment from the chairman of the Commission of the Five Civilized Tribes, as provided for in the agreement of December 16, 1897, became the equitable owner of the same, vested with an indefeasible title therein, and that the duty or obligation to issue a patent therefor was imperative, and not discretionary, with the tribe or government, and could make a binding sale, deed, or conveyance on that part of his allotment not selected as a homestead, after the removal of the restrictions on alienation by the Indian appropriation act, approved April 21, 1904, although no patent had been issued or delivered to said allottee before he undertook to alienate the same."

[3] On the whole, we are satisfied that the Attorney General presents no question in the present proceeding which has not already been decided against him in the cases of *Choate v. Trapp*, 224 U. S. 664, 32 Sup. Ct. 565, 56 L. Ed. 941, *Gleason v. Wood*, supra, and other cases of that class.

The judgment of the court below must therefore be affirmed. All the Justices concur.

HULS v. JANEWAY. (No. 3595.)  
(Supreme Court of Oklahoma. April 17, 1914.)

*(Syllabus by the Court.)*

1. FRAUDS, STATUTE OF (§ 23\*)—AGREEMENT TO PAY DEBT OF ANOTHER—EVIDENCE.

The conversation set out in the opinion did not constitute an original agreement to pay the debt of another, and an action cannot be maintained thereon to recover the amount of such debt.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

2. JUSTICES OF THE PEACE (§ 152\*)—APPEAL—PARTIES.

An order made by the county judge dismissing an appeal taken by one of two defendants from a judgment of a justice of the peace on the ground that both did not join in such appeal was reversible error, since, under the Constitution and statute, either of such defendants had the right to an appeal. Sections 14 and 15, art. 7, sections 189 and 200, *Williams' Const.*, and section 5466, *Rev. Laws* 1910.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 516-519; Dec. Dig. § 152.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Payne County; W. H. Wilcox, Judge.

Action by D. F. Janeway against R. W. Huls. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

H. A. Johnson, of Perry, for plaintiff in error. J. M. Springer, of Stillwater, and

Henry Ousler, of Cushing, for defendant in error.

GALBRAITH, C. Dr. D. F. Janeway commenced an action before a justice of the peace of Payne county against Al Huls and R. W. Huls, to recover on an account amounting to \$116 for professional services rendered Al Huls, which it was alleged in the bill of particulars the defendants orally undertook and agreed to pay. The trial before the justice of the peace resulted in a verdict in favor of the plaintiff against R. W. Huls for \$87.50 and interest, and against Al Huls for \$119.50 and interest. The defendant, R. W. Huls, appealed to the county court of Payne county, where there was a trial to the court and a jury and a verdict for the plaintiff against R. W. Huls in the sum of \$84.50. To reverse this judgment an appeal has been perfected to this court.

[1] One of the assignments of error urged is that the county court erred in overruling the defendant's demurrer to the plaintiff's evidence, and refusing to instruct a verdict for the defendant on such evidence. The plaintiff's right to recover was based upon an alleged oral agreement entered into with R. W. Huls to pay the plaintiff for professional services rendered Al Huls. In order to sustain the action, it was necessary for the plaintiff to establish by his evidence an original agreement on the part of the defendant, R. W. Huls, to pay for the services. The demurrer of the defendant raised the question of the sufficiency of the evidence introduced to establish such an agreement. The agreement, as testified to by the plaintiff on cross-examination, is as follows: "I said, 'Mr. Huls, Al is in a serious condition, a critical condition, and it is going to require practically all the time of some one to pull him through.' I says, 'He don't have the reputation of paying his debts, and I want you to see that I get my money.' Mr. Huls began to complain about how he had been paying out for the boy and getting nothing for it, and he said there was nothing to it. I says, 'Now, look here, he is your son, and, if you don't put up for him, who will.' Then he said, 'Well, I haven't any money, and won't have until fall.' I says, 'Now, Mr. Huls, I don't want my money now; all I want is the assurance that I will get it.' About that time they called me to come into the house, and I left." The conversation, as testified to by the plaintiff on cross-examination, was practically the same. The plaintiff says that, after he had asked the defendant if he would not put up for his son who would, Mr. Huls said, "I will do the best I can." He says, "I haven't any money now, and won't have before fall." I says, "That is all right; I am not demanding my pay; all I want to know is that I will get my pay for the services I render," and about that time they called me into the house."

If this conversation between the plaintiff and defendant arose to the dignity of an

agreement on the part of the defendant to pay for the services of the plaintiff rendered to the son, then the demurrer to the evidence was properly overruled; but, if it did not constitute an agreement, then the demurrer should have been sustained. *May v. Roberts*, 28 Okl. 619, 115 Pac. 771; *Richardson et al. v. Parker, McConnell & Co.*, 33 Okl. 339, 125 Pac. 442. As was said in *Atwood v. Rose et al.*, 32 Okl. 355, at 363, 122 Pac. 929, 932: "No contract is complete without the mutual assent of all the necessary parties to all its terms. An offer to sell imposes no obligations until it is accepted according to its terms. So long as the negotiation remains open, neither party is bound; the one may decline to accept, or the offer may be withdrawn by the other. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer. The offer of acceptance upon modified or added terms would be a new or counter proposal, which would require an acceptance according to its terms, before it could be said that a contract had been made."

Whether the conversation amounted to an agreement was a question of law for the court to determine. *Atwood v. Rose et al.*, *supra*. This question was squarely raised by the demurrer.

We have studied this conversation, as above quoted, carefully and are unable to say that it constituted a contract. We cannot say that it shows that R. W. Huls undertook and agreed to pay Dr. Janeway for his services for treating the son. We cannot say that it goes to that length. The doctor was called away before such stage in the conversation was reached—before Huls agreed or promised to pay. The language used by the doctor, "I want you to see that I get my money," would indicate that he was asking for a collateral, and not an original, promise to pay notwithstanding he must have known that the statute of frauds rendered such an oral collateral agreement absolutely void. We therefore conclude that the court was in error in overruling the demurrer to the evidence, and should have sustained the same.

[2] The judgment appealed from was rendered on the 14th day of July, 1911. On the 20th day of November, 1911, the attorneys for Dr. Janeway filed a motion in the county court of Payne county to vacate the judgment rendered and to dismiss the appeal of R. W. Huls on the ground that the same was an appeal from a judgment of a justice of the peace, and that there were two parties defendant in the justice court, and only one had joined in the appeal to the county court. On January 2, 1912, the court made an order sustaining the motion to vacate the judgment and dismissing the appeal. This action of the court is assigned as error, which it clearly appears to be. Without passing upon the question as to whether or not the county court of Payne county had jurisdiction of the cause on January 2, 1912, when this or-

der of dismissal was entered, upon authority of the case of *Barnard v. Douglass-Whaley Gro. Co.*, 31 Okl. 124, 120 Pac. 563, making this order and dismissing the appeal upon this ground was reversible error.

We conclude that the assignments discussed should be sustained, and the case should be remanded to the county court of Payne county, with directions to vacate the order dismissing the appeal, and also to vacate and set aside the judgment entered upon the verdict of the jury, and to sustain the demurrer of the defendant to the plaintiff's evidence, and to enter judgment in favor of the plaintiff in error, R. W. Huls, and against the defendant in error, D. F. Janeway, for costs.

PER CURIAM. Adopted in whole.

THOMPSON v. DE LONG et al. (No. 2963.)  
(Supreme Court of Oklahoma. March 31, 1914. Rehearing Denied May 5, 1914.)

(Syllabus by the Court.)

1. COURTS (§ 121\*)—JURISDICTION—AMOUNT INVOLVED.

Where a suit based upon a contract, the consideration being due, in determining whether or not the district court has jurisdiction under section 10, art. 7, of the Constitution, and under section 1978 of Comp. Laws 1909, the interest accruing upon said contract can be added to the principal, and when the two together exceed the sum of \$500, it comes within the jurisdiction of the district court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-426, 428, 450, 452, 453, 459, 466; Dec. Dig. § 121.\*]

2. CONTRACTS (§ 332\*)—PLEADING—SUFFICIENCY ON DEMURRER.

Where a petition is sufficiently explicit in pleading a contract and thereby raising an issue of fact upon which pleader would be entitled to recover in the case, such a petition is good upon demurrer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.\*]

3. BROKERS (§ 88\*)—ACTION FOR COMMISSION—INSTRUCTION.

Where, in a suit by brokers to collect their commission upon a contract to procure a person who is ready, willing, and financially able to buy upon the terms and conditions authorized and contracted for between the brokers and defendant, an instruction authorized the jury to find a verdict for the plaintiffs if they believed, from a preponderance of the evidence, that the plaintiffs did procure a person who was ready, willing and financially able to purchase the property upon the terms and conditions authorized by defendant, and through no fault of the plaintiffs the defendant refused to carry out the contract on her part, the plaintiffs would be entitled to recover, such instruction is not subject to the criticism that before a recovery can be had the jury must find that the *exact* terms and conditions were complied with, for, if the terms are complied with, it includes a finding that the "exact" terms are complied with.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

4. APPEAL AND ERROR (§ 1001\*)—FINDINGS OF FACT—EVIDENCE.

In a case where a lawful contract is entered into and where the evidence reasonably tends to support the findings of a jury upon instruc-

tions of the court properly advising the law, this court will not disturb the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by W. W. De Long and another, doing business as De Long & Thompson, against Alice R. Thompson. Judgment for plaintiffs, and defendant brings error. Affirmed.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. Jno. H. Wright and Clarence J. Blinn, both of Oklahoma City, for defendants in error.

RUSSELL, J. This suit, based upon a verbal contract, was instituted in the district court of Oklahoma county by W. W. De Long and G. M. Thompson, doing business under the partnership name of De Long & Thompson, in Oklahoma City, Okl., as plaintiffs, against Mrs. Alice R. Thompson, defendant. It is, in substance, alleged: That on or about the 15th day of December, 1909, the defendant employed the plaintiffs to procure a purchaser for her property situated in Oklahoma county, to wit, lots 11, 12, 13, and 14 in block 12 in Brusha's, Second addition to Oklahoma City. That the terms of said listing were as follows: The defendant authorized and employed the said plaintiffs to secure a purchaser for said real estate for the sum of \$5,000 net to her, any and all sums in excess of the said \$5,000 to be retained by the plaintiffs as their commission for said services in securing a purchaser for said property. That said plaintiffs accepted the employment under the terms above set forth, and on or about the 15th day of December, 1909, in accordance with the listing and holding of said property for sale by plaintiffs, secured a purchaser for said real estate who was ready, able, and willing to buy said property and pay therefor the sum of \$5,500. That by reason thereof the plaintiffs became entitled to the sum of \$500 as their commission for services in procuring such purchaser under the terms of said contract; that plaintiffs notified the defendant that they had secured such purchaser, and demanded of the defendant the sum of \$500 earned as commission, etc., which payment the said defendant refused to make. The plaintiffs pray for judgment against the defendant in the sum of \$500, with interest from this date at the rate of 6 per cent. per annum, costs of suit, etc. With the filing of their petition on February 21, 1910, there was filed in said court an affidavit for attachment, in proper form, and alleging, among other things, that said defendant was a non-resident of the state of Oklahoma and a resident of the state of New York, in the city of Syracuse. On the same date a writ was issued against the property of the defendant, found in the state of Oklahoma, etc. And on February 23, 1910, the sheriff attached lots

11 and 12 in block 12 of Brusha's Second addition to Oklahoma City, Oklahoma county, state of Oklahoma, as the property of the defendant, and made said levy and return as the statute required. Defendant's general demurrer was heard and overruled, and exceptions reserved. The defendant, Alice R. Thompson, then answered by general denial. The next step in the proceedings was the motion of defendant to dismiss for want of jurisdiction, and in support of said motion quotes (1) section 10, art. 7, of the Constitution of Oklahoma, which is: "The district courts shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court." Also section 1978, Comp. Laws 1909, which is: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters, shall have concurrent jurisdiction with the district court in civil cases in any amount over \$500.00 and not exceeding \$1,000.00, exclusive of interest, and exclusive original jurisdiction in all sums in excess of \$200.00 and not exceeding \$500.00." Which motion was on the same day it was filed, to wit, March 20, 1911, overruled by the court, and exceptions reserved.

A trial was had to a jury, and the testimony can be stated in a very brief space. In substance, G. M. Thompson stated that he and W. W. De Long were partners; that he was familiar with the location of lots 11, 12, 13, and 14 in block 12, Brusha's Second addition to Oklahoma City, and was personally acquainted with the defendant; that in May, 1909, he met the defendant on Hudson street in Oklahoma City and she stopped him; that "she had been in our office previous to this time a great many times, and I think it was the first instance she had ever given us the privilege of selling her property, or asked us to furnish her a customer. She listed her property with me for sale for \$5,000 net, at least one-half cash, and one-half she would give terms on at 8 per cent. I went to my office and put it on the books." Referring again to what she said, the witness stated she wanted to sell the property, and would sell it for \$5,000 net to her; that "we should get our commission above that"; that pursuant to this verbal listing agreement with the defendant the plaintiffs put a sign upon the property and advertised it in the paper, showed the property to several prospective customers, and one Haley was the first customer with whom the plaintiffs were able to agree upon terms, which they did, and Haley paid plaintiffs \$200 down and signed a contract, and thereupon plaintiffs notified defendant of the sale and gave Haley the following receipt: "Oklahoma City, Okla., Dec. 15, 1909. Received of Edward Haley two hundred and no 100 dollars, part payment of lots eleven (11), twelve (12), thirteen (13) and fourteen (14), in block twelve (12), Brusha's Second addition to Oklahoma City, Okla. The balance fifty-

three hundred dollars to be paid as follows: Thirty-five hundred dollars, less two hundred first paid in cash, and two thousand in payments thereafter at 8 per cent. interest, said deal to be closed as soon as owner can be found and make deed with abstract. De Long & Thompson, Agents. Edward Haley." In his testimony, this letter of the defendant to the plaintiffs, properly identified as received by them, is as follows: "Okmulgee, Okla., Dec. 15, 1909. De Long & Thompson, Gentlemen: Your letter just received. In regard to my property on 4th st. I would not want to take for it now what I would have taken six or seven months ago, when I was talking with you about it. If you could have sold it at that time for \$5,000.00 I would have taken it, as I could not dispose of it at that time; I changed my mind about selling and concluded to keep it awhile longer. Since then several parties have wanted me to put a price on it. If later I decide to list it will let you know, but would not want to tie it up more than two months at a time. Very truly, Alice R. Thompson." On cross-examination, defendant's counsel asked the witness to state when, if ever, he informed Mrs. Thompson of the transaction had between his firm and Mr. Haley with reference to this property, and the witness answered that he personally wrote the defendant a letter the same day or the next one of the Haley transaction. He also stated that he did not inclose Mrs. Thompson a deed because the practice always requires an abstract to show the title is all right. He also stated that he never had the abstract, nor did he inclose a memorandum of his contract with Haley in his letter to Mrs. Thompson, and on this point he said, "I notified her we had a payment on the property, the price and the terms," etc.

Defendant then filed a demurrer to plaintiff's evidence for the reason that the same does not prove or tend to prove facts supporting the petition, or tend to prove facts sufficient to constitute a cause of action in favor of the plaintiff and prove sufficient facts to entitle plaintiffs, or either of them, to any relief whatever against the defendant. This was overruled.

For the same reasons alleged, the defendant made a motion for the court to direct a verdict for the defendant. The jury being excused, the court heard the argument of defendant and overruled the motion, and exceptions were reserved.

The defendant did not introduce any testimony, but rested her case on the demurrer to plaintiff's evidence and the requested instruction.

The defendant requested two instructions, to wit: "You are instructed, gentlemen of the jury, that before the plaintiffs can recover in this action, you must find that they have proven by a preponderance of the evidence that they had a contract with the defendant authorizing them, as real estate brokers to procure for defendant a purchaser

ready, willing, and able to take the property on the exact terms specified in such contract"—which the court refused, and exceptions reserved. "You are instructed that in order to have produced Haley as a purchaser plaintiffs must have actually introduced Haley to defendant and thereby brought Haley and defendant together, or plaintiffs must have taken a binding and enforceable contract from Haley on the exact terms of the listing contract, and must have presented such contract to defendant under such circumstances as to enable defendant to satisfy herself as to Haley's financial responsibility"—which the court refused, and exceptions reserved. The court then instructed the jury, and at the conclusion permitted plaintiff and defendant each to save exceptions to each and all of the instructions given by the court. The verdict of the jury was returned in favor of the plaintiff and assessed the amount of their recovery at the sum of \$500. The defendant's motion for new trial, embracing all the alleged errors claimed by her happening on the trial, was heard in time and overruled by the court, to which ruling exceptions were taken and time given to file case-made in this court.

Plaintiff in error's (defendant below) assignments of error are numbered from 1 to 26, both inclusive, which present the matters complained of during the progress of the trial.

In the disposition of this case we will only deal with those assignments of error presenting matters that should be passed upon, and we say that there are a number assigned that, in our judgment, are not of merit, at least of sufficient merit that would affect the substantial rights of the parties.

[1] Plaintiff in error's second assignment is to the action of the court overruling her motion to dismiss said action for want of jurisdiction, and, in support of said motion, quotes the section of the Constitution and Comp. Laws 1909, § 1978, *supra*, and decisions from this court, among others: *Adair v. McFarlin*, 28 Okl. 633, 115 Pac. 787; *Good et al. v. Keel et al.*, 29 Okl. 325, 116 Pac. 777. The authorities referred to in no wise conflict with the opinion of this court lately handed down, and which is decisive of the question presented as to the jurisdiction of district courts. It is argued, quite plausibly, that, as the amount is, in his viewpoint, not over \$500, under the statute in force when the suit was brought the district court was without jurisdiction. Under the presentation made, the jurisdictional feature consists of the amount involved in the suit at the time of its institution, and is the rule invoked testing the jurisdiction of the court. We shall determine this matter solely upon the proposition whether the amount the plaintiffs were entitled to under the pleadings was within the jurisdiction of the district court. The suit being based upon a contract, the consideration for which became due when the contract was performed in December,

1909, the plaintiffs below were entitled to interest on said amount, under the statute at least from January 1, 1910, and when this suit was instituted, on February 21, 1910, sufficient interest had accrued, due plaintiffs, as to make their claim over \$500. In the case of *St. Paul Fire & Marine Ins. Co. v. S. E. Peck*, 139 Pac. 117 (case not yet officially reported), in referring to the act of 1909 treating of the concurrent jurisdiction of the county court with the district court in an amount not over \$500, and not exceeding \$1,000, exclusive of interest, that the clause "exclusive of interest," following the words "not exceeding \$1,000.00," modifies that sentence, which means that the maximum of concurrent jurisdiction, to wit, \$1,000, is exclusive of interest, but that the minimum concurrent jurisdiction, to wit, over \$500, can be made up of principal and interest, and if the two together are over \$500, then jurisdiction obtains in the district court. The opinion referred to announces this doctrine, and which is stated in 11 Cyc., p. 779, among authorities cited: "It is the general rule that where the principal sum sued for is less than is necessary to confer jurisdiction upon the court, if the accrued interest, together with said principal, amount to a sum sufficient to confer jurisdiction upon the court, the court will have jurisdiction of said suit."

It has been decided that costs cannot be considered in determining whether the amount in controversy is sufficient to confer jurisdiction upon the particular court. We deem it unnecessary to discuss this feature further than to say that there was no error in the action of the trial court in overruling the motion to dismiss the case for want of jurisdiction.

[2] Plaintiff in error's third assignment of error complains of the action of the court in overruling the demurrer to plaintiff's petition. We have read carefully the points presented in their brief, and hold that the action of the trial court in overruling the demurrer was right. The petition is certainly good upon a general demurrer. What more can be required of a petition based upon a contract such as the one at issue when it alleges everything was performed as agreed upon, and the character of the contract stated, in other words, a compliance with the full and complete legitimate agreement between two parties, when it is simply attacked by a general demurrer? The contract was that the plaintiffs below were authorized by the defendant below to "secure a purchaser for her real estate, and, if they secured a purchaser for her real estate, that they should have all over \$5,000," and not only had they secured such a purchaser who was ready, willing, and able to buy, but who agreed to buy, the property at \$5,500, and paid down \$200 upon a contract of purchase, awaiting an abstract, which he had a right to await. Now, on this point, it is the contention of plaintiff in error that, in

such a case and under such a contract, the brokers must do more than secure the purchaser, and that they must produce the purchaser, that is, they must bring the owner of the property and the purchaser together, and the petition, failing to allege that the brokers brought the owner and purchaser together, was bad upon demurrer. We cannot see any such necessity under this case for such pleading as is suggested by plaintiff in error. Under this case, the brokers (plaintiffs below) were the agents and representatives, under authority, of the defendant below, and they got together with the purchaser under the terms and stipulations that they were authorized by defendant below (plaintiff in error) to do. We would not stress this matter, as we apparently have done, but for the seeming insistency of plaintiff in error's counsel, and we are unable to see the force of the contentions made against the judgment rendered below when we apply the touchstone of reason and the law applicable to the record as made.

[3] It is urgently insisted by plaintiff in error that the trial court erred in refusing the two special requested instructions. These instructions have been incorporated, *supra*. The first requested instruction, which was refused, is, in effect, before the plaintiffs could recover they must have found a purchaser for the property on the *exact* terms of such contract, whereas the instruction complained of, given by the court, required that a purchaser of the property be found according to the terms of the contract. We do not appreciate the distinction between the "terms of a contract" and the "exact terms" complied with. If the terms of a contract are complied with, it is *exactly* complied with, as we understand it.

Special requested instruction No. 2 is to the effect that the plaintiffs must have actually introduced the purchaser to the owner, thereby bringing the purchaser and owner together, or, if not, these plaintiffs must have taken a binding and enforceable contract from Haley on the exact terms of the listing contract, and must have presented such contract to defendant (owner) under such circumstances as to enable defendant, (owner) to satisfy herself as to Haley's (purchaser) financial responsibility. It is plaintiff in error's contention that such things should have been done as a condition precedent to the securing of a purchaser who was ready, willing, and able to and did pay his bonus money to carry out a contract that plaintiffs were authorized to make with him by the owner. The law does not require either vain or impossible things. The contract, as we view this record, was complied with, and the brokers, in addition thereto, represented the owner, and this was not disputed on the trial.

[4] We have read the court's instructions to the jury, and, under the facts of this

record, we are unable to understand how he could have otherwise instructed the jury without violating the law applicable to the case.

The principles announced in the decisions submitted in plaintiff in error's brief, to our minds, are good law, but do not affect the conclusion we have reached, and therefore we deem it unnecessary to prolong this opinion, already too lengthy, in seeking to present the matters demanding our attention in this record, and which are decisive of this case.

There being no error affecting the substantial rights of the parties in this case, the judgment of the district court of Oklahoma county is in all things affirmed. All the Justices concur.

### COOK v. WARNER. (No. 3216.)

(Supreme Court of Oklahoma. April 17, 1914.)

#### (Syllabus by the Court.)

#### 1. EQUITY (§ 39\*)—RETENTION OF JURISDICTION—SCOPE OF RELIEF.

A court of equity which has obtained jurisdiction of the controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter, and to avoid multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

#### 2. EQUITY (§ 39\*)—JURISDICTION—COMPLETE RELIEF.

In an action invoking the general equity powers of the district court, where title to real estate and the questions of cancellation of the instruments of conveyance or determination of the interests of various parties and the partition and sale of such real estate are involved, the court will not be divested of its jurisdiction to decree a sale of such real estate merely because in the trial of the cause it develops that a minor has an interest therein; but the court will retain jurisdiction in order to grant complete relief to all parties in interest and avoid the necessity of other suits. Hence, a sheriff's deed made pursuant to an order of sale will be valid, although a minor's undivided interest may have been conveyed under the decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by J. Carter Cook, acting as guardian and next friend of George Harris, a minor, against E. S. Warner, to set aside a judgment of the district court, and cancel a sheriff's deed. Judgment for defendant, and plaintiff brings error. Affirmed.

J. Carter Cook, of Coweta, for plaintiff in error. Chas. F. Runyan, of Muskogee, for defendant in error.

HARRISON, C. In May, 1911, the guardian of George Harris, a minor, brought this action in the district court of Wagoner county to set aside a former judgment of the district court, and to cancel a sheriff's deed



which had been executed to the defendant, E. S. Warner, pursuant to such judgment. It appears from the pleadings that in May, 1909, in an action by the Iowa Land & Trust Company v. International Land Company et al. to quiet title of certain parties to a certain tract of real estate, and to determine the interest of such parties in said tract, that the court, in passing upon the issues presented in such suit, determined and decreed that George Harris, a minor, in whose behalf as guardian J. Carter Cook prosecutes this action, had a one-fourth interest in the tract of land in question, and that defendant, E. S. Warner, had the remaining three-fourths interest therein. Whereupon the court ordered a partition of the land in question if it could be fairly and equitably divided, and, in the event it could not be so divided, that the land be appraised and sold, and that the proceeds of sale, after payment of costs, be distributed to Warner and to George Harris, the minor, according to their respective interests in the estate, and that the proceeds to which said minor would be entitled should be paid into court to be paid out by the clerk of said court to the minor's proper guardian, and that, upon the report to the court that the land could not be fairly and equitably partitioned, the court ordered it appraised and sold according to law, which was done, and, which sale being duly confirmed, the court ordered the sheriff to execute a deed to the purchaser. Pursuant to which order the sheriff executed a deed to the entire tract to E. S. Warner, the purchaser and defendant in error herein. Some two years thereafter this action was brought to set aside such judgment, and to cancel the sheriff's deed to Warner. When the cause came on for hearing in September, 1911, the court sustained a demurrer to the plaintiff's petition. The plaintiff refused to plead further, and the court rendered judgment in favor of Warner, and, from such judgment, this appeal is prosecuted.

The decisive question presented in this appeal is whether, in an action by adults to determine and settle the title to real estate, and to determine interests of adverse claimants thereto, a district court should be divested of its equity jurisdiction to grant complete relief in the premises simply because it developed in the trial, and had been decreed by the court, that a minor had an interest in the estate.

[2] It is urged by plaintiff in error that the district court had no jurisdiction to decree the sale of the minor's interest; that such jurisdiction is vested exclusively in the probate courts of our state. This was the theory upon which the action was brought in the court below, and, upon the theory that the district court was not divested of such jurisdiction, the demurrer to the petition was sustained. No authorities on this exact point in question are presented by either party to the appeal; but each contents himself with an analysis of the constitutional and statu-

tory provisions in reference to the subject, and with an argument and citation of authorities in support of their respective interpretation of such constitutional and statutory provisions, and, but for other well-recognized principles of law which we must recognize in determining this question, it might be said that either interpretation is correct. Article 7, § 12, of Williams' Constitution in part provides: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest: Provided, that the county court shall not have jurisdiction in any action for malicious prosecution, or in any action for divorce or alimony, or in any actions against officers for misconduct in office, or in actions for slander or libel, or in actions for the specific performance of contracts for the sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, nor arising under its probate jurisdiction."

Also in section 18, art. 7 (198), Williams' Ann. Const., it is provided: "The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof. \* \* \*

In section 10, art. 7 (195), Williams' Ann. Const., the jurisdiction of the district courts of our state is defined as follows: "The district courts shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court, and such appellate jurisdiction as may be provided in this Constitution, or by law. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs, remedial or otherwise, necessary or proper to carry into effect their orders, judgments, or decrees. The district courts shall also have the power of naturalization in accordance with the laws of the United States."

Let it be observed: That section 12, supra, provides: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters." That section 10, supra, provides: "The district court shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law,

conferred on some other court. \* \* \*

In other words, the county court shall have original jurisdiction in all probate matters, and the district court shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is conferred upon some other court. The words "shall have original jurisdiction" are the same and used in the same sense as to both courts; that is, the district court shall have original jurisdiction in all cases, civil and criminal, the same as the county court shall have original jurisdiction in all probate matters.

Now, under our statutes there are but two kinds of actions: "Actions are of two kinds: First, civil; second, criminal." Section 4646, Rev. Laws 1910. "A criminal action is one prosecuted by the state, as a party, against a person charged with a public offense, for the punishment thereof." Section 4647, Id. "Every other is a civil action." Section 4648, Id. Hence the action of which plaintiffs in error complain was a civil action in the district court, which, under our Constitution, § 10, *supra*, has original jurisdiction over all civil cases, unless exclusive jurisdiction is conferred on some other court.

Now, the word "exclusive" is not used in reference to the jurisdiction of county courts in all probate matters in section 12, *supra*; and section 10 provides that the district court has jurisdiction in all civil cases, except where exclusive jurisdiction is conferred upon some other court. In section 1817, Rev. Laws 1910: " \* \* \* The county court shall have jurisdiction concurrent with justices of the peace in misdemeanor cases, and *exclusive jurisdiction* in all misdemeanor cases of which justices of the peace have no jurisdiction. \* \* \*

Section 2, art. 1, c. 27, Laws 1907-08, provides:

"Sec. 2. The county court, coextensive with the county, shall have original jurisdiction in all probate matters, shall have concurrent jurisdiction with the district court in civil cases in any amount over five hundred dollars and not exceeding one thousand dollars, exclusive of interest, and exclusive original jurisdiction in all sums in excess of two hundred dollars and not exceeding five hundred dollars. \* \* \*

These sections are referred to merely as an aid in arriving at the legislative intent, for, it being provided in section 10 of the Constitution, *supra*, that the district court has original jurisdiction in all civil cases, except where *exclusive* jurisdiction is by law conferred upon some other court, the Legislature has made use of the word "exclusive" in all cases where exclusive jurisdiction was meant to be conferred upon any particular court. By this we do not mean to be understood as holding that general original jurisdiction in probate matters is not conferred upon the county court, nor do we mean to be understood as holding that the district courts have a general concurrent jurisdiction,

in probate matters, with the county court; but there are many instances, as was true in the case at bar, that in the trial and determination of other civil matters questions arise which involve partial phases of the probate law, and in such cases, especially those involving questions of equity, our district courts being vested with general equity powers, we do not believe that it was the intention of the framers of the Constitution to, in matters invoking the general equity powers of the district court, divest it of its jurisdiction to grant complete relief to the parties in interest merely because some feature of the probate law, as an incident to the case, became involved.

The judgment complained of in the case at bar was a judgment in an action involving the title to real estate, and the cancellation of instruments of conveyance to real estate, and the determination of title of certain parties to the action in and to the real estate in question, an action which invoked the general equity powers of the district court. The court heard and determined the issues presented in the action, ordered the cancellation of certain instruments of conveyance, and determined the interest and title of the parties thereto in and to the real estate in question, and in its determination of the issues involved it developed that the minor, George Harris, plaintiff herein, owned a one-fourth interest in the real estate in question, and, upon the pleadings and upon the issues thereby formed, the court determined such minor's interest, and so decreed in its judgment.

It further appears, from the record herein of the proceedings in the judgment complained of and herein sought to be set aside, that the court, upon the issues presented to it, decided that a partition of the real estate in question was necessary in order to grant complete relief to all parties, provided it could be done fairly and equitably. Whereupon it appointed a commission to ascertain and report, and, upon the report of such commission that such real estate could not be fairly and equitably partitioned, the court decreed a sale of the entire tract as provided by law, and that the proceeds of such sale belonging to the minor, George Harris, should be paid into court to be paid out by the clerk thereof upon the order of the proper guardian of such minor. Pursuant to which order the sheriff sold the land in question and executed a deed to the purchaser.

No irregularities, inadequacy of price, or fraud in the proceedings are disclosed or complained of in the record, and we can find no valid reason, neither under the provisions of the Constitution nor those of the statutes, for holding that, merely because, in the trial of an action which invoked the general equity powers of the district court, it developed, as an incident to a final determination of such action, that a minor had an interest in the property in question, that the court

should thereby be divested of its powers to retain jurisdiction and render complete relief to all parties in interest.

[1] "Equity jurisdiction, having rightfully attached to a controversy, will be made effectual for the purpose of complete relief, though it may involve the adjudication of purely legal questions. Equity will assume jurisdiction to prevent multiplicity of suits: (a) Where numerous persons have a community of interests or a common right or title in the subject-matter of controversy, as against a common adversary, or where each has an equitable cause of action or an equitable defense against such adversary, involving the same questions of law and fact; (b) where reiterated litigation at law between the same individuals concerning the same subject-matter is threatened, or has actually taken place, without conclusively adjudicating the rights." *Fetter on Eq.* pp. 13-17. Also *Pomeroy's Eq. Jurisp.* c. 1, vol. 5, 2d Ed.; *Id.*, § 351, vol. 1, 3d Ed.; 1 *Story's Eq. Jurisp.* (13th Ed.) 64K; *Bailey on Juris.* (2d Ed.) § 535.

In 16 Cyc. 106, the following rule is announced: "A court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter. This doctrine seems to rest upon the same principles which permit a court of equity to take jurisdiction in the first instance, because the remedy is incomplete, or to avoid multiplicity of suits." This text of equity doctrine is supported by decisions from almost every state in the Union. See authorities cited under foregoing texts.

The judgment of the trial court seems to be abundantly supported both by reason and by the above equity doctrine. No other court in our state had jurisdiction to determine the question of title to the real estate involved, nor the interests of the parties thereto, nor to decree a partition of the land, nor to order a cancellation of the instruments involved therein; and we can see no valid reason why, after the court had determined the interests of the parties, and had further ascertained, from the report of the commissioners appointed, that the land in question could not be fairly and equitably partitioned, that the entire action should have been abated, relief suspended, the interests of the other parties disregarded until a separate action involving the necessary details and complications and extra expense, court costs and attorney's fees for the minor could be brought in the probate court by the guardian for the sale of the minor's interest in the land. Such a proceeding would have been in direct conflict with the well-established rules of equity, as well as an apparent detriment to the interests of the minor. Hence, upon the whole, in the absence of any showing of irregularity or fraud, we believe the deed executed by

the sheriff pursuant to the order of the district court was valid, and that the judgment of such court should be affirmed.

PER CURIAM. Adopted in whole.

LABADIE et al. v. SMITH. (No. 3204.)  
(Supreme Court of Oklahoma. April 17, 1914.)

(Syllabus by the Court.)

INDIANS (§ 18\*)—DESCENT AND DISTRIBUTION  
—WHAT LAW GOVERNS.

Under the Act of April 28, 1904, c. 1824, 33 Stat. 573, the Arkansas law of descent and distribution of decedents' estates, as provided in chapter 49, *Mansfield's Digest* (§§ 2522-2545), was extended over and put in force as to the estates of all tribes of Indians and all other persons, freedmen, or otherwise, in the Indian Territory. And the heirs of a deceased member of the Peoria Tribe who died in 1906 inherited under the Arkansas law.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

Commissioners' Opinion, Division No. 2.  
Error from District Court, Ottawa County; Preston S. Davis, Judge.

Action by Isadora Smith against Ella Labadie, Roy C. Labadie, Edna Labadie Jones, William Groom, and G. W. Helmick. Judgment for plaintiff, and defendants bring error. Affirmed.

E. E. Sapp, of Galena, Kan., and D. W. Cooter and L. T. Crum, both of Miami, for plaintiffs in error. F. D. Fulkerson, of St. Joseph, Mo., for defendant in error.

HARRISON, O. This was an action by Isadora Smith against her stepmother and half-brother and sister for a one-third interest in the estate of her deceased half-brother and for her share of the rents from same. The defendants, Groom and Helmick, were tenants on the estate and were made parties defendant. The facts are: That one Charles Labadie, a Peoria Indian, died in the year 1899 and left surviving him his wife, Ella Labadie, a white woman, and three children by her, and one, Isadora Smith, by a former wife. The children by the latter wife were the defendants Roy C. Labadie, Edna Labadie Jones, and Clarence Raymond Labadie, who afterward in 1906 died intestate and without issue, possessed of certain tracts of land. After his death the mother went into possession of his land under the Kansas law of descent and distribution. In 1910, Isadora Smith, the child by the former wife, brought this action against the surviving wife and her two surviving children, claiming that the land of her deceased half-brother descended to her and her surviving half-brother and sister under the laws of Arkansas and that the surviving wife had no interest in the estate of her deceased son, Clarence Raymond Labadie. The defendants answered, claiming the estate of the deceased under the Kansas law of descent and distribution which, by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Act of Congress Feb. 8, 1887, c. 119, § 5, 24 Stat. 389, as amended by Act of Congress March 2, 1889, c. 422, 25 Stat. 1013, was put in force as to the estates of the Peoria and some other tribes of Indians, and that such law, having never been repealed, was in force at the time of Clarence Labadie's death, and that the mother, Ella Labadie, under such law inherited all of her son's estate; she being the sole surviving parent. The issues being thus joined by petition and answer, the plaintiff, Isadora Smith, moved the court for judgment on the pleadings. The court sustained the motion and rendered judgment upon the pleadings in her favor, decreeing her a one-third interest in the estate on the theory that the Arkansas law was in force at the time of the death of her half-brother, and from such judgment the defendants appeal.

It is conceded by counsel for both parties to the appeal that a proper determination of the case depends upon which law of descent and distribution was in force at the time Clarence Labadie died. It is contended by plaintiffs in error that the Kansas law was in force, and by defendant in error that the Arkansas law was in force. Hence a review of the different acts of Congress on the subject is necessary in order to properly determine the controversy.

In 1887 (24 Stat. 389) Congress passed an act providing for the allotment of lands in severalty to certain tribes of Indians, section 5 of which provides in part as follows: " \* \* \* Provided, that the laws of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patent therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act. \* \* \* " Under section 8 of this act, it is provided that the Peoria Indians, of which tribe the heirs in question were members, together with some other tribes of Indians, were excepted from its provisions, but by the Act of March 2, 1889, c. 422, 25 Stat. 1013, the provisions of section 5, supra, were extended to the Peoria and some other tribes. Thus the law of descent and distribution was extended to and remained in force as to the Peoria Tribe until the Act of April 28, 1904, c. 1824, 33 Stat. 573, which in part provided: "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, \* \* \* whether Indians, freedmen, or otherwise. \* \* \* "

It is true, as contended by plaintiffs in error, that said act contained no repealing clause of laws in conflict therewith. Hence, if the provisions of the acts of 1887, 1889, supra, which put the Kansas law of descent in force, were repealed at all, they were repealed by implication; counsel for plaintiffs contending that such acts were not so repealed, citing a strong list of authorities in opposition to repeals by implication, and, while the authorities cited are strongly in opposition to the general doctrine of repeals by implication, yet they do not cover and should not control the exact question involved in the case at bar. For, prior to the Act of April 28, 1904, c. 1824, 33 Stat. 573, there had been no universal law on the subject of descent and distribution applicable alike to all the tribes of Indians, freedmen, or otherwise, within the limits of the Indian Territory. By such act a universal law applicable alike to all tribes of Indians, freedmen, or otherwise, and all other persons within the limits of the Indian Territory, was provided, and the Arkansas law of descent and distribution (chapter 49, Mans. Dig.) was put in force. It was evidently the intent of Congress, in order to avoid the interminable conflicts which would necessarily arise from laws of descent applicable to some tribes and not applicable to others, to provide a universal law applicable to all alike and to repeal all laws in conflict therewith. The necessity for such a universal law was so great and the intricate controversies liable to arise under the then existing and conflicting laws of descent so numerous, that the intention of Congress to provide a law of universal application is too clear to admit of doubt. While we do not feel that the departmental construction of legislative intent is controlling or binding upon this court, yet considerable light on the subject may be had from an opinion from the Assistant Attorney General to the Department of Indian Affairs, wherein the rights of the heirs of an Eastern Shawnee, whose status as to descent was the same as those of the Peorias, were involved; the opinion being as follows:

"Sir: The Department is in receipt of your letter of February 1, 1907 (Land 91856-1907), submitting the succession of Lucinda Dick, Eastern Shawnee, requesting decision by the Department for determination of the rule of descent for distribution of proceeds of sale of her allotted lands. Allotment of the lands was made to her under the Act of February 8, 1887 ([C. 119] 24 Stat. 388). Section 5 whereof provided that: 'The laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in Indian Territory which may be allotted in severalty under the provisions of this act.' The Act of May 2, 1890 ([C. 182] 26 Stat. 81, 94), Sections 30 and 31, provided: 'Sec. 30. \* \* \* The judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil

and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the state of Arkansas extended over and put in force in said Indian Territory by this act shall not apply. Sec. 31. \* \* \* That certain general laws of the state of Arkansas \* \* \* as published in \* \* \* Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes relating to administration, chapter one \* \* \* to descents and distributions, chapter forty-nine.' The Act of June 7, 1897 ([C. 3] 30 Stat. 62, 83), provided that after January 1, 1898, the United States courts in Indian Territory have exclusive jurisdiction of all civil causes after that date instituted, and all criminal causes for punishment of offenses after that date committed, and that the laws of the United States and the state of Arkansas in force in the territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in trial of like causes. The Act of April 28, 1904 [C. 1824] § 2 (33 Stat. 573), provided: 'All the laws of Arkansas heretofore put in force in the Indian Territory, are hereby continued and extended in their operation so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents \* \* \* whether Indians, freedmen or otherwise.' The Act of June 28, 1898 [C. 517], § 26 (30 Stat. 495, 504), forbids enforcement of tribal laws in courts of the United States, and section 28 abolished the tribal courts, July 1, 1898, as to all but three tribes named, and as to them on October 1, 1898, so that no courts existed for enforcement of tribal laws. The effect of this was to abolish the tribal law of descent. *Nivens v. Nivens* (64 Saw. 604).

"Lucinda Dick died July 14, 1905, seised of her allotted lands, and the question determining devolution of her lands depends on whether the law of Kansas or Arkansas governed the succession at date of her death. The act of 1890 is necessary to be considered for interpretation of the act of 1897 making the laws of Arkansas then in force as to persons not tribal Indians applicable to 'all persons therein irrespective of race,' and act of 1904 which 'continued and extended' the Arkansas laws, then partially in force, to 'embrace all persons and estates,' Indian or otherwise. No room is left to doubt that Con-

gress intended to make the law uniform as to all classes of persons and their estates. It is a fundamental proposition that no one is heir to any one living, so that no expectant rights of inheritance or succession are vested rights or can become vested till death of the propositus last seised. It necessarily follows that change in the law of succession is purely a question of legislative policy, and that the legislative action upon it is conclusive, violating no right and admitting no review by either executive or judicial authority. In case of *Loyal Creek Claims* (25 Ops. Attys. General, 163, 165) the Attorney General rendered opinion that the act of June 7, 1897, supra, 'operated to extend the Arkansas law of distribution to the individual estates of Indians dying after January 1, 1898.' The act was general and applied to all Indians, not to Creeks alone, and from April 28, 1904, at least, the laws of Arkansas so partially adopted by act of June 7, 1897, were extended to all persons and all decedents' estates. The Department therefore decides and you are instructed that as *Lucinda Dick* died after April 28, 1904, the lands of which she died seised descended and their proceeds are to be distributed according to the law of descent and succession of real estate under the laws of the state of Arkansas, in force at close of the general assembly of that state of 1883, as published in 1884, in the volume known as *Mansfield's Digest of the Statutes of Arkansas*."

This interpretation of the law has been recognized and followed by the Department since the Act of April 28, 1904, went into effect. Upon the subject of courts being controlled by departmental construction, the Supreme Court of the United States, in *United States v. Moore*, 95 U. S. 763, 24 L. Ed. 588, said: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards v. Darby*, 12 Wheat. 210 [8 L. Ed. 603]; *United States v. State Bank of North Carolina*, 6 Pet. 29 [8 L. Ed. 308]; *United States v. MacDaniel*, 7 Pet. 1 [8 L. Ed. 587]. The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

Again, in *United States v. Alabama Ry. Co.*, 142 U. S. 621, 12 Sup. Ct. 308, 35 L. Ed. 1134, the court held: "The contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations, \* \* \* should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such

statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change."

Also, this court in *League v. Town of Tulo-ga*, 35 Okl. 277, 129 Pac. 702, it was held: "The construction placed on statutes or constitutional provisions by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation."

There being a federal question in the case at bar, we feel inclined, if not bound by the doctrine announced in the foregoing decisions. Besides, there is a sharp, decided conflict in the provisions of the two acts; the one being applicable only to the tribes therein mentioned, the other, a later act, being expressly made applicable to all tribes and other persons, freedmen, or otherwise, within the limits of the Indian Territory. The general rule in such cases is that, "where two legislative acts are repugnant to or in conflict with each other, the one last passed being the latest expression of the legislative will, must govern, although it contains no repealing clause." 36 Cyc. 1073, and authorities cited.

Also, in *Mining Co. v. Gardner*, 173 U. S. 128, 19 Sup. Ct. 328, 43 L. Ed. 637, the Supreme Court held: "Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. In *United States v. Tymen*, 11 Wall. 92 [20 L. Ed. 153], it was said by Mr. Justice Field that: 'When there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' \* \* \* This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it."

Hence, in view of the foregoing authorities and the conditions existing in the Indian Territory at the time the Act of April 28, 1904, went into effect, we believe the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

**GANNON v. JOHNSTON et al.** (No. 4793.)  
(Supreme Court of Oklahoma. Feb. 3, 1914.  
Rehearing Denied April 28, 1914.)

(Syllabus by the Court.)

**1. INDIANS (§ 15\*)—SURPLUS LAND—RESTRICTIONS ON ALIENATION—HEIRS OF ALLOTTEE.**

The restrictions contained in section 18 of the Supplemental Treaty with the Choctaw and Chickasaw Nations (Act July 1, 1902, c. 1362, 32 Stat. 643) of one, three, and five years, upon alienation of surplus lands of allottees, selected during the life of the allottee, ran with the land, and prevented the heirs of a deceased allottee of such land from alienating the same before the expiration of said periods.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.\*]

**2. INDIANS (§ 15\*)—ALLOTMENTS—ALIENATION—RULE OF PROPERTY.**

The doctrine of rule of property cannot be applied to render valid conveyances made in violation of governmental policy.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.\*]

**3. CHAMPERTY AND MAINTENANCE (§ 7\*)—EJECTMENT—PARTIES.**

Where land in the adverse possession of another is conveyed, the grantee may maintain an action in the name of his grantor to recover from the adverse holder.

[Ed. Note.—For other cases, see *ChamPERTY and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.\*]

**4. PARTIES (§ 51\*)—ADDING NEW PARTIES—AMENDMENT TO PETITION.**

Where the grantee of land, which, at the time it was conveyed to him, was in the adverse possession of another, brought suit in his own name to recover it, it was not error to permit him to amend his petition so as to join his grantor as plaintiff.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 77-82; Dec. Dig. § 51.\*]

Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Action by D. R. Johnston and another against C. E. Gannon. Judgment for plaintiffs, and defendant brings error. Affirmed.

Bridges & Vertrees, of Waurika, and H. A. Ledbetter, of Ardmore, for plaintiff in error. F. E. Kennamer and Chas. A. Coakley, both of Madill, and Cham Jones and Guy Green, both of Waurika, for defendants in error.

**ROSSER, C.** This was an action by D. R. Johnston against C. E. Gannon, to recover certain lands which constituted the allotment of Agnes Wolfe. By amended petition, Wilburn Wolfe, Johnson's grantor, was joined as plaintiff. Wilburn Wolfe was the sole heir at law of Agnes Wolfe, who selected and took the land in controversy as her allotment, and, while the record is not absolutely clear, it is a fair inference from the whole record, and especially from the stipulation hereinafter set forth, that it was filed during her lifetime. After her death, Wilburn Wolfe sold the land to A. J. Waldock for the

expressed consideration of \$1,050. There was a conflict in the testimony as to whether or not the entire consideration was paid. The deed was dated October 18, 1908. Gannon claims under a chain of conveyances from Waldo. The plaintiff Johnston claims under a deed from Wilburn Wolfe, executed January 4, 1909. The trial court decided that Wolfe's deed to Waldo was good so far as it attempted to convey the homestead of Agnes Wolfe, but that it was invalid as to the surplus. There was a judgment in favor of the plaintiffs for the surplus allotment. From this judgment the defendant, Gannon, has appealed.

It was stipulated between the parties: "That, for a period of eight years after the passage of the Supplemental Treaty between the Choctaw and Chickasaw Nations and the United States, lands inherited under sections 12 and 16 of said Supplemental Treaty were construed to be alienable by the heirs so inheriting the same, whether they were full-blood Indians or otherwise, which construction was given by a majority of the lawyers of the Chickasaw and Choctaw Nation's portion of the state of Oklahoma, by the United States court prior to statehood, the district courts of the state of Oklahoma since statehood, and the Supreme Court of Oklahoma in 103 Pac. 566. That loan companies, prior to statehood, within and without the Indian Territory, loaned vast amounts of money on such land; that loan companies, since statehood, have loaned vast amounts of money on such lands. That there has been invested in such lands, prior to statehood and since statehood, by the farmers and investors, approximately \$10,000,000. That the lands this agreement has reference to are lands inherited by Indians under sections 12 and 16 of the Supplemental Agreement between the Chickasaws and Choctaws and the United States, which became effective September 25, 1902, wherein the Indian died between September 25, 1902, and April 26, 1906."

The defendant, Gannon, pleaded not only that the title was in him by reason of his chain of title from Waldo, but also pleaded that the plaintiff could not maintain his action, because, at the time he purchased, Gannon and his grantors had been in actual possession of the land for more than one year prior thereto, and that therefore the conveyance was champertous.

Plaintiff in error contends: First, that the restrictions of section 16 of the Supplemental Treaty do not follow the land into the hands of the heirs of a deceased allottee; second, that, though the statute might have originally been subject to such construction, the facts with reference to the opinions of lawyers and decisions of courts, as set forth in the agreement above quoted, establish a rule of property which would require this court to hold that the lands were not subject to the restrictions in the hands of the

heirs; third, that the sale to Johnston was champertous, and that he cannot maintain the action upon that reason.

[1] The portion of the Supplemental Agreement between the United States and the Choctaw and Chickasaw Indians, approved July 1, 1912 (chapter 1362, 32 Stat. 641), which are material to the decision in this case, are contained in sections 11 and 16 both inclusive, which are as follows:

Section 11: "There shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw Nations; to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section."

Section 12: "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

Section 13: "The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Section 14: "When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under the rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribe."

Section 15: "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

Section 16: "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

Section 12 relates solely to the homestead, and, under its provisions, the homestead was inalienable during the lifetime of the allottee, not exceeding 21 years, but, upon the death of the allottee, could be alienated by the heirs, whether the 21 years had elapsed or not. This is the plain reading of the statute, and it was so held in *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 839. Section 16 is not so clear. In the first place it is provided not that the land shall be *inalienable* during a certain period, but that it shall be *alienable* after the issuance of patent, "one-fourth in acreage in one year, one-fourth in acreage in three years and the balance in five years." But, notwithstanding the difference in language, the meaning is the same. The statement that land *shall be alienable* after one, three, and five years is equivalent to saying that it could not be alienated before the expiration of said periods of time.

In the case of *Thirty Thousand Land Suits*, *In re Lands of the Five Civilized Tribes*, 199 Fed. 811, Judge Campbell, of the Eastern District of Oklahoma, in an opinion which bears the evidence of careful consideration, held that the restrictions on alienation of one, three, and five years ran with the land, and affected it in the hands of the heirs, as well as of the original allottee, and prohibited alienation by the allottee or his heirs until the expiration of the period mentioned. In that case Judge Campbell analyzed the opinion of Mr. Justice Hughes in the case of *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 495, 56 L. Ed. 839, and came to the conclusion that, at the time of rendering that decision, "it did not then occur to the court that the one, three, and five year restriction attached to the land in the hands of the heirs, as well as in the hands of the allottee." He bases this conclusion on this view on the effect of the opinion of the Supreme Court upon the fact that it referred to the restriction as contained in the proviso of section 16. It is possible that his analysis of the

decision is correct, but a reading of the entire opinion leaves a different impression upon the writer. It will be noted that Judge Campbell was combating the theory advanced that *Mullen v. United States* decided that the restrictions were personal to the allottee. What is said in that opinion with reference to section 16 is said by way of inducement, and leading up to the question of whether or not allotments made under the terms of section 22 of the Supplemental Agreement could be alienated by the heirs of a deceased Indian. The court said: "It will be observed that the homestead lands are made inalienable 'during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment.' The period of restriction is thus definitely limited, and the clear implication is that, when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the 21 years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon the alienation by the heirs of a deceased allottee. And the reason may be found in the fact that each member of the tribes, each minor child as well as each adult, duly enrolled as required, was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16, which relates to the additional portion of the allotment, or the so-called 'surplus' lands, contains a restriction upon the alienation not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively." Proceeding, the court considers the question of whether or not there are any restrictions upon land allotted as provided in section 20 of the Supplemental Agreement. The court refers to the opinion of the Assistant Attorney General for the Interior Department, Van Deventer (now of the Supreme Court), in which he held that under the Creek treaties it was not necessary that a homestead be designated by the land allotted by the heirs of a deceased member of the tribe, and then proceeds: "We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segre-



gation of homestead and surplus lands, respectively. Whatever the policy of such a distinction, which gives a greater freedom for the disposition by heirs of homestead land than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion, or authority, for creating a division of the land so as to impose a restriction upon a part of them."

It will be observed, upon a reading of the opinion, that the question involved was whether the heirs to whom land had been allotted under the provisions of section 22 could sell at all. The question was not presented as to whether they could sell for a particular consideration, but could they sell, and the court, in effect, said that, in a case where lands were taken under the provision of section 16, a different case would have been presented. They did not attempt to limit it to the question of price. The opinion does not say that if the heirs had attempted to sell under the provisions of section 16, that it would have been incumbent upon the purchaser that it pay the appraised value. Nothing of that sort is contained in the opinion, and it is believed that the proper interpretation of the language of the court is that a restriction as to time applied to land taken as surplus allotment under the provisions of section 16. Of course, the language of the court with reference to section 16 was merely obiter, but obiter of the Supreme Court of the United States upon a question of which it has final jurisdiction, in a case which had been so ably argued as the Mullen Case, at a time when the court had been considering a number of similar questions, cannot be disregarded by this court.

In the case of *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525, it was held, affirming the Indian Territory Court of Appeals (7 Ind. T. 711, 104 S. W. 942), that, under the act of Congress of March 2, 1895 (28 Stat. 907, c. 188) which provided that the allotments of the Quapaws should be inalienable for a period of 25 years from and after the date of patents, this restriction ran with the land, and prevented the heirs, as well as the immediate allottee, from conveying within the prescribed period. It was this decision that Judge Campbell relied upon in case *In re Lands of the Five Civilized Tribes* (D. C.) 199 Fed. 811.

In the case of *United States v. Aaron*, decided by the Circuit Court of the Western District of Oklahoma, 183 Fed. 347, it was held that the provisions of Act June 28, 1906, c. 3572, 34 Stat. 539, with reference to the land of the Osage Tribe of Indians, that they shall be inalienable until otherwise provided by act of Congress was a restriction running with the land and against alienation,

even after the land had descended to the heirs of the allottee.

[2] It is with regret that the conclusion is arrived at that the surplus lands were not alienable by the heirs before the expiration of one, three, and five years. The doctrine of the rule of property cannot avail the defendant. No rule of property can be built up in the face of the statute, where there is a governmental policy involved. The question involved here is not merely a proprietary question between individuals, but there is a governmental policy involved. *Heckman v. U. S.*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. It would not be proper to pass over this question of the effect of the rule of property upon the rights of the parties without calling attention to an erroneous statement of fact in the agreement. The agreement refers to the case of *Hancock v. Mutual Trust Co.*, 24 Okl. 391, 108 Pac. 566, as holding that lands such as are involved here could be alienated by the heirs before the expiration of the one, three, and five year period. The question involved in *Hancock v. Mutual Trust Co.* was where lands allotted to the heirs of a member of a tribe who had died before selecting his allotment, as provided by section 22 of the Supplemental Treaty (32 Stat. 641), could be alienated. It was held that they could, and that view was upheld in the case of *Mullen v. United States*, 224 U. S. 443, 32 Sup. Ct. 495, 56 L. Ed. 834.

[3] The remaining question is as to whether the plaintiff is prevented by the rule against champerty from maintaining this action. The cases of *Huston v. Scott*, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721, *Powers v. Van Dyke*, 27 Okl. 27, 111 Pac. 939, 36 L. R. A. (N. S.) 96, and *Martin v. Cox*, 31 Okl. 543, 122 Pac. 511, establish the rule that a conveyance of real estate in the adverse possession of another, where the grantor has not been in possession receiving the rents and profits within one year, is void as against the person in possession, though good as between the parties. These cases were followed by Judge Campbell, of the Eastern district of Oklahoma, in the case of *Bell v. Cook* (C. C.) 192 Fed. 597, and in *Miller v. Fryer*, 35 Okl. 145, 128 Pac. 713, the rule was applied to a case where the grantor was an allottee whose restrictions had not been removed at the time he placed the adverse holder in possession, and where the adverse holder's deed was absolutely void, because the restrictions had not been removed, and this rule was followed in *Ruby v. Nunn*, 37 Okl. 389, 132 Pac. 128.

Those cases, however, are not decisive of this one. In this case the suit was first brought in the name of the grantee, but the petition was afterwards amended, and the allottee, Wolfe, was made a party plaintiff. No question of surprise or lack of time to prepare to meet the new party is raised.

The question involved here is whether the suit can be maintained in the name of the allottee grantor, and whether it was proper to permit him to be joined as plaintiff after the suit was brought. The suit can be brought in the name of the grantor in all the states where the champertous deed is good between the parties. No authorities to the contrary have been found.

In the case of *Thompson v. Richards*, 19 Ga. 504, Mr. Justice Lumpkin said: "It is straining pretty hard, perhaps, to adopt the act of 32 Henry VIII into a new country like this has been; and we feel no disposition to relax the rule which allows the grantee, whose deed is made void by that statute, to use the name of his grantor to recover the premises."

In the case of *Pearson v. King*, 99 Ala. 125, 10 South. 919, it was held that, though such conveyances were void, the grantee could bring suit in the name of the grantor, and the grantor could not prevent the use of his name for such a purpose. The authorities are reviewed at considerable length in this case. And to the same effect is *Coogler v. Rogers*, 25 Fla. 853, 7 South. 391; *Edwards v. Parkhurst*, 21 Vt. 473; *Hamilton v. Wright*, 37 N. Y. 502; *Steeple v. Downing*, 60 Ind. 478. See, also, *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258. In North Carolina the statute specially permits the bringing of an action in the name of the grantor.

[4] Neither was it error to permit the grantor, Wolfe, to be made a party. An answer was filed after he was made a party, and no one was injured by the fact that he was made a plaintiff by amendment rather than at the beginning of the action. In the case of *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75, a proceeding similar to that adopted in this case was followed, and it was held that the grantor could be made a party plaintiff by adding a new count to the declaration after suit was brought. In the course of the opinion the court said: "Formerly the plaintiff, whose deed was void for champerty, might add a count in the name of his grantor, in order to have the benefit of the title he had bought. *Wilson v. Nance*, 11 Humph. (Tenn.) 190. The same practice was sanctioned by this court, under the Code, during the last term at Knoxville. If there were no privity between the plaintiff and the new party, the additional count would be treated, for all purposes of defense, as the commencement of a new suit as of the date of its filing. *Corder v. Dollin*, 4 Baxt. (Tenn.) 240. If there were privity, as in the case of grantor and grantee, where the deed was void for champerty, it was held, under the old practice, that the amendment would relate back to the commencement of the suit, and place the rights of the parties on the

same ground as if it had been originally incorporated in the writ and declaration. *Nance v. Thompson*, 1 Sneed (Tenn.) 321. The reason was, as stated in that case, that no new right or title is set up. 'It is rather' says the judge, 'a different statement of the same cause of action or right of recovery, adapted to a different state of proof. The plaintiff merely seeks, in aid of his right, to use the name of his vendor, as he has the right to do, and to draw to the equitable title in himself the mere dry legal title remaining in the vendor with which it was attempted ineffectually to vest him.'"

It has been held several times that it was not error to join the grantor and grantee in the action in order to take advantage of every phase of the evidence. *Pitts v. McWhorter*, 3 Ga. 5, 46 Am. Dec. 405; *Jackson v. Leggett*, 7 Wend. (N. Y.) 377; *Livingston v. Proseus*, 2 Hill (N. Y.) 526; *Williams v. Jackson*, 5 Johns. (N. Y.) 489.

The judgment of the trial court should be affirmed.

#### KINGFISHER COUNTY v. LINDSEY. (No. 4107.)

(Supreme Court of Oklahoma. April 7, 1914.)

Error from District Court, Kingfisher County; James W. Steen, Judge.

Action between Kingfisher County and J. A. Lindsey, etc. From the judgment, the County brings error. Dismissed.

F. P. Whistler, County Atty., of Muskogee, and R. F. Shutler and W. B. Blair, both of Kingfisher, for plaintiff in error. P. S. Nagle, of Kingfisher, and Gray & McVay, of Oklahoma City, for defendant in error.

**PER CURIAM.** This case involves the same state of facts with reference to the right to appeal as the case of *County of Kingfisher v. John M. Graham*, 139 Pac. 1149, which has just been decided, and, for the reasons stated in that opinion, the appeal is dismissed.

#### LOCHE v. STATE. (No. A-1987.)

(Criminal Court of Appeals of Oklahoma.  
May 2, 1914.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1130\*)—APPEAL—BRIEF.

When an appeal is taken from the judgment of a trial court to this court, it is the duty of counsel to brief the assignments of error relied upon for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.\*]

#### 2. CRIMINAL LAW (§ 1132\*)—APPEAL—ORAL ARGUMENT.

All cases are assigned in this court for oral argument, and when counsel, for any sufficient reason, are unable to file briefs, they are entitled to appear and orally argue the assignments of error relied upon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2980-2983; Dec. Dig. § 1132.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. CRIMINAL LAW (§ 1182\*)—APPEAL—MOTION TO AFFIRM.**

When no appearance is made for oral argument, and no briefs are filed, a motion to affirm for failure to prosecute should be sustained, and the judgment of the trial court affirmed, in the absence of error depriving the accused of substantial rights under the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3208-3214; Dec. Dig. § 1182.\*]

Appeal from District Court, Garvin County; R. McMillan, Judge.

J. F. Loche was convicted of embezzlement, and appeals. Affirmed.

Blanton & Andrews, of Paul's Valley, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. [1-3] The plaintiff in error, J. F. Loche, was convicted at the September, 1912, term of the district court of Garvin county on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a period of one year. The appeal was filed on the 3d day of April, 1913, and the cause duly assigned for oral argument at the March term of this court. No appearance was made for oral argument, and no briefs have been filed on behalf of plaintiff in error. We have examined the transcript for fundamental error, and fail to find that the accused was deprived of any substantial right in the trial below.

The Attorney General has interposed a motion to affirm this judgment for a failure to properly prosecute the same. We are of opinion that the motion should be sustained; and it is so ordered. No fundamental error appearing, the judgment of the trial court is affirmed.

Mandate ordered forthwith.

DOYLE and FURMAN, JJ., concur.

**HILBRETH v. STATE. (No. A-2189.)**

(Criminal Court of Appeals of Oklahoma.

April 25, 1914.)

Appeal from County Court, McCurtain County; E. E. Cochran, Judge.

Robert Hilbreth was convicted of a violation of the prohibitory law, and appeals. Dismissed.

Jeff. D. McLendon, of Idabel, for plaintiff in error.

PER CURIAM. Robert Hilbreth, plaintiff in error, was convicted in the county court of McCurtain county of a violation of the prohibitory law, and in accordance with the verdict of the jury, he was on the 18th day of July, 1913, sentenced to be confined in the county jail for a term of 30 days and to pay a fine of \$50. To reverse this judgment an appeal was attempted to be taken by filing in this court on February 16, 1914, a petition in error with case-made.

On March 10, 1914, the Attorney General filed a motion to dismiss the appeal, for the reason that the same was not filed in this court until long after the expiration of the time allowed by law in which an appeal could be taken in a misdemeanor case. It appearing from the record that the petition in error and case-made were not filed in this court until three or four months after the limit fixed by law for taking an appeal had expired, the motion to dismiss is well taken.

The purported appeal herein is therefore dismissed, and the cause remanded.

**THOMPSON v. STATE. (No. A-2094.)**

(Criminal Court of Appeals of Oklahoma.

April 25, 1914.)

Appeal from County Court, McIntosh County; Ben D. Gross, Judge.

Phineas S. Thompson was convicted of violating the prohibitory law, and appeals. Dismissed.

Collier & Tully, of Eufaula, for plaintiff in error.

PER CURIAM. Phineas S. Thompson, plaintiff in error, was convicted in the county court of McIntosh county of a violation of the prohibition law, and in accordance with the verdict of the jury he was on the 25th day of July, 1913, sentenced to be confined in the county jail for a term of 30 days and to pay a fine of \$75. To reverse this judgment an appeal was attempted to be taken by filing in this court on September 24, 1913, a petition in error with case-made.

On October 2, 1913, the Attorney General filed a motion to dismiss the appeal, for the reason that the same was not filed in this court within 60 days from the rendition of the judgment. It appearing from the record that the statutory time had not been extended by order of the court, and it appearing further that the appeal was lodged in this court one day too late, the motion to dismiss must be sustained.

The purported appeal is therefore dismissed, and the cause remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**PEERY v. STATE.** (No. A-2039.)  
(Criminal Court of Appeals of Oklahoma.  
May 11, 1914.)

Appeal from County Court, Grady County;  
N. M. Williams, Judge.

Oscar Peery was convicted of a misdemeanor,  
and appeals. Appeal dismissed.

Bond, Melton & Melton, of Chickasha, for  
plaintiff in error.

**PER CURIAM.** Plaintiff in error was tried  
and convicted upon an information, which charged  
that he did willfully and unlawfully point at  
and towards one A. B. Hoblett a certain deadly  
weapon, to wit, a shotgun. On April 28,  
1913, judgment was entered, and he was sentenced  
to be confined in the county jail for a  
term of three months and to pay a fine of \$50.  
To reverse this judgment an appeal was perfected.  
Plaintiff in error has filed a motion to dismiss  
his appeal herein.

The motion to dismiss is sustained.

**Ex parte BENITES.** (No. 2117.)

(Supreme Court of Nevada. April 28, 1914.)

**1. SODOMY (§ 5\*)—OFFENSES—INDICTMENT.**

Rev. Laws, § 6459, punishing the "infamous  
crime against nature" either with man or  
beast, includes all unnatural acts in whatever  
form or by whatever means they are perpetrated,  
and an indictment charging that accused  
did unlawfully commit "the infamous crime  
against nature" with a man, stating the manner  
of the act, was sufficient.

[Ed. Note.—For other cases, see Sodomy, Cent.  
Dig. § 6; Dec. Dig. § 5.\*]

**2. SODOMY (§ 1\*)—STATUTES—CONSTRUCTION.**

Rev. Laws, § 6459, punishing the infamous  
crime against nature, must be construed according  
to the fair import of its terms, so that its  
objects may be effective.

[Ed. Note.—For other cases, see Sodomy, Cent.  
Dig. §§ 1, 2; Dec. Dig. § 1.\*]

In the matter of the application of Frank  
Benites for a writ of habeas corpus. Writ  
dismissed.

Thomas E. Kepner, of Reno, for petitioner.  
George B. Thatcher, Atty. Gen., E. T. Patrick,  
Deputy Atty. Gen., and William Woodburn,  
Jr., Dist. Atty., of Reno, for respondent.

**MCCARRAN, J.** This is an original proceeding  
in habeas corpus. The petitioner,  
Frank Benites, as is related in the petition,  
is now held by A. A. Burke, sheriff of Washoe  
county, by reason of an information filed  
against petitioner by the district attorney of  
Washoe county, which information is as follows:  
"William Woodburn, Jr., district attorney in and  
for the county of Washoe, in the name and by  
the authority of the state of Nevada, informs  
the above-entitled court that Frank Benites,  
the defendant above named, has committed a  
felony, to wit, the infamous crime against nature,  
in the following manner: That said defendant,  
on the 3d day of March, A. D. 1914, or thereabouts,  
and before the filing of this information, at and  
within the county of Washoe, state of Nevada,  
did then and there willfully, unlawfully, and  
feloniously commit the infamous crime against  
nature with and upon one, \* \* \*

a male human being, then and there being,  
by then and there inserting and placing his  
penis in the mouth of the said. \* \* \* All  
of which is contrary to the form of the statute  
in such case made and provided, and against  
the peace and dignity of the state of Nevada."

It is the contention of counsel for petitioner  
that the information in this case fails to state  
facts sufficient to constitute a public offense  
under the statutes of Nevada. The statute  
applicable to this offense, and the only statute  
in this state that has any bearing upon this  
offense, is as follows: "The infamous crime  
against nature, either with man or beast, shall  
subject the offender to be punished by imprisonment  
in the state prison for a term not less than five  
years, and which may extend to life." Section  
6459, Revised Laws.

It is the contention of petitioner that the  
infamous crime against nature is synonymous  
with sodomy as that crime was known and  
construed under the common law. In our  
judgment it is scarcely necessary to determine  
whether or not the term "infamous crime against  
nature" is of similar import or significance to  
the crime which, under the common law, was  
designated sodomy. In 1 Hawkins' Pleas of the  
Crown, p. 357, speaking of the crime of sodomy,  
it is stated: "All unnatural carnal copulation,  
whether with man or beast, seems to come under  
the notion of sodomy, which was felony by the  
ancient common law, and punished according to  
some authors with burning, according to others  
with burning alive."

It must be observed in this respect that  
even in the time in which this authority wrote  
all unnatural carnal copulations were embraced  
within the term and generally understood to be  
sodomy.

[1] It is unnecessary in our judgment to  
determine whether or not our Legislature, in  
enacting the section above quoted, had in mind  
the common-law crime of sodomy. It is sufficient,  
we believe, to say that the infamous crime  
against nature as mentioned by our statute  
should be no less in its scope than that which  
was understood to be within the crime of sodomy  
as designated by Hawkins in his Pleas of the  
Crown, wherein he states, "All unnatural carnal  
copulations seem to come under the notion of  
sodomy."

If our statute specifically mentioned or  
designated the crime sought to be reached as  
sodomy, perhaps we would be bound by the  
understanding of the crime as described by that  
word, or as that crime was construed in the  
earlier decisions. It must be observed, however,  
that the statute did not limit or define the  
crime which it sought to punish by designating  
it as sodomy, but rather sought to cover the  
entire field of unnatural acts of carnal copulation.  
In other words, it is our judgment that section  
6459 of our Revised Laws seeks to define and  
punish acts of unnatural copulation in whatsoever  
form those

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

acts may be perpetrated, and without regard to the means or manner of perpetration.

Nature has provided in the male and the female the organs for the reproduction of the species. Any copulation by male with male, or by male with female, other than that copulation by and through the organs provided by nature for the reproduction of the species, is an act against the order of nature, and hence must of necessity be a crime against nature, inasmuch as it is an act against nature's law.

[2] Counsel for petitioner refers to many decisions setting forth a view contrary to our reasoning in this particular. It is true that writers upon the common law, and common-law courts generally, hold that, to constitute sodomy, the act must be in that part where sodomy is usually committed; and were we limited by the words of our statute to the crime of sodomy, as it was generally understood in the common-law courts, it is doubtful as to whether or not we could construe it as embracing any other acts than those contemplated by the common-law authorities. But our statute must be construed according to the fair import of its terms, and to the end that its objects may be effected, and, with this in view, it is our judgment that it is not unreasonable to assume that all unnatural acts of carnal copulation between man with man or man with woman, where a penetration is effected into any opening of the body other than those provided by nature for the reproduction of the species, are sufficiently contemplated and embraced within the term the "infamous crime against nature" as set forth by our statute.

The method by which the act is alleged to have been performed, as set forth in the information in this case, is as much an act against nature and against the laws of nature as was the act generally conceded to be sodomy by the common-law writers and common-law courts.

As was said in the case of *Honselman v. People*, 168 Ill. 175, 48 N. E. 304: "It is as much against nature, in the sense of being unnatural and against the order of nature, as sodomy or any bestial or unnatural copulation that can be conceived."

The Supreme Court of South Dakota, in the case of *State v. Whitmarsh*, 26 S. D. 426, 128 N. W. 580, in construing a statute somewhat similar to that of ours, said: "It would be an insult to the Legislature which enacted our statute to hold that from the words of our statute it appears it intended to allow the most heinous form of the crime against nature to go unpunished simply because it was an unusual form of such crime."

In the case of *Herring v. State*, 119 Ga. 706, 46 S. E. 816, the Supreme Court said: "After much reflection we are satisfied that, if the baser form of the abominable and disgusting crime against nature, i. e., by the

mouth, had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy. And no satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute, and the greater excluded, when both are committed in like unnatural manner, and when either might well be spoken of and understood as being 'the abominable crime not fit to be named among Christians.'"

Without commenting upon the authorities relied upon by counsel for petitioner, we rather concur in the reasoning and rule as set forth in the case of *State v. Whitmarsh*, supra, and as asserted by the Supreme Court of the state of Oregon in the case of *State v. Start*, 65 Or. 178, 132 Pac. 512, 46 L. R. A. (N. S.) 266.

In our judgment the information sufficiently charges a crime under the statute wherein the crime against nature is made a felony. It follows that the writ should not be perpetuated, but should be dismissed. It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

#### HEWITT v. ANDREWS et al.

(Supreme Court of Oregon. March 31, 1914.)

##### 1. CONTRACTS (§ 97\*)—FRAUD—RATIFICATION.

One defrauded must act promptly and at once restore or offer to return the property received, and any action in procuring an extension of the agreement, out of which some unjust advantage is undertaken to be obtained, is a ratification of the original contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 442-446; Dec. Dig. § 97.\*]

##### 2. BILLS AND NOTES (§ 491\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note, testimony that the note has been assigned to a bank which is not a party to the action is rebutted by the production of the note in evidence by plaintiff, and will not prevent a recovery by plaintiff.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1643-1648; Dec. Dig. § 491.\*]

##### 3. BILLS AND NOTES (§ 519\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note, a defense that defendant paid a certain sum to plaintiff for gasoline which plaintiff failed to deliver is not sustained by evidence that defendant paid for a certain quantity of oil, without any statement as to the price paid.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1802; Dec. Dig. § 519.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by L. P. Hewitt against Crayton S. Andrews and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action by L. P. Hewitt against Crayton S. Andrews and Lillie M. Andrews

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to recover on a promissory note executed by the defendants December 28, 1911, for \$350 to W. H. Markell and alleged to have been assigned by him to the plaintiff. The answer admitted the execution of the note, but denied that it had been assigned. For further defenses it is averred, in substance, that on March 28, 1910, W. H. Markell sold an automobile to the defendant Crayton S. Andrews for \$550, falsely representing that the machine was in good condition and capable of being run a long distance without repairs; that Andrews, relying upon such representations and ignorant of the true condition of the car, was induced to purchase it agreeing to pay the sum stated in six months. The defects in the vehicle are stated, and the sums of money expended in attempting to repair it are set forth, and it is alleged that the automobile was then worthless. For a further defense it is averred in effect that the note sued on was executed without consideration, in that it was given to evidence a part payment on the car. Another defense is that on March 28, 1910, in consideration of \$1.80 Andrews purchased ten gallons of gasoline from Markell, who agreed to deliver it but had failed to do so or to repay that sum of money though demand therefor had been made. The reply denied the allegations of new matter in the answer, and, the cause having been tried without a jury, findings of fact and of law were made according to plaintiff's theory of the case, and, a judgment having been rendered in accordance therewith, the defendants appeal.

W. O. Winslow, of Salem (A. W. Andrews and C. J. Crosby, both of Portland, on the brief), for appellants. L. P. Hewitt, of Portland, for respondent.

MOORE, J. (after stating the facts as above). No bill of exceptions was settled or allowed, but a transcript of all the testimony given at the trial has been brought up, an inspection of which discloses that no objection was made or exception taken to any action of the court now assigned as erroneous. It is insisted that no evidence was produced tending to show that plaintiff was the owner or holder of the note; that the testimony conclusively establishes the fact that the defendants were entitled to a credit of \$1.80 for gasoline purchased from Markell; and that findings to the contrary are not based on any evidence. It is also asserted that the defendants were not permitted to introduce sufficient testimony to substantiate their defense.

The transcript shows that W. H. Markell, as a witness having identified the note sued upon, was asked, "Is that your signature on the back of it?" and replied: "Yes, sir; I assigned it to the bank. I wanted to use the money you know. Q. What have you done with the note? A. I put it in the bank

at that time." The court thereupon, addressing plaintiff's counsel, said: "I will hear what the other side has to say to this."

C. S. Andrews, one of the defendants, referring to the note sued upon, testified that it was executed in renewal of an old note given six months prior for an automobile. The witness then described the condition of the machine, saying that he had expended \$97.00 in trying to repair it. He was then asked, "What about this oil you speak of?" The question probably related to the gasoline mentioned in the answer, for no statements had been made by Andrews in his testimony as to any oil. In answer to the inquiry, the witness said: "Mr. Markell agreed to fill the oil tank, and he went off to California the next morning, and didn't fill it. I paid him for ten gallons of oil, in cash."

E. Gould, who had repaired the automobile referred to, testified as to its condition, and, referring to its value, said: "Well, if I had the car for sale, and a man offered me cash for it, I would be tempted to take \$250 for the car." Gould having given further testimony as to the condition of the automobile, the defendant's counsel remarked that the witness might then be cross-examined, whereupon the court stated: "Don't take up any more time with this matter. My mind is firmly made up in this matter. This machine was bought, the price agreed upon, and a promissory note given. The note becomes due, the maker goes back, and he renews the note after he had had the machine in his possession some eight or nine months. Now, when they come in here with this new note and try to collect it, then you bring up this defense of false representations." Addressing the plaintiff's counsel, the court remarked further: "Prepare your findings."

[1] The conclusion reached upon the ultimate facts is certainly correct. If a party has been defrauded by another, he must act promptly and at once restore or offer to return the property which he has received. *Vaughn v. Smith*, 34 Or. 54, 55 Pac. 99; *Sievers v. Brown*, 38 Or. 218, 58 Pac. 170; *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426; *Scott v. Walton*, 32 Or. 460, 52 Pac. 180; *Waymire v. Shipley*, 52 Or. 464, 87 Pac. 807; *Elgin v. Snyder*, 60 Or. 297, 118 Pac. 280. After the discovery of a fraud, if the party affected thereby does anything in procuring an extension of a performance of the terms of the agreement out of which some unjust advantage is undertaken to be obtained, his action in such respect constitutes a ratification of the original contract. *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54; *Doherty v. Bell*, 55 Ind. 205.

[2] It would appear from the testimony given by Markell that the note sued upon had been assigned to a bank. This manifest conclusion was evidently rebutted by the fact that the negotiable instrument was received in evidence and it has been brought up with

the transcript. There can be no doubt that the plaintiff was the holder of the note at the time of the trial, and the defendants need have no fear that another action will be instituted on the written obligation.

[3] The testimony fails to show what sum the defendant Crayton S. Andrews paid Markell for the oil, so that the proof in this respect is insufficient to establish the averment of the answer that the substance purchased was gasoline and the amount paid therefor was \$1.80.

No objections having been made or exceptions taken to any action of the court, we conclude from an examination of the entire evidence given that the judgment is proper and should be affirmed.

. It is therefore so ordered.

BEAN, BURNETT, and RAMSEY, JJ., concur.

# MERRILL v. MISSOURI BRIDGE & IRON CO. et al.

(Supreme Court of Oregon. March 31, 1914.)

## 1. TRIAL (§ 168\*)—TAKING QUESTIONS FROM JURY—SUFFICIENCY OF EVIDENCE.

Where there is no conflict in the evidence, and no dispute as to the material facts, the question is for the court, and it should direct a verdict in accordance with the undisputed evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.\*]

## 2. APPEAL AND ERROR (§ 866\*) — REVIEW — QUESTIONS OF FACT—DIRECTION OF VERDICT.

A motion for an instructed verdict for defendant, who demands no affirmative relief, presents the same question on appeal as a motion for a judgment of nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.\*]

## 3. TRIAL (§ 159\*)—TAKING QUESTIONS FROM JURY—NONSUIT—SUFFICIENCY OF EVIDENCE.

A judgment of nonsuit is properly granted when the plaintiff fails to prove a cause of action sufficient to be submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 359-367; Dec. Dig. § 159.\*]

## 4. APPEAL AND ERROR (§ 1001\*) — REVIEW — QUESTIONS OF FACT—CONSTITUTIONAL PROVISION.

Within Const. art. 7, § 3, providing that no fact tried by a jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, evidence to support the verdict must be legal evidence and must tend to prove every material fact as to which the prevailing party has the burden of proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

## 5. EVIDENCE (§ 592\*) — WEIGHT AND SUFFICIENCY—EVIDENCE OF LOSING PARTY.

In determining the sufficiency of evidence to support a verdict for plaintiff, any evidence produced by the defendant, tending to make out plaintiff's case, must be considered with that offered by plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2429; Dec. Dig. § 592.\*]

## 6. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a lime and gypsum company and an independent contractor for death of an employé of the contractor, evidence that the employé's fingers were crushed by a steel beam, which decedent, as assistant foreman, was handling with the aid of a sufficient force of men for the purpose, is insufficient to show negligence of either defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## 7. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a lime and gypsum company and an independent contractor for death of an employé of the contractor, evidence that the general foreman of the contractor took the decedent to the office of the company and directed a person, not in the employ of either defendant, to dress the crushed fingers of the decedent and put peroxide on them, while the foreman went for a team to take decedent to a doctor for treatment, and that, in the absence of the foreman, the third person, after dressing the fingers and putting on peroxide, took from the shelf in the office a bottle supposed to contain whisky, but in fact containing poison, and gave it to the decedent, causing his death, is insufficient to show negligence of either defendant causing the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## 8. DEATH (§§ 14, 17\*)—ACTIONS FOR CAUSING—GROUNDS—NEGLIGENCE.

Defendants, in an action for causing death, are not liable unless they were guilty of negligence in relation thereto, and such negligence was the proximate cause of death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 16, 19, 21; Dec. Dig. §§ 14, 17.\*]

## 9. DEATH (§ 33\*)—ACTIONS FOR CAUSING—GROUNDS—NEGLIGENCE.

A lime and gypsum company, which had employed an independent contractor, was not negligent in permitting an employé of the latter, whose fingers had been crushed, to be taken for treatment to the company's office, where there was a supply of medical appliances belonging to the company and a bottle of poison belonging to the president of the company, which a third person, through mistake, administered to the injured employé, causing his death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 49; Dec. Dig. § 33.\*]

## 10. MASTER AND SERVANT (§ 92\*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

A steel construction company was not negligent, rendering it liable for death of an injured employé, in failing to have a physician at a point where it had 12 employés engaged, and where there was no town; the company having arranged for the services of a physician at a town 8 miles distant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Elizabeth F. Merrill, as administratrix of the estate of V. E. Merrill, against the Missouri Bridge & Iron Company and another. From a judgment for plaintiff for \$2,500, defendants appeal. Reversed and remanded, with instructions.

A. L. Clark, of Portland (Wilbur & Spencer, of Portland, on the brief), for appellant Missouri Bridge & Iron Co. R. C. Nelson, of Portland (Beach, Simon & Nelson, of Portland, on the brief), for appellant Pacific Lime & Gypsum Co. J. G. Arnold, of Portland, for respondent.

RAMSEY, J. On September 23, 1912, the defendant the Pacific Lime & Gypsum Company was having constructed for itself a large steel building at a point about eight miles from Huntington, in this state. The place where the building was erected is called Gypsum, but at the time that the accident occurred, referred to infra, there was no town or hamlet there, nor were there any houses excepting those used in connection with the erection of the said steel building.

The Pacific Lime & Gypsum Company had let the contract for the construction of said steel building to the defendant the Missouri Bridge & Iron Company, and the last-named company was an independent contractor for the construction of said building, and said company was on September 23, 1912, engaged as an independent contractor in the construction of said building for the Pacific Lime & Gypsum Company at said place.

The decedent, V. E. Merrill, was on said 23d day of September, 1912, in the employ of the Missouri Bridge & Iron Company at Gypsum in the construction of said building. He was not in the employ of the Pacific Lime & Gypsum Company, and he was assistant to the foreman on said work. Ev. p. 42. At the time he was injured, he, with five or six other men, was engaged in rolling over a beam of steel. This beam was about 12 inches in diameter, and about 14 feet long, and it weighed about 400 pounds. A number of these beams had been unloaded by the railroad, and lay in a pile on the ground, and Merrill and his assistants were endeavoring to get one of these beams from said pile, and it became necessary to roll one of them over, and, in doing so, it caught Merrill's fingers between said beam that they were rolling over and another beam, and the backs of his fingers on one hand were mashed or bruised and the insides of them were cut. The injury was painful, and the wounds bled. At the time of this accident, the men, with Merrill, were working under him as assistant foreman.

A. P. Schloat was the foreman for the construction of said building, and, at the time of said accident, he was near where it occurred, and he decided to take Merrill to Huntington to have his hand dressed and treated by the company's physician, residing there; there being no physician nearer than Huntington. He took Merrill to a small office about 150 yards distant, and left him there, until he could obtain a conveyance to take him to the physician at Huntington. This office belonged to the Pacific Lime &

Gypsum Company, and it was used by that company as an office for its bookkeeper and other officers. The Missouri Bridge & Iron Company had no right in or to said office.

The Pacific Lime & Gypsum Company kept in said office, in a small box, nailed to the wall, what is called the "first aid to the injured kit," consisting of antiseptics, bandages, adhesive plasters, absorbent cotton, peroxide of hydrogen, and other antiseptics, including an antiseptic solution contained in a bottle. All of these articles, excepting said antiseptic solution belonged to the Pacific Lime & Gypsum Company. This bottle of solution was the individual property of William A. Baker, the president of said company, and it was left there by him. These articles were kept there by said last-named company for use when any of its employes should be hurt. The Missouri Bridge & Iron Company had no interest in any of said articles, and had no right to use them. However, that company's men, when hurt, had, in a few instances, been permitted to use said appliances.

Mr. Schloat obtained permission for doing so, and took Merrill to said office. Mr. T. H. Cosford was in the office, sitting at a table, and Mr. Schloat asked him if he would dress Merrill's fingers while Schloat got a team to take Merrill to Huntington to a physician. Mr. Schloat then left the office to get a team. Mr. Cosford told Mr. Schloat that he would dress Merrill's fingers and put peroxide on them, and he did so. He obtained warm water and washed the wounds, and, while he was doing so, Merrill complained of pain, and seemed faint, and Cosford suggested to him that a drink of whisky or brandy would strengthen him. Mrs. Stella Rizer, who was at that time in the office, seconded that suggestion, and Merrill himself said that it would probably do him good. Cosford then looked up at the shelf or box from which he had obtained bandages, and seeing a plain bottle, containing a liquid of the color of whisky, took it and removed the cork, and handed it to Merrill. Merrill took several swallows, handed the bottle back to Cosford, and the latter recorked it, and placed it back on the shelf, or in the box from which he had obtained it. In a few minutes Merrill said that the stuff that he had drunk was very peculiar tasting whisky. Cosford then obtained the bottle, uncorked it, and tasted of its contents, and immediately realized that what Merrill had drunk was not whisky. Mrs. Rizer also tasted of the stuff, and decided that it was not whisky. Mrs. Rizer procured some mustard and warm water, and also some olive oil. They gave Merrill a glass of the mustard and warm water, but he drank only a part of it. They then tried to get him to drink some olive oil as an emetic, but he refused to drink it, saying that he was all right, and that he felt no ill effect from what he had drunk. There was



no one in the office when Merrill's fingers were dressed, or when said liquid was given him, or when he drank the warm water with the mustard, and refused to drink the olive oil, but Merrill, Cosford, and Mrs. Rizer.

Mr. Schloat obtained a team and vehicle, and Merrill got into it, and was taken to Dr. G. S. Standard, at Huntington, for treatment, and he died in a few minutes after reaching the doctor. The evidence of the doctor introduced by the plaintiff is to the following effect: That he saw Merrill a few minutes before his death, and was present with him until his death; that after examining the dead body, and ascertaining all possible facts relating to his death, the doctor gave it as his opinion that his death was caused by his drinking part of the contents of a bottle of unknown antiseptic of a poisonous nature; that the symptoms preceding his death were those of poisoning; and that death occurred by paralysis of the nerves of respiration, and that he did not believe that the injured hand was any part of the factor of death.

The complaint alleges that the defendants carelessly and negligently failed to furnish a sufficient number of competent servants or proper appliances for the erection and removal of said steel beams, and as a result of the carelessness and negligence of said defendants, in their failure to furnish a sufficient number of competent servants or proper appliances, a large steel beam was dropped on the hand of V. E. Merrill, thereby badly bruising and cutting said hand and fingers. The complaint alleges also that A. P. Schloat, foreman of said Missouri Bridge & Iron Company, immediately after said injury, and at the request of the defendant the Missouri Bridge & Iron Company, by and through R. P. Garrett, its vice president, and in conformity with the express direction of the Pacific Lime & Gypsum Company, took V. E. Merrill to the office of said Pacific Lime & Gypsum Company, an office in which is kept certain salves and antiseptics for the purpose of giving immediate attention to accidents, and then turned over the said V. E. Merrill to one T. H. Cosford, agent of the defendants, and expressly requested the said T. H. Cosford to dress the injured hand aforesaid of said Merrill, and to attend to and care for him. That, while the said T. H. Cosford was treating and dressing the injured hand as requested by said defendants, the said T. H. Cosford, seeing that the said Merrill was becoming weak and faint, carelessly and negligently gave to the said Merrill a poisonous solution of antiseptic liquid, used as a disinfectant, and represented and stated to the said V. E. Merrill that it was whisky, the bottle in which the solution was contained having no label indicating that it contained poison, and thereby carelessly and negligently caused the said Merrill to drink a quantity of the same. The said liquid was of a very

poisonous nature, and thereby the defendants carelessly and negligently caused the death of said Merrill within about an hour after he drank the same, as aforesaid. The complaint alleges also that said T. H. Cosford was a careless and incompetent person to care for and attend to said Merrill, and that the defendants were guilty of negligence and carelessness in placing said Merrill in his care. The complaint alleges also that the defendants were guilty of negligence in not keeping a physician on or near the premises where the said Merrill was hurt, etc.

The answers of the defendants denied most of the material allegations of the complaint, and they allege, *inter alia*, assumption by Merrill of the risk of being hurt in handling said beams, and that said injury to his hand was the result of the negligence of Merrill and his fellow servants, etc.

The affirmative matter of the answers was denied by the replies. After all of the evidence was in, each of the defendants moved the court to instruct the jury to find a verdict for the defendants. These motions were denied, and the defendants ask that the judgment of the court below be reversed, and they assign the denial of said motions for an instructed verdict as error.

[1] 1. When there is no conflict in the evidence, and no dispute as to the material facts of the case, the question for decision is for the court, and, under such a state of facts, the court should direct the jury as to the particular verdict that they should find in accordance with the undisputed evidence. *Coffin v. Hutchinson*, 22 Or. 554, 30 Pac. 424; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Wolf v. City Railway Co.*, 45 Or. 446, 72 Pac. 329, 78 Pac. 668; and *Patty v. Salem Flouring Mills Co.*, 53 Or. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298.

In *Coffin v. Hutchinson*, *supra*, the court says: "The general rule of practice undoubtedly is that it is the province of the jury to weigh the effect of oral evidence, and to determine the credibility of the witnesses, and that the court cannot ordinarily interfere with that right. But this rule of practice cannot be permitted to interfere with another one equally as well settled, and that is, when there is no conflict in the evidence, no dispute as to the facts, there is nothing to submit to the jury, and the question is one of law to be decided by the court. In such cases, it is proper for the court to direct the verdict; and a verdict thus ordered will be sustained, if the law and facts disclosed by the evidence warrant it."

[2] 2. A motion for an instructed verdict for the defendant, where no affirmative relief is demanded by the defendant, presents the same question, upon appeal, as is presented by a motion for a judgment of nonsuit. *Huber v. Miller*, 41 Or. 103, 111, 68 Pac. 400.

[3] A judgment of nonsuit is properly

granted when the plaintiff fails to prove a cause sufficient to be submitted to a jury. See section 182, L. O. L.

[4] Section 3 of article 7 of the Constitution of this state provides that no fact that has been tried by a jury "shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Evidence to support a verdict must be legal evidence, and must tend to prove every material fact in issue, as to which the person in whose favor the verdict was rendered had the burden of proof. If there was no evidence tending to prove any one material fact, then there was no evidence to support the verdict. If, in any case, it was necessary for the plaintiff to prove several material facts in issue, and he proved all of them but one, and there was no evidence tending to prove that material fact, and a verdict and judgment were rendered in his favor, such verdict and judgment could be properly set aside, because, under such circumstances, the court can say affirmatively that there was no evidence to support them.

[5] The question for decision in this case is whether there was evidence produced at the trial, tending to prove every material fact at issue, as to which the plaintiff had the burden of proof. Evidence produced by the defendant, if any, tending to make out the plaintiff's case, must be considered with the testimony offered by the plaintiff.

[6] 3. The evidence as to the injury to the decedent's hand shows that there was a pile of steel beams lying on the ground where the railroad had unloaded them. The Missouri Bridge & Iron Company wanted one of these beams. They were about 14 feet long and 12 inches in diameter, and weighed about 400 pounds. Merrill, who was acting as assistant foreman in handling the beams, had five or six men to assist him in rolling over one of these beams. In rolling it over, the fingers of one of his hands were caught between the beams, and bruised or mashed on the back, and cut on the inside. The other men were working under his directions, and they were his fellow servants in said work. There were six or seven men rolling over this beam, and all that they did, up to the time that he was hurt, was to roll the beam over. Three of the men were skilled in such work. Mr. A. P. Schloat was a witness for the plaintiff. He was general foreman on the work, and he testified that the three skilled men and the others that Mr. Merrill had, assisting him in rolling this beam over, were enough men to handle the beam.

It must be borne in mind that all that they did was to turn it over. The evidence fails to show who was at fault, if any one, for the injury to Merrill's fingers. As Merrill was in charge of the men who assisted him to roll the beam over, and they had a sufficient force to handle the beam, it is evident that,

if any one was guilty of negligence, it was some of his fellow servants or himself. The plaintiff could not recover for negligence of his fellow servants. We find that there was no evidence tending to show negligence on the part of the Missouri Bridge & Iron Company, or the other defendant, causing the injury to Merrill's fingers.

The Pacific Lime & Gypsum Company had nothing to do with handling said beams. The other company was an independent contractor for the construction of the steel building. Merrill and the other men were working for the Missouri Bridge & Iron Company, and not for the Pacific Lime & Gypsum Company.

[7] 4. Mr. Schloat, foreman of the Missouri Bridge & Iron Company, immediately took Mr. Merrill to the office of the other company for the purpose of having his fingers bandaged. Ev. p. 30. Mr. Schloat, as a witness for the plaintiff, says that he took Mr. Merrill inside the office, and that Cosford was there, and he asked Cosford if he would dress Merrill's fingers while he got a team to take Merrill to the doctor at Huntington, and that Cosford answered that he would. Schloat then left the office and did not return until after Merrill had drunk the poison, as stated supra. When he returned, he had a team and conveyance to take Merrill to the doctor at Huntington, eight miles distant. He was taken to the doctor and died, as stated supra. Schloat was the only person that asked Cosford to do anything for Merrill, and all that he asked him to do was to dress his fingers and put some peroxide on them. He did not ask him to "treat" or care for him. He intended to take Merrill to the company's physician at Huntington for treatment, and all that he asked Cosford to do was to apply those simple external remedies so as to relieve Merrill of pain temporarily, until he should reach the doctor. Cosford had no authority from him to do anything excepting to dress Merrill's fingers and put peroxide on them, and, when he did that, he had done all that Schloat authorized him to do. He had no authority from Schloat to give him whisky or anything internally.

Cosford, as a witness for the plaintiff, testified that he went and got warm water and washed Merrill's fingers and dressed his wounds with bandages that were there. He says that Merrill complained of distress, and became faint when he washed and dressed his fingers, and that the witness suggested that a drink of whisky or brandy would strengthen him, and that Mrs. Rizor, who had come into the office, seconded his suggestion, and that Merrill himself said that he thought it would probably do him good. Cosford then looked up and saw a plain bottle containing a liquid of the color of whisky, took it down, removed the cork, and handed the bottle to Merrill, and the latter took

several swallows of it. Neither Cosford nor Merrill smelt of the fluid, or did anything to determine what it was, until after the latter had drunk of it. When Merrill said that it was a peculiar tasting whisky, Cosford examined it and realized at once that it was not whisky or brandy. It neither smelt nor tasted like whisky.

Mrs. Stella Rizor, who was present when Cosford gave the liquid to Merrill, was produced as a witness for the defendants. She kept a boarding house and boarded the men for a certain sum per week; but she was not in the employ of either of the defendants. She went to the office at that time to telephone some one at Huntington. The only phone at Gypsum was in that office. This witness was near the door of the office when Mr. Schloat took Mr. Merrill there. She says she suggested that Merrill's hand be tied up, and that Cosford obtained warm water and washed the injured hand. She says that Merrill got "kind of sick," and Cosford suggested that, if he had a good drink of whisky, it would be good for him, and that she said, "Yes." Cosford reached up to the shelf and got the bottle and handed it to Merrill, and the latter drank of it, as stated supra, supposing it to be whisky. She says that she supposed that it was whisky. Merrill said, as she relates it, that what he drank did not taste like "booze." She says that Cosford then took the bottle down and tasted it, and handed it to her, and she tasted it, and Cosford then inquired of her whether she had any mustard, and that she went and got some mustard and warm water. Mustard and warm water were given him, but he did not vomit. Afterwards she got olive oil to give him, but he refused to drink it. She says that she looked down his throat to see whether it was inflamed, but it was not red. She says that, in a short time, he talked with Mr. Schloat, and got into the "rig" and went to Huntington. She says that she had been in that office many times to telephone, but never saw any whisky there. She says that said bottle looked like whisky or brandy. She says that Mr. Cosford did not smell or taste of the contents of the bottle before he gave it to Merrill, and that Merrill did not smell it before drinking it. This witness says that she thought the bottle contained a little carbolic acid, and that it did not taste like whisky, and that she smelt carbolic acid in it. She says that, when Cosford suggested to Merrill that whisky would be good for him, Merrill assented thereto.

It appears from the evidence of Cosford and Mrs. Rizor that from the time that Schloat took Merrill to the office until after he had drunk the poisonous liquid, supposing it to be whisky, there was no person in the office but Merrill, Cosford, and Mrs. Rizor. It appears from the evidence of Cosford and Mrs. Rizor that Cosford was the person who suggested that a drink of whisky would be

good for Merrill, and that both Merrill and Mrs. Rizor assented to his suggestion, and that Cosford then reached up to the shelf or box and obtained said bottle, uncorked it, and gave it to Merrill, and he drank it, and that all this was done without any examination of the bottle by any one to ascertain whether it was whisky or not. Other evidence shows that there was no whisky or brandy kept there.

William A. Baker, president of the Pacific Lime & Gypsum Company, was a witness for the defendants, and testified that the said office was used for the bookkeeper, superintendent, the architect, and himself, but that the Missouri Bridge & Iron Company and its men had no right to use said office for any purpose. As to the bottle of fluid from which Merrill drank, he said that that belonged to him individually, and not to his company. He testified that this bottle contained an antiseptic solution, and that he had found it very effective, when applied locally on cuts, bruises, etc.

The evidence shows, without any conflict, that T. H. Cosford was not an employé of, or connected with, either of the defendants, and that he was an employé of the Bates Valve Bag Company, and had a contract with the Pacific Lime & Gypsum Company for installing some machinery in the steel building of that company, then in process of construction, and that on the day that Merrill drank said fluid at the office of the Pacific Lime & Gypsum Company, as stated supra, he was in said office, examining, for his company, some papers belonging to that company, and not in the employ of either of the defendants. He arrived there in a buggy from Huntington only a short time before Merrill was hurt.

Neither of the defendants had anything to do with giving said solution to Merrill, and none of the officers or employés knew anything about it until after it had been done. It was not done as a result of any instructions or authority given by any officer or employé of either company.

A. P. Schloat, who took Merrill to said office, was an employé of the Missouri Bridge & Iron Company; but he neither did nor said anything that can reasonably be claimed to have had a tendency to cause Cosford to give said solution to Merrill. All he did was to ask Cosford to put peroxide on his fingers and to dress them while he went and obtained a team to take Merrill to the doctor. What he said did not imply that Cosford was to treat him or give him internal remedies. Cosford alone is responsible for giving Merrill the poisonous solution. He was a stranger in that office, and no one had informed him that there was any whisky there; but he reached up and took the bottle containing the solution, uncorked it, and gave it to Merrill without having examined it or taking any precautions to ascertain what it was.

[8] The defendants are not liable for damages for the death of Mr. Merrill, unless they were guilty of negligence in relation thereto, and such negligence was the proximate cause of his death.

In volume 1, § 3, of *Shearman & Redfield on Negligence* (6th Ed.), actionable negligence is defined thus: "Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended damage to the latter."

The same authors, in section 25a of the same volume, say: "One is liable for all the injurious consequences naturally and approximately caused by his negligence."

The same authors, in section 29 of the same volume, state the rule thus: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have been thought reasonably possible to follow, if they had occurred to his mind."

The same authors, in section 32 of the same volume, say: "The connection between the defendant's negligence and the plaintiff's injury may be broken by an intervening cause. In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence, contributing thereto, in the slightest degree, produces the injury."

In *Bowers v. E. T. & W. N. C. R. Co.*, 144 N. C. 684, 57 S. E. 454, 12 L. R. A. (N. S.) 446, the Supreme Court of North Carolina says: "It seems from the authorities that there are two very essential elements in the doctrine of proximate cause: (1) It must appear that the injury was the natural or probable consequence of the negligent or wrongful act; (2) that it ought to have been foreseen in the light of attending circumstances."

In *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256, the court says: "But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Cleghorn v. Thompson*, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 404, the Supreme Court of Kansas says: "We may say, then, that negligence, to be actionable, must result in

damage to some one, which result, under all the circumstances might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act."

In *M. P. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399, the court says: "In cases of this character, where two distinct, successive causes, unrelated in operations, to some extent contribute to an injury, it is settled, when there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition or give rise to the occasion by which the injury was made possible."

In *Reddick v. General Chemical Co.*, 124 Ill. App. 35, the court says: "The nearest efficient cause which is adequate to produce and does bring about an accident is the proximate cause of that accident. Such new and independent cause supersedes prior causes and negligences, if they exist."

In *G. M. Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583, the facts were that the defendant shipped to a consignee a car load of crude petroleum in a car which had no valve, regulating the outflow of the oil. The consignee had the car removed to a side track, and then, with knowledge that the car was leaking, attempted to draw off the oil near the plaintiff's mill, the engine room of which was lower than the track. Owing to the absence of the valve, the oil ran out so rapidly that it flowed into plaintiff's engine room, exploded and destroyed the mill. The United States Circuit Court of Appeals held that the defendant was not liable therefor, "since its negligence was not the proximate cause of the injury."

4 *Thompson on Negligence*, § 3774, says: "In applying this doctrine of reasonable care, it is well held that a master is not liable for injuries to his servant, resulting from an accident of such a character that reasonable men, proceeding with reasonable caution, would not ordinarily have foreseen and anticipated it; such an injury happening under very exceptional circumstances, although the precautionary measures, if taken, would have prevented it."

In *Ford v. Tremont Lumber Co.*, 123 La. 742, 49 South. 492, 22 L. R. A. (N. S.) 917, 131 Am. St. Rep. 370, the syllabus is as follows: "The master is not liable for injuries to his servant, resulting from an accident of such a character that \* \* \* reasonable caution would not ordinarily have foreseen and anticipated it. A person is not negligent for failing to anticipate that other persons will be negligent."

The defendants can be held in this case only for negligence that is the proximate cause of the injury to the plaintiff's intestate, Merrill, and, if they were not guilty of negligence of that character, the plaintiff has no cause of action against them.

We have stated, *supra*, the substance of the material evidence. There is no conflict in the evidence as to the material facts, and the questions for decision are matters of law.

The injury to Merrill's fingers was to no extent the cause of his death. His death was caused by the fluid that T. H. Cosford gave him to drink, thinking that it was whisky, and the material question for decision is whether the defendants were guilty of negligence that was the proximate cause of the giving of said solution to Merrill. J. C. Schloat was the foreman of the Missouri Bridge & Iron Company, and he took Merrill to the office of the other company, and asked Cosford, as stated *supra*, to dress his fingers and put peroxide on them. That is all that Schloat asked Cosford to do. Schloat did not go into the office, but, when Cosford signified that he would dress Merrill's fingers and put peroxide on them, Schloat went immediately to get a conveyance to take Merrill to the doctor. In a few minutes he returned with the conveyance. While he was gone, Cosford dressed Merrill's fingers and put peroxide on them, as Schloat had requested. That far he had followed Schloat's instructions; but, in addition to that, he had given him the poisonous solution that caused Merrill's death. We hold that neither of the defendants is responsible for this unfortunate act of Cosford's. No man, under the circumstances, however wise or prudent, could or would have foreseen that Cosford would take a bottle of medicine, uncork it, and give it to Merrill to drink, without smelling or tasting it, or taking any precautions to determine whether it was whisky or something else. There was nothing on the bottle to indicate that it was whisky. No person represented to him that it was whisky, or that there was any whisky kept there. It would have been an easy matter to determine that it was not whisky, as was shown, after Merrill drank it, and expressed the opinion that it was not whisky. As soon as Cosford tasted the solution, he realized his mistake. He was a stranger there, and had no reason to believe that there was any whisky in the office.

[9] The Pacific Lime & Gypsum Company owned and controlled the office, and owned the medical appliances that were there, excepting said solution contained in said bottle. That bottle and its contents belonged to the president of the company, but that company was not guilty of negligence in permitting Merrill to be taken to said office to have his fingers dressed with the company's appliances. As stated *supra*, Cosford was not an employé of either of the defendants, and had no connection with them. He was an employé of another company, and was there in the interest of his company, when Merrill was taken to said office. His giving said medicine to Merrill to drink was his own act, and

he alone is responsible for what he did. He evidently intended well.

[10] The Missouri Bridge & Iron Company was not guilty of negligence in not having a physician resident at or near Gypsum. It had made arrangements with a physician at Huntington to treat any of its employes that should need medical treatment. That company had less than 12 employes there. We find that the motions for an instructed verdict should have been sustained, and that the trial court erred in not instructing the jury to return a verdict for the defendants.

The accident was a very sad one, but under the facts, as shown by the bill of exceptions, it is clear that the defendants were not at fault therefor. No degree of prudence, on the part of the defendants, would have foreseen that Cosford would give the poisonous solution to Merrill to drink, without exercising the slightest precaution to ascertain whether it was whisky. The defendants being without negligence in the matter it is our bounden duty to hold that they were not liable for damages for the death of Mr. Merrill.

The evidence is all before us, and, from the evidence, we find that there should have been a judgment in the circuit court for the defendants. We find that the court below erred in not instructing the jury to find a verdict for the defendants.

The judgment of the court below is reversed, and this cause is remanded to the court below, with instructions to enter a final judgment for the defendants for costs and disbursements.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

McMILLAN v. MASON, County Judge, et al. (Supreme Court of Oregon. April 14, 1914.)

1. HIGHWAYS (§ 30\*)—ESTABLISHMENT—STATUTORY PROCEEDINGS—PROOF OF POSTING NOTICES.

Under L. O. L. § 6280, directing that when any petition is presented for laying out a county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement posted at the place of holding the county court, and also in three places in the vicinity of the proposed road, an affidavit stating that the road notices were posted in public places, specifying them, but not asserting that either notice was in the vicinity of the proposed road, followed by a finding by the county court that the petition was accompanied by proof satisfactory to the court that notice had been given by advertisement in the manner provided by law by posting a notice at the place of holding county court, and also at three public places in the vicinity of the proposed road, is insufficient to sustain the proceeding.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 60-70; Dec. Dig. § 30.\*]

2. HIGHWAYS (§ 41\*)—ESTABLISHMENT—STATUTORY PROCEEDINGS—REPORT OF VIEWERS.

Under L. O. L. § 6284, as amended by Laws 1911, c. 212, prescribing the duties of boards of county road viewers, though not expressly declaring when the reports of such boards shall be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

filed, and section 6290, giving an appeal from the assessment to the county court at its next regular term, and from its decision to the circuit court, it is incumbent on a board to file its report before the commencement of the term of the county court next after its appointment, and a report filed March 5, 1913, by a board appointed December 7, 1911, in Tillamook county, the terms of whose county court are set, by L. O. L. § 2981, as amended by Laws 1911, c. 37, on the first Wednesday of each month, will be set aside.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108-131; Dec. Dig. § 41.\*]

Department 1. Appeal from Circuit Court, Tillamook County; Webster Holmes, Judge.

Writ of review prosecuted by N. McMillan against Homer Mason, County Judge, and others as the county court of Tillamook County. From a judgment of the circuit court dismissing the writ, plaintiff appeals. Reversed and remanded, with directions.

This is a special proceeding by N. McMillan to review the action of the county court of Tillamook county in the matter of locating a county road across the premises of the plaintiff and not allowing him any damages caused thereby. A writ of review was issued by order of the circuit court for that county, and directed to the defendants, Homer Mason, as county judge, and George R. Edner and Herman Farmer, as county commissioners of that county, constituting the county court thereof, and in obedience to such command the proceedings relating to the undertaking to establish the highway were certified and sent up. The trial court considering the matters dismissed the writ, and the plaintiff appeals.

S. S. Johnson, of Tillamook, for appellant. M. J. Gersoni, of Tillamook (D. H. Upjohn, of Dallas, on the brief), for respondents.

MOORE, J. The transcript shows that on December 7, 1911, the plaintiff and 35 others, who are designated as freeholders residing in the road district where the public highway was to be laid, petitioned the county court of Tillamook county to locate a county road described as follows: "Commencing at a point 30 feet south of the S. W. corner of block 5 in Garibaldi, said point being in section 21 T. 1 N., R. 10 W., W. M., as shown on the records of the county clerk of Tillamook county, and running thence in a northwesterly and northeasterly direction, parallel to the right of way of the P. R. & N. Ry. as nearly as possible, using streets of the towns as now platted along the proposed route of said road where possible, and terminating 20 feet north of the N. W. corner of block 23 in Wheeler, said point being in section 2, T. 2 N., R. 10 W., W. M. as shown in the records aforesaid." The petition was accompanied by an affidavit, which reads: "State of Oregon, County of Tillamook—ss: I, F. L. Sappington, being first duly sworn on oath say, that I posted notices (a copy of which is hereto

annexed) of the proposed road in the following public places to wit: On Union Fishery Dock at Wheeler, U. S. Post Office at Rockaway, Nelson Co.'s store in Garibaldi, Oregon, and one at the courthouse door in Tillamook City in said county and state of Oregon, thirty days prior to the presentation of petition herein, to wit: On the 26th day of October, 1911, and that all of said petitioners are householders residing in the vicinity of said proposed road in Tillamook county and state of Oregon. [Signed] F. L. Sappington," and duly verified. The notice thus referred to was in due form and properly subscribed by all the petitioners. At the time the petition was presented, the county court made an order as follows: "Now at this time this matter came on to be heard upon the petition of N. McMillan and others for a county road, described as follows [setting forth the proposed route and termini as hereinbefore given]: And it appearing to the satisfaction of the court that the said petition is signed by more than 12 freeholders residing in the road district in which said proposed road is located, and the same being accompanied by proof satisfactory to the court that notice has been given by advertisement in the manner provided by law by posting at the place of holding county court, and also at three public places in the vicinity of said proposed road, more than 30 days previous to the presentation of said petition to the county court, notifying all persons concerned that application would at this time be made to court for the laying out of such road, said notices each being duly signed by each of said petitioners; and the said petitioner having presented to the court his bond in the sum of \$200, and said bond being found satisfactory, the same is ordered approved by the court. It is further ordered that T. O. Jackson, county surveyor, and Fred Zaddach and F. M. Wakeley, duly qualified freeholders of this county, be and they are hereby appointed as the board of road viewers for the laying out of said road, and they are hereby ordered and directed to meet at the Wheeler mill on the 4th day of January, 1912, at 10 o'clock a. m. near the terminus of said road, or in case of their failure to meet on said day, then five days thereafter, and to survey and view and lay out said road, and to make due report of their proceedings to this court." The record of the county court of March 7, 1913, shows that the report of the board of viewers, "In the Matter of the Petition of N. McMillan and Others for a County Road known as Garibaldi-Wheeler Road," was read on that day and on the two preceding days, and it was ordered that the report be accepted and the county clerk was directed to record the plat, profile and field notes of the survey. The plaintiff on March 22, 1913, and prior to the next succeeding term of the county court, filed with the clerk written objections to the report of the board

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

of road viewers, giving a description of his land through which the line of the proposed highway was surveyed, stating the area of the premises undertaken to be appropriated thereby, and asserting that he would sustain damages in consequence thereof in the sum of \$8,170. The county court on April 5, 1913, rejected his claim, to review which action these proceedings were instituted and determined, as hereinbefore set forth.

[1] It is contended by plaintiff's counsel that the proof of the posting of the road notices was insufficient in that it does not appear from the affidavit of Sappington that they were put up in the vicinity of the proposed road. The statute directs generally that when any petition is presented for laying out a county road it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding the county court, and also in three public places in the vicinity of the proposed road. L. O. L. § 6280. The affidavit referred to states that the road notices were posted in public places, specifying them, but it does not assert that either notice was put up in the vicinity of the proposed road. The county court, however, found that the petition was "accompanied by proof satisfactory to the court that notice has been given by advertisement in the manner provided by law by posting of notice at the place of holding county court, and also in three public places in the vicinity of said proposed road." This is not a decision upon a question of fact, but is a conclusion of law without the statements of any facts upon which to predicate such determination, so far as discoverable from an inspection of the order of the county court.

In *Sweek v. Jorgensen*, 33 Or. 270, 54 Pac. 156, the affidavit of the posting of road notices failed to state that either was put up in a public place, except by inference with respect to one notice, which was posted on the county courthouse door. The order of the county court in respect thereto was as follows: "And it further appearing the notice of posting said petition at this time has been fully given, as required by law, for more than 30 days prior thereto, by posting notice thereof, duly signed by more than 12 of the lawful petitioners, in three of the most public places along the line of said proposed road, one of said notices tacked to C. H. Voegtly's barn, one of said notices tacked to a fence post at or near the east end of said proposed road, and one of said notices on the south side of the old stage barn on the line of the proposed road, and also by posting one of such notices for such period of time at the place of holding court." In referring to the order quoted Mr. Justice Wolverton, speaking for the court, says: "This record is quite sufficient, by legal intendment, to show a posting in three public places within the vicinity of the proposed road." Further in the opinion it is observed: "But the journal entry recites the posting of such notices, 'all of which were in

public places within the vicinity of said proposed road, and that these facts were made satisfactorily to appear to the court,' thus indicating, in effect, that it is sufficient if it be made satisfactorily to appear to the court that the posting was in public places within the vicinity of the road by evidence at the hearing otherwise than by affidavit."

In the case at bar it will be remembered that the county court made no findings as to where the notices were posted, so that it must be inferred that no proof was offered other than Sappington's affidavit, which is insufficient in the particulars specified.

[2] Section 6284, L. O. L., as amended February 23, 1911 (Laws Or. 1911, c. 212), including also sections 6283-6288 of the compilation indicated, does not expressly declare when the report of the board of county viewers or the plats, etc., of the county surveyor shall be filed with the county clerk. That board is required, while viewing and laying out a county road, to assess and determine how much less valuable the premises are through which the road is surveyed and located, and set forth in the report the conclusion with respect to the estimate, and any person aggrieved at the determination may appeal from the assessment to the county court at its next regular term, and from the decision of the county court to the circuit court. L. O. L. § 6290. It is believed that when this clause of the statute is construed in connection with section 6284 thereof as amended, it is incumbent upon the members of the county board of road viewers to make and file a report of their conclusion with respect to the advisability of establishing the county road petitioned for before the commencement of the term of the county court immediately next after the term thereof when they were appointed. By doing so all persons interested in the proposed road or in the alteration of a public highway would have notice of the proceedings, and an opportunity to be heard in respect thereto. In the case at bar, though the viewers were appointed December 7, 1911, their report was not acted upon until March 5, 1913, when it was read for the first time.

The petition for the writ of review states that the report was subscribed by the board of county road viewers December 3, 1912, or 11 months and 26 days after their appointment, and that the report was returned to the county court March 5, 1913. A term of the county court for the transaction of the county business is required to be held in Tillamook county on the first Wednesday of each month. L. O. L. § 2931, as amended February 10, 1911 (Laws 1911, c. 37). The road petitioned for herein probably does not much exceed 10 miles in length, and why it should have required 1 year, 8 months, and 1 day to view and survey the proposed route and make and file a report thereof, including a plat and profile of the survey, and to secure an order establishing the highway, is not

explained in any manner. As these reports were not filed prior to the first Wednesday in January, 1912, the next regular term of the county court of that county after the appointment of the board of road viewers, a sense of fair dealing demands that these proceedings should be set aside in order that another petition may be filed, notice thereof be given, proof given as required by law, and a review and resurvey of the proposed route be made.

The judgment will therefore be reversed, and the cause remanded, with directions to set aside all proceedings undertaken to establish the county road.

EAKIN, BURNETT, and RAMSEY, JJ.,  
concur.

#### STATE v. DAVIS.

(Supreme Court of Oregon. April 7, 1914.)

##### 1. CRIMINAL LAW (§ 368\*) — EVIDENCE — RES GESTÆ.

In a prosecution for murder, an exclamation of decedent's daughter, during a scuffle between defendant and decedent's husband and another at the time of the killing, that defendant had killed her mother, was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. § 368.\*]

##### 2. WITNESSES (§ 393\*)—IMPEACHMENT—FOR MER INCONSISTENT TESTIMONY.

Though, under L. O. L. § 864, providing that a witness may be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony, a coroner or stenographer may be called to testify whether a witness made statements at an inquest inconsistent with his present testimony, the exclusion of the coroner's record, consisting of a synopsis of the evidence, or of the stenographer's transcript of it, is not error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.\*]

##### 3. HOMICIDE (§ 145\*)—INTENT—USE OF DEADLY WEAPON—PRESUMPTION—RULES OF EVIDENCE.

Neither L. O. L. § 798, subd. 2, relating to conclusive presumptions, providing that a malicious and guilty intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another, section 790, subd. 3, providing that a person is presumed to intend the ordinary consequences of his voluntary acts, nor section 1804, providing that if any person in the commission or attempt to commit any felony kill another, such person shall be deemed guilty of murder in the second degree, authorized an instruction in a prosecution for murder committed while the defendant was engaged in fight with others than the decedent, that it is presumed that a person using a deadly weapon intended the consequences which happened from it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 262-264; Dec. Dig. § 145.\*]

##### 4. HOMICIDE (§ 113\*)—SELF-DEFENSE—AGGRESSION OF DEFENDANT.

Where defendant is the aggressor, he cannot rely upon self-defense unless he has first withdrawn from the combat in such a manner

as to show his adversary his intention, in good faith, to desist.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 151, 152; Dec. Dig. § 113.\*]

##### 5. HOMICIDE (§ 300\*)—INSTRUCTIONS—BURDEN OF PROOF.

Under L. O. L. §§ 1500, 1506, giving the defendant the right, under the plea of not guilty, to make every defense he has, including self-defense and insanity, except former conviction or acquittal, which must be specially pleaded, and section 868, subd. 5, placing the burden of proof always upon the state except on the defense of insanity, as to which section 1527 casts the burden on the defendant, it was error to instruct the jury that if they found, beyond a reasonable doubt, that defendant was justified in shooting, they should find him not guilty, and if they did not find beyond a reasonable doubt that he was justified they should find him guilty of one of the crimes specified in the instructions.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 6. CRIMINAL LAW (§ 1182\*)—APPEAL—REVIEW—AFFIRMANCE—HARMLESS ERROR.

Const. art. 7, § 3 (L. O. L. p. xxiv), providing that, if the Supreme Court shall be of the opinion that the judgment appealed from was such as should have been rendered, the judgment shall be affirmed notwithstanding any error committed during the trial, does not authorize affirmance of a conviction where the case was submitted on a wrong theory of the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Department 2. Appeal from Circuit Court, Polk County; Webster Holmes, Judge.

Louis Davis was convicted of murder in the second degree, and appeals. Reversed and remanded for new trial.

This defendant was indicted for murder in the first degree, to which he entered a plea of not guilty. Trial was had resulting in a verdict of murder in the second degree. Defendant and his wife were separated, and the wife was at the home of her parents, Mrs. Eliza J. Stewart and G. M. Stewart, near Ballston, in Polk county, Or. On the morning of June 29, 1913, the defendant, at Eola, put an automatic gun into his pocket, and went from there to Dallas. Arriving at Ballston about 5 o'clock, he spent the night in a grove about 400 yards from the Stewart home. Near 6 o'clock on the morning of the 30th he went to the Stewart home, and met his wife and her mother in the dooryard, and on going into the house by the kitchen door defendant was ordered away by G. M. Stewart, when Stewart says defendant drew a gun out of his pocket. Stewart then withdrew and went to a neighbor's (Agee's), and asked him to go over to his house. They returned to the house and went in through the front door, passing through the house to the kitchen, where defendant and his wife and her mother were. As told by Agee, Stewart ordered defendant to leave the house, and Davis moved forward a couple of steps and commenced shooting; the first shot strik-



ing Agee, as did three other shots fired in close succession. During this time, Agee and Stewart took hold of Davis for the purpose of disarming him, and Mrs. Stewart was killed by a bullet. Stewart had a gun in his pocket, and during the struggle dropped it on the floor. The guns were both of the same caliber. Stewart says his gun was not fired at all. There was some controversy at the trial whether Mrs. Stewart was killed by a bullet from defendant's gun or from that of Stewart; not being involved, however, on this appeal. In Salem, on June 28th, defendant had made threats to Marshall Stewart, a brother of Mrs. Davis, that he (Stewart) would bury his mother over this (the trouble growing out of the separation of defendant and his wife), and that he would put a bullet through himself. He made other threats at the same time, and also to other people at a different time that he would kill Mrs. Stewart.

With other instructions, the court gave the following to which the defendant took exceptions, relying upon it as reversible error: "Now the voluntary and intentional use of a deadly weapon of one capable of taking life leaves the presumption of malice, and there has been some testimony introduced here of threats made by this defendant. You are the sole judges of whether you think that is true or not, beyond a reasonable doubt, and the threats, if they are proven in a case of this kind, are permitted for the purpose of showing premeditation, and a deliberate design, and also of malice, so you must consider whether or not you think the defendant has made threats upon the life of the deceased. \* \* \* And the deliberate use of a deadly weapon. It is presumed that the person using it intended the consequences which happened from the same, and you have a right to consider that in connection with other evidence, and when it comes down to a case of self-defense, which the defendant has undertaken to avail himself of here, it isn't necessary that there be actual or real danger emanating from some person toward the accused; but, if it has the appearance of being real or genuine, and of such a nature as to cause him to believe he will suffer great bodily harm, then the person under those circumstances is justified in taking human life on his own behalf. But that must be of such an appearance as would satisfy any reasonable man, under the circumstances, that he was in real or apparent danger of great bodily harm. And also the defendant could not avail himself of the defense of self-defense if he had provoked the quarrel; the rule being that if a person starts a row, a fight, himself, and then the other party resists, even with a weapon, he is not in a position to take that individual's life, and invoke the rule of self-defense. The only theory when self-defense is allowed is when a man, when he is not the aggressor, protects his own life from either

real or apparent danger to himself from great bodily harm. You will consider the evidence carefully in that regard, as you should consider all the evidence in this case. If you find from all the evidence, beyond a reasonable doubt, under the rules given you that this defendant was justified under all the circumstances, in shooting with a pistol to protect himself from great bodily harm, then you should find him not guilty, but, if you do not, beyond a reasonable doubt, then you should find him guilty of some one of those crimes about which I have heretofore charged you." The trial resulted in a verdict of murder in the second degree, and judgment was rendered against the defendant, from which he appeals.

Walter L. Tooze, Jr., of Dallas, for appellant. D. H. Upjohn, Dist. Atty., and J. E. Sibley, both of Dallas, for the State.

EAKIN, J. (after stating the facts as above). [1] It is first objected that it was error on the part of the court to admit in evidence an exclamation by defendant's wife during the scuffle at the time Mrs. Stewart was shot and fell, namely, "He's killed Ma." This was evidently a spontaneous exclamation made in the excitement of the occasion by Mrs. Davis, and was a part of the transaction—an expression incident to and occasioned by what was taking place. It was indicative of both the fact that Mrs. Stewart had been killed and of the particular instant of her fall, and was, in fact, contemporaneous with the transaction and a part of the *res gestæ*; and its admission in evidence was not error.

[2] It is assigned as error that the court refused to permit defendant to introduce in evidence the record of the coroner's inquest held over the body of the decedent. The county clerk was called as a witness and asked to produce the report of the coroner of the proceedings had at the inquest. This was offered in evidence by the defendant that the testimony of Mr. Stewart might be read to the jury for the purpose of impeaching him. The coroner is required by statute to reduce the evidence taken at the inquest to writing, and, if the coroner's jury find that a crime was committed, the coroner must forthwith deliver the testimony and the verdict to a magistrate, who must issue a warrant for the arrest of a person charged with the crime; but the statute does not make the report of the evidence by the coroner evidence against the defendant or cause it to be used other than as a basis upon which the warrant may be issued. However, that did not prevent its being used as evidence for impeachment purposes, if it was written by the witness or signed by him and properly identified. Usually the coroner preserves only a synopsis of it, or, if taken by a stenographer, his transcript of it is not sufficient to im-

peach the witness who testified, as he is not bound by the minutes of the testimony or the transcript thereof as being the exact statements made by him, although the coroner or the stenographer may be called to testify whether the witness made some statements inconsistent with his present testimony under the provisions of section 864, L. O. L. There was no error in excluding the coroner's record.

[3] Error is alleged in the giving of the first part of the second instruction quoted, namely: "It is presumed that the person using it (a deadly weapon) intended the consequences which happened from the same." This does not come within any of the statutory presumptions. Subdivision 3 of section 799, on the subject of a disputable presumption, provides that a person is presumed to intend the ordinary consequences of his voluntary acts; and subdivision 2 of section 798, as to a conclusive presumption, provides that a malicious and guilty intent is presumed from the deliberate commission of an unlawful act for the purpose of injuring another; but neither of these is followed by the court. The instruction was given as a conclusive presumption, at least it would be so understood by the jury. It would not be true in every case that such a presumption would arise as to the ordinary consequence of an act; but the killing of Mrs. Stewart, if the shot having that result was intended for and directed at Agee, would not be the ordinary consequence of the act. The first presumption of law in such a case is that the defendant is innocent until the contrary is made to appear; but when it is shown that he killed deceased by the deliberate use of a deadly weapon, and the killing is otherwise unexplained, the statutory presumption, that an intent to murder is conclusively presumed from the deliberate use of a deadly weapon causing death within a year, would prevail. When the attendant circumstances of the killing are shown in evidence, the presumption must be taken in the light of the facts proved; but a presumption cannot be raised contrary to the facts established; and, where there is a conflict in the evidence, it is for the jury to determine what are the facts. If Mrs. Stewart was killed by accident, then the presumption given by the court would not follow; but even were she killed by defendant, though unintentionally, the malice against Agee or Stewart, if defendant were the aggressor, is by the statute carried over to Mrs. Stewart. Section 1894, L. O. L. provides: "If any person \* \* \* in the commission or attempt to commit any felony, other than \* \* \* kill another, such person shall be deemed guilty of murder in the

second degree." But in such case the killing of Mrs. Stewart would not be the ordinary consequences of the deliberate use of the weapon, and the giving of the instruction was error.

[4, 5] Again, the defendant assigns as error the portion of that instruction in which the court tells the jury that the defendant could not rely upon self-defense if he provoked the quarrel. The rule is that where the defendant is the aggressor he cannot rely upon self-defense, except he has first withdrawn from the combat in such a manner as to show his adversary his intention, in good faith, to desist. 21 Cyc. 805. But that question did not arise in this case. Defendant does not pretend that he at any time desired to withdraw from the combat. He was acting either in self-defense from the first or was the aggressor throughout; but the court also told the jury that if they found from the evidence, beyond a reasonable doubt, that defendant was justified in shooting, they should find defendant not guilty, and, if they did not find beyond a reasonable doubt that he was justified in shooting, they should find him guilty of some one of the crimes specified in the instructions given. This instruction shifted the burden of the proof and cast it upon the defendant. A defendant is entitled to make every defense he has upon a plea of not guilty, except the defense of former conviction or acquittal, which must be specially pleaded, as provided by sections 1500, 1505, L. O. L., in which self-defense, and even a defense of insanity, are included. The burden of proof is always upon the state (subdivision 5 of section 883, L. O. L.), except on the defense of insanity, where the burden is cast upon the defendant. Section 1527, L. O. L. There are other assignments of error, but as the same questions may not arise upon the new trial, we deem it unnecessary to discuss them.

[6] The state contends that by the provisions of section 3, article 7, of the Constitution the court should sustain the judgment notwithstanding the errors; but the case was submitted to the jury upon a wrong theory of the law, both as to the application of the presumption mentioned and as to the burden of proof on the question of self-defense. Therefore we are not permitted to theorize as to what the verdict of the jury should have been if the issues had been properly presented.

For the errors mentioned, the judgment must be reversed, and the case remanded for a new trial.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

**WADE et al. v. NORTHUP et al†**

(Supreme Court of Oregon. April 7, 1914.)

**1. DESCENT AND DISTRIBUTION (§ 68\*) — RIGHTS OF EXPECTANT HEIRS.**

A child, whether of the blood or by adoption, has no standing to assert or defend any interest which is expected hereafter in the estate of a parent who is still living.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 152, 206, 207, 214; Dec. Dig. § 68.\*]

**2. DEEDS (§ 211\*) — EVIDENCE — CONSPIRACY TO DEFRAUD.**

In a suit wherein it was sought to cancel a deed, evidence *held* not to show a conspiracy between relatives of the grantor to defraud her.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

**3. DEEDS (§ 68\*) — VALIDITY — MENTAL CAPACITY OF GRANTOR.**

If at the execution of a deed the grantor has sufficient mental capacity to comprehend the nature of the business in which he is engaged, the instrument is valid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

**4. DEEDS (§ 211\*) — VALIDITY — CAPACITY OF GRANTOR — EVIDENCE.**

Evidence in a suit in which it was sought to set aside deeds *held* to show that the grantor was possessed of ample mentality to fully and fairly comprehend the nature of the business in which she was engaged when she gave the power of attorney under which the deeds were executed, and when they were executed by the agent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

**5. PRINCIPAL AND AGENT (§ 103\*) — POWER OF ATTORNEY — CONSTRUCTION.**

While a power of attorney authorizing the attorney to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands upon such terms and under such covenants as he shall think fit, does not technically authorize a gift, conveyances upon the consideration of \$10 and \$1, respectively, are within the letter of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.\*]

**6. EVIDENCE (§ 461\*) — PAROL EVIDENCE AFFECTING WRITINGS — POWER OF ATTORNEY.**

Under L. O. L. § 713, providing that an agreement reduced to writing is to be considered as containing all its terms, and there can be no evidence of those terms other than the contents of the writing except where a mistake or imperfection is put in issue or the validity of the agreement is the fact in dispute, and section 717, providing that for the construction of an instrument the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may be shown, in determining whether conveyances by an attorney in consideration of \$10 and \$1, respectively, were within the spirit of a power of attorney which did not authorize a gift, parol testimony may be admitted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.\*]

**7. PRINCIPAL AND AGENT (§ 103\*) — AUTHORITY OF AGENT — POWER OF ATTORNEY.**

Where a woman of advanced age, both before and after the death of her husband, spoke of an interest in unproductive land which she had inherited from her brother as a burden, and of her intention to give it to her other brother

and sisters, and there is no evidence of undue influence over her, conveyances by her attorney in fact in consideration of \$10 and \$1, respectively, were within both the spirit and letter of her power of attorney authorizing him to sell.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.\*]

Department 1. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Suit by Henry Wade and others against Hazel Northup and another. From a decree for defendants, plaintiffs appeal. Modified.

This is a suit having the double aspect of asking that a mistake in the description of land in the conveyances of plaintiff be corrected, and that an alleged unfounded claim of one of the defendants be declared void. The mistake was denied by the defendants, and an answer in the nature of a cross-bill was filed by them to the effect that the deeds under which plaintiffs claim were obtained from the grantor, one of the defendants, by fraud, and while she was insane, and asking that those conveyances be canceled and held for naught. The reply denied the allegations of fraud and insanity, and otherwise traversed the answer. From a decree setting aside the deeds in question, the plaintiffs appeal.

O. P. Coshov, of Roseburg, for appellants. J. O. Watson, of Roseburg (Cardwell & Watson, of Roseburg, on the brief), for respondents.

BURNETT, J. There were three brothers and their three sisters: Robert Wade, John M. Wade, Henry Wade, Isabel Ozouf, Anna W. Spencer, and Rebecca Butler. Robert died intestate, seised of a large area of lands in Douglas county, Or., and leaving as his only heirs his brothers and sisters who succeeded to his estate under the statutes of descent. Isabel Ozouf has a large amount of property in her own right, besides inheriting a considerable estate from her deceased husband. After the conveyances were made, which the answer attacks, Rebecca Butler died intestate so far as the record here shows. She left four living children surviving her, to wit, Joseph R. Butler, Annie Conlisk, Kate Flye, and Mamie Smiley, besides four grandchildren, offspring of one of her deceased children, namely, Hazel Northup, Annie Northup, Alice Reed, and William Reed. During the lifetime of her husband, Isabel and he joined in a power of attorney authorizing John A. Black to transact business for them, and he acted as their agent for a considerable period while Mr. Ozouf yet lived. After the death of her husband, Mrs. Ozouf executed a general power of attorney to Black, the terms of which will be more particularly noted further on in this opinion. In pursuance of this general power of attorney, Black, on February 8, 1908, conveyed to John M. Wade, Hen-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 2, 1914.

ry Wade, Anna W. Spencer, and Rebecca Butler, the interest of Mrs. Ozouf in certain timber lands inherited from the estate of her brother Robert Wade. This conveyance was made upon the consideration of \$10 and other good and valuable considerations. In the following January, Black, still acting under the same authority, conveyed the interest of Mrs. Ozouf in other lands derived from her brother's estate, to the same parties, naming as the inducement "one dollar and other good and valuable considerations." Still later, during the year 1910, on the petition of Hazel Northup, the county court of Douglas county adjudged Mrs. Ozouf insane, and appointed John A. Black as her general guardian. Meanwhile Rebecca Butler had died leaving the four children and four grandchildren above mentioned as her heirs. On September 20, 1912, John M. Wade, Henry Wade, Anna W. Spencer, and the surviving children of Rebecca Butler began this suit against Isabel Ozouf and grandchildren of Rebecca Butler already mentioned, to correct an alleged mistake in the conveyances executed by Isabel Ozouf through her attorney in fact.

The complaint further alleges that Hazel Northup claims a greater interest than the one-eightieth of the share in Robert Wade's estate cast upon her grandmother Rebecca Butler by the conveyance in question, and prays that she be restricted to a claim of one-eightieth. The general guardian of Isabel Ozouf, John A. Black, filed an answer on her behalf admitting the mistake and consenting to the correction of the same as prayed for in the complaint. Afterwards Hazel Northup filed a petition in the circuit court where the suit was pending, showing in effect that the general guardian was interested in the result of the suit by reason of having participated in the purchase of the interest of John M. Wade in the property involved, and prayed that she herself be appointed guardian ad litem in this suit on behalf of Isabel Ozouf; and the court accordingly made an order appointing her such guardian ad litem. Operating under this order as to Isabel Ozouf, the defendants filed an answer which concerning Hazel Northup alleges that during the lifetime of Mrs. Ozouf's husband he and his wife adopted said Hazel as their own child, and that she claims no greater interest in the property involved than would descend to her in case of the death of Isabel Ozouf intestate. On behalf of Annie Northup, Alice Reed, and William Reed, the answer disclaims any interest in the real property by virtue of the alleged deeds from Isabel Ozouf executed by her said attorney in fact. The answer further contains this allegation: "And the defendants allege that for the purpose of cheating and defrauding the said Isabel Ozouf, and the defendant Hazel Northup, in the event of the death of Isabel Ozouf, the plaintiff Anna W. Spencer, and John A. Black, the son-in-law of said

Anna W. Spencer, conspiring together, did, at a time when the said Isabel Ozouf was insane, to wit, on the 23d day of July, 1907, procure a pretended general power of attorney from said Isabel Ozouf, an insane person, purporting to appoint the said John A. Black her attorney in fact; that said Anna W. Spencer and the said John A. Black further conspiring to defraud and cheat the defendants Isabel Ozouf and Hazel Northup, without the knowledge of the plaintiffs except the said Anna W. Spencer, on the 8th day of February, 1908, for the recited consideration of \$10 and other recited good and valuable considerations, through said power of attorney procured as aforesaid by said John A. Black, did cause a deed to be pretended to be made and executed by Isabel Ozouf, by John A. Black, her alleged attorney in fact, at a time when the said Isabel Ozouf was insane, in favor of the plaintiffs for a portion of the property described in plaintiffs' complaint." And then sets out the conveyance of February 8, 1908. The answer further makes similar allegations concerning the conveyance of January 4, 1909. Knowledge of the alleged insanity of Isabel Ozouf is imputed to all the plaintiffs by the answer. The defendants pray that the deeds executed by the attorney in fact be canceled and held for naught. The allegations of fraud and insanity were traversed by the reply as stated.

[1] At the outset it is apparent that whether Hazel Northup be the adopted daughter of Isabel Ozouf or her own child cannot affect the question here involved. In either event, whether she be a child of the blood or adopted by Mrs. Ozouf, she has no standing to assert or defend any interest which she may expect hereafter in the estate of Mrs. Ozouf. No one can be an heir of a living person. Moreover, parents' lawful children, whether natural or adopted, have no interest in the estate of their living parents by virtue of the relationship of parent and child. The expectancy of title by descent, however strong, carries with it no power to assert or defend an interest in the real property of the living ancestry. We decline therefore to consider the question of the regularity of the adoption of Hazel Northup.

It may well be questioned whether the circuit court could rightly authorize Hazel Northup to act as guardian ad litem for Mrs. Ozouf. The only authority vested in such courts to appoint a guardian ad litem is found in sections 32 and 33, L. O. I., providing that a guardian of that kind may be appointed for an infant. Section 1319, L. O. L., vests in the county court the authority to appoint guardians for insane persons, infants, and all who are incapable of conducting their own affairs; and section 1327 states that such a guardian "shall appear for and represent his ward in all legal suits and proceedings, unless when another person is appointed for that purpose as guardian or next friend."

It is well open to question, therefore, whether the pleading filed by the general guardian ought not to control this litigation as against Mrs. Ozouf. It is questionable, also, whether she can be bound by the statements filed as a pleading in her behalf by the guardian ad litem. However, the parties actually appearing have treated the case as if Hazel Northup has a present interest to defend, and a right to attack the conveyances in question, and that she has authority in the suit to represent the grantor in those conveyances in the effort to set them aside. Considering, therefore, without deciding, that the attitude occupied in the pleadings and in the argument of the case is correct so far as the proper parties are concerned, we will consider the issues involved as presented at the hearing. There are three: First, the alleged conspiracy of Anna W. Spencer and John A. Black to defraud Mrs. Ozouf; second, the alleged insanity of the latter at the time she executed the power of attorney, and at the time her attorney in fact executed the conveyances in her name; and, third, considering that the power of attorney was valid, whether its terms authorized the acts of the attorney in fact, which are here questioned.

[2] Considering the first of these, it appears in testimony that John A. Black is the son-in-law of Mrs. Spencer. There is no word of testimony indicating that either Mrs. Spencer, Mrs. Butler, or either of the two brothers of Mrs. Ozouf ever sought the conveyance executed to them. In fact, it appears in testimony that neither of the brothers nor Mrs. Butler knew of the conveyance until after it was executed. There is no testimony whatever that any of the brothers or sisters of Mrs. Ozouf ever counseled or requested that the conveyance be executed.

The defendants called John A. Black as a witness on their behalf, and thus vouched for his credibility. He testified, in substance, that the land conveyed was what was known as Mrs. Ozouf's one-fifth interest in the timber lands inherited from Robert Wade; that she retained her interest in about 900 acres of ranch land known as her brother Robert's Home Place. He further stated on oath as a witness that Mrs. Ozouf and her husband, during his lifetime, talked it over several times that Mrs. Ozouf would give her part of Robert's estate to her brothers and sisters, on account of its being unproductive, and that it would be difficult for her to manage the same after his death. The witness declared that Mrs. Ozouf talked the same way after the death of her husband, which occurred in May, 1907, and many times expressed her intention to convey her interest in the timber lands mentioned to her brothers and sisters, and, finally, a few days before the deed was executed, while he was visiting her at Scottsburg, she expressly directed him to make such a conveyance to her brothers and sisters mentioned; that in pursuance of this direction, acting under the authority of the

power of attorney already executed, he went to Roseburg, procured a description of the land from the records there, and executed the first conveyance, naming therein a consideration of \$10 and other good and valuable considerations, which sum of money was paid to him by Mrs. Black and Mrs. Spencer; that about 11 months later, acting under the same authority, he executed the second conveyance. There is no testimony disputing the utterances of Black on this point. By inference we may say that the opportunity to conspire existed, but there is no evidence of any such conspiracy.

In passing, it may be remarked that although the suit was begun to correct a mistake in the conveyances, and issue was joined, no testimony whatever was offered by either party on the question of mistake; it appearing to have been lost in the larger contest of whether or not the deeds were at all valid. The matter of the alleged mistake is therefore laid out of the case as not proven.

[3] The defendants assert that at the time of the execution of the power of attorney, and subsequently at the time the conveyances in question were executed by the attorney in fact, Isabel Ozouf was insane. Whether she was insane to such a degree that she was not capable of understanding the nature and consequences of the instrument which she executed vesting the power in John A. Black therein set forth is not stated in the pleading. The allegation is simply that she was insane. In the language of *Ames v. Ames*, 40 Or. 495, 504, 67 Pac. 737, 741: "The rule is settled in this state that if a testator at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity." *Chrisman v. Chrisman*, 16 Or. 127, 18 Pac. 6; *Potter v. Jones*, 20 Or. 239, 25 Pac. 769, 12 L. R. A. 161; *Clark v. Ellis*, 9 Or. 128; *Cline's Will*, 24 Or. 175, 33 Pac. 542, 41 Am. St. Rep. 851. The rule is not different respecting the capacity of one executing a power of attorney or a conveyance. If at the time of the execution of the document the grantor has mental capacity sufficient to comprehend the nature of the business in which she was engaged, the instrument is valid. *Carnagle v. Diven*, 31 Or. 366, 49 Pac. 891; *Swank v. Swank*, 37 Or. 439, 61 Pac. 846; *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039; *Hamilton v. Holmes*, 48 Or. 453, 87 Pac. 154; *Pickett's Will*, 49 Or. 127, 89 Pac. 377; *Reeder v. Reeder*, 50 Or. 204, 91 Pac. 1075; *Ames v. Moore*, 54 Or. 274, 101 Pac. 769; *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; *Stevens v. Myers*, 62 Or. 382, 121 Pac. 434, 126 Pac. 29; *Bohler v. Hicks*, 120 Ga. 800, 48 S. E. 306; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 371; *Bauchens v. Davis*, 229 Ill. 557, 82 N. E. 365; *Drum v. Cappa*, 240 Ill. 524, 88 N. E. 1020; *Conner v. Skaggs*, 218 Mo. 334, 111 S. W. 1132; *In re Will of*

James D. White, 121 N. Y. 406, 24 N. E. 935; *In re Brush's Will*, 35 Misc. Rep. 689, 72 N. Y. Supp. 421; *Buchanan v. Belsey*, 65 App. Div. 58, 72 N. Y. Supp. 601; *McGovran's Estate*, 185 Pa. 203, 39 Atl. 816; *Hemingway's Estate*, 195 Pa. 291, 45 Atl. 726, 78 Am. St. Rep. 815; *Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629; *Hartung v. Holmes*, 159 Cal. 161, 113 Pac. 130; *Stull v. Stull*, 1 Neb. (Unof.) 389, 96 N. W. 196; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Deckenbach v. Deckenbach*, 65 Or. 160, 130 Pac. 729. Applying this standard as established by the decisions mentioned, we proceed to examine the testimony respecting the allegation of insanity, bearing in mind that the burden of proof rests upon those who assert that mental condition.

[4] The first witness on this question for the defendants was Dr. Patterson, whose deposition discloses that at the time it was taken he was aged 49 years, residing in San Francisco, and had practiced his profession in Central Point, Gardiner, Lake View, and Merrill in the state of Oregon, and later in San Francisco. He said that he treated Mrs. Ozouf somewhere between 1900 and 1903; found that she had delusional insanity, and that her delusion was that "some one had injured or killed her husband or was about to do so, and fancied she heard sweet slings as of angels." The circumstances under which he treated her are thus explained by her sister, Mrs. Spencer: She stated that Mrs. Ozouf had been assisting the other sister, Mrs. Butler, in nursing the latter's husband at Gardiner and was much worn out by continued watching; that she came up Umpqua river on the steamboat as far as Dean's creek, and then rowed herself up the latter stream a mile or two to the residence of Mrs. Spencer, and arrived there exhausted; that Dr. Patterson pronounced her allment nervous prostration, but said nothing about insanity; that he treated her for brain fever. Concerning the supposed delusion, Mrs. Spencer says that, at the time, Mrs. Ozouf had not seen her own husband for quite a period; that he was traveling back and forth between Scottsburg and Roseburg on horseback, carrying considerable amounts of money with him for deposit in the bank at the latter place; that he journeyed by out of the way roads, and, as he told her, was himself anxious about his safety, and for his protection carried a revolver; that, not having seen her husband for some time, Mrs. Ozouf entertained considerable anxiety about his safety. No other witness besides Dr. Patterson speaks of any specific delusion, and this delusion is in part explained by Mrs. Ozouf's anxiety for her husband.

It has been said in *Fulton v. Freeland*, 219 Mo. 494, 517, 118 S. W. 12, 18 (131 Am. St. Rep. 576), that: "There is no such thing as a delusion founded upon facts. It is a mental conception in the absence of facts. If the

idea entertained has for a basis anything substantial, it is not a delusion. There may be a misjudgment of facts, or there may be an accentuated opinion founded upon insufficient facts, but not a delusion, arising to the dignity of a mental aberration." Under the circumstances disclosed, there was much to justify an anxiety on the part of Mrs. Ozouf for the safety of her husband, which would not amount to a delusion. Counsel for defendants in their brief, however, say in substance that they do not contend that the insanity exhibited at this time was of a permanent character, or that Mrs. Ozouf was habitually insane prior to the latter days of 1907.

Dr. Mingus, a witness for defendants, who was called to see her in conjunction with another physician January 2, 1908, says that she entertained delusions, but does not give the nature of those mental aberrations. He testifies that she was melancholy, but he declares on cross-examination that he did not test her for memory at the time on account of her general mental condition. He saw her but the one time, and the weight of his testimony is considerably depreciated by the fact that in payment of his services he accepted a check of Mrs. Ozouf drawn February 28, 1908.

Hiram Weatherby, a resident of Scottsburg, where Mrs. Ozouf at that time lived, took her acknowledgment of the power of attorney, which he found in her possession. It seems that her husband died in May, 1907; that afterwards, according to this witness, Mrs. Ozouf became melancholy. He says: "Well, she is what I would call insane. I don't know; somebody else might call it something else; I would call her insane." Cross-examined about the matter, he says, referring to the power of attorney, that he did not explain it to her because "she was a woman that didn't need any explaining"; that he supposed that she knew what she was signing and appeared to know what she was about; that he took her acknowledgment to another deed to one McKay on October 7, 1908. This witness fittingly exemplifies the standard of mental capacity established by the numerous authorities above noted.

Another witness, W. H. Fisher, gave it as his opinion that she was insane, because on one occasion while he was sawing wood at her residence he wanted to get water from her tank for his engine, and she said that she did not think they had water to spare; but he also disclosed the fact that others were using from the same tank and that at one time the water was a little short. Another reason assigned by him for believing her insane was that she had hired a horse from him on one or two occasions to drive out to her husband's grave in the country about three miles distant, and finally she wanted to buy the horse from him. He said he thought she did not need the horse,

and he never heard anything more about it after a few days. This witness twice received pay for his services by the check of Mrs. Ozouf.

T. W. Andrews testified that he set up the monument at her husband's grave for which she had contracted in the sum of \$175; that when it was completed he told her that the work was done and that he wanted her to come and see it; that she said that she could not go then but would pay him; and that she seemed very nervous; that she made out the check for \$1,700 when it should have been \$175; that, not having his spectacles, he did not discover it, but went back and she wrote the correct amount, asking the witness to "stay by her and point out to her"; that she was nervous and said she wanted to finish it up then because the next day she might be worse. This witness also said that she wanted to buy a horse from him. Another reason given for her insanity was that she lectured him about drinking to excess. He admitted that he was somewhat addicted to that habit and that Mrs. Ozouf was a very religious woman and strongly in favor of temperance in such matters. Insanity cannot be fairly predicated on a single mistake in drawing a check, upon an offer to buy a horse, or upon an expressed opinion that the witness should reform his bibulous habits.

John M. Hedden told about Mrs. Ozouf setting a fence over on his ground by his consent ten years before, and then after her husband's death offering him \$1,000 for the same land with the right to pasture his cow three months in the year; that she wanted to build a church and contribute one-fourth herself, have him and his wife advance one-fourth each, and the public one-fourth; that later in the day she asked him if he had sent for the bill of lumber; and he also says that she objected to his selling a right of way to the S. P. Co., through his premises adjacent to hers, and that she said that she would give him as much herself; that she did not want the railroad to come down on their side of the river. He also produced a letter which Mrs. Ozouf wrote to his wife on the subject of building a church in Scottsburg. The letter is connectedly written and simply shows that she was an enthusiast on the subject of church work, and that, inasmuch as some one was about to establish a saloon in Scottsburg, she thought it ought to be counteracted by the establishment of a church, there being no religious edifice in the place. This witness also is shown to have accepted her checks both before and after the occurrences which he describes.

The defendant Hazel Northup, a witness on her own behalf, noticed a change in Mrs. Ozouf a little before Christmas in 1907; that on one occasion she found her on her knees crying and saying that she was sorry she had treated the witness so badly. This may

be explained from the fact that Mrs. Ozouf, as disclosed by other testimony, had made a will which she afterwards destroyed because she had given too liberally to this witness and not enough to the brothers and sisters of the latter. Mrs. Northup, after speaking of seeing Mrs. Ozouf in bed in 1908 at the residence of Mrs. Conlisk, testified that the sick woman said that her voice sounded like Hazel's, but it was not Hazel. This also may be accounted for by the fact that in the interim, Hazel, contrary to the wishes of Mrs. Ozouf, had gone away from home and married before she was 18 years of age. The witness saw her again in 1910, in Portland, and says of Mrs. Ozouf that: "She sat in a chair with her hands folded looking down at the floor, and did not talk except when spoken to. I don't think she recognized me, but don't remember much about it now." The last time she speaks of seeing Mrs. Ozouf was a few days before her examination, and merely says, "I don't know whether she recognized me or not."

Dr. Fields treated Mrs. Ozouf first in August, 1907. He visited her twice to treat a severe abscess under her arm, and once when she ran a nail into her foot. He says that beginning in August or September, 1907, she was abnormally excitable, active, talkative, and afterwards drifted into a state where she was morose, melancholy, and quiet. He said he did nothing to test her sanity; just looked at her and talked to her; that sometimes she would give proper answers to his questions and sometimes would not answer him at all. In one instance her relatives sent for him to visit her at Scottsburg; that he ran across her on the street, and that no doubt she knew him, but that she did not look at him or speak to him; that he went to the house and found her upstairs; that she did not want to see him and appeared provoked that he had come, or that her folks had sent for him. He says, too, that he went upstairs and sat on the top step with her and eventually left her in a different frame of mind. He sums up by saying that "she seemed angry at me for coming, though she had no occasion to be so"; that he recalled nothing out of the ordinary in the conversation, and says there was no time, but that she knew any acquaintance she saw. This witness also accepted as pay for his services the checks of Mrs. Ozouf drawn long after the occurrences of which he speaks.

Of the relatives of Mrs. Ozouf, her sister, Mrs. Spencer, her nieces, Mrs. Conlisk, Mrs. Black, and Mrs. Bell, all testified about her mental condition. It would prolong this opinion to too great a length to quote from their testimony in detail, but they unite in saying that while she grew melancholy and reserved after her husband's death, and was incapacitated by an illness which the physicians pronounced paralysis, she also retained her mentality, and whenever she con-

versed at all she spoke intelligently and connectedly even up to the time of the hearing. Mrs. Dimick, in no way related to her, but a life long friend and acquaintance, visited her in October, 1907, for the purpose of borrowing money, and afterwards in November of the same year saw her on the same business. This witness says that Mrs. Ozouf conversed intelligently on the subject of business both times, and that she saw nothing to indicate that Mrs. Ozouf was not competent to attend to the business. This witness saw the patient next in January, 1909, and says that she had changed in the meantime. Speaking of the nature of the change, she says: "She did not converse with me then very much. She knew me and answered my questions rationally, but did not converse with me."

G. M. Bassett, cashier of a bank at Drain where she kept an account, testified to having had business correspondence with Mrs. Ozouf during the year 1907, and of meeting her on one occasion, and in substance says that she was of sound mind. Of similar import is the testimony of T. M. Word, present sheriff of Multnomah county, who as notary public on January 31, 1911, took her acknowledgment to a deed executed by her as executrix of her husband's will.

Dr. H. W. Hegele treated Mrs. Ozouf during May and June, 1910, for eczema. He says: "She had no delusions nor any derangement of any of her mental faculties. As to her mental condition, she was slow to respond to questions; her volition was not as active as it would be in a person where they did not have the condition of grief such as her case showed. Her replies were very definite and intelligent. I spoke to her about herself, and she told me that she did not care to have anybody bother very much with her; that she liked to be left alone. Her answers were intelligently given. She took time to think them over, because a person of her age does not think rapidly as a person that is younger. Her reason was clear and definite." He further says that she conversed with him very rationally as late as April 22, 1913.

Dr. Williamson, witness for the plaintiffs, in rebuttal, was for many years a physician at the Oregon State Hospital for the Insane, and a specialist in the treatment of mental and nervous diseases. At the time of the hearing he was conducting a private hospital of his own for the treatment of such maladies. Mrs. Ozouf went to his sanatorium for treatment the latter part of February, 1908, and remained there for several weeks under his daily observation. Dr. Williamson described her physical ailment as the rigidity of paralysis agitans. He says that "her mind was tinged with this melancholy, but, so far as being irrational in her speech, at no time did she express an irrational idea. Her conversation outside of her complaint about herself was always strictly coherent and rational." He further says: "She is not insane.

Her mind is affected in this that it does not operate quickly. There is a retardation which she is unable to control; but when it comes to the ultimate expression of her ideas they are rational and correct."

What would seem to be a controlling factor on the subject in this state of the testimony is found in the letters written by Mrs. Ozouf, a few of which only will be here noticed. In her letter of August 28, 1907, to Mr. Black, she writes about deposits in the Drain Bank which had recently suspended; about Hazel coming home with her sister, to stop at Astoria en route, and asks Black to send them money. She tells of suffering with the abscess under her arm, and speaks of other family affairs, and says, "I am piling work onto you." September 10th, she sends the address of some nephews and speaks of receiving a letter from the defendant Annie Northup, and of writing to Hazel to come on without their delayed trunks, and to inform Black that they would be in Portland. September 20th she inquires about her late husband's property and about what notes and mortgages can be first called in. She says she wants Warren Reed's note taken up the day it is due. Later she writes of collecting money from Warren and directs Black to send his note to him. She tells of negotiating the loan to Mrs. Dimick, and says: "I wish I could see you so as to have a talk about business, but this matter is O. K., but we could not wait for you to come." October 31st, she speaks, among other things, about receiving a letter from Mrs. Dimick, and hopes everything will prove satisfactory so that she can have the money. November 22d, she writes to Black about a letter received from Mrs. Dimick complaining that Black had declined the loan of \$2,500 already promised by Mrs. Ozouf. The latter hopes it can be arranged rather than break her promise to make the loan. The writer also speaks in that letter of the Fishers, who owed her some money, wanting to dissolve partnership, and says she thought it was all right, but referred them to Black. January 24, 1908, she writes again to Black hoping that he will see that everything is secured about Mrs. Conlisk's house, and asks to have it insured. It otherwise appears in testimony that she had advanced some money to enable Mrs. Conlisk to build a house in Portland, and that she was to be secured by some lien on the house whereby the rent should be applied to the interest. She refers in this letter to Black's intention to go to Roseburg to make a final settlement of her husband's estate, and inquires in what bank he deposited the interest from the loan made to one Maupin. These, with other letters, are as clearly and connectedly written as one could wish, and come from the pen of one evidently well educated and skilled in business. They speak stronger than the testimony of any witness of a clear intellect, and, were the scale otherwise at a balance, would certainly make a



preponderance in favor of the plaintiffs who hold the negative of the question at issue.

Considering medical testimony, the evidence given by Dr. Williamson, a skillful alienist of wide experience, who observed her for a long period of time, and that of Dr. Hegele, who observed her much longer than the physicians testifying for the defendants, make a showing certainly of greater value than the evidence of the physicians called for the defendants, especially since the latter gave the patient only casual observation and did not disclose at the time to any one their belief that she was insane. The value of the opinions of nearly all the witnesses for the defendants is much depreciated by the fact that they transacted business directly with her and took her checks in payment of their demands at the very time they now say she was insane. None of them vouchsafes the idea that she was so insane that she did not or could not understand the nature and quality of the business in which she was engaged. On the contrary, one of them already noted says in substance that she knew enough for that purpose and did not need any explanation. Her letters show that she recognized Black as her business representative and disclose a capacity for such affairs above the average. A careful study of the testimony leads to the conclusion that the evidence on the subject of Mrs. Ozouf's insanity preponderates in favor of the plaintiffs, and that she was possessed of ample mentality to fully and fairly comprehend the nature of the business in which she was engaged at the time she executed the power of attorney and at the time the deeds were executed by her agent.

[5] It remains to determine whether the execution of the conveyances mentioned was within the scope of the authority conferred upon the attorney in fact. His power of attorney, among other things, after appointing him such attorney, authorized him to "lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements, and hereditaments, upon such terms and conditions and under such covenants as he shall think fit. \* \* \* And also for me and in my name and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, \* \* \* and other instruments in writing of whatever kind and nature. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might do or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue of these presents."

[6] It is contended on behalf of the defend-

ant that this authority did not include a gift of the property involved, and this is technically true; but it is overcome by the other technical truth that the conveyances were made on the money consideration of \$10 in one case, and \$1 in the later conveyance. The attorney in fact was within the letter of his authority to convey the lands upon such terms as he should think fit. In determining whether the act was within the spirit of the authority conferred upon Black by Mrs. Ozouf, we may resort to the parol testimony offered by the parties. The defendants contend that the terms of the power of attorney cannot be enlarged by resorting to such testimony, and that it must speak for itself. This may be conceded, but that is not the question. Section 713, L. O. L., reads thus: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties." Here the validity of the power of attorney is the crucial fact in dispute, and for the proper construction of the instrument, in the language of section 717, L. O. L., we may resort to "the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it," so that the court may be placed in the position of those whose language it is interpreting.

[7] As partly stated above, Mrs. Ozouf was possessed of a considerable fortune of her own, besides which she inherited a large estate from her husband. At the time her interest in the lands in question was unproductive. She was well advanced in years. Her husband advised, and she acquiesced in that counsel, that it would be a burden to her, and that it would be a proper thing to convey her interest in her deceased brother's estate in those lands to her brothers and sisters, and she still had that purpose after her husband's death, as stated by the undisputed testimony of Black, for whose credit as a witness the defendants have vouched by making him speak for them from the witness stand. This is also disclosed by the testimony of Mrs. Fanny Dimick, a wholly disinterested witness and lifelong friend and acquaintance of Mrs. Ozouf, who states that the latter told her that she did not wish to be burdened with

her one-fifth of the property of Robert Wade which she had inherited, and that she would like to turn it over to her brothers and sisters. It must be borne in mind, also, that she reserved her interest in about 900 acres of ranch land belonging to her deceased brother. It thus appears that the conveyances were the result of a settled purpose of Mrs. Ozouf formed at the time when no question is made of her soundness of mind. It was a natural and proper thing for her to do considering her financial condition at the time, and the relation she bore to the objects of her bounty. It does not appear anywhere in the testimony that any effort was made by any one to influence her in her decision, but that it was the culmination of her own matured design. The act of the attorney was within the strict letter as well as within the spirit of the power conferred upon him.

The defendants rely mainly upon the case of *Coulter v. Portland Trust Co.*, 20 Or. 469, 26 Pac. 565, 27 Pac. 286. In that case, under a power of attorney authorizing the agent thus created to buy, sell, or transfer real estate, the attorney in fact conveyed the land to a grantee charging the same with the support and maintenance of a minor daughter of the grantor. The court very properly held that this did not constitute a sale within the meaning of the instrument creating the power, and that it was wholly foreign to the intention of the person creating the agency. In other words, as the court points out, it amounted to an executory agreement, the performance of which by the grantee was in no wise secured. On the subject to which it is applicable, this case is quoted with approval in *Security Savings Bank v. Smith*, 38 Or. 72, 62 Pac. 794, 84 Am. St. Rep. 756, where Mr. Justice Wolverton lays down the rule in such matters in this language: "These rules of construction in no wise conflict, however, with another just as well established, and of equal potency and power, which is that the object of the parties must always be kept in view, and, where the language will permit, that construction should be carried out that will support instead of defeat the purpose of the instrument." Mr. Justice Wolverton also quotes with approval the language of *Hemstreet v. Burdick*, 90 Ill. 444: "But it is said the power must be strictly construed. This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention fairly appears from the language employed, that intention must control. A strained construction should never be given to defeat that intention, nor to embrace in the power what was not intended by the parties."

It follows that the execution of the power of attorney by Mrs. Ozouf was a valid and binding act, and that the deeds in question executed by her attorney in fact in pursu-

ance of that authority are also binding upon her. The circuit court erred in setting aside those deeds, and its action in that respect must be reversed. For want of proof the suit of the plaintiffs so far as it contemplates a correction of the alleged mistake must likewise be disregarded.

A decree will therefore be entered here to the effect that the plaintiffs take nothing in respect to the alleged mistake in the conveyance; that the defendants take nothing by their cross-bill; that plaintiffs have a decree establishing the validity of the deeds of February 8, 1908, and of January 4, 1909; and that none of the parties recover costs or disbursements from either of the others.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

### STROM v. HANCOCK LAND CO.

(Supreme Court of Oregon. April 7, 1914.)

#### 1. ADVERSE POSSESSION (§ 25\*)—ACTUAL OCCUPANCY—OCCUPANCY BY AGENT.

Possession by an agent is the possession of the principal, for the purpose of acquiring title by adverse possession, though the principal never personally occupied the land.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 116-120; Dec. Dig. § 25.\*]

#### 2. ADVERSE POSSESSION (§ 36\*)—EXCLUSIVE-NESS OF POSSESSION.

Where a 100-acre tract inclosed by fence was occupied by an agent for his principal till the principal sold him a 7-acre tract out of it, including the land in dispute, after which he continued to occupy the 7 acres as his own land, and the remainder as agent, though for a time the entire 100 acres were inclosed by a common fence and the agent lived on a portion other than that he had purchased, there was no such common or mixed possession by the principal and agent as interrupted the continuity of disseisin of the former owner of the land in dispute.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 139-143; Dec. Dig. § 36.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by Gustav Strom against the Hancock Land Company to determine an adverse claim to real property, etc. From a decree for plaintiff, defendant appeals. Affirmed.

E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for appellant. A. H. Tanner, of Portland (John Van Zante, of Portland, on the brief), for respondent.

RAMSEY, J. On the 22d day of March, 1912, the plaintiff commenced this suit. The complaint alleges that the plaintiff is, and for a long time prior to the date of the commencement of this suit was, the owner in fee simple and in the actual possession of lot No. 1, in block No. 1, in Delmar Shaver's Second addition to the city of Portland,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Multnomah county, Or., according to the duly recorded map and plat thereof. The complaint alleges, also, that the defendant has unjustly claimed, and now unjustly claims, an estate or interest in said real property or some part thereof, adverse to the plaintiff; that the claim of the defendant is without any right whatever; and that the defendant has no estate, right, title, or interest whatever in said premises, or in part thereof. The complaint alleges, also, title to said premises in fee under and by virtue of the statute of limitations, for the reason that neither the defendant nor any of its predecessors or grantors have been in possession of said real property within the ten years preceding the commencement of this suit, and that the plaintiff, his grantors and predecessors in title and interest, had been in the actual, open, visible, notorious, continuous, hostile, and adverse possession of the above-described property for more than ten years prior to the commencement of this suit, etc. The complaint prays for a decree declaring that the plaintiff is the owner in fee simple of said real premises, and that the defendant has no claim, right, title, or interest in or to said real property, or any part thereof, and barring all claim of the defendant in or to said real property, and quieting the plaintiff's title thereto. The answer denies most of the allegations of the complaint, and pleads title in the defendant as to a part of the real premises described in the complaint. The reply denied the allegations of the answer. The court below made findings and entered a decree for the plaintiff, as prayed for in the complaint. The defendant appeals, and claims that the findings and the decree of the court below are not supported by the evidence.

The parties stipulated, in the court below, that the plaintiff owns all of the premises described in the complaint lying south of the north line of the donation land claim of William Irving, and that the defendant owns all land lying north of the north line of Delmar Shaver's Second addition, as shown on the recorded plat thereof, and, also, that if the north line of the William Irving donation land claim is situated south of the north line of the said Delmar Shaver's Second addition, then the defendant owns so much of the premises described in the complaint as is north of the north line of the William Irving donation land claim, unless the plaintiff or his predecessors or grantors have acquired title thereto, by adverse possession, in which case said premises are owned by the plaintiff.

The weight of the evidence shows that the north line of the donation land claim of William Irving is about 20 feet south of the north line of the said Second Addition of Delmar Shaver. Hence the further question to be determined is whether the plaintiff, his predecessors and grantors, had had prior to

the commencement of this suit the adverse possession of the land now covered by said lot No. 1, of said block No. 1, of Delmar Shaver's Second addition to the city of Portland, described in the complaint, for the period of at least ten years.

The land in dispute was supposed to be a part of the donation land claim of William Irving and wife. The Delay donation land claim adjoined the Irving claim on the north, and, according to the contention of the plaintiff, the north line of the Delmar Shaver's Second addition coincided with the north boundary of the Irving claim and the south line of the Delay claim. As stated supra, according to recent surveys, it seems that the north line of Delmar Shaver's Second addition extends about 20 feet north of the north line of the Irving claim, and that about 20 feet of the north part of the property described in the complaint, and claimed by the plaintiff, is situated upon the Delay claim, and that it does not belong to the plaintiff, unless he and his grantors and predecessors had had adverse possession thereof for at least ten continuous years prior to the commencement of this suit. The plaintiff contends that he and his predecessors in title had been in the adverse possession of said land for more than ten years, and the court below sustained his contention.

Mrs. E. Ryan was one of the witnesses for the plaintiff. She was formerly the wife of Capt. William Irving, and he and she settled on the Irving claim and received title thereto as donees under the Donation Law of 1850 (Act Sept. 27, 1850, c. 78, 9 Stat. 496). The land in dispute was supposed to be on that part of said claim set apart by the government to Mrs. Irving. She remembers when the north boundary line of the Irving claim was surveyed. She resided on said claim with her husband, Capt. Irving. In 1860 she and Capt. Irving moved to British Columbia, and they remained there for years. Mrs. Ryan was acquainted with Joshua Delay, the owner of the Delay claim. Mrs. Ryan says that a fence was built on the line between the Irving and Delay claims about 1870 according to the government survey. She says that that fence was always recognized as the line between the claims. She testified that Irving claimed to own up to that fence. Asked whether Joshua Delay always recognized that fence as the division line between the two claims, she answered, "Yes, they never disputed it." She says that she never heard of Delay's questioning that that fence was on the line. (See Ev. p. 32.)

Mrs. Ryan says that she and Mr. Irving claimed to own the land up to the old fence. (Ev. pp. 31, 32.) She says that she and Irving moved to British Columbia in 1860, and that G. W. Shaver came over in 1860 to look after the land for her, and he looked after her land, including the land in question, and farmed it, and that there were some fruit

trees on it. Mrs. Ryan says that during the time she resided in British Columbia she came to Portland every year. She says that the old fence referred to was a rail fence. She says, also, on cross-examination, that she remembers the part of her land that she sold to G. W. Shaver, and that the fence around her land included the land that she sold to Shaver, and also other land owned by her.

The patent to the Irvings was issued November 13, 1865.

Mrs. Elizabeth J. Irving (Ryan) conveyed to G. W. Shaver, on June 16, 1876, seven acres and a fraction of her part of the Irving claim, and this tract is the land that was laid out as Delmar Shaver's Second addition by G. W. Shaver and wife in 1900, and the land in dispute is lot No. 1, in block No. 1, in said addition. When this addition was laid out, G. W. Shaver believed that all of it was on the Irving claim.

Delmar Shaver, a son of G. W. Shaver, was a witness for the plaintiff. He was born and reared on the Irving claim, and lived on it until after he was 23 years old. He lived there with his father G. W. Shaver, and is familiar with those premises. He says that the first fence that inclosed the Irving land, on which his father resided so long, was an old rail fence, and that when his father bought the seven-acre piece (in 1876) it, including what his father bought, was inclosed as one piece, and that the old rail fence was there then. He says that he does not know when this old rail fence was built, but it was there as far back as he can remember. This witness says that (after his father bought the seven-acre tract) they built a board fence on what was supposed to be the line of the old rail fence, and that the board fence was supposed to be on the line between the Irving and Delay claims, and he says that the line where said fence was built, as he understood it, always had been recognized as the line between said two claims, and that he never heard anything to the contrary, until a few years ago. Asked how long, to his knowledge, the Irving land (on which his father lived) had been fenced all around by a substantial fence, he answered that he was born there, and that it was fenced and inclosed then, and that they always had it for pasture and for an orchard, and he testified (Ev. p. 23) that his father always claimed up to the old fence line, and that his father cleared the ground up to that line. He says they used part of the land, and had a big orchard. On cross-examination, he testified that, before his father bought said seven-acre tract of Mrs. Irving, there was a rail fence entirely around it; but he said, also, that the fence inclosed other lands besides what his father bought. He says that he helped build the board fence, but that the board fence itself did not go around the whole piece, and that it connected with the old rail fence, and that the board

fence on the north line was built along the line of the rail fence. He says that his father had the seven-acre tract inclosed with Mr. Ryan's property. He says that all of the property was inclosed when his father bought the seven-acre tract, and that his father took care of Mrs. Ryan's property and lived on it until his death. He says that the inclosure included more than 100 acres of land belonging to Mrs. Ryan, and what she sold to his father, and that his father raised wheat and oats on this land and had a large orchard. He says that his father did not reside on the piece that he bought of Mrs. Ryan, but on the part that she did not sell to him. It appears that G. W. Shaver lived on this property from about 1860 until his death, a period of about 40 years, and took care of it for Mrs. Ryan, as her agent.

It is impracticable to set out a summary of all the material evidence. There were three other witnesses for the plaintiff.

The defendant did not offer any evidence on the subject of adverse possession. It put a witness on the stand to prove that the 20-foot strip in dispute was not in the Irving claim, and rested. Hence the question as to adverse possession must be determined on the evidence produced by the plaintiff.

The defendant in its brief gives a summary of the facts as shown by the evidence as it viewed them: (a) It admits that Mrs. Ryan, as early as 1872, had a rail fence built, inclosing about 100 acres of her land, and that during that time, and for many years afterwards, G. W. Shaver, as agent of Mrs. Ryan, was in possession of this 100 acres, so inclosed, and that this fence was built as early as 1872, and did inclose that part of the Delay claim that is in dispute in this suit. The evidence shows that this fence was built in 1870, and that it inclosed the land in dispute, and that G. W. Shaver, as agent of Mrs. Ryan, lived on this 100-acre tract continuously from 1870 until his death in 1901, about 30 years. Shaver raised wheat, oats, and fruit on said land. The inclosure appears to have been an ordinary rail fence. (b) The defendant admits, also, that Mrs. Ryan in 1876 sold and conveyed seven acres within said 100-acre inclosure to G. W. Shaver and described said parcel in said conveyance by metes and bounds. The defendant claims that this deed did not describe any part of the small strip in dispute, and this contention seems to be true; but the evidence shows that that conveyance included the land running up to the north line of the Irving claim, and that both Mrs. Ryan and G. W. Shaver believed and understood that it did include the land in dispute, and that both Mrs. Ryan and G. W. Shaver claimed the land up to the said old rail fence which the defendant admits, and the evidence shows, included the strip in dispute. The evidence shows that, prior to the execution of said deed, G. W. Shaver held and had possession of said land for Mrs. Ryan as her

agent, and, from the date of said deed until his death, he held said seven-acre tract as the owner thereof, and not as agent for Mrs. Ryan; but he held the remainder of said tract as her agent until his death. (c) The defendant claims that Mrs. Ryan resided in British Columbia for many years and did not reside on said 100-acre tract; but that it was inclosed with a rail fence in 1872, and from that time on she had G. W. Shaver in the possession of said land as her agent, and that he held it for her. The evidence shows that he was in the actual possession of all of said 100-acre tract all of said time as her agent. His possession was her possession.

The defendant admits an adverse possession in G. W. Shaver from 1897 until about 1901, and admits that the plaintiff had adverse possession of the premises during the seven years prior to the commencement of this suit, but claims that there was a breach of several years in the possession between the possession of G. W. Shaver, and that of the plaintiff, and that the plaintiff cannot add to his possession that of any of his predecessors. (d) The defendant admits that the 100-acre tract, including the strip in dispute, was inclosed with a fence from 1872 until the death of G. W. Shaver, about 1901. We think that the fence was built about 1870, and that the inclosure and possession continued until G. W. Shaver's death and beyond that date, but we will call it a period of 30 years. All of the 100-acre tract, including the tract in dispute, was inclosed with a substantial fence. The sufficiency of the fence has not been questioned.

The defendant, commenting on this possession, says, in its brief: "Shaver extended her (Mrs. Ryan's) fence over the line between her land and Delay's. This was without color of title, and, to be adverse, possession must be actual occupancy. The occupancy of Shaver was not her occupancy because she herself had not taken actual possession, and then put Shaver in possession, but Shaver took possession for her. This cannot be done. Disselsin cannot be accomplished by an agent or tenant."

[1] The counsel for the defendant seems to think if Shaver had been acting for himself, and not for Mrs. Ryan, his possession might have been sufficient to constitute adverse possession; but inasmuch as he was acting for her, as her agent, his possession was not her possession sufficiently to constitute adverse possession on her part. In this we cannot agree with counsel. Shaver was the agent of Mrs. Ryan and acted for her. What she did by him she did herself. She caused him to erect the fence inclosing the 100 acres, including the land in dispute, and when this was done, by her authority, and she claimed to own all of the land inclosed as her land, such acts constituted a disselsin of the defendant's grantors as to the land in dispute.

1 Cyc. p. 996, says: "The possession of one's agent is, for the purpose of acquiring title by adverse possession, the possession of the principal."

In *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962, the syllabus is as follows: "One may plead adverse possession and is entitled to the benefit of the statute relating thereto, although he was a nonresident and absent from the state during a portion or all of the period covered by his possession. The possession of one's agent is, for the purpose of the statute of limitations, the possession of the principal."

In *Den ex dem. Roberts v. Moore*, 3 Wall. Jr. 298, Fed. Cas. No. 11,905, Justice Grier says: "I think, also, the 30 years' limitation applies to this case. Possession by an agent or manager is actual possession within the meaning of the statute (of limitations)."

31 Cyc. 1405, says: "If an agent is in possession of the principal's property, by authority of the principal, possession of the agent is the possession of the principal, and will authorize the agent to maintain against third persons possessory actions with reference to the property."

In *Cochrane v. Faris*, 18 Tex. 857, the court says: "The possession of the tenants and agent of Riley was the possession of Riley. The land must be used and cultivated, but whether this be done by Riley or his tenants or agent, those holding under him, was immaterial."

In *Whithead v. Foley*, 28 Tex. 14, the court says: "In answer to the third objection made to the defense relied upon by this defendant, it may be said that, although it is unquestionably true that the party who seeks to protect himself under this section of the statute must show that he has title or color of title, as defined by the law, or holds by chain of transfer, \* \* \* has possession of the land in dispute, and that the same has been held adversely to the plaintiff during the time prescribed, yet there is nothing which defines or limits the manner in which he must hold possession, or forbids him claiming the benefit, when held in any manner recognized by law, as sufficient to invest him with actual seisin and possession of the land. It is immaterial whether he does so by actual individual occupancy, or by a servant, agent, or attorney."

In *McColman v. Wilkes*, 3 Strob. (S. C.) 470, 51 Am. Dec. 638, 639, the court says: "The persons who held the land for the plaintiff were rather agents than tenants, or if tenants they were not lessees of a particular parcel, but tenants employed to hold possession of the whole. \* \* \* The possession of such a tenant or agent is the possession of the person under whom he holds, as much as would be an occupation of that person's overseer and slaves or cropper and hirelings." See, also, *Goodwin v. Sawyer*, 33 Me. 541.

It is held, also, that, where the owner has

been disseised, he can re-enter upon the premises by an agent, and by such re-entry toll the statute of limitations. *Campbell v. Wallace*, 12 N. H. 367, 37 Am. Dec. 219; *Ingersoll v. Lewis*, 11 Pa. 219, 51 Am. Dec. 536; *Hinman v. Cranmer*, 9 Pa. 41.

[2] We find from the evidence that from 1870 or 1872, whom the 100-acre tract was inclosed with the rail fence, until 1876, Mrs. Ryan, the predecessor of the plaintiff, by her agent, G. W. Shaver, had the actual, open, notorious, continuous, exclusive, and adverse possession of the whole of said 100-acre tract of land, including the strip of land in dispute. G. W. Shaver, from 1870 to 1876, when Mrs. Irving deeded the 7-acre tract to him, held the possession of the whole of the 100-acre tract, as agent of Mrs. Irving; but from June 16, 1876, until his death, he held the 7-acre tract in his own right, and had the actual, open, exclusive, and continuous possession of said tract from the date of said deed until his death, about 1901.

Mrs. Irving had no kind of possession of said 7-acre tract after she made said deed, and she recognized the title of said Shaver thereto. Some time after said deed was made, Shaver fenced his 7-acre tract off from Mrs. Irving's land; but, during part of the time after the execution of said deed, said 7-acre tract continued to be inclosed by the same fence that inclosed the remainder of said 100-acre tract belonging to Mrs. Irving. Said 7-acre tract was inclosed by a substantial fence from 1870 or 1872 until about 1901—a period of about 30 years—and neither the defendant nor any of its predecessors had possession of any part thereof at any time during said period of 30 years. The inclosure of the 100-acre tract in 1870 or 1872, and the claim of Mrs. Irving to own the whole thereof, and the actual occupancy thereof by her agent and his family, as stated *supra*, under a claim of title, operated as a disseisin of the defendant's predecessors, and this disseisin continued until the death of Shaver, and the title of G. W. Shaver to the 7-acre tract became vested in him in fee by the adverse possession of Mrs. Irving and the adverse of himself as early as 1882.

It is true that Shaver did not live on the 7-acre tract, but he resided on Mrs. Irving's remaining portion of the 100-acre tract. However, he had actual possession of the 7-acre tract, and, as testified by his son, he cultivated part of it and used other parts for pasture, etc. Before he fenced it off from Mrs. Irving's land, it was completely inclosed by her fence as it had been since 1870 or 1872. G. W. Shaver had the possession and use of Mr. Irving's land by her authority, at all times from 1870 or 1872 until after he fenced the 7-acre tract from her land, and he continued to use her fence to inclose his said land, with her consent, until he fenced his land off from hers. Mrs. Irving did not have or claim to have any kind of possession

of Shaver's land after she deeded it to him as stated *supra*.

Shaver and Mrs. Irving had no common possession of the land in dispute. She neither had, nor claimed to have, any rights therein after she made the deed to Shaver. The fact that their lands were inclosed by a common inclosure for a short time did not destroy the adverse character of the possession of the 7-acre tract including the land in dispute.

In *Parker v. Newberry*, 83 Tex. 431, 18 S. W. 817, the court says: "Beaseley sold it (land) in March, 1886, to appellee, who went into possession. If he was in possession up to the sale by Beaseley, and appellee's possession commenced with that sale, the continuity of the possession was clearly unbroken. The fact that the parties may have been in possession of the separate tracts of land included within the fence [or inclosure], and that their stock may have grazed on the land of appellee, and a concurrent use of the same by others, would not militate against the exclusiveness, in a legal sense, of his possession, nor make it the less adverse in its character. Especially is this so where that use or concurrent enjoyment of it by others was in subordination to appellee."

1 Cyc. 990, says: "In New York it has been held that, although a claimant may avail himself of a fence upon the line to complete his inclosure, the statute does not contemplate that a fence located far away from the premises and including other lands should be used as a means of protection to a claim by adverse possession. In other states the fact that land other than that claimed by adverse possession was embraced within the inclosure does not seem to affect its sufficiency if the whole tract inclosed was occupied and claimed for the statutory period."

In *Ambrose v. Huntington*, 34 Or. 487, 56 Pac. 513, the court says: "At some points it (the fence) was constructed somewhat off the line, and included some three acres of railroad land, and five or six acres of land belonging to Mr. Long. This fact, however, is not material, as the other land inclosed was inconsiderable, and the fencing may be said to have been placed substantially upon the boundary line," etc.

In *Hamilton v. Flournoy*, 44 Or. 102, 74 Pac. 485, the court says: "The inclosure relied upon was common to him and to others owning lands within its limits, and the use which consisted wholly of pasturage of stock was common as to all, so that his possession was neither actual, nor exclusive, and was therefore wanting in these essential elements to adverse possession, such as will ripen into a full title."

In the quotation from 1 Cyc., *supra*, reference is made to what was held in New York, and that work refers to the case of *Doolittle v. Fice*, 41 Barb. 181, which is based on a New York statute requiring that, to consti-

tute adverse possession, the claimant's land must have been protected by a substantial inclosure, and the facts of that case are different from the facts of this case.

We have examined the cases cited by the appellant and many others; but we have found no case where the facts are similar to the facts in this case where it was held that a claim of adverse possession was not made out.

In this case Mrs. Irving held the possession by G. W. Shaver, her agent, from about 1870 until June, 1876, and at the last-named date she conveyed the premises in dispute to her agent, and he continued from that date to occupy the remainder of her premises until about 1901, and, from the date of said deed until his death, he held the premises described in the deed and the premises in dispute as his own property. There was no mixed possession. Mrs. Irving neither had nor claimed to have any possession of the seven-acre tract after the date of said deed, and no one possessed any part of said tract after said deed was made, during the life of Shaver, but him.

While said seven-acre tract was inclosed by the same fence that inclosed the remaining land of Mrs. Irving's, for a while after said deed was made, yet G. W. Shaver, the grantee of said seven-acre tract, remained until his death in the actual possession of the remainder of Mrs. Irving's land. He had the continuous possession of her land as her agent and of the seven-acre tract as owner thereof.

Every case of adverse possession must be decided on its own facts.

We find that the plaintiff is the owner of the premises described in the complaint, and we approve the findings and the decree of the court below. The decree of the court below is affirmed.

MOORE, BURNETT, and BEAN, JJ., concur. McBRIDE, C. J., not sitting.

# DENVER & RIO GRANDE R. CO. v. FREDERIC et al.

(Supreme Court of Colorado. April 6, 1914.)

## 1. DEATH (§ 48\*)—ACTIONS FOR CAUSING DEATH—PLEADING—COMPLAINT.

A complaint in an action for wrongful death, alleging that the train was so negligently "operated" by defendant's employes as to cause a collision, etc., stated a good cause of action under Rev. St. 1908, § 2056, authorizing recovery for a death caused by the negligence of railroad employes "whilst running, conducting, or managing any locomotive, car, or train of cars," notwithstanding the word "operate" may be broader than the words of the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 63; Dec. Dig. § 48.\*]

## 2. APPEAL AND ERROR (§ 1039\*)—DEATH (§ 48\*)—SURPLUSAGE—REVIEW—HARMLESS ERROR—PLEADING.

An allegation of a complaint, in an action for wrongful death under Rev. St. 1908, § 2056,

authorizing recovery for a death caused by the negligence of "any officer, agent, servant, or employe" of a railroad, of negligence on the part of the company, as well as of its "officers, agents, and employes," was merely surplusage, and was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039; Death, Cent. Dig. § 63; Dec. Dig. § 48.\*]

## 3. DEATH (§ 7\*)—ACTIONS FOR CAUSING DEATH—NATURE OF REMEDY.

Rev. St. 1908, § 2056, providing that, if the employes of a railroad negligently cause the death of any person, the company shall forfeit not less than \$3,000 nor more than \$5,000 to the next of kin of the deceased, is penal in its nature, rather than compensatory, like sections 2057, 2058, which permit a recovery for wrongful death, based on the damage sustained.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 10; Dec. Dig. § 7.\*]

## 4. DEATH (§ 95\*)—ACTIONS FOR CAUSING DEATH—MEASURE OF DAMAGES.

Under Rev. St. 1908, §§ 2057, 2058, authorizing the next of kin to recover such damages for a wrongful death as may be fair and just, reference being had to the injury sustained by the plaintiffs, the amount of recovery is to be determined from the prospective accumulations of the deceased, having reference to his age, occupation, habits, bodily health, and ability to earn money.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.\*]

## 5. DEATH (§ 11\*)—ACTIONS FOR CAUSING DEATH—NATURE OF REMEDY.

Rev. St. 1908, § 2056, providing that, if the employes of a railroad negligently cause a death, the company shall forfeit \$3,000 to \$5,000 to the next of kin, does not, like sections 2057, 2058, depend upon whether the deceased could have maintained an action, but creates a new and independent cause of action, which is penal in its nature.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.\*]

## 6. DEATH (§ 7\*)—ACTIONS FOR CAUSING DEATH—NATURE OF REMEDY.

The purpose of Rev. St. § 2056, providing that a railroad, whose employes negligently cause a death, shall forfeit \$3,000 to \$5,000 to the next of kin, is to protect human life, and enjoin upon such employes the exercise of the utmost care, and upon the company great care in their selection, and the recovery is a forfeiture, rather than compensation for damages sustained.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 10; Dec. Dig. § 7.\*]

## 7. DEATH (§ 7\*)—ACTIONS FOR CAUSING DEATH—NATURE OF REMEDY.

That Rev. St. 1908, § 2056, providing that a railroad, negligently causing a death, shall forfeit \$3,000 to \$5,000, directs that such sum shall be paid to the next of kin, does not affect the fact that it is a penalty, especially in view of the fact that the recovery of compensatory damages was fully provided for by other statutes.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 10; Dec. Dig. § 7.\*]

## 8. DEATH (§ 64\*)—ACTIONS FOR CAUSING DEATH—ADMISSIBILITY OF EVIDENCE.

Since Rev. St. 1908, § 2056, providing that a railroad negligently causing a death shall forfeit \$3,000 to \$5,000 to the next of kin, is penal in its nature, it was error to admit evidence of the loss sustained from such death; the cul-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pability of the defendant being the sole guide in fixing the recovery.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 83; Dec. Dig. § 64.\*]

**9. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action for wrongful death under Rev. St. 1908, § 2056, authorizing the recovery of a penalty of \$3,000 to \$5,000 by the next of kin, it was reversible error to admit evidence of plaintiff's loss, as it might mislead the jury, who could only consider the defendant's culpability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.\*]

**10. DEATH (§ 25\*)—ACTIONS FOR CAUSING DEATH—DEFENSE.**

The cause of action authorized by Rev. St. 1908, § 2056, providing for the forfeiture for a wrongful death of \$3,000 to \$5,000 to the next of kin, being one in which the deceased had no interest, and from which he could not relieve defendant from liability, a free pass, exempting defendant from liability for injury to deceased, was properly excluded.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 27; Dec. Dig. § 25.\*]

Appeal from District Court, El Paso County; J. W. Sheafor, Judge.

Action by George T. Frederic and another against the Denver & Rio Grande Railroad Company. From a judgment for plaintiffs, the defendant appeals. Reversed and remanded.

E. N. Clark and J. G. McMurtry, both of Denver, for appellant. R. L. Holland, of Colorado Springs, Taylor R. Young, of St. Louis, Mo., Willis L. Strachan, of Colorado Springs, for appellees.

**BAILEY, J.** The suit was filed in the district court of El Paso county December 8th, 1909, by appellees, the parents of the deceased, against the railroad company, appellant, alleging that by its own careless, negligent and unskillful acts, and those of its officers, agents, servants and employes, in operating one of its trains, the death of Frank G. Frederic, their unmarried son twenty-seven years old, was occasioned. On the 14th of August, 1909, deceased was riding on the defendant's north bound passenger train on a free pass, and met his death through a head-on collision between that and another passenger train of the company near Husted, Colorado. The company admits negligence as charged, but contends that the complaint and proofs fail to make out a case under the statute; and it also relies upon the following agreement in the free pass to negative liability:

"The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person or for any loss or damage to the property of the passenger using this ticket, who hereby agrees that the company shall not be considered as a common carrier, or liable as such.

"Not good unless signed by the person named hereon, and if presented by any other person the conductor will take up this ticket and collect fare" (signed).

The action was brought under section 2056, R. S. 1908, which reads as follows:

"Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé, whilst running, conducting or managing any locomotive, car or train of cars, \* \* \* the corporation, individual or individuals in whose employ any such officer, agent, servant, employé, master, pilot, engineer or driver shall be at the time such injury is committed, \* \* \* shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand dollars, and not less than three thousand dollars, which may be sued for and recovered," etc.

Upon trial, the court instructed the jury that their verdict under the pleadings and evidence should be for the plaintiffs for not less than three thousand, nor more than five thousand dollars, the award being for the larger sum. The court overruled a motion for a new trial and entered judgment on the verdict, which the company brings here for review.

[1, 2] The first objection is that the complaint fails to state, and the proofs to establish, a cause of action under the statute upon which plaintiffs rely. It is alleged that "said train was by defendant and its officers, agents and servants, so negligently, carelessly and unskillfully operated that it collided violently head-on with another train of the defendant company," while the language of the statute allows recovery for the death of any person resulting from the "negligence, unskillfulness or criminal intent of any officer, agent, servant or employé, whilst running, conducting or managing any locomotive, car or train of cars," etc. The contention is that the negligence of the company as such is not covered by the provision, but rather that the statute applies only to officers, agents, servants or employes, and is limited solely to acts of negligence committed by such persons whilst running, conducting or managing any locomotive, car or train of cars. In particular it is urged that the statute does not apply to the negligence of a person who does not engage at any time in the actual running, conducting or managing of locomotives, cars or trains. A somewhat similar contention was made in *Whittle v. Denver & Rio Grande Railroad Co.*, 51 Colo. 382, 118 Pac. 971, a case where in a suit brought under the same provision it was sought to hold the railroad company liable for the negligence of its station agent, in failing to communicate train orders to the train crew, resulting in a head-on collision. Those facts were set out at length in the complaint, it



being there contended that it was the purpose of the statute to limit its provisions to those employed in the immediate charge of the train. But this court declined to assent to that narrow construction, and reversed a judgment of dismissal, following the election of plaintiffs to stand by their complaint, to which a general demurrer had been sustained below, and remanded the case. While we do not commend the complaint under consideration as a model, still that it fairly meets the essential requirements of the section under which the action was brought cannot well be doubted. Charging negligence directly against the company, if a fault, may be regarded as surplusage, and certainly does not constitute serious or reversible error. Negligence was also charged against the officers, agents and servants of the company in operating the train. The allegation that the officers, agents and servants of the company so carelessly, negligently and unskillfully operated the train is equivalent to charging that this was done by some one or more of them while engaged in running, conducting or managing the train, so that a case was made out under the provision in question, especially in view of the Whittle decision, supra. This is equally true even though the word "operate" may be said to be of broader significance than the expression "whilst running, conducting or managing any locomotive, etc." The word "operate" would certainly include and cover everything contained in the statutory expression, even though it might include matters outside and beyond that. It is, therefore, apparent that if, in fact, the accident was due to negligence of the character contemplated by the statute, such negligence was included in the allegations of the complaint, and the objection that those allegations are too broad cannot be taken in the manner proposed. It may well be that the complaint was subject to a motion to make more specific, or to a special demurrer, but even so, it by no means follows that a cause of action such as contemplated was not stated. The answer admits negligence as charged, and as we hold that the allegations of the complaint include a cause of action under the statute, proof to show just why and precisely how the accident happened was unnecessary.

Other matters urged on this review consist largely in the alleged improper admission and rejection of testimony. First, the court admitted over objection evidence of deceased's earning capacity, habits, character, and contributions made to his father and mother during his lifetime, as a basis for establishing pecuniary loss; and second, the defendant company offered the free pass in evidence to prove the contract relied on to acquit it of liability, which was rejected on objection by counsel for plaintiffs.

[3] The first proposition involves the question of the character of the section quoted,

whether penal or compensatory. If penal, the evidence offered as to the earning capacity of deceased and the like was improperly admitted, but if compensatory, then such evidence was competent.

We have separate statutory provisions authorizing civil actions to recover for the wrongful death of persons caused by negligence, which are essentially and diametrically different in their characters, purposes and objects: Section 2056 fixes a penalty for wrongfully causing the death of another under the particular circumstances and conditions therein provided; and sections 2057-2058 give a right to recover damages as compensation for the wrongful death of a person caused by or resulting from the negligence of any person or corporation, dependent upon whether the deceased would have had a cause of action for damages if he had been injured only. These latter sections read as follows:

"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured.

"All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."

Under section 2056 the amount of recovery is placed at not more nor less than certain sums, without reference to the earning capacity of deceased or amount of damages inflicted, but depends solely upon the degree of culpability of the wrongdoer, the precise amount of which is to be fixed by the jury either at the minimum or maximum, or at some amount between these limits, under proper instructions. The fact that no matter how young or old, how infirm or useless the deceased, the recovery for his death, under this provision, is precisely the same, depending on the character of the defendant's failure of duty, as it would be had he been in the prime of life, having the highest capabilities and attainments, mentally and physically, demonstrates with unerring certainty the purpose of the Legislature to make it a punitive section pure and simple. That it contains no provision for assessing dam-

ages on the basis of pecuniary loss, as in the compensatory provisions, is another evidence of its penal character; indeed, the fact that recovery may be had under it without any proof whatever of damages conclusively establishes that it is penal.

[4] Sections 2057-2058 are distinctively and by express terms compensatory provisions, authorizing an action for damages as compensation for the death of a person caused by the wrongful act, neglect or default of another, where such wrongful act, neglect or default is such that if death had not ensued the party injured could have maintained an action for damages. Under these sections the amount of recovery is to be determined from the prospective accumulations of the deceased had he not been killed, having reference to his or her age, occupation, habits, bodily health and ability to earn money. Compensation as damages under these sections is based on the reasonable expectation of benefit which a plaintiff may have a right to indulge from a continuance of the life of the deceased.

[5] The right of recovery under section 2056 does not depend in the least upon whether the injured person could have maintained an action for injuries if death had not ensued, but is an absolutely new and independent cause of action, unknown to the common law, and exists only where death results from an injury occasioned in the particular manner and form as therein prescribed. By the compensatory sections it is manifest that it was the intent and purpose of the Legislature to give a cause of action only in case the person injured would have had such a right had death not ensued, provisions in effect to preserve a cause of action; indeed, such purpose is expressly stated. That the right of action under section 2056 does not depend upon whether the injured person, if death had not ensued, could have recovered for personal injury, is one of the essential characteristics which distinguishes it from the compensatory provisions, where the right exists only on the theory that the person injured would have had a cause of action had he not been killed. It was, without a doubt, the presence of sections 2057-2058 in the act which lead this court to declare, in *A. T. & S. F. R. R. Co. v. Farrow*, 6 Colo. 498, that the purpose of the act is to keep alive a right of action which otherwise would have perished under the rule of the common law. There is no such purpose or intent either express or implied, in section 2056. The conclusion reached on this proposition in the *Farrow* Case seems to apply only to a cause of action under the compensatory provisions, and not to one under the penal section. Such conclusion in that case can be justified and upheld only upon the theory above advanced, for it is so plain that section 2056 creates a new cause of action where none at all existed before in favor

of any one, to wit, for the recovery of a penalty for the death itself, that there is no room for a difference of opinion on the subject. The following decisions so hold and are precisely in point: *Garrett v. L. & N. R. Co.*, 197 Fed. 715, 117 C. C. A. 109; *Osteen v. Southern Railway*, 76 S. C. 368, 57 S. E. 196; *Beavers' Admx. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353; *Fink v. Garman*, 40 Pa. 95; *Davis v. Railway*, 58 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; and *Matz v. Chicago & A. R. Co. (C. C.)* 85 Fed. 180. But if it be insisted that the decision in the *Farrow* Case on the question under consideration was intended to and does apply to section 2056, then it becomes important to note that in that case there was no issue tendered which even warranted, much less required, the court to determine that precise matter, and therefore what is said in the opinion in that connection is dicta, and while persuasive, is neither conclusive nor controlling.

[6, 7] The purpose and policy of the section manifestly is to guard and protect human life against the fatal consequences of the negligence, unskillfulness or criminal intent of any officer, servant, agent or employé of any common carrier, whether a corporation or individual, while engaged in running, conducting or managing any locomotive, car or train of cars, or other public conveyance. Undoubtedly the provision was intended to enjoin upon such representatives the utmost skill and diligence in the discharge of their important duties as guardians of human life, and upon the carrier itself the exercise of great care and caution in their selection, to the end that better service be secured, with fewer accidents and less destruction of life. The recovery, whatever it may be in amount, is denominated a forfeiture, and the fact that it goes to the next of kin cannot be said to affect or change the character of the provision, as clearly indicated by its express terms. It would have been quite as competent for the Legislature to have awarded the penalty to the public school fund, or in the nature of a fine to the general treasury of the state, as it was to authorize its recovery by those named in the statute, and had that been done there could have been no doubt of its penal character.

Similar provisions have been considered and construed by many other courts, and so far as we have been able to ascertain they have been uniformly held penal. Section 212 of chapter 112 Public Statutes of Massachusetts 1882, reads as follows:

"If by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by a

fine of not less than five hundred or more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin. \* \* \* If the corporation is a railroad corporation, it shall also be liable in damages, not exceeding five thousand and nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in a case of an indictment."

The Supreme Court of Vermont was the first to construe this statute, and held it penal, *Adams, Admx. v. Railroad Co.*, 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800, speaking in the opinion to that point as follows:

"The plaintiff claims to recover by virtue of the provisions of a public statute of Massachusetts. The suit cannot be maintained if the statute declared upon is held to be penal. *Blaine v. Curtis*, 59 Vt. 120 (7 Atl. 708, 59 Am. Rep. 702). So far as we are informed by counsel or have been able to ascertain by examination, no construction has been placed upon this statute by the Massachusetts court. It thus becomes necessary for us to give to the statute our own interpretation. \* \* \* A statute giving a right of recovery is often penal as to one party and remedial as to the other. It is said that in such cases the true test is whether the main purpose of the statute is the giving of compensation for an injury sustained, or the infliction of a punishment upon the wrongdoer. We think an application of this test to the provision in question shows it to be penal. The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right of action to the personal representative of the deceased, for the benefit of the widow and children, or widow, or next of kin. If the right of recovery is established, the damages are to be five hundred dollars in any event. Any recovery beyond this is to be assessed with reference to the degree of the defendant's culpability. \* \* \* Here there is no ascertainment of the loss suffered, and as far as the amount of the verdict is left to the judgment of the jury, it is to be determined by the culpability of the defendant's act, regardless of the injury resulting from it to the persons for whose benefit the suit is brought. \* \* \* It is difficult to say that an assessment which is made to depend solely upon the degree of the party's culpability is not primarily meted out as a punishment. The sum is

to be determined by the very considerations that would govern a court in fixing a fine for involuntary manslaughter. The fact that it is given to persons whom the law would have entitled to share in the estate of the deceased cannot control the construction. A statute may be penal, although the entire amount recovered be given directly to the party injured."

Soon after the Vermont decision the Massachusetts court was called upon to consider the same section, and also held it penal, *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335, where this was said:

"In considering the contract on the back of the ticket, the fact that the statute is a penal one must also be borne in mind. The word 'damages' is not used in a strictly legal sense. *Sackett v. Ruder*, 152 Mass. 397, 403 [25 N. E. 736, 9 L. R. A. 391]. Damages are to be assessed not less and not more than a certain amount, and with reference to the degree of culpability of the corporation, its servants or agents. Originally the remedy was by indictment. Afterwards it was extended to an action of tort. \* \* \* It [amount of recovery] is in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth, and as such the intestate could not release the defendant from liability for it."

The statute of New Mexico on this subject is substantially like the section here under consideration, except only that the amount to be recovered thereunder is fixed at a single definite sum. The question of its extra-territorial force arose in *Kansas, Dale v. Railroad Company*, 57 Kan. 601, 47 Pac. 521, and the Supreme Court, holding it to be penal, declined jurisdiction to enforce it, saying:

"Another and perhaps more serious difficulty lies in the penal character of the statute of New Mexico. Although it is argued that the law of that territory provided for the payment by the wrongdoer of a sum of money to his widow, or minor children, and that they are the ones usually, if not invariably, most injured by his death, and that the money to be paid under that statute subserves really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of the husband and father, yet it is apparent that the theory of the law of the two states is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal; for it might happen that the person killed was a burden upon his family, contributing nothing to them."

The Supreme Court of Illinois refused to enforce in that jurisdiction a like statute of Missouri, because penal, *Ralsor v. C. & A. R. R. Co.*, 215 Ill. 51, 74 N. E. 71, 106 Am. St. Rep. 153, 2 Ann. Cas. 802, and in that connection had this to say:

"The language of the statute (sec. 2864) is,

shall forfeit and pay for any person or passenger so dying, the sum of \$5,000.00, which may be sued for and recovered,' etc. The plaintiff is not required to prove any damage, but only that the death was occasioned by such defect, negligence or criminal intent as is mentioned in the section and averred in the declaration. \* \* \* By the terms of the statute, and as it is administered in Missouri, whether the plaintiff has or not suffered pecuniary loss or damage is immaterial. His right to recover depends solely on the plaintiff's relation to the deceased and the culpability of the defendant, within the meaning of the statute and as averred in the declaration. From this it necessarily follows that a plaintiff who has suffered no damage, but has even been relieved, by the death, of a pecuniary burden, may recover \$5,000.00. If, in any case, any part of the amount recovered may be deemed compensatory, this is merely incidental, the primary object of the statute being punitive."

In a recent case, *Young v. Railroad Company*, 227 Mo. 307, 127 S. W. 19, the Supreme Court of that state had under consideration a Missouri statute on this subject in every essential identical with the one now before us. A former statute of that state on the subject had been amended by adding the words "as a penalty," so as to make the provision read "shall forfeit and pay as a penalty for every such person, employé or passenger so dying the sum of not less than \$2,000 and not exceeding \$10,000, in the discretion of the jury, which may be sued for and recovered," etc. The opinion therein is the very latest expression of that court upon the nature and character of such provision, upon which point it spoke as follows:

"The words, 'as a penalty' inserted by the amendment add nothing to the meaning or effect of the section. \* \* \* If it be a case in which the damages as for compensation to the person injured be in question, the jury after assessing compensatory damages may, in a proper case, look into the character of defendant's conduct to see if punitive damages should also be awarded. In the case at bar, however, the damages are not given as compensation to the party aggrieved, but as a penalty which the law prescribes for the negligent killing of a human being; it is all penal in its character and in fixing the penalty the jury have a right to consider the conduct of the negligent party beyond the mere finding that he was negligent; they may consider whether the conduct which resulted in the catastrophe arose from mere inattention or was wilful, wanton or reckless. That is what the jury does in assessing the punishment for a crime and it is what the amendment of 1905 to section 2884 authorizes the jury to do in assessing the amount of the penalty under that section of the statute."

In *Marshall v. Wabash Railway Co. (C. C.)* 46 Fed. 269, in a well considered opinion, the

Federal Circuit Court for the southern district of Ohio, in a case involving the enforcement there of the Missouri statute on this subject, held the statute distinctively penal, and declined jurisdiction because statutes of that nature could be enforced only within the sovereignty of their creation.

The fact that for several years prior to the adoption of section 2056 we had on our statute books broad and comprehensive compensatory provisions, under which every conceivable action for damages resulting from the negligence of persons or corporations causing the death of a person could be maintained, is strongly confirmatory of the view that this latter section was intended to be and is penal. There was no field to be occupied by any further enactment providing for the recovery of compensatory damages, and unless section 2056 be penal it is without a function to perform or a purpose to serve.

[8, 9] Since we hold the statute penal, it was improper to allow plaintiffs to prove damages because of the loss of the services of and support by their son; indeed, that element is not involved in this action in the slightest and cannot be under our construction of the provision in question. To make out a case in the first instance the plaintiffs had only to show that the defendant was a common carrier, that the negligence charged was the proximate cause of the death of their son, was of the character described in the statute, and their relationship to the deceased. Whether the plaintiffs did in fact suffer pecuniary loss or damage is wholly immaterial. The amount of recovery depends solely on the degree of culpability of the defendant and cannot, when a cause is made out, be less than \$3,000, and may go to \$5,000 in the discretion of the jury, depending on the nature and quality of the wrongful act of which complaint is made. Because of the character of the statute, and the rights of the plaintiffs and the liability of the defendant as therein defined, it is plain that the evidence showing the character, habits, health, age and earning capacity of the deceased, and the contributions by him to the support of his parents, was inadmissible. *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146; *Marshall v. Wabash Railway Co.*, supra; *Philpott v. Missouri Railway Co.*, 85 Mo. 164; *Adams, Admx. v. Railroad Company*, supra; *Dale v. Railroad Company*, supra; *Raisor v. C. & A. R. R. Co.*, supra; *Young v. Railroad Co.*, supra. While we do not say, under the facts of this case, that with that testimony omitted the jury might not have properly returned a verdict for the amount which it did return, we leave that question open, still it is plainly impossible to determine what the verdict of the jury might have been had no such testimony been before it. It was the right of the defendant to have the finding of the jury upon the amount of the award with no testimony be-

fore it bearing on the question other than such as was competent and proper in that connection for it to consider. It is out of the question, upon any logical, fair or reasonable theory, to hold that the admission of this testimony was not harmful. On the contrary, it is quite reasonable to assume that but for it the verdict might have been less, possibly not more than the minimum amount which the statute allows. The fact that this testimony was permitted to go to the jury for consideration in arriving at the amount of their verdict is such prejudicial error as necessitates a reversal of the judgment.

[16] From the nature, purposes and objects of the statute, as herein declared, it is manifest that the cause of action is one in which the deceased had no interest at all, and from the liability for which he could not relieve the company by a contract with it. It, therefore, follows that the pass, and the contract included in it, offered in evidence, was incompetent and immaterial, and was properly excluded. *Doyle v. Fitchburg Railroad*, supra; *Clark v. Geer*, 86 Fed. 447, 32 C. C. A. 295; *Tingley v. Long Island Ry. Co.*, 109 App. Div. 793, 96 N. Y. Supp. 865; *C. v. R. I. & P. Co. v. Martin*, 59 Kan. 437, 53 Pac. 461; *Weir v. Roundtree*, 173 Fed. 776, 97 C. C. A. 500, 19 Ann. Cas. 1204; *Littlejohn v. Fitchburg R. Co.*, 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; *Jones v. Boston, etc., Ry. Co.*, 205 Mass. 108, 90 N. E. 1152.

The judgment is reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

MUSSER, C. J., and WHITE, J., concur.

# RILEY v. TRAINOR.

(Supreme Court of Colorado. April 6, 1914.)

ELECTIONS (§ 180\*)—BALLOTS—INDICATION OF CHOICE—INSERTION OF NAMES.

Under Rev. St. 1908, §§ 2235, 2259, 2266, and Laws 1913, p. 685, § 1, prescribing the form of the official ballot, requiring the voter to indicate his choice by a cross mark opposite the name of his candidate, and providing that if an imperfect mark be found near any name, so that the intent of the voter may be gathered therefrom, it shall be counted for that candidate, a ballot on which the names of candidates were written in after the printed names on the official ballot, but no cross mark made after any of the names, cannot be counted for any candidate.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.\*]

En Banc. Error to Crowley County Court; G. F. Patrick, Judge.

Election contest by James Trainor against George Riley. Judgment for the contestant, and the contestee brings error. Reversed and remanded.

I. H. Stanley, of Ordway, for plaintiff in error. Dan B. Carey, of Denver, for defendant in error.

MUSSER, C. J. At a municipal election held in the town of Ordway, plaintiff in error, Riley, and the defendant in error, Trainor, were candidates for the office of trustee of the town, for the term of two years. Upon a count of the ballots, the election judges found that Riley had received 120 votes and Trainor 117, and, upon a canvass, Riley was declared elected. Thereupon Trainor instituted a contest, and, after trial and recount of the votes, the court found that Trainor had received 121 votes and Riley 120, and rendered judgment in favor of Trainor.

Several assigned errors have been argued by the plaintiff in error; but, in the view we take of the matter, it is necessary to notice one only. At the election three trustees were to be chosen for a term of two years. On the official ballot, under the designation of that office, there were printed the names of three candidates in separate spaces, to the right of each of which there appeared the name of the party he represented, and then a small square or space in which the voter might make his cross. Among these printed names was that of Riley. Below the printed names, were three blank spaces, as the law required, in which the elector might write the name of any person, or persons, for whom he desired to vote, as trustee for the term designated. At the extreme right of these blank spaces were the small spaces for the cross mark, the same as appeared after the printed names. When the ballots were counted, three were found, in each of which the elector had written three names in the blank spaces provided for that purpose, among which was written the name of Trainor. There was no cross or mark after or near any of the six names on the ballots. In fact the three ballots, so far as that office was concerned, appeared the same as they did when given to the elector, except that the three names were written thereon in the spaces that had been blank. With respect to the particular office in question, each appeared as follows:

FOR TRUSTEES	
For Term of Two Years (Vote for Three)	
GEORGE E. BEAVER	Law and Order Party
E. I. OLIVER	Law and Order Party
GEORGE RILEY	Law and Order Party
J. P. Bouldin	
Jas. Trainor	
O. N. McNulty	

The election judges did not count these three ballots for any one for that office. The county court held that they should have been counted for the persons whose names had been written in, and, therefore, counted them for Trainor. The election judges were right in not counting the ballots, for the electors

failed to designate their choice of candidates as the law has always required. Section 2235, Rev. St., relating to the form of a ballot, after stating how the names of candidates shall be printed and arranged thereon, and that there shall be left at the end of the list of candidates for each different office as many blank spaces as there are persons to be elected to such office, in which the elector might write the name of any person not printed on the ballot, for whom he desires to vote, says: "The ballots shall be so printed as to give each voter a clear opportunity to designate by a cross mark (X) in a sufficient margin at the right of the name of each candidate, his choice of candidates and his answer to the questions submitted, and on the ballot may be printed such words as will aid the voter to do this, as 'Vote for one,' 'Vote for three,' 'If you have not voted a straight ticket above, place a cross mark (X) with ink opposite each name you wish to vote for in the blank space left for that purpose,' and the like."

That part of the section relating to emblems and voting a straight ticket, of course, has been repealed, but its requirement that the ballot should be so printed as to afford a voter a clear opportunity to designate his choice by a cross mark is not changed. Section 2259 provides: "On receiving his ballot the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting shelves or compartments so provided, and shall prepare his ballot by marking, in ink, in the appropriate margin or place, a cross (X) opposite the name of the candidate of his choice for each office to be filled; and in case of a question submitted to a vote of the people, by marking in the appropriate margin or place a cross (X) against the answer which he desires to give; and in case of a vote for an entire or straight ticket or list of candidates, by making a cross (X) in the appropriate square after the name and emblem designating such ticket or list of candidates."

That part, which relates to the voting of a straight ticket has been repealed, but the requirement that he shall prepare his ballot by marking a cross opposite the name of the candidate of his choice for each office to be filled is still the law. Section 2266 provides that if an imperfect cross or mark be found near the name of a candidate which "appears to have been made with intent to designate the candidate so marked as the one voted for, such ballot shall not be rejected, if the intent of the voter to designate the person for whom he intended to vote can be reasonably gathered therefrom."

It is clear from so much as remains of the foregoing sections that it is necessary for the voter to designate his choice by a cross mark opposite the name of the person for whom he desires to vote. The headless ballot law of 1913, after the passage of which

the election in question was held, provides, in section 1: "The official printed paper ballot used at elections shall be arranged and prepared as now provided by law, except across the head or top of the ballot shall be printed only the following words: 'To vote for a person, make a cross mark (X) in the square at the right of his name.' And in order to vote for any candidate whose name appears upon such ballot the voter shall place a cross mark (X) in the square at the right of his name." Laws 1913, p. 685. There can be no mistaking this language. It requires that in order to designate his choice the voter must use a cross mark as the law requires. In this case no cross mark was used anywhere with reference to any of the candidates for the particular office in question, and the ballots ought not to have been counted. The case of *Baldwin v. Wade*, 50 Colo. 109, 114 Pac. 399, is not like this one. There, the voter made a cross mark (X) after the name of the candidate for whom he desired to vote, and the question was to ascertain the intent of the voter from a ballot that was marked with a cross mark substantially as the law required. Here there is no cross mark at all, and the voters failed to indicate any choice. If these ballots are not counted, Riley will have 120 votes, as counted by the election judges and on the trial, and Trainor 118 votes, on the count as made at the trial, or 117, as counted by the judges. This elects Riley.

The judgment is reversed, and the cause remanded, with directions to dismiss the contest.

Reversed and remanded.

WHITE and HILL, JJ., specially concur.

HILL, J. I agree in the conclusion that the ballots under consideration should not have been counted for the defendant in error, Trainor, for the reason that the electors casting them have not designated their choice in the manner provided by statute. I also agree with the conclusion that the requirement that the elector shall prepare his ballot by marking a cross opposite the name of his choice for each office to be filled, in the blank space provided for that purpose, has not been repealed by the headless ballot law of 1913. In this respect I agree that the law is the same now as it was when the case of *Baldwin v. Wade*, 50 Colo. 109, 114 Pac. 399, was decided, but I cannot agree that the legal principles here involved can be distinguished from some of those declared in the *Baldwin-Wade* Case; but to the contrary, by the conclusion reached, we are overruling certain alleged law pronounced in that case, and I think properly so, for, in my opinion, it is not supported by reason or authority, and never ought to have been declared. Neither can I agree with the statement that in the *Baldwin-Wade* Case the voter made

a cross mark after the name of the candidate for whom the majority thought he intended to vote, or that his ballot was marked substantially as the law requires when applied to the candidate, Wade, for whom this court counted the ballot; but, to the contrary, the ballot shows (a photograph copy of which I inserted in my dissenting opinion) that the voter made a cross in the space provided for that purpose to cast a vote for the opposing candidate, Baldwin, and directly opposite his name, as well as to the right of his party name, and at the exact place where the law says that a cross mark shall be made in order to vote for him. Yet, regardless of this, and the statute which thus authorizes it, simply because the name of Wade was written in on the line beneath Baldwin's name, and where it did not belong, and where it was outside of the blank spaces provided for the writing in of names, this court refused to count the ballot for Baldwin, although cast for him as the law says it shall be, and counted it for Wade, in direct conflict with the provisions of the statutes. In my opinion the most that could consistently be reasoned out in that case would be to say that it was impossible to determine for which candidate the voter intended to cast his ballot; but, when it is considered in connection with the provisions of the statutes, it certainly ought not to have been said that the voter either made an effort to substantially or otherwise express his choice for Wade in the manner provided by law.

This case is much clearer concerning the intention of the voter than the Baldwin-Wade Case. There is no contention that they intended to vote for any other candidate. The evidence of their intention to vote for these is strengthened by the further fact that they wrote three names in, the exact number to be elected, and did not attempt to make any mark opposite the names of any candidate whose name was printed upon the ballot, and I have not a shadow of doubt but that the electors casting these ballots intended to vote for Trainor, otherwise, as said by the majority in the Baldwin-Wade Case, "If he did not want to vote for Wade, why did he write his name in?" If the Baldwin-Wade Case declarations are sound, the same question is pertinent here, "If they did not want to vote for Trainor, why did they write his name in?" In my opinion, there is no answer to the question other than that these electors intended to vote for Mr. Trainor, as well as for the other two gentlemen whose names they also wrote in, and the only reason they should not be counted is because the voter has failed to express his choice in the manner provided by statute. That they are required to do so is recognized by all the authorities, many of which were set forth by Mr. Justice White and the writer in our dissenting opinions in the Baldwin-Wade Case. On the other hand, the reasoning in the Baldwin-Wade Case is to the ef-

fect that where the statute says, if for any reason it is impossible to determine the choice of any voter for any office to be filled, the ballot shall not be counted, and that this clearly implies that if the converse is true, the ballot shall be counted in the absence of any positive declaration of the statute that such a vote shall not be counted. This is followed by a declaration, in substance, that it would be a sacrifice of truth for technicality to say that such ballots ought not to be counted. If that reasoning is sound, when applied to the facts of that case, then I am impelled to suggest, when applied to the facts here, that the same reasoning ought to compel this court to now say that it would be a sacrifice of truth for technicality to say that these ballots ought not to be counted for Trainor.

The weakness of the reasoning in the Baldwin-Wade Case is demonstrated by the fact that the majority appear to have lost sight of the legal principle which is supported by all of the authorities, namely, that the declaration of a voter, in order to be effective, must be expressed in substantial compliance with the provisions of the statutes. The opinion in the present case recognizes this as the law, for which reason these votes are not to be counted, but if we were to follow the reasoning in the Baldwin-Wade Case, this judgment ought to be affirmed, and we ought to say here, as the concluding paragraph in that case says, viz.: "It is thus seen that the county court arrived at the very right of the matter. That is the object of inquiry, and when that end is reached, no person can, in any manner, shape, or form, be injured, but every one, the voters and the candidates, are awarded and given exactly what they are entitled to."

It will thus be observed by these excerpts from that opinion that the principles attempted to be promulgated in the Baldwin-Wade Case are applicable to the facts here. To my mind this record discloses that the trial court so understood them; and, while he was of opinion that these ballots should not have been counted, he added them to Trainor's total in the belief that he was following the law as announced by this court in the Baldwin-Wade Case. In this respect I think he was right, and I am of opinion, for this reason, that he is entitled to an apology from this court for a reversal of this judgment. The judges of election, who are usually laymen, and do not read the opinions of this court, followed the statute as it reads and declined to count these ballots for Trainor, as the former ones did in the Baldwin-Wade Case. The trial judge, while having the statutes before him, was also confronted by the opinion of this court in the Baldwin-Wade Case, and, it being our latest declaration upon the subject, and its principle being specially applicable to the facts here, he unquestionably felt that he was bound to follow its conclusions, and, is now

to be reversed for so doing, but in my opinion this reversal can only be justified by the overruling of the Baldwin-Wade Case, which, as I view it, is necessary in order to get right in this respect.

I am authorized to state that Mr. Justice WHITE concurs in these views.

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BUCKLAND et al. v. FIEDLER et al.  
(No. 3722.)

(Court of Appeals of Colorado. April 13, 1914.)

TAXATION (§ 761\*)—TAX DEEDS—RECITALS AS TO SALE.

Under the statute relating to tax sales, providing that, if no bid is made for any land, the treasurer shall reoffer it at the sale the next day, and reoffer it from day to day until he shall become satisfied that it cannot be sold at such sale, when he shall strike it off to the county, the county cannot purchase on the first day, or while there is a reasonable hope to find a cash purchaser, and a tax deed to the county, which did not show that the property was offered and reoffered by the treasurer before it was stricken off to the county, was void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.\*]

Appeal from District Court, Summit County; Chas. Cavender, Judge.

Action by George Fiedler and another against Charles Buckland and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Joseph N. Baxter, of Denver, for appellants. James T. Hogan and Quentin D. Bonner, both of Leadville, for appellees.

BELL, J. The complaint in this action is the ordinary one under section 255, Mills' Annotated Code, to quiet the title to the Tempest lode mining claim, United States survey lot No. 1854, in Snake River mining district, Summit county, Colo., and praying that the defendants be required to set up their title or estate therein, as provided by the Code, and that, upon the final hearing, the claim of title, estate, or interest made by the defendants be declared to be invalid and of no effect, and that the title of the plaintiffs to the premises be quieted and confirmed in them. The defendants David J. Cook and Mary Singleton, née Lowe, deraigned a title in fee simple from the government of the United States, through a patent of said premises, to themselves to an undivided three-fourths interest therein, and allege that one Alice M. Hardenbrook, a nonresident of the state, who was served by a publication of the summons, without a copy being mailed to her, claims to have and own the remaining one-fourth interest in the premises. It is further averred in the answer that the defendants Joseph N. Baxter and Joseph N. Baxter as trustee of the estate of Samuel Milton, deceased, have a lien on

the said interest of Mary Singleton, née Lowe. The other defendants disclaim any interest in the premises, and no appearance has been entered for the said Alice M. Hardenbrook.

For a second defense, defendants allege that the only claim of title of the plaintiffs is under a tax deed dated December 5, 1898, issued by the county treasurer of Summit county, Colo., to the plaintiffs, based on a tax certificate obtained by said county and assigned to the plaintiffs. The defendants allege that said tax deed is void upon its face because, among many other things, said property was not offered and reoffered for sale, as required by law, before the same could have been bid in by the county of Summit. The defendants also filed a cross-complaint setting up the same facts in substance as appear in the new matter in the answer, then make an offer of a return of the money paid for said certificate, together with all taxes, costs, and penalties which the court might adjudge to be due and payable, and thereupon pray that said tax deed be canceled, that the title to the premises be confirmed in the defendants, and for general relief.

The plaintiffs made no reply to the allegations and deraignment of title in the first cause of defense in the answer, but denied the allegations in the subsequent causes of defense.

At the trial the plaintiffs introduced the tax deed in evidence, the recitals of which, in part, read as follows: "The treasurer of said county did on the 11th day of July, A. D. 1890, by virtue of the authority vested in him by law, at the sale begun and publicly held on the 7th day of July, A. D. 1890, expose to public sale, \* \* \* in substantial conformity with the requisitions of the statute, \* \* \* the real property above described, for the payment of the taxes, interest, and costs then due; \* \* \* and whereas, \* \* \* the county of Summit in the state of Colorado having offered to pay the sum of seven dollars and eleven cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said property, \* \* \* which was the least quantity bid for, and payment of said sum having been made by it to the said treasurer, the said property was stricken off to it at that price."

The recitals fully establish the allegation in the answer that said property was not offered and reoffered by the treasurer before it was stricken off to the county. The deed states that the county treasurer on the 11th day of July, 1890, did expose to public sale this property, and that the county bid \$7.11 for the whole thereof, and, this being the least quantity bid for, the property was stricken off to it. It has been repeatedly held by this and the Supreme Court that where the recitals of a deed affirmatively show but

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



one offer of a piece of real property for sale, and that a sale thereof is made to a county on the first day of the offer, such deed is void upon its face. The law does not provide for a bid by a county on the offer of real estate, as recited in this case, nor for its paying the cash on a bid, as herein recited.

The statute provides that, if no bid is made for any tract of land, the treasurer shall pass it over and reoffer it at the beginning of the sale the next day, and that the same must be reoffered from day to day until the treasurer becomes satisfied that the same cannot be sold at such sale; then the treasurer shall strike it off to the county. A cash purchaser may buy the first time land is offered, or at any subsequent period; but a county cannot purchase on the first day, or while there is a reasonable hope to find a cash purchaser on any subsequent day during the continuance of the sale. *Dyke v. Whyte*, 17 Colo. 296-300, 29 Pac. 128; *Charlton v. Toomey*, 7 Colo. App. 304, 43 Pac. 455; *Bryant v. Miller*, 48 Colo. 192-196, 109 Pac. 959; *Lambert v. Scott*, 53 Colo. 357, 358, 127 Pac. 142. Under the above authorities, the tax deed is manifestly void upon its face, and, being void upon its face, it could not set in operation the five-year statute of limitation. *Carnahan v. Hughes*, 53 Colo. 318, 319, 125 Pac. 118.

The trial court, therefore, erred in finding the issues for the plaintiffs, quieting their title, and decreeing the title of the defendants to be void. Wherefore the decree of the trial court is reversed, the case remanded, and the court directed to enter a decree for the defendants, quieting and confirming their title in them against any and all claims of the plaintiffs, or of any person or persons claiming under or through them, and to decree said tax deed to be void and of no effect, and that the same be canceled upon the defendants paying into court for the use of the plaintiffs, within a reasonable time, an amount sufficient to reimburse them for the amount for which the land was sold at the tax sale, with interest and penalties as prescribed by statute, including subsequent taxes paid by them and interest thereon; and the costs of this suit are hereby ordered to be taxed to the appellees.

Reversed and remanded.

# SCHOOL DIST. NO. 3 IN CLEAR CREEK COUNTY v. NASH. (No. 3938.)

(Court of Appeals of Colorado. April 13, 1914.)

## 1. SCHOOLS AND SCHOOL DISTRICTS (§ 138\*)—TEACHERS—ACTIONS FOR BREACH OF CONTRACT—PLEADING.

A school-teacher suing for breach of a contract of employment for a year was not required to allege in her complaint that other employment was secured at additional expense for

living, etc., in order to have such expense deducted from the amount realized from the other employment in arriving at the amount of her damage.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 138.\*]

## 2. MASTER AND SERVANT (§ 39\*)—COMPENSATION—ACTIONS—PLEADING.

The complaint, in an action by a servant for breach of a contract of employment, need not allege that reasonable effort was made to secure other employment and failed, or that other employment was secured and a certain sum earned, as such matters are for the defendant to show, and, failing to do so, plaintiff is entitled to the full amount due on the contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 45, 46; Dec. Dig. § 39.\*]

## 3. APPEAL AND ERROR (§ 1047\*)—REVIEW—HARMLESS ERROR—CONDUCT OF TRIAL.

The erroneous ruling of the court, in an action by a teacher for breach of a contract of employment, that plaintiff should show the amount realized from other employment, instead of leaving such matters for the defendant to show, was not harmful to the defendant, who brought out the facts on cross-examination.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.\*]

## 4. SCHOOLS AND SCHOOL DISTRICTS (§ 138\*)—TEACHERS—ACTIONS FOR BREACH OF CONTRACT—EXPENSE OF SECURING OTHER EMPLOYMENT.

A school-teacher suing for breach of a contract of employment was entitled to have deducted from the amount received from other employment her expense resulting from the change, for railroad fare, increased living expense, etc., in arriving at her damages.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 138.\*]

## 5. MASTER AND SERVANT (§ 41\*)—COMPENSATION—ACTIONS—EXPENSE OF SECURING OTHER EMPLOYMENT.

A servant suing for breach of a contract of employment may charge the defendant with expenses incurred in obtaining new employment for the unexpired term, and for additional necessary expenditures caused by the change from the old to the new place of employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 50-53; Dec. Dig. § 41.\*]

## 6. SCHOOLS AND SCHOOL DISTRICTS (§ 138\*)—TEACHERS—ACTIONS FOR BREACH OF CONTRACT—ADMISSIBILITY OF EVIDENCE.

In a suit by a school-teacher for breach of a contract of employment, evidence of the amount expended by plaintiff in removing her family to her new place of employment, which was not pleaded, was properly excluded, as such expenses, if allowable at all, must be specially pleaded.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 138.\*]

Error to District Court, Clear Creek County; Charles McCall, Judge.

Action by Margaret Nash against School District No. 3, in the County of Clear Creek and State of Colorado. From a judgment for plaintiff, the defendant brings error. Affirmed.

John J. White, of Denver, for plaintiff in error. Morrison & De Soto, of Denver, for defendant in error.

HURLBUT, J. October 7, 1905, defendant in error, as plaintiff, filed her complaint in the district court, alleging in substance that on June 14, 1904, she was employed by defendant as a teacher in one of its schools, at an agreed price of \$70 per month, for the period of one year beginning July 1, 1904; that she accepted such employment and performed services as a teacher thereunder until January 1, 1905, at which time, without her assent and without cause, she was discharged from her employment by defendant; that defendant paid her in full for all services up to and including December 31, 1904, but no more; that at all times from said 1st day of January until June 30, 1905, she was ready and willing to perform the services as teacher under said employment, but was prevented from doing so by defendant. To this complaint defendant filed answer containing a general denial and a second defense, alleging that by force of a certain resolution or regulation passed by said defendant on June 13, 1904, such employment was conditioned upon her having or obtaining (on or before January 1, 1905) a first-grade certificate from the county superintendent of schools of Clear Creek county, failing in which the contract of employment would become void and of no effect; further alleging that plaintiff consented to such condition. A reply was filed to this answer, containing a general denial and a "second reply," stating that plaintiff was a graduate of the State Normal School of Colorado, and held a diploma from said school signed by the lawful authorities of that institution, and that the same had been filed with said county superintendent of schools; further averring that under the provisions of section 4128, Mills' Annotated Statutes, said diploma entitled her to teach in any of the public schools of the state, and that the resolution was void, of no effect, and contrary to the terms thereof. The case was tried to a jury, verdict returned in favor of plaintiff for the sum of \$185.88, and judgment rendered thereon. The case is in this court for determination by lawful transfer from the Supreme Court.

The contract of employment is founded upon two written instruments, viz.:

"Georgetown, Colo., June 15, 1904.

"Miss Margaret Nash—Dear Madam: You are hereby notified that at a meeting of the board of education, held on Tuesday evening, January 14th, you were reappointed as teacher in district No. 3, Clear Creek county, for the ensuing school year at (70.00) seventy dollars per month. At a meeting held on Monday evening, June 13th, the following resolution regarding the examination of teachers was adopted: 'Resolved, that after January 1, 1905, all teachers in district No. 3, Clear Creek county, shall hold a first-grade certificate.' In accepting this position, unless you already hold a first-grade certificate, you will be required to pass the county examination

in December, in accordance with the above resolution. Very respectfully, Will C. Hood, Secretary."

"Georgetown, Colo., June 20, 1904.

"To the Secretary of the School Board, Georgetown, Colo.—Dear Sir: Your notice dated June 15, 1904, containing appointment as teacher in your district for the ensuing year was received by me in due time. I accept the appointment, and am ready to sign a regular contract to that effect. Respectfully yours, Margaret A. Nash."

This is the second trial of this case. The first trial resulted in judgment for defendant, which judgment was taken to the Supreme Court on error, and there reversed. *Nash v. School District No. 3*, 49 Colo. 555, 113 Pac. 1003. The court held that the diploma of defendant in error entitled her to teach in the public schools of the county without first obtaining a certificate from the county superintendent of schools, and that the resolution was in conflict with the statute, was void, and of no effect as against defendant in error. After determining the matter just alluded to, the court further said: "The facts stated in the complaint, and supported by the evidence, were sufficient to constitute a cause of action in favor of plaintiff, and, unless rebutted, entitled her to a judgment for the actual damages by her sustained."

It is difficult to find in this record sufficient merit to justify the appeal. The issues were clearly defined, and, after the Supreme Court had decided against defendant the only serious question that could likely arise in the case, the latter had no defense left. The complaint stated a cause of action, and the evidence was undisputed and clearly sustained plaintiff in her right of recovery. At the second trial the only thing left for defendant to do, in order to prevent full recovery by plaintiff for the five months' salary, was to diminish the sum by introducing evidence, if it could, showing plaintiff had earned other money during that period, or that she had remained idle and made no reasonable effort to find other employment, which facts, if proven, could be used by defendant to minimize the loss for which it was liable. The spirit shown by the plaintiff is highly commendable, for the record shows that almost simultaneously with her wrongful discharge she sought other employment, and secured the same within less than a week, but at a reduced salary, and in a locality remote from where she had been teaching. There is no doubt that she suffered expense and inconvenience in changing her residence from where she had been employed for four years to her new place of employment.

The only question raised on this appeal which even approaches importance is that relating to expenses allowable to an employé wrongfully discharged, where such expenses are necessarily incurred by such employé in securing new employment, and the neces-

sary additional cost occasioned by the changed conditions surrounding the new employment. At the trial defendant made objection to all evidence which tended to show any expenses incurred by plaintiff in or about the obtaining of the new employment or her removal from Georgetown to Cripple Creek in order to properly establish herself preliminary to entering upon the discharge of her duties, which objections were based entirely upon the contention (1) that such expenses were not chargeable to defendant, and (2) that they were not pleaded in the complaint. We fail to see any merit in either contention. As to the first, counsel for plaintiff in error seems to contend that the items of expense and increased cost of living, etc., testified to by the plaintiff, were charges which plaintiff was seeking to recover from defendant as part of her cause of action. If such be the case, he is clearly in error, as no such claim was made by plaintiff, and the case was not tried on any such theory. When counsel was pressing this contention in the trial court, and claiming that plaintiff was attempting to show these items as recoverable against defendant in the main case, the court interposed and said: "I don't hold it is a charge against the school district. That is not the purport or theory of this examination now. I am trying to find out, and want the jury to know from the testimony of the witness, how much money this teacher earned during the time she should have been employed here, and how much she could have earned with reasonable diligence, minus the expenses that she had above the expenses here; that is what I want to come at. Not any expenses, except those expenses, figured directly, in connection with her work that are in excess of the expenses in that connection that she would have had to sustain her in Georgetown." The objection, therefore, on the ground given does not appear to have been well taken.

[1-3] Concerning the second ground, we have only been able to find one state, Kentucky, which holds that in an action of this kind the complaint must state that, subsequent to the wrongful discharge, plaintiff made reasonable effort to obtain other employment and failed, or that he thereafter secured other employment and earned a certain sum. As opposed to this doctrine, it is almost universally held, our own Supreme Court being among those so holding, that such matters are entirely for the defendant to show, and, if he fails to do so, the plaintiff will be entitled to judgment for the full amount due for the unexpired term following the wrongful discharge. It is not claimed in the instant case that such matters were pleaded. At the trial, after plaintiff had established by proper evidence her cause of action, her counsel suggested to the court that evidence of matters constituting a rebate against the judgment plaintiff was en-

titled to should come from the defendant. The court erroneously ruled that plaintiff should proceed to show such rebates in her main case. No exception was taken to the ruling; but, if there had been, no harm would have resulted, as defendant brought out the facts on cross-examination. This ruling of the court explains why we find plaintiff offering evidence to show the rebates, which should have properly come from defendant. Certainly the defendant should not be heard to complain when the court erroneously compels the plaintiff to prove his case for him, and that is the situation here. After plaintiff proved the contract and employment, its breach by defendant and wrongful discharge of plaintiff, the amount of the salary and the period for which she was entitled to recover, her case was complete, and, unless defendant, either by cross-examination or original evidence, had shown the amount earned by plaintiff during that period, she would have been entitled to a judgment for the full period of five months at \$70 per month. It is evident that, if the court had not erroneously compelled plaintiff to make this proof, and she had remained silent, then, after defendant had proven the amount plaintiff had earned after discharge, plaintiff would have been entitled to show in rebuttal her expense in securing the new employment and additional costs to her in performing the duties of such new employment.

[4] The Supreme Court, in *Saxonia M. & R. Co. v. Cook*, 7 Colo. 569, 4 Pac. 111, defined the law as applicable to some of the issues in this case as follows: "Where one is employed to serve for a definite term, as for a year, and is discharged before the expiration of the term, without fault on his part, he has a right of recovery either for the balance of wages due or damages for the loss he may have suffered by reason of the wrongful discharge. \* \* \* Under the remedy in the latter class of cases, i. e., where the action is for breach of the contract, whether brought before or after the end of the term, the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. He cannot recover the wages accruing for the balance of the term *as a matter of course*. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor is to be deducted from the amount of the damages occasioned by the breach of the contract sued upon. \* \* \* But, while the defendant in such case is entitled to mitigate the damage to the extent of what the plaintiff might have earned from other parties

during the term, the burden of establishing such mitigating facts is upon the defendant." See, also, *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8. From 26 Cyc. pp. 1006 and 1009, I quote the following: "The measure of damages for the breach of a contract of employment is *prima facie* the sum stipulated to be paid for the services, and the burden of reducing the damages by proof that the servant has, or might, with reasonable diligence, have, obtained other remunerative employment, after his discharge rests on the employer."

[5] The question as to whether or not one suing for a breach of contract based upon a wrongful discharge before the expiration of the term of employment may charge the defendant with expenses incurred in obtaining new employment for the unexpired term, and for additional necessary expenditures and outlays caused by the change from the old to the new place of employment, seems to be settled in the affirmative by the general trend of authority. In fact we have been able to discover only one case, *Tickler v. Andrae Mfg. Co.*, 95 Wis. 352, 70 N. W. 292, which seems to hold to the contrary.

In *Development Co. of America v. King*, 170 Fed. 923, 96 C. C. A. 139, the court held that one wrongfully discharged was entitled to subtract from the amount of money earned by him in another employment thereafter a certain sum which he had paid for stock in a corporation, which stock it was necessary for him to purchase in order to obtain the employment; the court saying: "The purchase of the stock was an expense incident to obtaining the employment."

In *Tufts v. Plymouth G. M. Co.*, 14 Allen (93 Mass.) 407, the court held that one wrongfully discharged before the expiration of the term of employment was entitled to have considered his necessary expense in traveling to the place of his new employment; the court saying: "If he was obliged to return home or go elsewhere, the expense of removal from the mines to the place of employment became a proper subject of consideration."

In *Van Winkle v. Satterfield*, 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853, it was held that a servant wrongfully discharged before the expiration of the term of employment was entitled to have deducted from the wages he earned during the term, or might have earned, the expense of obtaining employment elsewhere; the court saying: "In estimating his damages, therefore, such sums as he, by reasonable diligence, might have earned in a similar business, making allowance for the expense of obtaining employment, should be deducted from the wages he might have earned under the broken contract. \* \* \* The burden of proof is on the employer to show that the servant might have obtained similar employment, for the failure of the servant to obtain other employment does not

affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, 'the servant is entitled to recover the contract price upon proving the employer's violation of the contract, and his own willingness to perform.' The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss."

To the same effect: *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 310; *Dickinson v. Talmage*, 133 Mass. 249; *Sedgwick on Damages* (8th Ed.) §§ 666, 667.

The opinion in the Wisconsin case of *Tickler v. Andrae Mfg. Co.*, supra, is brief, and cites but one authority, and that upon a different proposition. We quote from the opinion of the appellate court as follows: "The jury was instructed, in effect, that, in case they found for the plaintiff upon the principal issue, they should give him the amount of the agreed wages for the year, \$900, less such sums as he had earned and received from other sources, and that to that result they should add the sum of his reasonable expense in removing himself, his family, and stuff from New London back to Milwaukee. \* \* \* This was error for, while the defendant is entitled to be credited by the plaintiff's net earnings only, yet it may fairly claim that its proper credit shall not be diminished by any sum which he shall expend for his own purposes, or for the convenience of his family. The expenses of the return of the family to Milwaukee were not within the defendant's undertaking."

[6] So it appears from this that the court considered the removal of plaintiff and his family from New London back to Milwaukee as an act done for *his own purpose*, and inferentially at least not for the purpose of obtaining a new employment after his wrongful discharge. The facts there are entirely different from those of the instant case. Here the plaintiff's *only* purpose in going to Cripple Creek from Georgetown was to teach in the public schools of that town, and it was clearly for the benefit of the defendant to have her go, as her earnings in Cripple Creek would reduce that much the defendant's liability to her. In the case at bar plaintiff did not recover any amount for moving her family to Cripple Creek. The trial court excluded from evidence the testimony which tended to show that plaintiff had expended \$50 in removing her family to Cripple Creek from Georgetown. This ruling was clearly right, if for no other reason than that it had not been pleaded. If allowable at all, it must have been specially pleaded.

It is impossible to ascertain from this record just what method was adopted by the jury in arriving at the verdict of \$185.88. The evidence conclusively shows that the un-

expired term of the employment was 5 months, and the agreed price was \$70 per month, making \$350, which measured plaintiff's recovery, and that plaintiff received the total sum of \$285 during that time from her new employment. This left a credit due her of \$65. The evidence further shows that plaintiff expended, while in Cripple Creek, during the unexpired term, \$20 a month more for her living expenses than she would have paid in Georgetown. She was there 4 months and three weeks, which would make the total amount \$95, to which should be added her railroad fare to Cripple Creek, \$8, and 70 cents for telephoning to that place accepting the new employment; the total being \$103.70, which, if the jury believed correct, should have been deducted from the \$285 she had earned, before subtracting the same from the \$350. The amount of \$103.70, however, was apparently not allowed by the jury, but only \$60 thereof, for if \$60 be deducted from the \$285, and the balance, \$225, from the \$350, it will leave a balance of \$125, which, with interest at 8 per cent. for 6 years, will amount to just \$185.

It is clear that the second trial, and appeal by defendant, has been vexatious and unreasonable. It is also evident that the wrongful discharge of plaintiff caused her, aside from distressing inconvenience and discomfort, a considerable expenditure and outlay in excess of any amount which by law she could recover for the breach. Plaintiff had been teaching in the schools of the Georgetown district for 4 years prior to the making of the contract in issue, and it is a fair presumption that she was a competent and faithful employé. She was the support of her mother and sister, who were dependent on her, and they were settled and keeping house in Georgetown. She was arbitrarily and wrongfully discharged in the midst of winter, but, with enviable spirit, at once set about finding new employment, and succeeded in the short space of one week in securing, at a distant town, like employment to that she had been engaged in. This new employment naturally compelled her to break up her home in Georgetown and move her "family," as she terms it, to the new place.

Her speedy and successful efforts, which resulted in the new employment, were all to the direct financial benefit of defendant, and it is to be regretted that defendant did not magnanimously concede plaintiff the pitance allowed her by the jury for expenses and outlays incurred in and about securing the new employment, and increased expenses ensuing therefrom, particularly as no complaint is made against her for inefficiency or insubordination.

The instructions as a whole are free from prejudicial error. The judgment will be affirmed.

Judgment affirmed.

SCHOOL DIST. NO. 3 IN CLEAR CREEK COUNTY v. OLSEN.

(No. 3939.)

(Court of Appeals of Colorado. April 13, 1914.)

SCHOOLS AND SCHOOL DISTRICTS (§ 138\*)—TEACHERS—CONTRACTS OF EMPLOYMENT—ACTIONS FOR BREACH.

A school-teacher wrongfully discharged before the expiration of her contract was entitled to recover the amount she would have received under the contract, less whatever she earned by other employment, with interest thereon at 8 per cent.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 138.\*]

Error to District Court, Clear Creek County; Charles McCall, Judge.

Action by Mamie Olsen against School District No. 3, in the County of Clear Creek and State of Colorado. From a judgment for plaintiff, the defendant brings error. Affirmed.

John J. White, of Denver, for plaintiff in error. Morrison & De Soto, of Denver, for defendant in error.

HURLBUT, J. December 30, 1910, defendant in error, as plaintiff, commenced this action to recover damages for breach of contract, and recovered judgment for \$163.39.

The issues here, both of law and fact, are substantially the same as those involved in the case of School District No. 3 v. Nash (No. 3938) 140 Pac. 473, decided at this term. By stipulation the two cases were consolidated and tried together. There is a slight difference in the pleadings of the two cases. In the Nash Case none of the pleadings contain any allegations as to defendant's earning any money after her wrongful discharge; while in the present case the answer alleges that plaintiff found other employment after her discharge and earned money to the amount she would have earned under her contract had she not been discharged. Defendant offered no evidence at the trial.

The undisputed evidence shows that plaintiff was wrongfully discharged, and was entitled to recover \$70 per month for five months, or \$350, and that she earned during said period of five months \$240, which defendant was entitled to have subtracted from the \$350. This would leave a balance due plaintiff of \$110, plus interest thereon for six years at 8 per cent., which would amount to \$52.80. This added to \$110 equals \$162.80. Plaintiff was clearly entitled to judgment for this sum.

This appeal is without merit, vexatious, and unreasonable in a marked degree. What was said in the Nash Case may be repeated here with emphasis.

We discover no reversible error in the record. The judgment will be affirmed.

Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**DEGGE v. CARSTARPHEN ELECTRIC CO.**  
(No. 3820.)

(Court of Appeals of Colorado. April 13, 1914.)

**1. APPEAL AND ERROR (§ 171\*)—THEORY OF CASE IN LOWER COURT—CONSTRUCTION OF PLEADINGS.**

Where a case was tried by the parties as though a special plea was denied, and no attempt was made to rely upon an admission thereof, and it is contended by the plaintiff that the admission of the plea was inadvertently made, the admission will be disregarded on appeal, especially when the replication denied a similar plea to a second cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

**2. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS—CONFLICTING EVIDENCE.**

Where the testimony of the plaintiff and defendant was in direct conflict as to whether an automobile was sold with a specific guaranty, the finding of the trial court that there was no guaranty will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**3. APPEAL AND ERROR (§ 1027\*)—HARMLESS ERROR—FAILURE TO REQUIRE ELECTION.**

Error in refusing to compel the plaintiff to elect whether he would rely upon the cause of action for the reasonable value of an automobile, or upon one for an agreed value, was not prejudicial, where the trial was before the court and the evidence disclosed no dispute as to the value or the promise by the defendant to pay it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.\*]

Appeal from County Court, City and County of Denver; Geo. W. Dunn, Judge.

Action by the Carstarphen Electric Company against W. W. Degge. Judgment for plaintiff, and defendant appeals. Affirmed.

O. A. Erdman, of Denver, for appellant. Rice W. Means and Bernard J. Ford, both of Denver, for appellee.

**MORGAN, J.** The defendant appeals from a judgment against him for \$632.60 entered in the Denver county court on a complaint filed October 5, 1910, which contained two causes of action for goods sold and delivered: The first, upon a promise to pay the reasonable value thereof; and, the second, upon a promise to pay a specified amount. The defendant denied both causes of action, by general denial, and, for a third defense, pleaded that the goods sold consisted in part of a certain electric automobile and that the sale was "upon condition that the said vehicle should prove to be in a merchantable condition, with a storage battery of standard capacity, that is to say, a capacity sufficient to propel said vehicle a distance of 50 miles or more with each full charge of electricity"; and, pleading further, that the plaintiff shipped the vehicle to the defendant "equipped with a storage battery which the said plaintiff represented to be of standard capacity with power sufficient to propel the said automobile a distance of 50 miles or more on

ordinary roads," following with an allegation that the said storage battery was not of standard capacity, was not capable of propelling the said vehicle more than 27 miles on ordinary roads with one full charge of electricity, and then alleging that the defendant offered to return the said vehicle in as good condition as it was received and that the plaintiff refused to accept such offer. The plaintiff replied admitting the allegations of paragraph 3, which contained the first condition above set forth, but further on in the replication alleging that the vehicle was the same as represented, and denying that it represented that the vehicle contained "a storage battery of standard capacity with sufficient power to propel said automobile a distance of 50 miles or more on ordinary roads with each full charge of electricity," then denying new matter not already admitted. On these pleadings the case was tried by the court, without a jury; and on the trial the defendant moved the court to compel the plaintiff to elect upon which cause of action it would stand, which motion was denied. The court after hearing the testimony found for the plaintiff, and also found that the sale was absolute and not upon any condition such as the defendant alleged. The appellant in his brief discusses the errors assigned under three questions: (1) Was the sale absolute or conditional? (2) If conditional, were the conditions met? (3) Did the court err in declining to require the plaintiff to elect?

The principal question to be determined is whether the court was justified in finding from the evidence that the sale was absolute, and whether this court will disturb such finding if based upon conflicting testimony.

[1] The defendant contends that the plaintiff admitted in its replication that the sale was conditional by admitting the allegations of paragraph 3, and it so appears; however, the case was tried throughout and the judgment rendered, as though it had been denied, without calling the court's attention to this admission; no allusion to it is made in the motion for a new trial, and the evidence of the defendant quite clearly shows that he did not rely upon such admission, as he attempted to prove that the sale was conditional.

Where a case is tried by the parties as though a special plea is denied, and no offer is made to rely upon an admission thereof, and it is contended by the one making the admission that it was inadvertently made and was not intended to be such, the admission should be disregarded on appeal, especially when the replication, as in this case, thereafter denies a similar plea.

[2] This apparent admission being thus disposed of, and the evidence examined, it appears that the testimony is quite conflicting as to whether the sale was upon the condition pleaded. The plaintiff testified that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the automobile was sold upon a guaranty that the battery would run 6,000 miles, and that no guaranty, or representation, was made that it would run 50 miles on one charge of electricity. The defendant testified that there was a guaranty that the automobile would run 50 miles on ordinary roads on one charge of electricity. Under the established rule, with this conflict in the testimony, the finding of the lower court on this issue will not be disturbed.

Having concluded that the judgment of the lower court should not be disturbed in the finding that the sale was not conditional, it is unnecessary to discuss the second contention of appellant.

[3] While the court might have required the plaintiff to elect between the two causes of action, yet, as the trial was before the court without a jury, the defendant was not prejudiced in any way by the failure of the court to enter an order requiring the plaintiff to so elect. The evidence disclosed quite clearly that there was no dispute as to the value agreed upon and the promise of the defendant to pay the same. The court, in view of the evidence, could have eliminated, and it may be assumed it did eliminate, from its mind the first cause of action and entered the judgment upon the second cause of action.

The judgment of the lower court is affirmed.

# MAUSER v. HURDLE. (No. 3814.)

(Court of Appeals of Colorado. April 13, 1914.)

## 1. BROKERS (§ 82\*)—ACTION FOR COMPENSATION—PLEADING REVOCATION.

Unless specially pleaded, the defendant, in an action by a broker for commission earned by producing a purchaser to whom defendant refused to convey, cannot rely on revocation of authority to sell.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82.\*]

## 2. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—EVIDENCE.

In an action by a broker for commission earned by producing a purchaser to whom defendant refused to convey, evidence held not to raise the issue of revocation of authority to sell.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

Appeal from District Court, Larimer County; Nell F. Graham, Judge.

Action by W. E. Hurdle against C. F. Mauser. From a judgment for plaintiff, defendant appeals. Affirmed.

George A. Carlson and Claude C. Coffin, both of Ft. Collins, for appellant. Clammer & Temple, of Ft. Collins, for appellee.

CUNNINGHAM, P. J. Action by real estate agent to recover commission alleged to have been earned by producing a purchaser ready, able, and willing to buy, to whom the defendant, appellant, refused to convey.

From a judgment in favor of appellee, the action is here on appeal.

The complaint was in the usual form in cases of this character, and the answer amounted to no more than a general denial. No new matter whatever was pleaded by way of answer. The uncontradicted evidence is that the plaintiff produced a purchaser ready, able, and willing to buy on the terms and conditions stated in the original agreement between plaintiff's firm (plaintiff succeeded to the rights of his firm by an assignment of the claim here sued upon) and appellant, the owner of the land. Counsel for appellant, with commendable frankness, states in his brief that the substantial issue in the case (on the trial below) was whether or not the listing of the farm for sale in the fall of 1908 was that upon which Hurdle had authority to act, and upon which he did act in March, 1909, when Melvin was produced as an alleged purchaser; and with equal frankness counsel states the real issues or contentions presented for our consideration on this appeal, in the following language: "Had this question, the one just stated, been properly submitted to the jury by fair and impartial and appropriate instructions by the trial court, we feel this appellant would not have the case before this court for review. \* \* \*

While many errors have been assigned, we deem it necessary only to consider the instructions requested by defendant and the instructions given by the court." From the instructions tendered by appellant, and from the argument made here on brief, it appears that his sole defense is that the authority given by Mauser in the fall of 1908 for the sale of the farm had been revoked before plaintiff produced a customer ready, able, and willing to buy. As we read the record, there are two objections fatal to this contention:

[1] 1. Defendant did not plead revocation in his answer, or any modification whatever of the original contract, but contented himself with denying that such a contract was entered into, or, if entered into, that it was carried out by plaintiff. Under a general denial the defendant had no right to prove revocation. In 1 Enc. Pl. & Pr. p. 849, it is stated "that release must be specially pleaded," and at page 851 it is said: "In an action by a contractor to recover the contract price, the defense that the contractor did his work in an unworkmanlike manner is new matter to be pleaded." While these are not exactly parallel situations, by analogy they afford authority for the conclusion that we have reached. In Alden Investment Co. v. Carpenter, 7 Colo. 92, 1 Pac. 907, our Supreme Court announces that "a failure of consideration, which must always occur subsequent to the making of the contract, and which if pleaded as a defense, may well be regarded as new matter in avoidance of the original cause of

action." A revocation, of course, like a failure of consideration, can only occur subsequent to the making of the contract. See, also, *San Juan County v. Tulley*, 17 Colo. App. 113, 87 Pac. 346; *Balsch v. Mueller*, 53 Colo. 474, 128 Pac. 466; *Pomeroy's Code Remedies* (4th Ed.) §§ 583-586.

[2] 2. There is no evidence in the record of a revocation. On the contrary, the defendant's own testimony indicates quite the opposite. On cross-examination he was asked the following questions, to which he made the answers here given: "Q. Is it not a fact that, after concluding that you had your place listed too low, that you tried to do everything in your power to back out of the deal that Hurdle had arranged for you? A. No, sir; it is not. Q. You knew you had it listed too low? A. No, sir; I did not. *I had a chance to take it off if I thought it was too low. I could take it off if the price did not suit me.*" This is tantamount to an admission by defendant that his farm, at the time of the negotiations, was still listed with plaintiff, and at the price first fixed by him. Four witnesses on behalf of plaintiff testified that, when plaintiff drove to the farm with the prospective customer, and for the first time took up the question of the sale of the farm directly with Mauser, he (Mauser) said, in substance, "that he had *thought of taking the farm off the market, but that he had not done it.*" Thereupon he directed the plaintiff to show the customer over the land, and permitted them to return to town, a distance of 12 miles, and a few days later come back and stay all night with him at the farm, at which time an unconditional offer was made by the customer for the farm; the offer being the same, both as to amount and terms, as that contained in the original listing agreement

or contract. Indeed, the defendant himself testified that Hurdle said to him, at one time: "If you want it, take your \$12,000 and get off; *but I didn't think he meant it.*" Just prior to this statement by Hurdle it is testified that they were parleying, with a view of inducing Mauser to accept, not a less price for the land than agreed upon in the original listing, but to accept \$8,000 in cash, as a first payment, instead of \$12,000, which was provided for by the terms of the original listing agreement. At no time did defendant testify that he stated to Hurdle, when the latter called upon him with a customer, or thereafter, or at all, that he desired to raise the price he had put upon his farm, or wished to withdraw it from the market, nor did he pretend, while on the witness stand, that he at any time informed Hurdle that the latter's authority had been revoked or modified in any particular. It is true that there was considerable preliminary negotiation as to the amount to be paid down, and as to when possession should be given, and other details not necessary to refer to; but the fact remains that at the end of these negotiations, and before defendant had indicated any purpose of withdrawing the land from the market or raising his price, the customer produced offered to pay him the original listing price and the amount in cash called for by that agreement. Under these circumstances, the trial court did not commit error in refusing to submit the question of revocation to the jury; indeed, it is our impression that at the close of all the testimony the trial court would have been warranted in instructing the jury to return a verdict in favor of plaintiff for the same amount in which the jury thereafter found.

Judgment affirmed.



**EMERSON v. AKIN. (No. 3818.)**

(Court of Appeals of Colorado. April 18, 1914.)

**1. MINES AND MINERALS (§ 9\*)—MINING CLAIM—LOCATION.**

The location of a mining claim must be made upon some part of the public mineral domain not already located.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 9-13; Dec. Dig. § 9.\*]

**2. MINES AND MINERALS (§ 24\*)—CLAIMS—LOCATION—ABANDONMENT.**

The abandonment of a mining location is a matter of intention and may be proven by the acts of the original owner, as well as by his words and statements.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 60; Dec. Dig. § 24.\*]

**3. MINES AND MINERALS (§ 26\*)—CLAIMS—ABANDONMENT.**

Where the owner of a mining claim abandoned part of it, his relocation of another claim, which included part of the abandoned claim, is good; it not appearing that the abandonment was with any fraudulent purpose.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 61-63; Dec. Dig. § 26.\*]

**4. MINES AND MINERALS (§ 19\*)—MINING CLAIMS—NOTICE.**

Under the statute requiring the locator to post at the point of discovery a plain sign or notice, a location notice written on a piece of white paper placed on a stick and partly covered by a rock to prevent it from blowing away cannot, as a matter of law, be held insufficient.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 37-39; Dec. Dig. § 19.\*]

Appeal from District Court, Chaffee County; Charles A. Wilkin, Judge.

Action by J. H. Akin against J. W. Emerson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

G. K. Hartenstein, of Buena Vista, and Wallace Schoolfield, of Salida, for appellant. George D. Williams, of Salida, for appellee.

**CUNNINGHAM, P. J.** This is an ordinary action in support of an adverse proceeding, brought by Akin, the appellee. The trial court instructed the jury that they could not find in favor of Emerson, the appellant, defendant below, but submitted the question of Akin's title to the jury, and, from a verdict and judgment in favor of Akin, Emerson appeals. The other facts necessary to an understanding of the contentions involved will appear as we proceed.

1. It appears that Emerson, prior to the location of the Recompense claim, was the owner of another lode claim known as the Victor, which covered a part of the same territory embraced within the Recompense claim; the Victor being located long prior to the location of the Recompense. The Recompense claim runs in a general northerly and southerly direction, while the Victor runs easterly and westerly, and crosses, almost at right angles, the Recompense claim; the northerly 300 feet of the latter claim be-

ing substantially coincident with a block of about 300 square feet near the center of the Victor claim. Emerson placed the discovery notice of the Recompense claim within the territory of the Victor claim, or, according to his contention and theory, within what had been a portion of the Victor claim. Emerson contends that he, at and prior to the location of the Recompense claim, abandoned that portion of the Victor claim which was in conflict with the Recompense. The discovery notice which Emerson posted for the purpose of initiating title to the Recompense lode contained a clause reading as follows: "This portion of the Victor claim being excluded from that claimed by this location."

[1-3] This discovery notice was introduced in evidence, and, in addition thereto, Emerson testified explicitly that it was his intention to abandon, and that he did abandon, that portion of the Victor claim which he sought to embrace within the Recompense. There was no evidence introduced that tended in any wise to rebut this showing of abandonment by Emerson. The trial judge refused to give instructions tendered by Emerson, submitting properly, as we believe, the question of abandonment to the jury, but, on the contrary, he instructed the jury as follows: "Another of these requirements is that the discovery on which the location of a claim is made must be made and must exist upon some part of the public mineral domain not already occupied and held under a prior and subsisting mining location." Of course this preliminary announcement correctly states the law, but, immediately following this, the jury was instructed as follows: "And respecting the alleged discovery and location on the part of the defendant here, of the so-called Recompense lode mining claim, the jury is instructed that from all the testimony in this case, before the jury, the facts are insufficient to show either that the ground on which the discovery was made was unoccupied as lode mining ground at that time, \* \* \* and that therefore the acts and doings of defendant Emerson for the location of the said Recompense claim were ineffective, and the jury in this case may not find a verdict in favor of the said defendant respecting that part of conflict ground included within the said Recompense claim."

It is evident, from what we have quoted, that it was the opinion of the trial judge that Emerson could not abandon a part of the Victor claim, all of which he owned, for the purpose of initiating title to another claim, the Recompense, and that, because the discovery on which the location of the Recompense claim was based was made within the boundary of the Victor, therefore, as a matter of law, the location of the Recompense was absolutely void. In this respect we are persuaded that the learned trial judge fell into error. Of course there can be no controversy

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—31

touching the rule which requires that the location of a mining claim must be made upon an unappropriated part of the public mineral domain, but it is equally true that abandonment is a matter of intention. The rule supporting these two propositions has been announced so often and so universally that it requires the citation of no supporting authority. We know of no rule, however, that forbids the abandonment by an owner of a valid mining claim, or any part thereof. And when any part of a mining claim is, in good faith, abandoned by the owner, the title of the part thus abandoned reverts to the government. Abandonment may be proven by the acts of the original owner, as well as by his words and statements. If Emerson were now attempting to patent the Victor lode, the very fact that he located the Recompense across it, and based such location upon a discovery made upon the Victor claim, would be competent evidence against him to show an abandonment of at least that part of the Victor claim covered by the Recompense. Or, if some person other than Emerson had thus located the Recompense across the Victor lode, with the acquiescence and approval of Emerson, we think it clear that the courts would hold that he had voluntarily abandoned at least so much of the Victor as was covered by the Recompense. We are aware of no authority which would prevent Emerson, under the circumstances here presented, from abandoning that portion of the Victor claim covered by the Recompense, and thereafter locating the Recompense as he did locate it, or as he says he located it. Surely no one's rights were invaded by his conduct in this behalf, and the policy of the government to encourage the development of its mineral domain may be said to have been advanced. What effect the conduct of Emerson in abandoning a part of the Victor claim, if he did abandon it, may have upon his claim of title to what remained of the Victor lode not conflicting with the Recompense, we are not called upon to consider.

If the owner of a claim abandons any part of it from any improper motive, such, for instance, as to escape the annual assessment, and thereby projecting, or attempting to project, his rights one year into the future without doing his annual assessment work, then it might well be that such abandonment would be held to have been prompted by ulterior motives, and therefore void. But there was no evidence in this case that Emerson was actuated by such motives.

[4] 2. The trial judge further instructed the jury that Emerson had not properly complied with the statutes of Colorado in the matter of posting his discovery notice on either the Recompense or the Recompense No. 2 claim, and for that reason the jury were advised they could not return a verdict in favor of Emerson for that part of the conflicting ground included within the boundary of either of said claims. This necessi-

tates a brief statement of what Emerson's evidence concerning the posting of his notices discloses. No question can be made as to the sufficiency of the discovery notices; the sole contention on this point apparently is that Emerson did not comply with the requirements of the statute in the manner of posting the notice on each of the claims. From the defendant's testimony, considered in the light most favorable to him, we learn: That the notice on the Recompense claim "was written on a piece of white paper. The wood lying around was rotten and not fit to write a notice on, and I wrote it on a piece of white paper, and erected a stake, and placed the notice upon it—the white paper would simply be a speck alongside of the stake—and put it in the cut. I did not fasten the notice on the stake. It was leaning up against the side of the cut, and the notice was placed on the surface rock, and another rock put on top of it so it would not blow away, and the fold of white paper stuck up the side a piece. \* \* \* I did not put anything on the post. I put it in the open cut. It was leaning up against the side of the cut, then the paper was put up so that it would show above that; of course that was up several feet above the ground. It was placed on the nearest hand side of the cut as you go in. I mean that the notice was several feet above the bottom of the stake which I set up. \* \* \* Now it was put down with this large fold sticking up beside the stake, like that (indicating); a rock was put on this point of it here to hold it up. The writing was not exposed. The writing was inside of the fold. I could not tack it up. The notice was laid on a rock in that fashion (indicating), and another rock placed on it in that fashion (indicating). The rock did not cover up the whole of the notice; just the way it is there (indicating); it was a pretty good-sized rock. The only part exposed was that part which stuck up. \* \* \* There was no difficulty on the part of Mr. Akin and Mr. Hershberger in finding it [meaning the notice, and referring to a time when the parties referred to went with witness to look at these discovery notices]. The rock had not been laid on top of the entire notice, just a part of it, I think. I should think that probably half of the fold was sticking out, an inch and a half or two inches of the notice. The notice was legible and could be read when taken out of there. The portion which was sticking out had been exposed to the weather." This notice was posted on August 17th, the day the claim was located. Witness testified that he was not back to the claim between August 17th and October 16th, when it is admitted on all hands that the parties were able to find the notice; the sole contention being as to how much search was required before the notice was found. The location of the Recompense was made in an old abandoned tunnel or adit driven into the side of the mountain.

There are very few authorities to be found directly in point, or sufficiently parallel in their facts as to be controlling or even helpful in this case. The nearest parallel case appears to be that of *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283. From the opinion in that case it appears that the facts as to the posting of the discovery notice are as follows: "The notice was placed on the claim in this way: It was written on one side of a sheet of paper, which was folded, with the writing inside, and placed upon a mound of rocks three feet high, and upon the notice were placed two flat rocks, so that about three-fourths of an inch of the margin of the paper was exposed to view; the rest of the paper being obscured by the two stones which covered it." Thus it will be seen that the methods pursued in posting the discovery notice in the *Donahue* Case were strikingly similar to the methods pursued by Emerson in posting the discovery notice on the Recompense claim. In the *Donahue* Case the trial court ruled that the notice was not conspicuously posted, and that its posting did not comply with the rule then in vogue in California, which required that the discovery notice should be "posted conspicuously in a conspicuous place." Our statute requires that the locator shall post, "at the point of discovery on the surface a plain sign or notice," etc. If there be any difference between the California rule and the Colorado statute pertaining to the posting of the discovery notice, the rule of the former state is more exacting as to the prospector than our statute. The Supreme Court of California, in the *Donahue* Case, reversed the trial court, saying: "In so holding, the court, we think, erred. It was not found that the notice was so placed for the purpose of concealing it; but it was found that the location was made in good faith, and that, 'in posting said notice, defendant, Meister (who posted the same) intended protecting it from the weather, and had made prior locations the same way.' It is further found that 'other devices were resorted to by miners to protect the notices from the weather, such as covering the notice with glass, or folding it in a box and placing the box in a conspicuous place.'" If the plaintiff had attempted to relocate the claim immediately after defendant's notice had been placed there, and before defendant had done further acts of possession, and before there had been any legislation by Congress upon the subject, and the only question had been as to the sufficiency of the posting, still we think that the posting, as shown by the findings, would have been sufficient." In other words, the Supreme Court of California ruled, as a matter of law, that the posting in the *Donahue* Case was sufficient. It is only necessary for us to hold (and that is all we do hold) that the trial court in the case at bar erred in holding, as a matter of law, that the posting was insufficient. The entire opinion in

the *Donahue* Case may be read with profit. But we desire to call attention to the fact that, in reversing the lower court and remanding the *Donahue* Case for new trial, the Supreme Court of California, in its opinion, used this further language: "Our conclusion is that, whatever evidence may be presented on another trial, under the facts as shown in the findings before us, the posting of the defendant's original notice should be held to have been a substantial and sufficient compliance with the said custom"—thus unequivocally directing the trial court to find, on the second trial, as a matter of law, that the evidence as to the posting of the discovery notice was sufficient.

In *Upton v. Santa Rita M. Co.*, 14 N. M. 96, 89 Pac. 285, it is said: We do not believe this to be within the spirit of the mining laws, which have ever held that, in the matter of location notices, the courts shall take a liberal and not a narrow view." It is further announced in the *Upton* Case that: "The posting of the location, however, is not the basis of the title. It is simply a provision of law by which, in connection with the subsequent record, the world may have notice that the land described is being claimed as a mining location." In other words, this preliminary posting serves, and is only intended to serve, a temporary purpose; its utmost life is 60 days, within which time the locator must sink his shaft and stake his claim at all the corners and the centers of the two side lines. It is not probable that within these 60 days any very great wrong can be done the public or any individual, if the discovery notice should be defective in form, or in the method of its posting; and for this reason, we apprehend, the courts have universally adopted and applied the most liberal rules in considering the sufficiency of the discovery notice, both as to the form and the posting thereof.

In the case of *Gird v. California Oil Co.* (C. C.) 60 Fed. 543, it was held that a discovery notice placed in a tin can and the can placed by the locator on a shelf in a rock mound was sufficient, and answered the purpose for which it was required.

The posting of the discovery notice on the Recompense No. 2 being even more conspicuous than was the posting of the notice on the Recompense claim, it is not necessary that we should state the facts with reference thereto, or comment upon them. If the action of the trial court, in taking from the jury the question of the sufficiency of the posting of the notice on the Recompense, constituted prejudicial error, as we think it did, then a fortiori error was committed in taking the same question, as applied to Recompense No. 2, from the jury.

For the reasons we have assigned, the judgment of the trial court is reversed, and the case remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

**AGNEW v. MATHIESON.** (No. 3906.)  
(Court of Appeals of Colorado. April 13, 1914.)

**1. PRINCIPAL AND SURETY (§§ 89, 104\*)—SURETY—DISCHARGE—GROUNDS.**

Where one acting as secretary, librarian, and stenographer of a corporation signed, as surety, a note of the corporation, she was not released from liability because of the execution of renewal notes by the corporation alone, through the fraud of the president, or by his representations to her that she was released by reason of the renewal notes.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 133, 133½, 136-139, 186-190, 193-195, 197-200; Dec. Dig. §§ 89, 104.\*]

**2. NEW TRIAL (§ 97\*)—GROUNDS—SURPRISE—OBJECTIONS.**

Where no objection to the admission of evidence was based on surprise, the objection is waived and is not a ground for new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 195-198; Dec. Dig. § 97.\*]

**3. BILLS AND NOTES (§ 462\*)—ACTIONS—PLEADINGS.**

A complaint, in an action on a note, which sets out the note and alleges that the indorsement of payment thereof by a new note was fraudulent and that the original note had not been paid and remained in force, shows that plaintiff relies on the original note, and the surety thereon, seeking to escape liability on the ground of the execution of a new note not signed by him, cannot rely on surprise to the introduction of testimony establishing a cause of action on the original note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1444, 1445, 1452-1461, 1464-1466; Dec. Dig. § 462.\*]

Error to District Court. City and County of Denver; Greeley W. Whitford, Judge.

Action by P. J. Mathieson against Rosa A. Agnew. There was a judgment for plaintiff, and defendant brings error. Affirmed.

E. I. Thayer, Garwood & Garwood, and Davis, Whitney & Mothersill, all of Denver, for plaintiff in error. A. D. Quaintance, of Golden (M. E. Peters, of Denver, of counsel), for defendant in error.

**CUNNINGHAM, P. J.** Mathieson, the defendant in error, as plaintiff below, brought his action upon a joint and several promissory note given to him by the Psychic Science Company, and the plaintiff in error, Rosa A. Agnew; the note representing money borrowed from Mathieson. The note sued upon was dated April 29, 1909, and was made to mature two months later. On or about the date of the maturity of the note referred to, plaintiff's wife presented the same to J. Howard Cashmere, the president of the Psychic Science Company, and Cashmere paid her the interest then due, and \$150 on the principal of the note, and indorsed these payments on the back of the note, writing across the face of it the following: "Paid by new note for two months for \$1,350." At the time of this transaction Cashmere drew up a second note in favor of plaintiff for \$1,350, due in two months, and delivered the same to the wife of plaintiff, retaining the old note. Note No. 2 was signed by the Psychic Science Company

only. Shortly after that note fell due, plaintiff's wife also presented it to Cashmere for payment, and he indorsed thereon the following: "\$45 interest paid to October 9-09." And across the face of it wrote the following: "Paid by renewed note October 9-09." This second renewal note, or note No. 3, was also signed by the Psychic Science Company only, but, for some reason not explained, was made payable to Maggie Mathieson, the wife of plaintiff. On the trial all three of the notes were produced, and were introduced in evidence. Mrs. Mathieson testified, in substance, that the original note had been left by her with one John McDonough, who apparently had the custody of it for the convenience of the Mathiesons; that it was kept in an envelope, and, when she presented it to Cashmere, she simply handed him the envelope containing the note, and in like manner she presented, supposedly, note No. 2, at the time it was taken up, and note No. 3 issued; that she had no knowledge whatever that Cashmere had written anything across the face of note No. 1, or that he had substituted in lieu thereof note No. 2, nor did she have any knowledge, according to her testimony, of the substitution of note No. 3 for note No. 2. She, having no knowledge whatever of the substitution, of course gave no consent to that transaction. It appears that, after note No. 1 and note No. 2 had thus gone into the possession of Cashmere, they were kept in the safe of the Balance Publishing Company; Cashmere appears to have had complete control over both companies. Afterwards Cashmere got into trouble, which landed him in the penitentiary, and his secretary delivered notes Nos. 1 and 2 to some representative of Mathieson, and they all came into the hands of his attorney. As we have said, suit was brought by plaintiff on the original note, and he repudiated the two renewal notes, testifying positively that he had given his wife, who, because of his illness, transacted his business for him, no authority whatever to consent to the surrender of the original note, or to accept either of notes Nos. 2 or 3. The defendant Agnew testified that she signed the first note, and that, after Cashmere had taken it up, he exhibited it to her, with the memorandum and indorsements above referred to upon it, advising her that she had been entirely released from her obligation upon the note. She insisted, at the trial, that she had signed the note simply as a surety, and that the money was obtained solely for the use of the Psychic Science Company. On the trial there was no appearance for the Psychic Science Company, and default was entered against it. The case was tried to the court without a jury, and the judge found "that the fraud, in the judgment of the court, was known alone to Cashmere." We think the evidence is ample to support this finding. Judgment was rendered against Agnew, from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which she sued out a writ of error, by which the case is brought to this court for review.

[1] 1. Under the facts stated, there is but one serious question for our consideration, and that is whether the plaintiff, Mathieson, by delivering the note to his wife for presentation to Cashmere, as the head of the Psychic Science Company was grossly negligent, in that he put it within the power of Cashmere to perpetrate a fraud to the injury of Agnew. We are not strongly impressed with this argument, which seems to be based largely upon the theory that Cashmere possessed some sort of psychic power over both Mrs. Agnew and Mrs. Mathieson, who appear to have been devotees of his cult. At the time Mrs. Agnew signed the note, she was actively and officially connected with the Psychic Science Company, being its secretary, and the librarian and stenographer for the company, or for Cashmere. By signing the note, she indicated to Mathieson her confidence, both in the solvency and integrity of Cashmere and the Psychic Science Company, so, if any one was imposed upon, it would appear to have been Mathieson, rather than Mrs. Agnew. Moreover, the record shows that Mrs. Agnew had stated, prior to the presentation of the first note, that Cashmere had all of her money, and that, by reason thereof, she was bankrupt, and living upon the charity of friends, hence his misrepresentation to her as to her release from the note can hardly be said to have lulled her into a sense of security, to her injury, for it does not in any way appear that, had she had full knowledge of all that transpired, she could have in any way protected herself from her liability on the first note, the one here sued upon. Indeed, as we have seen, there is evidence tending to show that there was no opportunity whatever for her to have so protected herself.

[2.] 2. It is urged in behalf of defendant that the trial court erred in overruling her motion for a new trial, which was based largely upon a claim of newly discovered evidence, and upon surprise. Defendant insists that she "had no means of knowing, either from the pleadings or otherwise, that plaintiff could or would claim that said second note of \$1,350 had been procured or delivered by fraud, or otherwise, and that defendant had no opportunity to meet such testimony, having had no prior intimation that such testimony could or would be produced." We discover no merit in this contention: First, because no objection, based upon surprise, was made to the introduction of testimony on the trial. "Objection on the ground of surprise is waived unless the party surprised calls the court's attention to the matter at the time, and asks for some proper relief." *Outcalt v. Johnson*, 9 Colo. App. 519, 49 Pac. 1058. The authorities on this point are numerous and harmonious. Second, we cannot

agree with the contention made on behalf of plaintiff in error as to the pleadings, for the complaint in the cause set out the original note in *hæc verba*, and in and by the complaint the defendant was advised that the plaintiff would go to trial upon said first note; indeed, the whole complaint is bottomed upon note No. 1, and upon nothing else. It would therefore seem unreasonable to contend that the defendant could not know that the plaintiff would insist that this note had never been paid, but was still in full force and effect. Defendant must have known, by inevitable deduction, that, in order for plaintiff to rely upon note No. 1, he would have to show that No. 2 was a fraud, and that the cancellation made across the face of No. 1 was a fraud. But defendant was not driven to this deduction, palpable though it was, for in the fifth paragraph of the complaint appears the following: "Plaintiff further states that there now appears written across the face of said note the following, to wit, 'Paid by new note for two months of \$1,350.00,' and plaintiff alleges that said writing has been placed there since the execution and delivery to him of said note; that the same has been placed thereon without his knowledge, and without his consent or authority. Plaintiff further alleges that said note has not been paid by the issuance to him of a note for the sum of \$1,350, or at all, save and except the payment of the sum of \$150 as aforesaid, and that said note is in full force and effect according to the tenor as above set forth." By the complaint itself, therefore, it is clear that the defendant was fully advised of all the facts which would make the deposition of Cashmere (whose affidavit she produced on her motion for new trial) necessary, and, being in the penitentiary, it can hardly be said that Cashmere could not have been found before the trial and his deposition taken. Third, the infamous character of Cashmere's conduct, as disclosed by the evidence in this case, would hardly justify the setting aside of a judgment and the granting of a new trial for the purpose of taking his deposition.

We are persuaded that the evidence in the case is sufficient to sustain the findings and judgment of the trial court, and for that reason the judgment will be affirmed.

Judgment affirmed.

# MOORE v. CARRICK. (No. 3954.)

(Court of Appeals of Colorado. April 13, 1914.)

## 1. CORPORATIONS (§ 121\*)—SALE OF STOCK—FRAUD—NATURE OF REMEDY.

A suit equitable in nature to recover land conveyed in payment of corporate stock on the ground of actual, intentional fraud, involving moral turpitude, is governed by the rules governing an action for damages for such fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

**2. FRAUD (§ 9\*)—"ACTIONABLE FRAUD"—WHAT IS.**

"Actionable fraud" is a false representation of a material fact made with knowledge of its falsity, or recklessly, without belief in its truth, with intent that it shall be acted on by the party complaining and relied on by and actually inducing him to act on it to his damage.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 1, p. 147.]

**3. FRAUD (§ 11\*)—EXPRESSIONS OF OPINION.**

A representation by a seller of corporate stock that the stock is good is a mere expression of opinion and not a statement of a material fact within the definition of actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

**4. FRAUD (§ 11\*)—EXPRESSION OF OPINION.**

A representation by a seller of stock that the stock was worth above par as far as he knew was only an expression of opinion where he had no peculiar means of knowledge as to the condition of the corporation or the acts of its officers whose criminality destroyed the intrinsic value of the stock.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

**5. FRAUD (§ 58\*)—CANCELLATION OF DEED—EVIDENCE—SUFFICIENCY.**

Where in a suit, equitable in nature, to recover land in payment of corporate stock on the ground of actual fraud inducing a conveyance based on representations as to the value of the stock, there was no evidence that plaintiff relied on any representations, but relied on his own investigations and purchased other stock of the same corporation and contracted to sell the same at par immediately before concluding the trade, plaintiff could not recover on the theory that he relied on the representations in the absence of anything to show the existence of the fiduciary relation between the parties or peculiar knowledge on the part of defendant as to the value of the stock and the condition of the corporation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.\*]

**6. APPEAL AND ERROR (§ 1121\*)—FRAUD—REMEDY.**

Where a suit equitable in nature to recover land conveyed in payment of corporate stock was tried on the theory that the conveyance was induced by actual and intentional fraud, but the evidence did not sustain a finding of fraud, a judgment granting relief will be reversed without prejudice to the right to sue for rescission on the ground of mutual mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4418, 4419; Dec. Dig. § 1121.\*]

Error to District Court, Mesa County; Sprigg Shackelford, Judge.

Action by Herbert L. Carrick against Thomas B. Moore. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Fry & Welch, of Grand Junction, and Rothgerber & Appel, of Denver, for plaintiff in error. Solon T. Williams, of Seattle, Wash., for defendant in error.

KING, J. This action was brought by Herbert L. Carrick, defendant in error, to obtain

the cancellation of a deed by which he conveyed to Thomas B. Moore, plaintiff in error, 20 acres of land situated in Mesa county, Colo., for which he received from said Moore 90 shares of the capital stock of the Hudson's Bay Mutual Fire Insurance Company of Vancouver, a corporation organized under the laws of British Columbia. The complaint alleges that the deed was procured by the defendant through his fraud, and through the fraud and conspiracy of defendant and the said insurance company; that the defendant falsely and fraudulently represented to the plaintiff that the said stock was good stock, was worth \$110 a share, and that he had paid \$110 a share for the same; that the officers and agents of said company and the defendant, conspiring to cheat and defraud plaintiff, falsely and fraudulently represented to plaintiff that the stock was good stock and worth the sum of \$110 a share; that defendant knew such representations were false, and made the same for the purpose of defrauding plaintiff out of his land; and that plaintiff relied upon said false and fraudulent representations, believing the same to be true, and, so believing and relying, accepted defendant's offer, and on March 4, 1911, in consideration of said stock, made, executed, and delivered the deed; that the said company, at the time of the signing of said deed, was totally insolvent; and that the stock was and is of no value. The answer admitted the exchange of the land for the 90 shares of stock mentioned in the complaint, and denied each and every other allegation of the complaint.

The evidence on the part of the plaintiff is substantially as follows: Plaintiff and defendant had no conversation or communication, were not acquainted, and had not met each other until long after the transaction in question. Plaintiff was a resident of Seattle, defendant of Vancouver, but was doing business in both Vancouver and Seattle as a broker, and buying and selling lands and stocks on his own account. George L. Estes was a resident of Seattle, engaged in the general brokerage business. About February 24, 1911, Estes overheard a conversation between Moore and the Sunset Realty Company, in which Moore mentioned that he had for sale or trade some stock in the insurance company. Estes followed Moore out of the office, and a conversation took place between them on the street, in which Estes stated that if the stock was good he thought he might be able to handle some of it, in answer to which Moore said, "You assure yourself that it is all right, and then, if you want to make the deal, all right," and suggested that he inquire of the president of the insurance company and of brokers in Vancouver. At that time, and perhaps about the 27th also, Moore stated that the stock was good, was worth \$110; that he had paid that for it. On the 27th of

February, Estes procured from Moore or from his certificate of stock the name of the president, and sent the telegram and received the answer following:

"Seattle, Wash., Feb. 27, 1911. Chas. W. Jennings, Dominion Trust Building, Vancouver, B. C. What is stock Hudson Bay Mutual Fire worth \* \* \* what price can it be cashed. \* \* \* Send full particulars. [Signed] Geo. L. Estes, 1258 John St."

"Vancouver, B. C., Feb. 27, 1911. 6:12 P. M. G. L. Estes, 1258 John St., Seattle. Hudson Bay Fire has no more stock for sale. Vancouver brokers paying 110 per share. Chas. W. Jennings, President."

About the same time, Estes began to talk with Carrick relative to purchase of the stock. Estes showed the telegram to Carrick, and told him that it sounded good. Both Estes and Carrick went to Vancouver personally to investigate the company and the stock. Estes examined the articles of incorporation, and found that the company was incorporated for \$100,000 "guaranteed" stock, so called. He examined the law under which the company was incorporated, and came to the conclusion that under such law its capital stock was insured or guaranteed, and inquired of the president of the company and of the cashier of some bank as to its value. Plaintiff had a personal interview with Jennings, president of the company, who told him, and also Estes, that the stock was worth 110 and would be worth more. The conversation between the president and Carrick was on March 1st. Prior to that time, Carrick, or Carrick and Estes, had secured 26 shares of the stock, which plaintiff then offered to sell at par, and took back to Seattle a letter from Jennings, addressed to Estes, dated March 1st, stating that a man named Allen would take the stock at par, and had deposited a check for \$100, and directing Estes to send the stock and draft through a bank in Seattle. This offer was accepted. Thereafter, Estes met Moore, and stated that he could get some fruit land in Colorado for shares of the stock, to which Moore replied, "All right, he would consider anything of that kind if we" (meaning Estes and his client, Carrick) "were satisfied that the stock was all right." Estes told Moore that the proposition was for fruit land in Colorado—20 acres at \$500 an acre. After some negotiations between Carrick and Moore, carried on entirely through Estes, the trade was closed. Estes delivered the deed to Moore and received the stock on or about March 4th. It is shown that, at about the time of the foregoing transaction, the Dominion Investors' Corporation, Limited, was attempting to secure, and did secure, a majority (more than \$50,000) of the capital stock of said company, for the purpose of obtaining control of the corporation; that they traded property at their market price for the stock at par value, and that other trades

were made for the stock at or about the same time; that about November, 1910, one James Ball traded a house to defendant for 30 shares of the said stock, and that Ball got in communication with Moore through an advertisement which stated that the advertiser had some good commercial stock to exchange for a house, and to apply at a certain telephone number, which thereafter appeared to be the telephone number of the insurance company. It further appeared that, some time after the transaction between the plaintiff and the defendant was concluded, the persons who had secured a majority of the stock demanded a statement from the president of the company, and began investigations of its conditions, preparatory to taking charge, whereupon the president fled. Upon such investigation, no assets or books could be discovered. The president was arrested, tried, convicted for swindling, and sent to the penitentiary. Ball caused the arrest of Moore as a conspirator with the company. Upon trial before the county court in Vancouver, at which both Carrick and Estes testified for the prosecution, Moore was acquitted; a transcript of their evidence at that trial being in evidence here.

All the evidence upon the part of the plaintiff in this case is by deposition or transcript as aforesaid, with the exception of one witness as to the value of the land. Neither Carrick nor Estes testified, nor does it otherwise appear, that the statements made by Moore to Estes, relative to the stock, were communicated to Carrick. Neither of them testified that Carrick relied upon such statements, or any of them. The transcript of Estes' testimony before the county judge shows that while Estes was under examination, the following questions were asked and answers made: "Q. At any rate, he (Moore) left it to you to make your inquiries about the stock in Vancouver? A. Yes. Q. You did investigate it? A. Yes. Q. And it was not from anything he said to you that you recommended the deal to your client, but rather from what you learned from Mr. Jennings' telegram, or some other source? A. That's right." And in his deposition: "Q. But I mean Mr. Moore left it to you to investigate the value of the stock, didn't he? A. He told me to investigate it, yes. Q. And it was not from what Moore told you, but rather from what you got from Jennings and what Mr. Carrick found out, that you relied on in making the deal? A. It only backed up what Mr. Moore had already said in regard to the stock—that it was good—that part of it; but I didn't particularly go into the proposition until I investigated both ends of it, you understand. I could tell you that stock was good, but you wouldn't take it until you went and seen what the company was. Q. Did Mr. Moore ever make any representation of the value of the stock before the deal? A. He spoke about the stock being good: 'As

far as I know, the stock is good. I would not take less than \$110 a share.' Q. That is what Mr. Moore said? A. Yes. Q. Did he tell you to investigate? A. Yes." There was no testimony on the part of plaintiff showing, or tending to show, that Moore did not pay \$110 for the stock, nor, indeed, what price he paid; nothing to show that, if any of his alleged statements of fact were false, he knew them to be false, except as to the price he had paid; nothing tending to show that he knew or had opportunity to know anything more about the company's affairs than Carrick and Estes knew. The witness Ball testified that he had seen Moore in the office of the company—Ball was there himself.

At the time of the trial in this case, Moore was called as a witness in his own behalf. He testified that he had owned and traded some of the stock; that the stock he traded to Ball he got from a Mr. Lundy, paying him therefor ten acres of land in Idaho and \$750 cash; that the stock he traded to Mr. Carrick he got through a deal with a Mr. G. W. Crotz, of Vancouver, about the middle of February, 1911, in exchange for 120 shares of stock in the Crescent Lumber Company, which he obtained in exchange for 160 acres of land in Washington. The value of the parcels of land and personal property which he exchanged for stock was not given or asked. Moore testified that he was not interested in the insurance company; had never purchased any stock directly from it, but only in the market; that, at the time he dealt with Carrick, it was being traded in the market at \$110; and that he believed it was all right; and his testimony was not disputed except as hereinbefore related.

The cause was tried to the court without the intervention of a jury, and the court rendered judgment for the plaintiff upon findings of fact in substance that the insurance company was a "cloak for a swindle"; that the stock was worth nothing; from which, and the further fact that Moore had had some dealings with the president, and had directed Estes to the president for information, it was conclusively presumed that he had done so with knowledge of the president's fraud and of what answer he would give; therefore was chargeable with actual fraud in this proceeding.

[1] In form, this is an action, equitable in its nature, to recover the purchase price, to wit, land, paid by the plaintiff for certain shares of stock after tendering back the stock and rescinding the contract of purchase and sale, upon discovery of the alleged fraud. The only cause of action stated in the complaint is based upon the fraudulent representations of the defendant, made by him alone or in conspiracy with others. The fraud charged is not constructive or implied, but active, intentional fraud, involving moral turpitude.

There is some diversity of opinion as to

whether the same rules which apply to actions to recover damages for deceit apply to cases equitable in their nature, such, for instance, as for rescission of contracts on the ground of misrepresentation; but in this state slight, if any, distinction is made, and we think no difference when the fraud charged is actual and intentional. *Sellar v. Clelland*, 2 Colo. 532; *Larimer County L. & I. Co. v. Cowan*, 5 Colo. 320; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Connell v. El Paso G. M. & M. Co.*, 33 Colo. 30, 78 Pac. 677; *Colorado Springs Co. v. Wight*, 44 Colo. 179, 96 Pac. 820.

[2] As defined by the foregoing authorities, "actionable fraud" is a false representation of a material fact (as distinguished from an opinion), made with knowledge of its falsity, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and relied on by and actually inducing him to act upon it to his damage. See, also, 9 Cyc. 411.

*Sellar v. Clelland* was an action to recover damages for deceit. *Larimer County L. & I. Co. v. Cowan* was an action in equity, praying for the cancellation of a deed made by the plaintiff. The court quoted and adopted the following rule as laid down in *Kerr on Fraud & Mistake*, 73: "In order that a misrepresentation may support an action or be of any avail whatever as a ground of relief in equity, it is essential that it should be material in its nature, and should be a determining ground of the transaction. The misrepresentation must be, in the language of the Roman law, *dolus dans locum contractui*. There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all, or at least not on the same terms. Both facts must concur; there must be false and material representations, and the party seeking relief should have acted on the faith and credit of such representations. \* \* \* A misrepresentation goes for nothing unless it is a proximate and immediate cause of the transaction. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the other party to enter into it. The representation must be the very ground on which the transaction has taken place."

The foregoing excerpt was also cited and quoted with approval in *Wheeler v. Dunn*, 13 Colo. at page 436, 22 Pac. 827. In *Connell v. El Paso Co.*, which was an action in equity for rescission of an executed contract of purchase and sale, for the cancellation of a deed and recovery of the purchase money, Mr. Justice Campbell, speaking for the court, said: "It is a settled doctrine of this court, ever since the decision in *Sellar v. Clelland*, 2 Colo. 532, that for a misrepresentation to be actionable the party charging the same must, *inter alia*, show not only



that it is false, but that the party making it knew it to be false. This general doctrine, however, is subject to the modification that 'when one has made a representation positively, or professing to speak as of his own knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred, or, at all events, this is so when the matters falsely represented are peculiarly within the knowledge of the party making them, and are not known to the party to whom they are made.'

In *Colorado Springs Co. v. Wight*, an action to recover damages for alleged misrepresentations, the same rule is approved, and the elements going to make up fraudulent representation, as enumerated by Pomeroy, are given, to wit: "A misrepresentation, in order to constitute fraud, must contain the following essential elements: (1) Its form as a statement of fact; (2) its purpose of inducing the other party to act; (3) its untruth; (4) the knowledge or belief of the party making it; (5) the belief, trust, and reliance of the one to whom it is made; (6) its materiality."

[3,4] Under the foregoing rules, there is an utter failure of evidence to support the judgment. Moore's representation that the stock was good is, under all the authorities, an expression of opinion only, as also under the evidence is his statement that the stock was worth 110, when coupled with the qualification "as far as I know," and as affected by the fact that he had no peculiar means of knowledge as to the condition of the company or the acts of its officers whose criminality or delinquency destroyed the market value, as well as the intrinsic value, of the stock. That statements as to value under such circumstances are generally regarded as opinions only, and may not be relied upon, is decided in *Noetling v. Wright*, 72 Ill. 390; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Plummer v. Rigdon*, 78 Ill. 222, 228, 20 Am. Rep. 261; *Kennedy v. Richardson*, 70 Ind. 524, 534; *Hoffman v. Wilhelm*, 68 Iowa, 510, 27 N. W. 483; *Bristol v. Braidwood*, 28 Mich. 191; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Brownlow v. Wollard*, 61 Mo. App. 124; *Nostrum v. Halliday*, 39 Neb. 828, 58 N. W. 429; *Smith v. Mitchell*, 6 Ga. 458; *Little v. Allen*, 56 Tex. 133, 139; *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858. See, also, extended note to *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co.*, 37 L. R. A. 593.

In *Connell v. El Paso G. M. & M. Co.*, 33 Colo. 30, 78 Pac. 677, it is held that a representation of the amount paid for property is a material fact, and if false and relied on will avoid the contract.

[5] But whether that statement or any of the statements alleged to have been made by Moore are regarded as mere opinions, or as statements of fact, it is manifest that

they were not relied upon by the plaintiff in this case. There is a total absence of evidence that these statements were ever communicated to or came to the knowledge of the plaintiff. The record is utterly devoid of any evidence, direct or indirect, tending to show that the plaintiff relied on any such representations, or that Estes, in acting for him, relied on such statements. On the contrary, there is a direct and positive statement made by Estes that he did not act thereon, but rather upon his own independent investigation. That both the plaintiff and Estes did rely upon their own investigations is abundantly established by their own evidence, twice given and recorded. It is almost universally held, under circumstances as here shown, that, if investigation is made by the buyer, he cannot claim that he relied on the representations of the seller, except in cases of active fraud or concealment, or in cases where fiduciary relations existed, or peculiar knowledge upon the part of the seller was shown. *Fauntleroy v. Wilcox*, 80 Ill. 477; *Fisher v. Dillon*, 62 Ill. 879; *Port v. Williams*, 6 Ind. 219; *Colton v. Stanford*, 82 Cal. 351, 23 Pac. 16, 161 Am. St. Rep. 137; *Gridler v. Clopton*, 27 Ark. 244; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Anderson v. McPike*, 86 Mo. 293; *Herron v. Herron*, 71 Iowa, 428, 32 N. W. 407.

The claim that plaintiff relied upon Moore's statements that the stock was worth above par is negatived by the fact that immediately before he concluded this trade he purchased other of the same stock and contracted to sell the same at par. As to the statement made by Moore that he paid a certain price for his stock, there is no proof that such statement was false, even if there had been anything to show, or tending to show, that such statement had been relied on; and the fact, shown by plaintiff's evidence, that the stock was being purchased in considerable quantities by persons having as good opportunities for investigation and knowledge as had Moore and who were taking it at par, corroborates and establishes the truth of defendant's statement that the stock was good and had value, if, as is generally the case, by "value" is meant what it is bringing in the market.

All material evidence upon the part of plaintiff having been submitted by deposition, this court is not governed by the usual rule that findings of the trial court upon conflicting evidence is binding upon the court of review, and the evidence offered by the plaintiff is in no manner aided by the oral testimony of the defendant.

We think it is not amiss to call attention to the fact that plaintiff does not come into this court with unsoiled hands. Representations were made to defendant that the land offered in exchange for his stock was worth \$500 an acre, while the evidence offered at

the trial showed that as good land, better situated, more highly improved, was offered in the market at \$250 or less an acre.

[6] Because of the entire failure upon the part of the plaintiff to sustain the charge of fraud, and because of the conclusive showing that plaintiff did not rely upon the representations alleged to have been made by defendant, the judgment must be reversed and the cause remanded. However, there remains the possibility that upon proper allegations a case might be stated admitting evidence of mutual mistake upon the part of both the plaintiff and the defendant, of which a court of equity might take cognizance. No suggestion of such a case was made in the trial court or is made in this court. It is evident from the complaint and the finding of the trial court that the cause of action and judgment were based upon allegation and finding of fraud in its most odious sense, and, that being true, this court is not at liberty to make a finding or to direct proceedings or judgment under any other theory or cause of action; but the reversal will be without prejudice to the right of plaintiff to institute another action, if he be so advised, for rescission of the contract on the ground of mutual mistake. *Connell v. El Paso G. M. & M. Co.*, supra; *Colorado Springs Co. v. Wight*, supra.

Reversed and remanded.

#### ARIZONA MINE SUPPLY CO. et al. v. BOLMAN et al. (No. 1332.)†

(Supreme Court of Arizona. May 6, 1914.)

#### 1. QUIETING TITLE (§ 2\*)—SUBJECT-MATTER—MINING MACHINERY.

Plaintiffs gave an option on a mine providing for payment of the price in installments, that the purchaser should have possession, and, on default in any payment, should forfeit, as liquidated damages, any machinery and improvements placed on the premises. Default was made after placing mining machinery, firmly affixed to the ground, on the premises, and plaintiffs took possession. *Held*, that plaintiffs could sue under Civ. Code 1901, par. 4104, authorizing an action to quiet title to real property, to quiet their title to the machinery against persons claiming it under a chattel mortgage or conditional sale.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 2\*]

#### 2. QUIETING TITLE (§ 35\*)—SUFFICIENCY OF COMPLAINT—ALLEGATIONS AS TO TITLE.

Under Civ. Code 1901, par. 4105, requiring the complaint, in an action to quiet title, to set forth the nature and extent of plaintiffs' estate, allegations that plaintiffs were the owners of a mine, that the machinery in question was placed thereon to operate the mine, that plaintiffs acquired it by a forfeiture of the option under which operating machinery placed at the mine became liquidated damages with the acquiescence of the purchaser sufficiently alleged the nature and extent of plaintiffs' property; and plaintiffs' title was not an issue unless defendant, who sold the machinery to the holder of the option under a contract of conditional sale and claimed a balance thereon, denied the purpose

for which it was placed at the mine or that it was to remain part and parcel of the mine.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.\*]

#### 3. QUIETING TITLE (§ 34\*)—SUFFICIENCY OF COMPLAINT—ALLEGATIONS AS TO CLOUD OR ADVERSE CLAIM.

Under Civ. Code 1901, par. 4105, requiring plaintiff, in a suit to quiet title, to set forth that he is credibly informed and believes the defendant makes some claims adverse to his own, and in view of paragraph 2702 providing that contracts for the conditional sale of personal property, with reservation of title in the vendor, shall be invalid except as to the parties and persons having notice thereof, unless in writing, and the same or a copy thereof is filed in the office of the county recorder where the property is situated, allegations, in a suit to quiet title to mining machinery, that plaintiff had acquired title thereto by forfeiture of the lease for default of rental payments, but that the conditional seller had duly recorded the contract, was sufficient to show the apparent validity of the instrument constituting the cloud.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.\*]

#### 4. PLEADING (§ 214\*)—DEMURRER—ADMISSION OF TRUTH.

In an action to quiet title to mining machinery, plaintiffs' allegation that the recorded contract of conditional sale under which defendant claimed was invalid in that there was no balance due thereon, and that it was an attempt to defeat plaintiffs' rights, would be treated as true for the purpose of a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

#### 5. QUIETING TITLE (§ 44\*)—DECREE—SUFFICIENCY OF EVIDENCE.

In an action to quiet title to mining machinery placed on mining land owned by plaintiffs, and on which they had given an option to purchase, providing for the forfeiture of any machinery placed thereon by the purchaser on default of payment on any installment of the price, where defendant, who sold such machinery to the purchaser, claimed a lien thereon for an alleged balance under its recorded contract of conditional sale, evidence held insufficient to sustain a decree for plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

Appeal from Superior Court, Yavapai County; Carl G. Krook, Judge.

Action by Charles H. Bolman and others against the Arizona Mine Supply Company and another. Decree for plaintiffs, and defendant Arizona Mine Supply Company appeals. Reversed and dismissed.

Norris & Mitchell, of Prescott, for appellant. E. S. Clark, J. Ralph Tascher, and Neil C. Clark, all of Prescott, for appellees.

CUNNINGHAM, J. Defendant Arizona Lead & Zinc Company, under an optional contract with plaintiffs, acquired possession of plaintiffs' U. S. Navy and Baltimore mining claims, with the granted privilege of operating the mines during the life of their option, viz., from September 23, 1911, to December 23, 1912, unless the right and privilege expired at an earlier date by reason of said defendant's default in making the certain pay-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

† Rehearing denied June 4, 1914.

ments of the purchase price agreed upon, at the dates agreed upon. The said defendant agreed to place upon the mines machinery and improvements sufficient to operate the same, and, in the event it should fail to make any payments agreed to be made, the machinery and improvements so placed by it upon the mines it was agreed should become the property of plaintiffs as liquidated damages. This optional contract was not recorded. While the said Lead & Zinc Company was occupying the mines under the said contract, on or about December 1, 1911, the defendant Arizona Mine Supply Company entered into a contract with the said Lead & Zinc Company to sell to it certain machinery to be placed upon the mines and used in the operation thereof, conditioned that the title to the same should remain in the Mine Supply Company until the purchase price should be fully paid, and, if not paid, the Mine Supply Company reserved the right to retake the property. This contract of conditional sale was duly recorded on March 12, 1912. The purpose of the action is to cancel this contract of conditional sale as a cloud upon plaintiffs' title. Defendants demurred to the complaint filed upon the grounds that the complaint fails to show equity, and upon the grounds that the facts stated are insufficient to constitute a cause of action. The demurrers were overruled, and appellant Mine Supply Company assigns the order overruling the demurrers as error.

Omitting the formal averments and those parts of the complaint not deemed material, the complaint is as follows:

"That on the 23d day of September, 1911, the plaintiffs were, and at all times since have been, and are now the owners of record and in fact of those certain lode mining claims situate in Copper Basin mining district, Yavapai county, to wit, U. S. Navy \* \* \* and Baltimore. \* \* \* That on the 23d day of September, A. D. 1913, the plaintiffs and defendant Arizona Lead & Zinc Company entered into a certain contract or agreement, in words and figures following, to wit: \* \* \* Witnesseth: That the parties of the first part, for and in consideration of the sum of one dollar to them in hand paid by the party of the second part, \* \* \* and the further sums to be paid as herein-after mentioned, have this day given and granted, and by these presents do give and grant unto the party of the second part exclusive right and option of purchasing from the parties of the first part all their right, title and interest of, in and to the following described mining claims, said mining claims being situate in the Copper Basin mining district, Yavapai county, Arizona, to wit [describing the said claims]. Said option and right to purchase is given upon the following terms and conditions, to wit: (1) The option is given until December 23d, 1912. (2) The total price to be paid is \$15,000.00. (3) Said

\$15,000.00 is to be paid as follows: 5,000 on or before December 23d, A. D. 1911; 5,000 on or before June 24th, A. D. 1912; 5,000 on or before December 23d, A. D. 1912. \* \* \*

(4) Immediate possession of said mines is to be given to second party, and it shall have the right to mine and extract ore and dispose of the same providing said work is done in a good and workmanlike manner. (5) Second party agrees to place upon said mines machinery and improvements sufficient to operate the same, and further agrees not to dispose of said machinery and improvements, or to remove the same from said mines without the written consent of first parties; and it is expressly understood and agreed between the parties hereto that, in the event that any payment be not made as herein provided, then, in that event, all buildings, machinery and improvements of whatever kind or nature so placed upon said mines shall revert to and become the property of first parties as liquidated damages for the failure to make said payments as agreed. Provision is made for placing deeds in escrow to be delivered to second party in case the payments are made as agreed, and, in case the payments are not made as agreed, the deeds shall be returned to first parties. Instructions are included as to the manner of passing the money paid to the escrow holder, to the persons named, and the proportions to be credited to each such named persons. That under and by virtue of said contract the said defendant entered upon said mining claims and extracted ores and minerals therefrom, and in the prosecution of said work said defendant, on or about December 1, 1911, placed upon said mining claims, and firmly affixed to the same, so as to become a part of the realty, the following improvements and machinery, to wit [describing the articles].

"(5) That on the 23d day of March, 1912, the defendant Arizona Lead & Zinc Company defaulted in the payment of \$5,000 then payable to plaintiffs under said contract, and therefore said contract became and was forfeited and was so declared by the parties thereto, and the deed in escrow was withdrawn by plaintiffs, and all of the machinery and improvements placed upon said mining claims by said Arizona Lead & Zinc Company, as hereinbefore set forth, became and were, and still are, the property of plaintiffs as against said Arizona Lead & Zinc Company, as it had theretofore and since being placed on said claims been their property as against all others; and plaintiffs took possession thereof.

"(6) That on the 12th day of March, 1912, the defendant Arizona Mine Supply Company filed in the office of the county recorder of Yavapai county a pretended chattel mortgage upon, or conditional bill of sale of, the property mentioned in paragraph 4 hereof, which said chattel mortgage or conditional bill of sale was dated December 1, 1911, and

purported to have been accepted by said Arizona Lead & Zinc Company, on the 5th day of December, 1911, an abstract of which said instrument is of record in Book 5 of chattel mortgages, at page 102, Records of Yavapai county, Ariz., which said instrument is hereby referred to and made a part hereof. The plaintiffs had no notice or knowledge whatsoever of said pretended chattel mortgage or conditional bill of sale until the filing of same for record as herein stated.

"(7) That plaintiffs are informed and believe that the defendants are asserting title to said property described in paragraph 4 hereof, by virtue of said pretended chattel mortgage or conditional bill of sale, and are threatening and intend to take said property forcibly or surreptitiously from plaintiffs' possession, and will do so unless restrained by an order of this court. That said pretended chattel mortgage or conditional bill of sale constitutes a cloud on plaintiffs' title to said property and interferes with their enjoyment, use, and disposition thereof, to their great damage and injury, for which they are without adequate or speedy remedy at law.

"(8) That as plaintiffs are informed and believe, and so state the fact to be, the defendant Arizona Mine Supply Company has been fully paid and satisfied for each and every article mentioned in paragraph 4 hereof, and has no claim upon the same or against the defendant Arizona Lead & Zinc Company, but that said defendants, in wrongful collusion for the purpose of harassing and annoying the plaintiffs and for the purpose of wrongfully compelling them to give up said property to defendants, persist in the pretention that said alleged chattel mortgage or conditional bill of sale gives said Arizona Mine Supply Company a better right to said property than that of plaintiffs. And plaintiffs are further informed and believe, and so state the fact to be, that, in case the said Arizona Mine Supply Company should recover any of the said property forcibly or surreptitiously, it will, pursuant to said collusion with the defendant Arizona Lead & Zinc Company, deliver the same or the proceeds thereof, wholly or in part, to said Arizona Lead & Zinc Company, whereby the latter corporation will be aided in avoiding its said contract with plaintiffs."

Paragraph 4104, Rev. St. Ariz. 1901, provides: "An action to determine and quiet the title to real property may be brought by any one having, or claiming, an interest therein, whether in or out of possession of the same, against any person or corporation, or, \* \* \* when such person, corporation \* \* \* claims any estate or interest, adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought. \* \* \*"

Paragraph 4105, Id.: "The complaint therefore must be under oath, setting forth

the nature and extent of his estate and describing the premises, and that he is credibly informed and believes the defendant makes some claims adverse to the complaint, and praying for the establishment of the complainant's estate, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the complainant."

[1] The jurisdiction in actions to quiet title or remove cloud is generally held to be confined to land, including the surface of the ground and everything that is on it and under it, and not to extend to personal property. 32 Cyc. 1308c.

Plaintiffs allege in the fourth paragraph of their complaint that the articles described and placed upon the lands were firmly affixed to the same, so as to become a part of the realty. In the fifth paragraph of the complaint they allege that all of the machinery and improvements placed upon said mining claims by said Arizona Lead & Zinc Company became and were and still are the property of plaintiffs, as against said Arizona Lead & Zinc Company, by reason of said Lead & Zinc Company's failure to make a payment of any installment of the purchase price as agreed, and, under a stipulation in the contract of purchase, said Lead & Zinc Company agreed to forfeit such machinery to plaintiffs as liquidated damages in the event of its failure to make any payments agreed to be made, and that it had joined with the plaintiffs in declaring the said contract forfeited and plaintiffs took possession of the property. The purpose of placing the machinery in question on the mines was to use it in operating the mines. The plaintiffs in the manner stated having acquired such property, and such property being on the lands, and intended to be used and suitable for use in connection with the operation of the mines, it would pass under a conveyance of the mines by plaintiffs as appurtenant thereto, unless reserved in such conveyance. In that sense the subject-matter dealt with in the complaint may be regarded as real estate.

"In an action to remove a cloud from title, the real controversy is as to that which creates the cloud, and not the title of plaintiff, unless the later is put in issue by the pleadings." 32 Cyc. 1365 (II).

[2] The general allegations that the plaintiffs are the owners of the mines, that the property in question was placed upon the mines for the purposes of operating the mines, and plaintiffs acquired the same by reason of a forfeiture of the contract under which the property was placed on the mines as liquidated damages with the acquiescence of the Lead & Zinc Company, and that they are in possession of the said property sufficiently meets the requirements of paragraph 4105, Rev. St. Ariz. 1901, in regard to the allegations of the nature and extent of their

estate in the property in this kind of an action seeking to remove a cloud; the title of the plaintiffs, in the meaning of the rule, is not put in issue under the facts alleged here, unless the defendants deny the purpose for which the machinery was placed upon the mines, and its use in connection with the operation of the mines, with a denial of other facts from which plaintiffs' intention may be inferred that the property is to remain a part and parcel of the mines.

[3] "In a suit to remove a cloud on title, it must be shown in the bill that such cloud exists before relief can be given against it, and in such case the bill must, in addition to specifying the writing or matter which constitutes the alleged cloud, state facts which give it apparent validity, as well as those which show its invalidity." 32 Cyc. 1353.

Under our statute this requirement of equity pleading is met by alleging "that he (plaintiff) is credibly informed and believes the defendant makes some claims adverse to the complaint, and praying for the establishment of the complainant's estate, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the complainant." Paragraph 4105, Rev. St. Ariz. 1901.

Plaintiffs did not rely upon the general statutory allegation in this respect as was their privilege, but, as appears in paragraph 4 of the complaint above set forth, the adverse claim of the defendant Mine Supply Company is set forth in detail. As to plaintiffs without actual or constructive notice, such instrument, as referred to, would be invalid at all times and for all purposes. Paragraph 2702, Rev. St. Ariz. 1901, provides that: "No contract for the sale of personal property by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale complied with, shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract of sale \* \* \* is in writing, subscribed by the parties thereto, and the same, or a copy thereof, filed and recorded in the office of the county recorder where said property is situated \* \* \* in the same manner as chattel mortgages are by law required to be filed and recorded."

This instrument being placed of record, it becomes apparently valid as to plaintiffs, and the allegations of the complaint setting forth the fact of the recording of the instrument is a satisfaction of the requirement of a statement of the apparent validity of the instrument which constitutes the cloud. The plaintiffs show the invalidity of the instrument in paragraphs 7 and 8 of the complaint set out above.

[4] The requirement of the statute relating to the statement of the adverse claim is sufficiently complied with by the allegation

of such facts; and, for the purposes of this demurrer, we must treat them as true; therefore the recorded contract must be considered invalid for the purposes of this demurrer.

The facts stated in the complaint prima facie entitle the plaintiffs to the relief sought, viz., a cancellation of the recorded instrument and an order restraining defendants from removing the property from plaintiffs' mines. The court committed no error in overruling the demurrers.

The defendant Mine Supply Company answered, denying that the machinery and improvements were so annexed to the mines as to become realty thereby, denied that plaintiffs acquired title to the said property by reason of the defendant Lead & Zinc Company's default in making the payment alleged, and a consequent declaration and forfeiture of the contract, and alleges that such always belonged to this defendant and subject to the conditions of the contract referred to in the complaint, but does not deny that the property was designed to be used in the operation of the mines, or that plaintiffs intended that it should remain on the mines for that purpose. It admits that the contract was recorded as alleged in the complaint, and alleges that by the provisions of which contract the parties thereto agreed that the title of the property described therein and delivered was to and did remain in this defendant until the full purchase price was paid, "that the contract price of the property was not paid, and the title thereof still remains in this defendant and is now and ever since has been in this defendant," admits that it asserts title to and claims the ownership of said property by reason of the said recorded contract, and the failure of payment of the purchase price, denies all collusion and all agreements, contracts, or understandings with defendant Lead & Zinc Company, as alleged in the complaint, whereby it should surreptitiously or otherwise take possession of said property except as agreed in said recorded contract, viz., that, in case payment of the purchase price was not made, this defendant should have the right to at any time retake the property for the non-payment of the purchase price. The said defendant raised no issue of the plaintiffs' intention to give to the property involved the machinery and improvements used in the operation of the mines, the character of realty after they acquired the Lead & Zinc Company's title, and therefore the manner and degree of the annexation of the property, so far as defendant's rights to remove the same were not involved. As a right to have defendant's recorded claim of title canceled is made to depend upon the validity of defendant's claim, the degree of annexation to the realty became an immaterial matter. Plaintiffs' intentions to make the machinery and improvements permanent fixtures for

the use of the mines was made to depend upon their title thereto acquired from the Lead & Zinc Company, and no issue was made on that question by the answer. The validity of defendant Mine Supply Company's claim is made the vital and controlling issue by the pleadings, and made to depend upon whether the purchase price of the property has been paid and the contract obligation thereby satisfied. If such fact is shown, then defendant Mine Supply Company has no valid enforceable claim to the property; if not, then it has a valid and subsisting claim prior to that of plaintiffs. A solution of that question is decisive of the controversy, and a solution depends upon the evidence produced.

The judgment is for the plaintiffs, establishing their title and canceling the recorded instrument as a cloud on the title, with the usual restraining order against defendants.

Defendant Mine Supply Company appeals from the judgment and, among others, assigns as error that "the decree entered by the court is contrary to law for the reason \* \* \* that it is not supported by the evidence." The sufficiency of the evidence to support the decree rendered is variously assigned, but amounts in effect to the one assignment and will be so considered. The only evidence bearing upon the matter at issue, which we deem necessary to notice, is the evidence of plaintiffs' title they acquired from Arizona Lead & Zinc Company and the evidence bearing upon the validity of the instrument alleged to constitute the cloud on that title. All other matters in evidence have little, if any, bearing upon the question involved.

In support of their allegations of title, plaintiffs introduced their contract with the Arizona Lead & Zinc Company, which was set out in full in the pleadings, but not of record. They introduced the oral evidence by one of the plaintiffs that the payment due on December 23, 1911, was not paid in full, but that on December 18, 1911, the Lead & Zinc Company, through its general manager, paid \$2,500 of the \$5,000 due on the 23d of December, 1911, as a consideration for an extension of 90 days' time for the payment of the balance which was to be payable on March 23, 1912. That the extension of time was granted, and another contract was drawn between the parties modifying the original contract, but such contract was not produced. That on March 23, 1912, the date when the balance, \$2,500 of the December 23, 1911, payment became due, it was not made and has never been made. A request for an extension of the contract for a year without payments was made, and the request was refused. "During the time the agreement was in force between the 23d day of September, 1911, and the 23d day of March, 1912, Mr.

Meese acted for the Arizona Lead & Zinc Company, put certain property or improvements upon the mines." "Since the 23d day of March, 1912, neither Mr. Meese nor any other officer of the Arizona Lead & Zinc Company has been on the ground that I know of." There is no evidence in the record tending to prove that the optional contract was ever declared forfeited, by the plaintiffs. There is no evidence in the record tending to prove the plaintiffs ever notified the Arizona Lead & Zinc Company that they claimed a forfeiture of the contract of optional sale or the property placed upon the mines under that contract, or that said defendant acquiesced in such matters. Such acquiescence may be inferred from the request of the Lead & Zinc Company for an extension of time of payment perhaps, but it would not be concluded thereby. It is concluded, however, by its default in this action.

The plaintiffs introduced in evidence the contract between the Mine Supply Company and the Lead & Zinc Company, the instrument alleged to constitute the cloud. It bears date and record as alleged in the complaint, and is as follows, omitting the date and filing: "This proposal is for acceptance within thirty days from date, or the price of machinery or merchandise specified herein shall be subject to revision. When this proposal is accepted it constitutes a contract. Delivery of material covered by this contract, is subject to delays occasioned by accidents, strikes, fires, delays in transit and causes beyond the control of Arizona Mine Supply Company. The title and right of possession to articles herein mentioned shall remain in Arizona Mine Supply Company until agreed price is fully paid. Terms of payment: One hundred (\$100) dollars cash. Balance sixty (60) days from date. To Arizona Lead & Zinc Company, Skull Valley, Ariz. We are pleased to quote you on the following articles delivered f. o. b. cars, Prescott, Arizona [articles described]. Respectfully submitted, Arizona Mine Supply Company, By Chas. T. Joslin, Pres't. Accepted: December 5, 1911. Arizona Lead & Zinc Company, By Geo. C. Meese, General Manager."

Plaintiffs offered no evidence in support of their allegation that the "defendant Arizona Mine Supply Company has been fully paid and satisfied for each and every article mentioned" in the complaint, "and has no claim upon the same as against the defendant Arizona Lead & Zinc Company." It was admitted by counsel during the course of the trial that the articles placed upon the mines by the Arizona Lead & Zinc Company were furnished by the Arizona Mine Supply Company under their contract. Defendant introduced evidence tending to prove that the sum of \$395.46 remains due from the Lead & Zinc Company to the Mine Supply Company upon the purchase price of the said machinery so

furnished, and this evidence was not disputed. No other evidence was offered or received upon that question.

[5] The evidence wholly fails to support the decree rendered, in that the evidence fails to show that defendant Mine Supply Company's conditional bill of sale is invalid, but, on the contrary, it does show that such contract is a valid and subsisting contract, the terms and conditions of which plaintiffs had constructive notice before any rights to the property accrued to them by reason of non-payment, and all their rights so acquired were only such as belonged to the Arizona Lead & Zinc Company at the time of such default, and the evidence is conclusive that such defendant had no title to the property but only a right to the possession subject to be terminated by the Mine Supply Company at its will. Plaintiffs then acquired the right to the possession of the property, subject to the will of the Mine Supply Company, and the further right to discharge the Mine Supply Company's claim of the balance actually due upon the purchase price and thereby acquire full title with this right to possession. Without such payment or offer to pay, the plaintiffs have shown no equitable right in the property as against appellant, except the right of possession during the will of said defendant.

The decree appealed from must be vacated for the reasons stated. The cause is remanded, with instructions to the lower court to vacate the decree and enter a decree dismissing the complaint.

FRANKLIN, C. J., concurs. ROSS, J., took no part in the decision of this cause.

PROVIDENT MUT. BUILDING-LOAN  
ASS'N et al. v. SCHWERTNER.  
(No. 1355.)

(Supreme Court of Arizona. May 6, 1914.)

1. QUIETING TITLE (§ 14\*)—CLOUD ON TITLE  
—MORTGAGES—EQUITIES.

An unsatisfied mortgage, securing a debt barred by limitations, will not be removed as a cloud on title without the debt being first paid.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.\*]

2. QUIETING TITLE (§ 14\*)—CLOUD ON TITLE—  
MORTGAGES—EQUITIES.

Where a debt secured by mortgage was usurious, but the principal and legal interest were paid, the mortgage would be canceled as a cloud on title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 46; Dec. Dig. § 14.\*]

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Action by A. Josef Schwertner, as guardian ad litem of Albert Schwertner, a minor, against the Provident Mutual Building-Loan

Association and another. From a judgment for plaintiff, defendant named appeals. Reversed and remanded for new trial.

O. Gibson, of Tombstone, for appellant. Lyman H. Hays, of Willcox, and J. T. Kingsbury, of Tombstone, for appellee.

ROSS, J. Action by appellee to remove a cloud upon his title to lots in Willcox, Cochise county, Ariz. The alleged cloud consists of a deed of trust executed on November 17, 1899, by A. Josef Schwertner and wife to the Title Guarantee & Trust Company, trustee, to secure a loan evidenced by note from the Provident Mutual Building-Loan Association. The trust deed is set out in complaint in hæc verba, followed by an allegation that the note to secure which the trust deed was given, and all interest and penalties, had been fully paid and discharged; that trust deed remains unsatisfied of record and is a cloud upon plaintiff's title. Prayer for its cancellation. The Title Guarantee & Trust Company defaulted. The Provident Mutual Building-Loan Association, appellant, answered and, among other defenses, claimed a balance unpaid, due, and owing it on account of loan in interest, premiums, and penalties, in the sum of \$1,393.96, that the appellee is the child of mortgagors and successor to them with notice of trust deed, asked that the lien of trust deed be foreclosed, and that property be ordered sold and proceeds applied to the payment of said sum. The appellee demurred to this answer on the ground that it appeared on the face thereof that the notes were barred by the statute of limitations. The demurrer was sustained. Whereupon a motion by appellee for judgment on the pleadings was made and judgment granted.

[1] While the appellant suggests other errors, its main contention is that an action to remove a cloud, being an equitable action, cannot be maintained for the cancellation of an unsatisfied mortgage, even though limitation has run against it, and the debt secured by it is barred. The form in which the action is prosecuted has not the sanction of the statutory law. However, "the jurisdiction of courts of equity to remove clouds from title is well settled, the relief being granted on the principle of quia timet; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect a plaintiff's title." Section 1398, vol. 4, Pomeroy, Eq. Juris.

Had proof been made of the recordation of the trust deed, its payment in full as alleged, and the refusal of appellant to enter satisfaction of record, a judgment directing its surrender and cancellation would have been proper. But there was no proof of payment and satisfaction offered or made. Judgment was entered upon the pleadings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the reason that the answer upon its face showed that the balance claimed was outlawed. Outlawry, under the statute of limitation, affects the remedy and not the right. It does not extinguish or satisfy the debt; it only prevents a recovery when properly invoked by the debtor. It is a shield and not a sword. It can be used for defense, but not for assault. Had appellant brought suit to recover, the plea of the statute would have defeated its recovery. But will a court of equity, where it is admitted, as in this case, by the demurrer to answer that a large amount is still due on the trust deed, permit the debtor or his successor in interest to force the creditor into court, just for the purpose of sending him out empty-handed? Or should he be required to do equity by paying the amount that he admits is unpaid? "Equity and good conscience require that she should pay the debt secured by the mortgage as a condition to its cancellation. The maxim that 'he who seeks equity must do equity' voices a just and universal rule in determining the equitable rights of suitors, and should always be applied in cases like this. \* \* \* The plaintiff seeks equity. They must do equity. Every man should pay his just debts. It is right that he should do so. The fact that he may not be coerced to discharge them by legal means affects only the legal character of his obligation. It does not alter the primary fact that he owes an obligation which in equity and good conscience he should pay." *Tracy v. Wheeler*, 15 N. D. 248, 107 N. W. 68, 6 L. R. A. (N. S.) 516. This case was one asking for the cancellation of a mortgage concededly unpaid, as being a cloud on the title of plaintiff, successor to the mortgagor. It is a well-considered case that collects many decisions sustaining the view that equity will not grant relief, except upon condition that the debtor pay or tender payment of the debt secured. Most of the courts hold that the statutory action to quiet title cannot be sustained as against a mortgage debt confessedly unpaid. *Tracy v. Wheeler*, supra, and annotations in 6 L. R. A. (N. S.) 516. The dissenting opinion in this case by Justice Engerud, while combating with much reason that doctrine as unsound, makes the observation that "there is no parallel between a suit to determine adverse claims and an ordinary suit in equity to cancel a mortgage or lien for specific reasons. The pleading in such a case necessarily admits that the lien or other adverse claim attacked is valid, unless invalid for the reasons pleaded; and the attacking party assumes the burden of establishing the specific invalidity alleged."

In the present case the trust deed was ordered cancelled for the sole and only reason that the debt had been fully paid. In the developments of the case, it is shown and admitted by appellee that the debt has not been paid; that only the remedy has been lost,

and, as before said, the wiping out of the remedy does not extinguish the debt. The obligation still exists. *Pomeroy, Eq. Juris.* vol. 1, § 388, has well said: "It may be regarded as a universal rule governing the court of equity in the administration of its remedies that, whatever may be the nature of the relief sought by the plaintiff, the equitable rights of the defendant, growing out of or intimately connected with the subject of the controversy in question, will be protected; and for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights (if any) the defendant may have, and to that end the court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies."

[2] As stated heretofore, if proof had been submitted sustaining the allegation of full payment, the equities of the case would demand a judgment ordering the cancellation of the trust deed. It is also urged in the brief of appellee that the amount claimed as due on debt is usurious; that the principal and legal interest have been paid; and that for those reasons the deed should be canceled. If the record disclosed these things, or either of them, to be true, it would afford a basis of equitable relief, but the pleadings raise no question of usury, and the statement, even though true, is not sustained by the record. The facts of payment and usury are open questions that should have been passed upon by the trial court, if desired to be reviewed here.

The judgment is reversed, and case is remanded for a new trial, and if, upon such trial, any balance be found due appellant on debt, the appellee is to be allowed 60 days in which to pay same, whereupon trust deed should be canceled; and, in case the appellee should default in making such payment, it is ordered that the action be dismissed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

#### MERRILL v. GORDON. (No. 1362.)

(Supreme Court of Arizona. March 6, 1914.)

#### 1. LANDLORD AND TENANT (§ 22\*)—AGREEMENT FOR LEASE—ACTION FOR DAMAGES.

For breach of an agreement for a lease, a party, may either treat the agreement as rescinded and sue for damages, or treat the contract as continuing and sue for specific performance, or repudiate the contract and sue for recovery of any advance payments made.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. LANDLORD AND TENANT (§ 22\*)—ESTABLISHMENT OF RELATION—EXECUTION OF LEASE.**

It is only where a lease has actually been made that the relation of landlord and tenant is established.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 55-59; Dec. Dig. § 22.\*]

**3. LANDLORD AND TENANT (§ 129\*)—WITHHOLDING POSSESSION—EJECTMENT.**

When the relation of landlord and tenant exists, the lessee may maintain ejectment against any person, including the lessor, who wrongfully withholds possession of the demised premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 450-457; Dec. Dig. § 129.\*]

**4. LANDLORD AND TENANT (§ 185\*)—LIABILITY FOR RENT—POSSESSION.**

Delivery of possession of the demised premises by the lessor to the lessee is necessary to the lessee's obligation to pay rent; and the rule is the same whether the lessor refuses or is unable to give possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 751-754; Dec. Dig. § 185.\*]

**5. PAYMENT (§ 82\*)—RECOVERY—VOLUNTARY PAYMENT.**

Plaintiff, after an agreement with defendant for a lease if he should purchase the stock of the then lessee, pending negotiations for such purchase, sent to defendant the amount of the advance payments, and thereafter, pending, and apparently in aid of his suit against the former lessee and the purchaser of his stock for possession of the store under his alleged lease from defendant, and upon advice of counsel that it was necessary to do so in order to maintain that suit, sent the rental each month for more than a year, specifying it as rental for each month, amounting in all to \$2,240. Defendant denied any lease, offered to hold the money for plaintiff, or to return it to him, and, after plaintiff's negotiation for the purchase of the stock fell through, and after his own sale and conveyance of the premises, cashed the checks. *Held*, in an action to recover such payments, that, as plaintiff voluntarily paid the money with a full knowledge of all the facts, though no obligation thereto existed, he could not recover; defendant's statement, on demand for repayment, that he owed plaintiff being immaterial as a conclusion of law, and without consideration.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 254-266; Dec. Dig. § 82.\*]

**6. PAYMENT (§ 89\*)—QUESTION FOR JURY—VOLUNTARY PAYMENT.**

Whether a payment was made voluntarily or not is a question of law, where the facts are undisputed.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 291-296; Dec. Dig. § 89.\*]

Appeal from Superior Court, Cochise County; Fred Sutter, Judge.

Action by Peter Gordon against Horace P. Merrill. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss complaint.

John B. Wright, of Tucson, for appellant. J. E. Morrison, of Phoenix, Doan & Doan, of Douglas, and Robert E. Morrison, of Prescott, for appellee.

ROSS, J. The appellee was the plaintiff below, and the appellant was the defendant. The suit was instituted by plaintiff to recover

of defendant the sum of \$2,240, claimed to be owing upon the following remarkable state of facts:

Defendant, who resides at Benson, Cochise county, was the owner of a store building in Jerome, Yavapai county. One Lubin, a dry goods merchant, had been his tenant for a number of years. Plaintiff, Gordon, who was Lubin's brother-in-law, had been in the latter's employ as a clerk in and about his mercantile business. About the 7th of March, 1911, while defendant was visiting in Jerome, Lubin informed him that he had sold, or was about to sell, his business to plaintiff, and requested defendant to make a lease of store building to Gordon. Plaintiff also talked with defendant of his purchase or proposed purchase of stock of goods, and of a lease of the store building. Lubin and defendant testified that the latter agreed to lease the building to any one to whom a sale was made. Plaintiff testified that defendant agreed to lease building to him. As to length and terms of lease, it was agreed that plaintiff should make, in writing, his proposition to defendant, which he did on March 9, 1911, by mailing his proposition to defendant at Benson. Receiving no response from defendant, Merrill, on March 21st plaintiff wired him: "About to close deal with Lubin. How about lease?" Defendant answered message on same day by wire, stating that plaintiff could have building on same terms as Lubin had had it, but rejecting plaintiff's proposition of the 9th, stating that he was writing explanation. On same day, March 21st, defendant wrote plaintiff a proposition of lease for a term of "one, two or three years" at \$140 per month, to be secured by bond, or, in lieu of a bond, the payment of "the last three months' rent in advance; that is, \$420.00." This proposition was received by plaintiff at Jerome on March 24th, whereupon he deposited with the Branch Bank of Jerome the sum of \$420, with instructions. The bank on same day wired defendant that plaintiff had made deposit, with instruction to credit his account upon receipt of three-year lease. March 27th plaintiff wired defendant of his acceptance of lease, as proposed in letter of the 21st, and that he had made deposit of \$420 in bank to his credit. March 28th defendant wrote plaintiff: "I received the wire from the bank regarding the deposit of \$420.00 made by you for lease, but I have not accepted it yet, and no lease has been made with any one. You can leave the deposit there until this row is settled, or you can draw it down. Better leave it there, as I think you and Lubin can get together and patch up the trouble, and then I will give you the lease on terms mentioned. \* \* \* Now, Gordon, if Lubin says it is all right to lease to you, or if he quits business or refuses to lease the place on the terms that you offer to lease it, then I will lease to you, you come right after him,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.-32

but not before him as long as he treats me right. \* \* \* March 31st plaintiff wrote defendant insisting that his acceptance of offer of March 21st entitled him to a lease, and stated that he had employed attorneys to enforce agreement.

The negotiations between Lubin and plaintiff came to naught, and some time in April, 1911, Lubin sold his stock to Brockway & Jones, who took possession of stock and buildings, and continued to hold same.

On April 15th, the day he claimed his lease commenced, plaintiff secured from the bank a cashier's check payable to his order for \$560, being the deposit for last three months' and the rent for month from April 15th to May 15th, and, without indorsing the same, sent it to defendant. The same action was taken with reference to rent of next two months. July 15, 1911, defendant mailed these three checks to bank, and asked what indorsement the bank would require to have the checks cashed and placed to his credit in that bank. The bank called plaintiff's attention to this communication, whereupon plaintiff indorsed the checks, and caused his attorney to return them to defendant. On July 24th defendant wrote plaintiff's attorney acknowledging receipt of cashier's checks indorsed to him, for a total sum of \$980, and in this letter he said: " \* \* \* I hereby notify you and Peter Gordon that I absolutely refuse to accept these checks as payments for any rents, or as payments on any lease that Gordon may claim on my property, and I unconditionally and absolutely repudiate and refuse to acknowledge that Peter Gordon has any lease or any right to occupy my store building in Jerome. \* \* \* I will take care of this money for Gordon, and hold it subject to his order, if he wishes me to do so, otherwise I will return it." The plaintiff's attorney, in a letter dated August 23d, inclosing rent for month ending September 15th, answered the above letter as follows: "You stated that you will take care of the money for Gordon, and hold it subject to his order. May advise that this information came quite awhile after you had accepted the money, and also that any money which belongs to Mr. Gordon can be taken care of by himself. At no time has he indicated that he desires you to look after his money for him." Plaintiff continued to send checks covering monthly rental until April 16, 1912, and while defendant received the checks, he made no acknowledgment of same after his letter of July 24, 1911. There were 14 of these checks; 13 were cashed by defendant on March 25, 1912, and the other one on its receipt soon thereafter.

Upon the above facts and some other facts disclosed in the trial, the plaintiff filed a complaint alleging an agreement for a lease, the payment of \$420 as assurance that he intended to comply with the terms of the contract, the further payment of \$140 per

month for 18 months from April 15, 1911, the defendant's failure to execute a lease to him, or to give possession, the sale of property by defendant after he had received the sum of \$2,240, and his inability by reason thereof to make lease or deliver possession, and demand for repayment, stating, as a reason why he should recover, "that the plaintiff has received no consideration or anything of value from defendant for sums of money so paid."

The defendant in his answer admits receiving the sum sued for, and that he has failed and refused to return it, and that he has sold and conveyed the property, and cannot execute and deliver any lease or leasehold rights therein to plaintiff or any one else. As a further answer, he sets forth the facts practically as we have given them, with the explanation that, at the time he wrote proposition of lease on March 21, 1911, he believed that plaintiff had purchased the Lubin stock of goods, and that he first learned on March 24th that the deal between plaintiff and Lubin had been declared off; that his proposition of lease was conditioned upon Lubin's selling to plaintiff, and that he so notified plaintiff upon learning the facts; that on the 1st day of May, 1911, the plaintiff instituted an action in the courts of Yavapai county against Lubin and Brockway & Jones, to whom Lubin had in the meantime sold his stock of merchandise, for the possession of the store building, alleging a lease of said property from defendant, beginning April 15, 1911, and that the litigation was pending until October 7, 1912, when it was finally determined against plaintiff; that, pending the litigation in the Yavapai county courts, plaintiff continued to remit to him drafts each month for the payment of rental; "that defendant refused to accept any moneys under such alleged lease, and on several occasions had returned to plaintiff the \$420 and other monthly payments, with full explanation of the entire situation; that, notwithstanding the above facts, the plaintiff voluntarily would return drafts to defendant and insist that defendant accept the same; that the same were paid by plaintiff to defendant under no mistake of facts by plaintiff whatever, but that the same were voluntary payments made by plaintiff to defendant without fraud, duress, or extortion, and with a full knowledge of the facts."

A jury trial was had. The evidence submitted to the jury consisted of what we have detailed above; the statement by defendant that he did not repay that \$2,240 "because he did not believe plaintiff could collect it from him, and that the consideration plaintiff received therefor was the right to sue Lubin" for possession of building; and the testimony of plaintiff that he kept paying defendant lease money pending his suit against Lubin and Brockway & Jones, being advised by his attorney that it was necessary to do so in

order successfully to maintain that suit. Practically the only conflict of the evidence arose over what was said by defendant to plaintiff when the latter went to Benson to try to collect the demand. Plaintiff testified that defendant then said to him: "Yes; I know I owe it to you, but I may beat you out of it." Defendant, when asked if that statement was true, said: "Nothing was said about beating him out of his money at all." "He said that he would give me six months' time, and I says to him—he said he would give me six months' time if I would give him security, and I didn't want to give him a decided answer then."

The verdict of the jury was against the defendant for the full amount of demand, upon which judgment was entered in favor of plaintiff.

The defendant complains of the judgment for two reasons: (1) That the complaint and all of the evidence show that the plaintiff voluntarily paid the money sued for with a full knowledge of all the facts, and that therefore the complaint does not state a cause of action, nor do the facts make out a case in which he should be permitted to recover; (2) that the court erred in submitting the case to the jury and in its instructions to the jury.

Giving full force and effect to all the negotiations between plaintiff and defendant concerning the lease of store building, the most that can be made of it is that it amounted to an agreement for a lease only.

[1] Proceeding upon the theory that it was nothing more than an agreement for a lease, and that is the theory of the complaint, for a breach of such agreement the plaintiff's remedies were to treat the contract as rescinded and sue for damages, or to treat the contract as continuing and sue for its specific performance. If the terms of the agreement called for any assurance money or any rent money in advance and as a condition of executing the lease, it was incumbent upon plaintiff to make such payment, or make a legal tender thereof. Having done as much, he was in a position entitling him to prosecute either of the above-named remedies, upon a refusal of the defendant to perform his part of the agreement, or, in lieu thereof, if he so chose, he could repudiate the contract and sue in assumpsit to recover advance payments.

[2, 3] It is only where a lease has actually been executed that the relation of landlord and tenant is established. When that relation exists, and "possession of the demised premises is withheld from the lessee, he may maintain an action of ejectment against any person, including the lessor, who so wrongfully withholds the possession from him; or, if possession is withheld by the lessor, or one claiming under him, the lessee may, at his option, repudiate the contract, or bring an action for damages against the lessor for a breach of his agreement." 24 Cyc. 1051.

[4] At all events, "delivery of possession of the demised premises by the lessor to the lessee is necessary to the obligation to the latter to pay rent; and the rule is the same whether the lessor refuses or is unable to give possession." 24 Cyc. 1145; *Sullivan v. Schmitt*, 93 App. Div. 469, 87 N. Y. Supp. 714; *Smith v. Barber*, 96 App. Div. 236, 89 N. Y. Supp. 817.

[5] The plaintiff was not in possession, he had no lease, and could not maintain a suit for possession, he was under no obligation to pay rent; yet, notwithstanding he was fully informed as to all these facts, and was charged with knowledge of their legal effect, he voluntarily and persistently continued to press upon defendant the assurance money of \$420 and the monthly rental for 13 months against defendant's repeated refusals and protests. These payments (except the assurance money) were made as the rental for the current months from April 15, 1911, to May 15, 1912, and, should the plaintiff have succeeded in obtaining possession of premises as the result of his suit in the Yavapai county courts, or otherwise, these payments could not have been applied in satisfaction of rental for any other months. The plaintiff had directed their application to the payment of the rental for these particular months. What was his purpose in making the payments? Surely not with the idea of recovering the money in case he obtained possession of premises, nor, in that event, of applying the payments on future rent. Plaintiff says he kept on paying rent pending his suit for possession, "being advised by his attorney that it was necessary to do so in order successfully to maintain his suit." The rental money was therefore avowedly paid in aid of his suit against Lubin, Brockway, and Jones for possession of premises. The facts as to the assurance money are in the same situation. Defendant refused not once, but several times, to accept it, going so far as to return the check covering this item, with others for rent, two or three times. He held the checks until March 25, 1912, before he cashed them, on which date he cashed 13 of them, and even after that plaintiff sent him a check for the rent for the month from April 15 to May 15, 1912.

Clearly every dollar of this money was paid by plaintiff to defendant without any consideration whatever, and it is equally as clear that it was voluntarily paid with a full knowledge of all the facts. In 2 *Parsons on Contracts* (9th Ed.) § 14, the author says: "When the consideration appears to be valuable and sufficient, but turns out to be wholly false or a mere nullity, or where it may have been actually good, but, before any part of the contract has been performed by either party, and before any benefit has been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, there a promise resting on this consideration is no longer obligatory,

and the party paying or depositing money upon it can recover it back. \* \* \* While it is true that a failure of consideration is a good ground for the recovery of the money paid, it is a familiar and well-settled principle of law that, where a person with full knowledge of all the circumstances pays money voluntarily, and without compulsion or duress of persons or goods, he shall not afterwards recover back the money so paid. But money paid by a mistake of fact which causes an unfounded belief of a liability to pay may generally be recovered back, even if the mistake arises from negligence; but not if the mistake affects only the motives of the party in paying the money, and not his obligation."

In this case the consideration, neither in fact nor law, had the appearance of being "valuable and sufficient," but was purely and simply in all its aspects voluntary, and against the protest and renunciation of right by defendant was paid to him.

Copper Belle Mining Co. v. Gleeson, 14 Ariz. 548, 134 Pac. 285, was a suit by the company in assumpsit for money had and received. After reciting the facts in the case, Chief Justice Franklin said: "With full knowledge of all the facts, without any instrumentality upon the part of Gleeson influencing its action, but in opposition to his wishes, it paid the redemption money into the hands of the sheriff, and took its chances in a lawsuit to quiet title to the property. True, in the action it subsequently brought for such purpose, Gleeson was successful in maintaining the Fitzmaurice location, but that is a matter which the redemptioner should have considered before it parted with the money and took just the title and interest which the San Remo Copper Mining Company had. If the matter turned out very differently from what was expected, the miscalculation is not such a mistake, either of fact or of law, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief. The appellant was in a position to calculate the chances, and it certainly assumed the risks." In that case we placed this court in the ranks of the great majority of the courts of this country, and held that a voluntary payment with full knowledge of the facts, in the absence of fraud, duress, or coercion, could not be recovered back.

The defendant, in his letter of July 24, 1911, acknowledging the receipt of \$980, refused unconditionally to accept the same as payment for rent or as payment on any lease and said: "I will take care of this money for Gordon and hold it subject to his order, if he wishes me to do so; otherwise I will return it." Had plaintiff accepted the offer of defendant to act as accommodation bailee or depository of the moneys that were being forced upon him, his action for money had and received probably could be maintained (27 Cyc. 867), in the absence of

simulation or fraud between the plaintiff and defendant for the purpose of ousting Lubin, Brockway, and Jones from premises, in which case the courts would refuse aid to both of the wrongdoers, for such they would have been. The plaintiff, however, flatly and most forcibly refused the offer of defendant in this language: "Any money which *belongs* to Mr. Gordon can be taken care of by himself. At no time has he indicated that he desires you to look after *his money* for him." Plaintiff disclaimed ownership of the moneys he was sending defendant, and asserted his ability to care for his own, and rejected the good offices of defendant as keeper for his use and benefit of the very sums that he now sues for as owner. Not only that, but the plaintiff renounced ownership of several months' rental thereafter; for month after month he mailed checks to defendant, accompanying each check with language like this: "I am sending you check for \$140.00 rent for your building for month ending September 15th"—thus freely, voluntarily, and forcibly making the payments and directing their application to particularly named months. What was defendant to do in the circumstances? He had returned several checks several times, only to have them sent back to him. He was forbidden to hold them for plaintiff, and was told to apply them for rent of his building. If plaintiff insisted on playing the game against the protest of the defendant, we conclude it was because he was willing to take "a long chance" at getting even with his brother-in-law, Lubin, for success in his litigation for the possession of the building would have forced Lubin to sell him his stock of merchandise or "be left out in the rain," or he might have reasoned that his litigious efforts would force a surrender of the building and a sacrifice sale of stock. Whatever his motive, whether in aid of his suit for possession of premises, or to drive a bargain with his brother-in-law, the bald fact remains that he made the payments of his own free will and with a full knowledge of all the facts.

The plaintiff testified that defendant, some time after all the money had been paid to him, and after he had spent it, admitted an indebtedness in these words: "Yes; I know I owe it to you, but may beat you out of it." Defendant, in his testimony, denied saying that he might beat plaintiff out of it, but does not deny admitting that he owed it to plaintiff. Grant that defendant said to plaintiff, upon being asked for a return of the money, "Yes; I know I owe it to you;" that of itself would not establish the relation of creditor and debtor. Defendant might have believed that he owed the plaintiff, but his belief would not make it so. It was merely his conclusion from the facts—an expression of his opinion. If defendant had said, "I know I do not owe it to you," it would have been merely his opinion or conclusion. In neither case would his opinion

or conclusion be of any probative value, except as supported by the detailed statement of the facts upon which it was based.

Even a gift *inter vivos* irrevocably invests title in the donee. 22 Cyc. 1212. The donee might, on being asked for the return of a perfected gift, under the generous influence of the situation, acknowledge that he owed the donor, but such acknowledgment would be without consideration and unenforceable. The donee of a perfected gift is the absolute owner of it, and as much so against the donor as all the rest of the world. If that is true of gifts, a fortiori voluntary payments with a full knowledge of all the facts, as in this case, irrevocably vest title of the property in the payee. He becomes the absolute owner against the payer, and as much so as against all the rest of the world. His statement, "I know I owe it to you," was therefore not only his conclusion, but, if considered as an admission of a fact, it was without consideration and not enforceable.

The writer hereof desires to state that he has found the solution of the controverted question a most difficult problem, largely because he was disinclined to solve it according to the standard of rules that have been adopted in solving similar problems by practically all the courts of this land. It seemed that defendant was getting something for nothing. At first glance the imprecation contained in the first sentence of plaintiff's brief, wherein it is said, "Voluntary payment is so repugnant to justice and right and honesty as between man and man," seemed justified. Indeed, if the plaintiff was here asking relief by guardian, we conceive it should be granted.

We have always understood the law to be that persons under no legal disability, as a general rule, have power to do as they wish with their own. They may enter into contracts; they may give away their substance; they may spend it for mere baubles; they may exchange it for high and riotous living; it may go to satisfy vanity or pride or ambition; and the courts are helpless to say nay or to control their freedom of action in those respects. Courts are not instituted to control and supervise the private dealings of persons *compos mentis* who are upon an equal footing and labor under no restraint of person, property, or mind, such as fraud, duress, coercion, or extortion. Freedom of contract and freedom in the use and disposition of one's own are no less sacred than freedom of speech. If defendant had offered the plaintiff the sole and exclusive easement of the skies of Arizona in perpetuity for aerial navigation for \$2,240, and the plaintiff, with full knowledge of the facts, had accepted the proposition and paid the price voluntarily, the courts could not aid in its recovery, unless suit for its recovery should be prosecuted by his guardian.

The general rule as to voluntary payments is stated in 30 Cyc. 1298, as follows: "Except where otherwise provided by statute, a party cannot by direct action or by way of set-off or counterclaim recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed." And this is the rule adopted by the English courts, the federal courts, and all the state courts, except the states of Georgia and Kentucky. To cite individual cases upholding the doctrine announced would be an easy matter, but would serve no useful purpose, and only extend the length of this opinion, already too long.

[6] There were no material facts in dispute, and therefore no questions for a jury to decide. "Whether a payment was made voluntarily or not is a question of law, where the facts are undisputed." *Eslow v. City*, 153 Mich. 720, 117 N. W. 328, 22 L. R. A. (N. S.) 872.

Without deciding whether the complaint states facts sufficient to constitute a cause of action in *assumpsit* for money had and received, it is clear to our minds that the plaintiff's evidence failed to sustain such action.

We think we should state that the attorneys who appear for plaintiff on this appeal had no part in getting the plaintiff in the predicament disclosed by this record. Their reliance here for relief was necessarily upon a failure of consideration and the ignoring of the doctrine of voluntary payment with full knowledge of the facts. To uphold their position would be to say that ignorance of the law alone excuses. As we said in *Copper Belle Mining Co. v. Gleeson*, *supra*, quoting from *Pomeroy, Eq. Juris.*: "The administration of justice, the law itself as a practical system of the regulation of human conduct, requires that some fundamental assumptions should be made as postulates. The most important of all these is the assumption that all persons of sound and mature mind are presumed to know the law. If ignorance of the law were generally allowed to be pleaded, there would be no security of legal rights, no certainty in judicial investigations, no finality of litigation."

Judgment is reversed, with directions to dismiss complaint.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

COWAN v. RAMSEY et al. (No. 1351.)  
(Supreme Court of Arizona. May 6, 1914.)  
BILLS AND NOTES (§ 140\*)—ACCOMMODATION  
MAKER—EXTENSION OF TIME OF PAYMENT—  
EFFECT.

Under Negotiable Instruments Act (Civ. Code 1913, pars. 4174, 4205, 4264, 4265, 4336), defining an accommodation maker and specifying the ways in which a negotiable instrument may

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be discharged, an accommodation maker is not discharged by an extension of the time of payment, pursuant to an agreement, made without his knowledge, by the holder and the principal maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 355-359; Dec. Dig. § 140.\*]

Error from Superior Court, Cochise County; Fred Sutter, Judge.

Action by William Cowan against Frank Ramsey and others. There was a judgment for defendant Peter Johnson, and plaintiff brings error. Reversed and remanded.

O. Gibson, of Tombstone, for plaintiff in error. Cleon T. Knapp, of Bisbee, for defendant in error.

ROSS, J. The plaintiff in error sued the defendants in error to recover upon the following promissory note: "4000.00. Douglas, Arizona, Jan. 30, 1908. Twelve months after date, for value received, we promise to pay to the order of William Cowan four thousand no/100 dollars at Bank of Douglas, Douglas, Arizona, with interest thereon, from date until paid, at the rate of 12 per cent. per annum payable monthly; the said interest, if not so paid, to be added to and become a part of the principal, and to bear the same rate of interest, and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay, besides the costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in such suit or action. Frank Ramsey. Mrs. Frank Ramsey. Peter Johnson." The defendant answered: That he received no part of the money for which the note was given, and that he "only signed and executed the said note as surety, and not as a principal maker thereof, all of which was at the time then and there, and ever since has been, known to plaintiff." That the plaintiff, the holder of note, without the knowledge or consent of defendant, had on June 28, 1911, after note was due and payable, bound himself by agreement with the principals on said note, Frank Ramsey and Lula Ramsey, to extend the time of payment, and had by such agreement postponed his right to enforce the payment of said instrument. There was a trial to the court, with judgment for defendant.

The question is as to whether the matters set up by defendant constitute a defense. In other words, is the defense of extension of time of payment by the holder of a negotiable promissory note to the principal available to an accommodation comaker when the extension is granted without his consent, under the Negotiable Instrument Act? Title 36, R. S. Arizona 1913.

Under the law merchant or common law affecting commercial paper, "a definite and binding agreement between the holder and the maker or acceptor of commercial paper extending the time of payment will discharge

the surety thereon, including a joint maker who is in fact a surety or accommodation maker, to the knowledge of the holder, \* \* \* unless he consents to the extension, or is estopped, or waives the right to set up a discharge by a binding agreement after the extension." 7 Cyc. 882; McGlassen v. Tyrrell, 5 Ariz. 51, 44 Pac. 1088. The defendant's answer, therefore, is a good defense, unless the common-law rule has been changed or supplanted by statute. Paragraph 4174 defines "an accommodation party" as "one who has signed the instrument as maker, drawer, acceptor or indorser without receiving value therefor and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party." Paragraph 4205 is: "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse." Paragraph 4336 is: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable." Paragraph 4264 provides how primary parties may discharge negotiable instruments in these words: "A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation. (3) By the intentional cancellation thereof by the holder. (4) By any other act which will discharge a simple contract for the payment of money. (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right." And paragraph 4265 provides how secondary parties may discharge negotiable instruments, as follows: "A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument. (2) By the intentional cancellation of his signature by the holder. (3) By the discharge of a prior party. (4) By a valid tender of payment made by a prior party. (5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved. (6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

The Negotiable Instrument Law, as found in our statutes, has been adopted by many of the states with a view of securing uniformity and "to remove the confusion or uncertainty which might arise from conflict of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

statutes or judicial decisions amongst the several states and to make plain, certain, and general the controlling rules of law." *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525. In this case the court had before it the identical question that we have, and in discussing the act, and like sections thereof as we have quoted, said: "Approaching the act from this point of view (uniformity), it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise, is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute. Sections 77, 208. The act makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. The fact that one is an accommodation maker gives rise to a duty no less or greater or different to the holder for value than that imposed upon a maker who received value. This is expressly provided by the act, even though such holder knew at the time that the maker was an accommodation maker. Section 46. The act further provides in definite terms that the instrument and hence one primarily liable is discharged in one of five different ways (section 136); that is, by payment by the principal debtor, or by the party accommodated, by cancellation, by any other act which would discharge a simple contract, and by the principal debtor becoming the owner at or after maturity. There is no mention here of a discharge of an accommodation party by extension of time. But among the ways in which a party secondarily liable may be discharged is (section 137) an agreement by the holder to extend the time of payment or to postpone his right to enforce the instrument 'unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved.' Whatever force might attach to the enumeration of ways in which the instrument and consequently parties primarily liable might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration and its inclusion among the ways in which persons secondarily liable may be discharged, is almost irresistible that the Legislature did not intend that persons primarily liable should be discharged in that manner. These two sections standing side by side, both dealing with the subject of discharge of liabilities of parties, the one mentioning, the other not mentioning, extension of time by the holder as a means of working

discharge of liability, cannot be treated as accidental or without significance. It is strong proof of a legislative purpose to change the pre-existing law of the commonwealth. These considerations outweigh the argument adduced from the fact that the 'instrument' rather than 'parties primarily liable' is the language used in section 136 and from the phrase of clause 4, to the effect that the instrument may be discharged 'by any other act which will discharge a simple contract.' The act establishes a liability on the part of an accommodation maker, which is not affected by an extension of time given by the holder to any other party to the note, even though, as between such party and the accommodation maker, a different relation may subsist in fact from that appearing on the face of the paper. The result is to render somewhat more rigid the rights of the parties as set forth in the written instrument, and, so far as the holder is concerned, to establish liability to him upon a firm basis, not easily shaken by parol evidence."

The rule expressed in the above quotation is that adopted by all the courts that have had occasion to pass upon the Negotiable Instrument Law (*Vanderford v. Farmers*, etc., Nat. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. [N. S.] 129; *Cellers v. Meachem*, 49 Or. 186, 89 Pac. 426, 10 L. R. A. [N. S.] 133, 13 Ann. Cas. 997; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Bradley Engineering, etc., Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127; *National Citizens' Bank v. Topfitz*, 81 App. Div. 592, 81 N. Y. Supp. 422, affirmed on another ground 178 N. Y. 464, 71 N. E. 1; *Richards v. Market Exch. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000; 26 L. R. A. [N. S.] 90; *Fritts v. Kirchdorfer*, 136 Ky. 643, 650, 124 S. W. 882), except the lone case of *Fullerton Lumber Co. v. Snouffer*, 139 Iowa, 176, 117 N. W. 50. In this case it was held that, as between the immediate parties to the instrument, an extension of time by the holder, without the consent of the accommodation maker, would discharge the latter, on the theory that in such case the payee was not a holder in due course. It seems to us that such a construction of the statute does not comport with either its letter or spirit. The other construction appeals to us as the correct one; besides it has the sanction of the great majority of the courts, and, by following it, uniformity of decision is more nearly secured and the object of the act accomplished. We think the answer failed to state a defense.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

**YUMA COUNTY v. STURGES. (No. 1377.)**

(Supreme Court of Arizona. May 6, 1914.)

**1. OFFICERS (§ 100\*)—COMPENSATION—RIGHT TO CHANGE.**

In the absence of constitutional prohibitions, the compensation of any public officer may be increased or diminished at any time during the term for which he was elected.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

**2. OFFICERS (§ 100\*)—COMPENSATION—RIGHT TO CHANGE.**

Const. art. 4, § 17, prohibiting the increasing or diminishing of the compensation of any public officer during his term of office, abridges the legislative power to increase the compensation of any public officer during his term, but the compensation prescribed for and as an incident to the office at the beginning of a term must remain during the term.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

**3. OFFICERS (§ 100\*)—COUNTY TREASURER—SALARIES—MODIFICATION DURING TERM.**

Under Civ. Code 1901, paragraph 2608, dividing into classes counties based on the assessed valuation of property for the fixing of compensation for county officers, and paragraph 2609 as amended by Laws 1905, c. 11, providing that county officers shall receive such compensation as is provided for and none other, and paragraphs 2610, 2611, fixing the salary of treasurers of counties having an assessed valuation of \$9,000,000 or more at \$2,500 per annum, and in counties having an assessed valuation of \$3,000,000 or more a salary of \$2,200 per annum, fix the compensation of county treasurers, and a county treasurer, entitled at the time of his election to a salary of \$2,200, is entitled to a salary of \$2,500 when during his term the assessed valuation exceeds \$9,000,000, notwithstanding Const. art. 4, § 17, prohibiting an increase in compensation during the term of office, and notwithstanding Laws 1912, c. 93, classifying the counties according to population for the fixing of salaries of county officers, which is inapplicable because enacted during the term of office.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 152-157; Dec. Dig. § 100.\*]

Cunningham, J., dissenting.

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by W. W. Sturges against Yuma County. From a judgment for plaintiff, defendant appeals. Affirmed.

Fred L. Ingraham, of Yuma, for appellant. Wupperman & Wupperman, of Yuma, for appellee.

**FRANKLIN, C. J.** The appellee is the treasurer of Yuma county. The term of office to which he was elected began on the 14th day of February, 1912, and will end on the 31st day of December, 1914. The compensation of appellee as such treasurer for the month of September, 1913, is the matter in dispute.

[1] A public officer is entitled to the salary provided by law as an incident to the office. Unless the fundamental law places a limitation upon the lawmaking power, that power may regulate, alter, increase, or diminish the

compensation of such an officer at any time.

[2] Having its basic idea in principles of the soundest public policy that a public officer should receive that compensation fixed by law without increase or diminution during his term of office, in other words, that compensation in the contemplation of the aspirant and the people when they elected him, the Constitution has placed an inhibition upon the lawmaking power in this language: "The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office." Article 4, § 17, Constitution of Arizona. When the salaries or compensation of public officers have been definitely fixed or prescribed by law, either by the Constitution of the state or by some statute made in pursuance thereof, the salary or compensation so prescribed may not be increased or diminished during the term of the officer.

It is at once seen that the constitutional restriction is an abridgement of the lawmaking power to either increase or diminish that compensation of the officer during his term, and which was prescribed for and as an incident to the office at the beginning of his term; that during his term of office the public officer enjoys exemption from legislative interference and control over the amount of his compensation, and at the same time has a curb put upon his activity in the direction of an increase of compensation, whether such activity be worthy or pernicious. In fine he may devote his attention to the performance of his official duties, unembarrassed by any feeling that his worth is being niggardly rewarded in money, and the offspring of such a feeling which usually moves in the direction of increased compensation. At the same time there is the counterpart which attends him with a security from the wretched thought that others may become imbued with the conviction that his stipend is much too large for one of his capacity, and thus move with the pruning hook by way of economy in the public funds, or that desire which might in time find congenial soil in the breast of a people desiring to get rid of an officer altogether, and to that end take away that compensation which he hath.

[3] The matter of paramount importance here, then, is to ascertain what compensation was fixed or prescribed by law when the term of office of the appellee commenced. That compensation was prescribed by the Revised Statutes of Arizona, 1901. We shall consult the provisions thereof which are relevant to the inquiry at hand. Paragraph 2608 provides:

"That for the purpose of fixing the compensation of county officers the counties of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the state are hereby divided into the following classes:

"1. Counties having an equalized assessed valuation of property of three million dollars or more, shall be counties of the first class."

"2. \* \* \*  
 "3. \* \* \*  
 "4. \* \* \*  
 "5. \* \* \*  
 "6. \* \* \*"

Paragraph 2609, as amended by the Laws of 1905, chapter 11, reads as follows: "County officers shall receive such compensation as is provided hereafter and none other. All salaries, unless otherwise provided, shall be paid quarterly at the end of each quarter; provided that in counties of the first class, the boards of supervisors of said counties may by resolution provide that all salaries shall be paid monthly at the end of each month."

Paragraph 2611 provides: "County treasurers shall receive, in counties of the first class, a salary of two thousand two hundred dollars per annum. \* \* \*"

Paragraph 2610 provides: "The treasurers of the counties of the first class having an assessed valuation of nine million dollars and over in the state of Arizona shall each receive a salary of twenty-five hundred dollars per annum."

When the term of office of appellee commenced Yuma county was a county of the first class, and at the time the equalized assessed valuation of the property in the county was more than \$3,000,000, but less than \$9,000,000. In the month of August, 1913, however, pursuant to law, the state board of equalization fixed the assessed valuation of property in said county in an amount over the sum of \$9,000,000, to wit, the sum of \$13,280,659.50. The appellee claimed his salary for the month of September, 1913, at the rate of \$2,500, to wit, in the sum of \$208.33, which the county declined to pay, hence this action. When appellee's term of office began his salary as treasurer of a county of the first class was definitely fixed and prescribed by law. While the equalized assessed valuation of property in the county remained less than \$9,000,000, he was entitled to a salary at the rate of \$2,200 per annum, it being also provided in the law prescribing such salary that when the county has an assessed valuation of \$9,000,000 and over, then the treasurer thereof is entitled to compensation at the rate of \$2,500 per annum, being in the monthly sum of \$208.33.

By chapter 93, Laws of 1912, for the purpose of regulating and fixing the compensation of all county and precinct officers, the several counties of the state are classified according to population. The classification under this act designates Yuma county as a county of the eighth class, and the salary of the treasurer of such county is fixed in the sum of \$2,250 per annum. This act is not

applicable to the appellee, for the reason that such application is prohibited by section 17, article 4, of the Constitution, which forbids the increase or diminution of the compensation of any public officer during his term of office. The appellant argues that if chapter 93, supra, may not be applied because in contravention of the Constitution, then paragraph 2610, supra, should not be applied for the same reason, and therefore appellee's salary must be as provided in paragraph 2611, supra. Such a position is not tenable. A consideration of the statute fixing the compensation of the appellee at the beginning of his term of office will make clear the distinction. When his term of office began, his compensation was definitely fixed and prescribed according as the assessed valuation of the county may be ascertained, if less than \$9,000,000 a certain sum, and if \$9,000,000 and over a certain sum; the fluctuation not being occasioned by any subsequent legislative action, but by operation of the very law in force and effect and controlling the compensation of the office at the beginning of appellee's term of office—by the operation of that law automatically.

Section 9 of article 11 of the California Constitution reads as follows: "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed." It will be observed that the inhibition there applies only to an increase of compensation and not to its diminution.

In the case of *Puterbaugh v. Wadham*, 162 Cal. 611, 123 Pac. 804, the court having the question of the salary of a justice of the peace being automatically increased, under a statute existing when he went into office, said: "Section 9 of article 11 is an inhibition directed to the Legislature because it applies, not only to attempted increases of salaries, but to efforts to extend terms of office. The latter part of the section is unquestionably a limitation upon legislative power, and the former from its association should be similarly construed. We think the section could have no application to the change in salary due to the passing of a city, not by legislative act, but by increased population, from one class to another—not a legislative, but an automatic, change. When petitioner was elected justice of the peace the statute established his salary at \$2,000 a year because of the population of San Diego; but the same statute fixed the salary of a justice of the peace in a city of the second class, and the evolution of the city into that class did not increase his salary as such; it merely placed him in a new class in which he was entitled to a certain salary, which happened to be in excess of that payable to him when he took the office. The possibility of a change in his status when the city should grow into another class must have been in

the contemplation of the officer and of the people who elected him. That this change would operate to increase his salary must also have been within their contemplation, and section 9 of article 11 of the Constitution, which was designed to protect taxpayers from legislative interference with their rights by increasing the compensation paid to their elected officers without consent of the electorate would have no application to such a case as this."

Under the facts before us the reasoning in the *Puterbaugh* Case is especially forcible. Under the classification in force when appellee went into office, Yuma county was a county of the first class, with an assessed valuation less than \$9,000,000; his compensation was therefore fixed at \$2,200 per annum. In August, 1913, Yuma county, while still remaining a county of the first class, nevertheless its equalized assessed valuation became more than \$9,000,000, and appellee's compensation was therefore fixed at \$2,500 per annum. Not by virtue of any subsequent legislative action, but solely by the automatic operation of the very law in effect at the beginning of the term, and which law definitely prescribed and fixed the compensation incident to the office, the amount thereof being graded according to the determination of an extraneous fact, to wit, the fact of the equalized assessed valuation.

Let us compare the statute of 1901 with a statute supposed. If the statute existing when appellee went into office made provision that the term of his office shall begin on the 14th day of February, 1912, and end on the 31st day of December, 1914, and that such officer shall receive a salary of \$2,200 for the first year of the term, and thereafter during the remainder of said term the officer shall receive a salary at the rate of \$2,500 per annum, and that the salary of such officer so provided shall be paid monthly, one could not be persuaded that the provisions of such a statute are within the inhibition of the Constitution prohibiting the compensation of a public officer from being increased during his term of office. In this instance, also, the amount would be graded according to the determination of an extraneous fact, to wit, the fact of one year of the term having expired. The law as it is and the one supposed, though differing in the medium of expression, do not differ in their application. The two statutes differ in words, but not in the effect of the words.

The constitutional inhibition has no application here, and the judgment of the lower court awarding appellee compensation for the month of September, 1913, in the sum of \$208.33, being at the rate of \$2,500 per annum, is correct.

The judgment is affirmed.

ROSS, J., concurs.

CUNNINGHAM, J. (dissenting). Section 26, c. 93, Laws 1912, repeals all laws in con-

flict with the provisions of that chapter. Paragraphs 2608, 2610, and 2611, Rev. St. Ariz. 1901, fix the compensation of county treasurers upon a basis of assessed valuation of property. The laws of the territory of Arizona were continued in force as laws of the state of Arizona "until they expire by their own limitations or are altered or repealed by law." Section 2, art. 22, Constitution of the state. Paragraph 2611, Rev. St. Ariz. 1901, is given force in the majority opinion as fixing the compensation of the treasurer of Yuma county for the month of September, 1913. If chapter 93, Laws of 1912, is not effective as a repeal, then section 2 of article 22, Constitution, must be construed as limited by section 17 of article 4, Constitution, as to repeal of laws fixing the compensation of county officers as well as increasing or diminishing their compensation during their term of office. To hold that a statute which is not the means of fixing an officer's compensation at any time prior to its repeal is continued in force during a term of office for the sole purpose of allowing the condition to arise by which the salary may be fixed with reference to such statute is in effect giving an officer a vested right in a law fixing his compensation conditionally.

I cannot approve such doctrine as within the Constitution or legislative intent. An officer is entitled to such salary only as is affixed to the office he holds. He has no rights in a statute providing certain conditions, such as an increase in the assessed valuation of property by which his salary automatically becomes increased, the condition arising. In this case paragraph 2611, Rev. St. Ariz. 1901, was repealed May 31, 1912. Plaintiff made no claim that the assessed valuation of property in Yuma county reached \$9,000,000 and over prior to August, 1913, more than a year after the repeal had become effective. I am clearly of opinion that paragraph 2611, Rev. St. Ariz. 1901, cannot be the basis for fixing his compensation after its repeal a year previous to the time when it is invoked for that purpose by the reason of an increase in the assessed valuation of property. Plaintiff's compensation must either remain as fixed by paragraph 2610, Rev. St. Ariz. 1901, which fixes his compensation at the commencement of his term of office, or be fixed by the provisions of chapter 93, Laws of 1912. If fixed by paragraph 2610, Rev. St. Ariz. 1901, notwithstanding the repeal, it is because of section 17 of article 4, Constitution; if fixed by the provisions of chapter 93 this is because section 2 of article 22, Constitution, is to be construed with, and as an exception to; section 17 of article 4, Constitution. This is the proper rule of construction applicable to the matter, *Cooley, Const. Limit.* pp. 91, 92 (17th Ed.), and gives every word and clause of both sections of the Constitution a meaning, and preserves the validity of

chapter 93, Laws 1912. Any other construction placed upon the Constitution makes chapter 93, Laws of 1912, invalid and inoperative as to all county officers whose salaries were fixed by the laws in force under the territorial government during their terms of office, and wholly neutralizes the general state law upon the subject of county and precinct officers' salaries contemplated by section 4 of article 12, Constitution, during the current term of office. Therefore, I dissent.

### BOEHRINGER v. YUMA COUNTY.

(No. 1874.)†

(Supreme Court of Arizona. May 6, 1914.)

#### 1. APPEAL AND ERROR (§ 34\*)—JURISDICTION—SUPREME COURT—"VALIDITY OF A STATUTE."

If the power to enact a statute as it is in terms, or as made to read by construction, is fairly open to denial, and is denied, the validity of the statute is drawn in question so as to give the Supreme Court jurisdiction under Const. art. 6, § 4, providing that its jurisdiction shall not extend to civil actions to recover money, where the amount in controversy does not exceed \$200, unless the action involves the "validity of a \* \* \* statute"; the phrase "validity of a statute" referring to the power to enact the particular statute, and not merely to its judicial construction or application.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 111, 173; Dec. Dig. § 34.\*]

#### 2. APPEAL AND ERROR (§ 34\*)—JURISDICTION—SUPREME COURT—QUESTIONS RAISED—VALIDITY OF STATUTE.

If statutes are constitutional, the fact that they have been misconstrued or misapplied by the trial court will not give the Supreme Court jurisdiction of an appeal under Const. art. 6, § 4, providing that its jurisdiction shall not extend to actions where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 111, 173; Dec. Dig. § 34.\*]

#### 3. APPEAL AND ERROR (§ 34\*)—JURISDICTION—SUPREME COURT—VALIDITY OF A STATUTE.

The "validity of a statute," as that term is used by Const. art. 6, § 4, withholding jurisdiction from the Supreme Court where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute, is not to be determined by what has been done under the statute in a particular case, but by its general purpose and its efficiency to effect such purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 111, 173; Dec. Dig. § 34.\*]

#### 4. APPEAL AND ERROR (§ 34\*)—JURISDICTION—SUPREME COURT—VALIDITY OF STATUTE.

A reference to the Constitution to strengthen objections to a particular statutory construction is not sufficient to give the Supreme Court jurisdiction, under Const. art. 6, § 4, withholding jurisdiction from that court where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 111, 173; Dec. Dig. § 34.\*]

#### 5. APPEAL AND ERROR (§ 34\*)—JURISDICTION—SUPREME COURT—VALIDITY OF STATUTE.

While the construction of the Constitution may be involved in the question of the validity

of a statute, a constitutional construction may be necessary where the "validity of a statute" is not involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 111, 173; Dec. Dig. § 34.\*]

#### 6. APPEAL AND ERROR (§ 34\*)—JURISDICTION—SUPREME COURT—"VALIDITY OF A STATUTE."

Const. art. 22, § 2, provides that all laws of the territory of Arizona in force at the time of statehood, and not contrary to the Constitution, shall remain in force as laws of the state until they expire by limitation or repeal. Plaintiff sued for compensation as county school superintendent, basing her claim upon Laws 1912, c. 93, while defendant county claimed that the salary of the officers was fixed by Rev. Stats. 1901, claiming that to apply the laws of 1912 to fix plaintiff's salary would violate the constitutional provision, forbidding the compensation of any public officer being increased or diminished during his term of office, and the trial court adopted that view, holding that Rev. Stats. 1901 controlled in fixing plaintiff's salary. Neither party claimed that either statute was an invalid exercise of legislative power. Held, that the "validity of a statute" was not involved within Const. art. 6, § 4, withholding appellate jurisdiction from the Supreme Court in civil actions where the original amount in controversy does not exceed \$200, unless the action involves the validity of a statute, so that the Supreme Court did not have jurisdiction of plaintiff's appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 111, 173; Dec. Dig. § 34.\*]

Cunningham, J., dissenting.

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by C. Louise Boehringer against Yuma County. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

C. A. Lindeman, of Yuma, for appellant.  
Fred L. Ingraham, of Yuma, for appellee.

FRANKLIN, C. J. The action in the court below was by the appellant as plaintiff for the recovery of her salary as county school superintendent of Yuma county for the month of September, 1913. The amount in controversy does not exceed the sum of \$200. We think this appeal must be dismissed, because the jurisdiction of this court is dependent entirely upon the amount in controversy, and that amount is less than the sum of \$200. The criteria prescribed by our Constitution determine the appealability of this judgment. Particular jurisdictional facts are dictated by the various Constitutions and statutes to determine what decisions are reviewable. We must note with caution the criteria appointed by our Constitution in this behalf. The Supreme Court shall have appellate jurisdiction in all actions and proceedings, "but its appellate jurisdiction shall not extend to civil actions at law for recovery of money or personal property where the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars, unless the action involves the validity of a tax, impost, assessment, toll, municipal fine, or statute." Article 6, § 4, Constitution of Arizona. If we

†For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attend this language with some heed, we notice that it does not embrace the construction of the Constitution, or the construction of a statute, but the words are restricted to an action involving the "validity of a tax \* \* \* or statute."

It is insisted that the action does involve the validity of a statute, but this position cannot be maintained. In its technical, as well as popular acceptation, the word "validity," in the general nomenclature of the law, is perhaps more frequently used than any other word to signify legal sufficiency in contradistinction from mere irregularity. Webster's Dictionary says it is that quality of a thing which renders it supportable in law or equity; legal sufficiency. Bouvier says it is legal sufficiency in contradistinction to mere irregularity. It is defined in the Cyclopedic Law Dictionary as freedom from vices of substance; effectiveness in point of law.

[1] Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise. "The validity of a statute" \* \* \* refers to the power \* \* \* to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power." *Baltimore & Potomac Railroad Co. v. Hopkins*, 130 U. S. 210, 9 Sup. Ct. 503, 32 L. Ed. 908. See, also, *Grand Gulf, etc., Co. v. Marshall*, 12 How. 165, 13 L. Ed. 938; *Borgmeyer v. Idler*, 159 U. S. 415, 16 Sup. Ct. 34, 40 L. Ed. 199; *Louisville & Nashville R. v. Louisville*, 166 U. S. 709, 17 Sup. Ct. 725, 41 L. Ed. 1173; *Miller v. Cornwall R. R.*, 168 U. S. 133, 18 Sup. Ct. 34, 42 L. Ed. 409; *Capital Traction Co. v. Hof*, 174 U. S. 4, 19 Sup. Ct. 580, 43 L. Ed. 873.

An appeal will not lie from a judgment in an action which involves the construction and application of a statute, but not its validity. *Matthews Lumber Co. v. Hardin*, 87 Tex. 639, 30 S. W. 896; *Hilgert v. Barber Asphalt Paving Co.*, 173 Mo. 319, 72 S. W. 1070; *Cohen v. Walford*, 111 Va. 812, 70 S. E. 860; *Hulvey v. Roberts*, 106 Va. 189, 55 S. E. 585.

"Whether an action is properly brought under a statute, whether a recovery can be had under a statute, or whether there is any statute governing a particular action, are all questions of the construction of statutes, but are not questions which go to the validity of a statute." *Doty v. Krutz*, 18 Wash. 169, 43 Pac. 17.

[2] If statutes are constitutional in themselves, the fact that they have been misconstrued or misapplied by the inferior tribunal is not sufficient to invoke the jurisdiction of this court. *State v. Third Justice of the Peace*, 12 La. Ann. 739; *Police Jury v. Manuel Villavabo*, 12 La. Ann. 788; *State v. Marshall*, 47 La. Ann. 646, 17 South. 202.

[3] The validity of a statute is not to be determined by what has been done in any

particular instance; but by what may be done under it; not from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659.

[4] A reference to the Constitution to strengthen objections to a particular construction is not sufficient to invoke jurisdiction. *Arbuckle v. Blackburn*, 191 U. S. 415, 24 Sup. Ct. 148, 48 L. Ed. 239.

[5] Ordinarily a statute is valid if it conforms to the Constitution, and invalid if it is repugnant to the Constitution, though the validity of a statute may be called in question by reason of the uncertainty of its provisions. The construction of the Constitution may be, and often is, involved in the question of the validity of a statute, but not necessarily so. For instance, when the constitutional provision is self-executing and requires no legislation to make it effective. A construction of the Constitution may be necessary in cases where the validity of a statute is not involved. *County of Cook v. Industrial School*, 125 Ill. 540, 18 N. E. 183, 1 L. R. A. 437, 8 Am. St. Rep. 386; *Herff v. James*, 86 Tex. 230, 24 S. W. 396.

Where jurisdiction is given in actions involving the validity of a statute, the courts differ in the extent of the exercise of such jurisdiction. The Texas Supreme Court says: "It is the case, not merely the question as to the statute, over which the jurisdiction is extended by the language. The existence of the question is the reason why the jurisdiction is given, but it is the case that is brought within it. It follows that, having decided the question of the validity of the statute, we must proceed to dispose of the case by the proper judgment and, in order to do that, must decide the questions of law on which the character of the judgment must depend." *Texas & P. Ry. Co. v. Webb*, 102 Tex. 210, 114 S. W. 1171. The Supreme Court of Washington holds that, where it has jurisdiction solely because the validity of a statute is involved, the exercise of that jurisdiction is limited to a review of the judgment appealed from only in case the statute is invalid, and then only to the extent that it is affected by the invalid statute. If the statute is valid, the inquiry is ended; if invalid, the judgment falls because founded on the invalid statute. *Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025.

Perhaps the greater number of courts take the view announced by the Supreme Court of Washington.

[6] By virtue of section 2 of article 22 of the Constitution of Arizona, all laws of the territory of Arizona in force at the time of statehood, and not repugnant to the Constitution remain in force as laws of the state of Arizona until they expire by their own limitations, or are altered or repealed by law; and wherever the word "territory," meaning the territory of Arizona, appears in said

laws, the word "state" shall be substituted. In a word, the laws of the territory of Arizona are carried forward and remain in force as the laws of the state of Arizona, as modified by the provisions of the Constitution; the impress of the section last cited being a limitation upon the duration of those laws, and not upon the power to enact laws.

The appellant contends that she is entitled to compensation as county school superintendent, based upon the provisions of chapter 93, Laws of 1912, while the appellee's position is that the salary of the office is fixed by the Revised Statutes of 1901. No claim is made that either law is an invalid exercise of legislative power. But objection is urged to applying the law of 1912 as a basis for fixing the salary of appellant, because of the constitutional provision forbidding the compensation of any public officer being increased or diminished during his term of office. This latter view obtained with the lower court, which held that the Revised Statutes of 1901, and not the act of 1912, controlled in fixing the salary of appellant, and rendered its judgment accordingly.

As we have seen, a reference to the Constitution to strengthen objections to a particular construction is not sufficient to invoke jurisdiction. *Arbuckle v. Blackburn*, *supra*.

Another matter that would seem to put the question of jurisdiction at rest in the instant case is that this court, in the case of *Patty v. Greenlee County*, 14 Ariz. 422, 130 Pac. 757, held chapter 93, Laws of 1912, to be a valid exercise of legislative power. It deals with the classification of counties for the purpose of fixing the compensation of county and precinct officers. Whether this statute repealed other laws, whether its operation is immediate or prospective, and to whom does it apply, involve matters of interpretation and construction, and not a question as to the validity of the statute.

Speaking to the question of jurisdiction, the Supreme court of Texas, in the case of *City of San Antonio v. Tobin*, 100 Tex. 589, 102 S. W. 403, says: "The purpose of the Legislature in making an exception as to cases which are brought \* \* \* in a county court, and giving this court jurisdiction over such as involved the validity of a statute, was to have this court determine the constitutional question. It was important that this should be done as soon as practicable. It was not intended to give this court jurisdiction in such cases unless there was reasonable doubt as to the validity of the provision, and unless the question was still open and undetermined. We conclude that the validity of a statute cannot be considered as involved in a case after the question has been decided in this court and its validity sustained."

The validity of the statute as distinguished from its construction or application is the source of our appellate jurisdiction. The

question whether the Laws of 1901 or whether the Laws of 1912 are applicable to the salary of the appellant turns upon the construction of the law, and in no wise involves a question as to the validity of a statute. The case must involve the validity of a statute in order that the Constitution may *ex proprio vigore* confer jurisdiction when the original amount in controversy, or the value of the property, is less than the constitutional limit. The case presents no issue as to the validity of a statute, but simply the question of its construction and application, and therefore the appeal must be dismissed.

Appeal dismissed.

ROSS, J., concurs.

CUNNINGHAM, J. I dissent from the order dismissing this appeal upon the grounds that this court has no jurisdiction because the amount claimed is less than \$200. I am convinced this case comes squarely within the exception recognized in section 4 of article 6, Constitution, viz.: " \* \* \* Unless the action involves the validity of a tax \* \* \* or statute." The particular grounds upon which I disagree are that this action involves the validity of chapter 93, Laws of 1912, as applied to this appellant's rights; the majority holding that the question involved in the action is one of construction, and not one of the validity of a statute.

"By construction of a statute is meant the process of ascertaining its true meaning and application. For this purpose resort may be had, not only to the language and arrangement of the statute, but also to the intention of the Legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws." 36 Cyc. 1102.

The plaintiff bases her right to recover upon chapter 93 of the Laws of 1912. Defendant admits all the facts pleaded, but denies the constitutionality of said chapter 93, alleging that such law is unconstitutional, void, and not in force as to this plaintiff during her term of office. As a conclusion of law the court finds that chapter 93, Laws of 1912, is in direct conflict with section 17, art. 4, of the state Constitution, and is therefore unconstitutional, and upon the pleadings renders judgment for the defendant.

Section 17, art. 4, Constitution, is as follows: "The Legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office." It is claimed that chapter 93, Laws of 1912, served to increase the compensation of plaintiff during her term of office, and therefore was invalid as to plaintiff during such term

The question is, Did the pleadings call for a construction of that statute, or did they raise the question of the validity of the statute? If the pleadings raised a question of construction, then they set in motion the process for ascertaining its true meaning and application. This burden is cast upon the court, and for the purpose of ascertaining the true meaning of a statute and its application resort may be had, not only to the language and arrangement of the statute, but also to the intention of the Legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries and its relation to other laws. The meaning of chapter 93, Laws of 1912, in regard to classifying the counties for the purpose of fixing the compensation of county and precinct officers is clear, and is susceptible of no construction. The provision fixing the compensation of school superintendent of counties of the eighth class at \$1,800 per annum is equally clear, and both parties raise no question in regard to the meaning of the statute; that is, that the compensation in the way of salary of the county school superintendent in classes of the eighth class is fixed at \$1,800 per annum. The fact is alleged and not denied that Yuma county is within said eighth class for the purpose of fixing the compensation of county officers. How must the statute be applied? Resort may again be had in ascertaining its application to the same tests as are applied to ascertaining the meaning. Its relation to other laws must be considered with a view to effect its objects; and, where the language used is not entirely clear, the court may, in aid of interpretation, consider the spirit, intention, and purpose of a law, and may look into contemporaneous and prior legislation on the same subject, and the external and historical facts and conditions which led to the enactment of the provisions under review. *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

Applying these tests, the court must necessarily assume that the Legislature had full authority as constituted to enact the law, else its meaning and application would be immaterial for any purpose. The meaning and application of the statute here involved is conceded by the parties and by the lower court, but the defendant questions the authority of the Legislature to enact the law so as to affect this plaintiff, and the court so holds. In solving the question of the authority of the Legislature to enact a law binding upon the parties in the situation we find these parties, no resort can be had to the tests above mentioned. The meaning and application of the enactment would become of no interest, it could be no law, and therefore acquires no meaning or applicability. To this effect are the cases cited in the majority opinion in *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 9 Sup. Ct. 503, 32 L. Ed. 908; *Grand*

*Gulf R. & Banking Co. v. Marshall*, 12 How. 165, 13 L. Ed. 938; *Borgmeyer v. Idler*, 159 U. S. 415, 16 Sup. Ct. 34, 40 L. Ed. 199; *Louisville & N. R. Co. v. Louisville*, 106 U. S. 709, 17 Sup. Ct. 725, 41 L. Ed. 1173; *Miller v. Cornwall R. Co.*, 168 U. S. 133, 18 Sup. Ct. 34, 42 L. Ed. 406; *Capital Traction Co. v. Hof*, 174 U. S. 4, 19 Sup. Ct. 580, 43 L. Ed. 873, and other authorities cited therein.

The validity of a statute is not to be determined by what has been done in any particular instance, but by what may be done under it, not from its effect in a particular case, but upon its general purpose, and its efficiency to effect that end. *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659. Applying this rule then what may be done under chapter 93, Laws of 1912? Can the plaintiff claim a salary at the rate of \$1,800 per annum as superintendent of schools of Yuma county? That is the question here presented, and where such question is involved, the validity of a statute involved is before the court. The validity of this same statute was before this court in *Patty v. Greenlee County*, 14 Ariz. 422, 130 Pac. 757, and we held the statute valid in that case. Again the question is raised and is before us. Because we have once held a statute valid is no reason why this court is ousted of jurisdiction to pass upon the question in another case. The former case is controlling to be sure, but we acquire jurisdiction by the appeal to so state and vacate a judgment which is based upon the view that the statute is invalid, and our opinion in the former case is wrong. We have held this statute valid, and the holding of this court is binding upon the lower court as the law. The lower court has disregarded the holding of this court upon that question, and therefore has disregarded the law in this cause. The court thereby erred as to the law.

In *Albertype Company v. Feist Company*, 102 Tex. 221, 114 S. W. 791, the court says that: "The construction placed by the Court of Civil Appeals upon the anti-trust act \* \* \* put that law in conflict with article 1, section 8, clause 4, of the Constitution of the United States, therefore, the validity of that law is involved in this case, and this court has jurisdiction of the cause."

In *Chaplin v. Commissioners*, 126 Ill. 264, 18 N. E. 765, that court said: "Where it can be seen that the constitutional question raised is one which may be fairly regarded as debatable, we think the question of the validity of a statute becomes involved in the case, within the meaning of the statute regulating jurisdiction of appeals."

Section 4 of article 6 of our Constitution was adopted, with slight alteration of language, from section 4 of article 4 of the Constitution of the state of Washington of 1889. In the Washington provision the exception under consideration is: "Unless the action involves the *legality* of a tax, impost, assess-

ment, toll, municipal fine, or the validity of a statute." Our provision substitutes the word "validity" for the word "legality" of the Washington provision, and omits the words "the validity" found in the Washington provision before the words "of a statute." Thus in effect, so far as here involved, the two provisions are identical.

For a guidance in applying this provision I would look to the decisions of the Supreme Court of Washington as persuasive authority, most strongly directing me in applying this provision.

In *Henry v. Thurston County*, 81 Wash. 638, 72 Pac. 488, that court entertained an appeal involving an original claim of \$62.45, founded upon a claim for mileage allowed by a statute to the superintendent of schools, while necessarily traveling about his county visiting the common schools. The county resisted the payment of the claim because the statute allowing mileage was alleged to be unconstitutional and void as in conflict with a provision of the state Constitution. The court instructed a verdict for the plaintiff for \$62.40, being the aggregate sum claimed in four causes of action, and rendered a judgment thereon. The county appealed from the judgment. The court says in reference to jurisdiction: "The article of the Constitution defining the appellate jurisdiction of this court provides that 'its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute.' \* \* \* It will be observed that the amount in controversy between the parties is insufficient to bring the action within the appellate jurisdiction of this court, and that the action is appealable, only because the appellant questions the validity of the statute upon which the first cause of action is founded."

In *Shook v. Sexton*, 37 Wash. 509, 79 Pac. 1093, the amount involved was \$150, the alleged value of a horse. The form of the action was replevin. A stipulation was entered into by the parties containing the following provision: "It is further stipulated that, if the court finds the ordinance set up in the answer to be valid, legal, and constitutional, then judgment shall be entered for the defendant; but, if the court finds that ordinance is invalid, illegal, and unconstitutional, then judgment shall be entered for the plaintiff." The court held the ordinance valid. The plaintiff appealed. The court said: "The amount in controversy is not within the jurisdiction of this court; but, inasmuch as the validity of the ordinance was considered as in issue, this court has jurisdiction of the appeal, under

section 4 of article 4 of the state Constitution."

These are the last expressions of the Supreme Court of the state of Washington upon this provision of the Constitution of that state, and, while not controlling, they are highly persuasive to me, sustaining the principle that, when the court below has necessarily ruled in passing judgment upon the constitutionality of a statute, without a direct, affirmative consideration of such question, the judgment entered could not be so entered, then the validity of such statute is involved, and this court has appellate jurisdiction, regardless of the original amount claimed. Such is this case. This court has appellate jurisdiction because the validity of the provisions of chapter 93, Laws of 1912, is involved in the action. *City of Eureka v. Wilson*, 15 Utah, 53, 48 Pac. 41.

Inasmuch as this court has heretofore held that chapter 93, Laws of 1912, is a valid enactment, and the superior court has held otherwise in this case, I think the judgment ought to be reversed and the cause remanded, with instructions to enter judgment for the plaintiff. It is the plain duty of the county to pay the superintendent of schools the compensation affixed to that office.

#### CURTIS & FREEMAN v. PARHAM. (No. 8378.)

(Supreme Court of Montana. April 17, 1914.)

##### 1. SALES (§ 81\*)—CONSTRUCTION.

Under Rev. Codes, § 5047, declaring that time is never considered as of the essence of a contract, unless by its terms expressly so provided, time is not of the essence of a contract for the sale of sheep which only provides for delivery on a certain day.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.\*]

##### 2. SALES (§ 81\*)—CONTRACTS—RESCISSION.

Where time was not of the essence of a contract for the sale of sheep, the buyers could not, under Rev. Codes, § 4986, declaring that, where delay is capable of compensation, and time has not been declared the essence of the obligation, an offer of performance, with compensation for delay, may be made at any time after it is due, claim violation of the contract or rescind for nondelivery on the day specified, without giving the seller an opportunity to tender performance with compensation for delay; and the seller, to protect his rights, must, within a reasonable time, tender performance, coupled with an offer to compensate for delay.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.\*]

##### 3. EVIDENCE (§ 445\*) — PAROL EVIDENCE — MODIFICATION OF CONTRACT.

Where a contract of sale was in writing, any modification, unless executed, must also be in writing; and hence evidence depending upon an executory parol modification was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by Fred H. Curtis, and Fred E.

\*For other cases see same topic and section, NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Freeman, copartners doing business under the name of Curtis & Freeman, against Owen B. Parham. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

F. B. Reynolds and W. M. Johnston, both of Billings, for appellant. Miller & O'Connor, of Livingston, for respondents.

SANNER, J. On June 20, 1910, at Jonesville, Mich., the plaintiffs and the defendant entered into the following contract: "Owen B. Parham, Sheep Dealer, Billings, Montana. This is to certify that Owen B. Parham, of Billings, Mont., has this 20th day of June, 1910, bargained and sold to Curtis & Freeman of Jonesville, Mich., the following described live stock, and do hereby guarantee the title thereto, viz.: No. head, 6,000; description, mixed lambs; brands, ———; price per cwt., \$5.50; time and place of delivery, Sept. 25, 1910, Livingston, Mont., f. o. b. cars. To be no extremely coarse shaggy wooled lambs. Curtis & Freeman agree to use two days in receiving lambs. Stock guaranteed to be in merchantable condition at time of delivery. All sheep bought subject to federal inspection. Received in part payment for above-mentioned stock, \$2,000. [Signed] Owen B. Parham. F. H. Curtis & Freeman."

The complaint, declaring upon the above contract, alleges that time of delivery was of the essence thereof, that no lambs were delivered or tendered on September 25, 1910, or for several days thereafter, that the lambs which defendant held for delivery were not of the requisite kind or quality, and prays for the return of the moneys paid down by the plaintiffs, with other damages. The answer denies that time of delivery was of the essence of the contract, denies that the lambs held by him for delivery were deficient in quality, and pleads excusable delay in such delivery. By way of counterclaim, it is alleged that plaintiffs agreed to receive delivery on October 4, 1910, at Clyde Park and Big Timber; that they refused to accept such delivery; and that damages accrued to defendant in consequence thereof. The affirmative allegations of the answer and counterclaim were put in issue by reply.

Verdict and judgment were for the plaintiffs. The defendant appeals from the judgment, and from an order denying his motion for new trial.

The undisputed facts are: At the time the contract was made, the plaintiffs were informed that the lambs referred to were the Wirak lambs. The plaintiffs appeared at Livingston on September 24th for the purpose of taking delivery, but, though they remained at Livingston until October 2d, no lambs were delivered or tendered. The reason for this was that part of them had become involved in a "mix-up," and had to be taken to Clyde Park for separation, and the

other part had met with storms and bad weather, and could not be brought in as soon as intended. By message from defendant on September 27th, plaintiffs were informed that Wirak could not deliver until about October 1st; whereupon they wired to defendant: "Contract violated; on ground to make other arrangements; advise immediately." To this defendant rejoined: "Contract not violated; will be able to make delivery soon; will be up to-night." On September 28th the parties conferred at Billings, and, upon the return of plaintiffs to Livingston, they saw Mr. Wirak, and learned from him that part of the lambs were at Clyde Park. On September 30th the plaintiffs proceeded to Clyde Park, looked over the lambs which were there, decided they were not up to the requirements of the contract, and came back to Livingston. On October 2d, after making demand on defendant for the moneys paid down on the contract, which was refused, they returned to Michigan.

The other issues of fact were the subject of conflicting evidence, but it is quite doubtful whether, upon the whole case, plaintiffs were warranted in concluding that the defendant could not deliver out of the Wirak bands, enough lambs of the quality required to meet the contract. Be that as it may, the plaintiff Freeman specifically testified: "If the lambs had been according to the contract, we would not have received them on the original contract, because it was after the time we were to receive them."

[1] Ten alleged errors are assigned, presenting certain matters of practice, and one really vital question, viz.: Was time of delivery of the essence of the contract? Much testimony touching the intent of the parties was received as illuminative of this, but we do not reproduce it, because we deem it wholly irrelevant. Section 5047, Revised Codes, provides: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided." Language so plain ought to leave no doubt of its meaning or application, and comment could serve only to obscure it. Under this section, but one subject is open to discussion, and that is not what the parties may have intended to say, but what they did say in their contract. It is true, of course, that no set form or arrangement of words is necessary, but the contract must, upon its face, convey the meaning that time shall be of the essence. Our statute will not permit an oral extrinsic showing that such was the intention of the parties to a written contract, the terms of which are expressed in clear and explicit language. *Strunk v. Smith*, 8 S. D. 407, 66 N. W. 926; *Standard Lumber Co. v. Miller, etc.*, *Lumber Co.*, 21 Okl. 624, 96 Pac. 761; *Snyder v. Stribling*, 18 Okl. 205, 89 Pac. 222, 233, affirmed, 215 U. S. 261, 30 Sup. Ct. 73, 54 L. Ed. 186.

There is nothing in the contract before us



to indicate that time of delivery should be deemed as of its essence; but the respondent urges that the subject-matter was of such character as to bring it within the decision of this court in *Snider v. Yarborough*, 43 Mont. 203, 207, 115 Pac. 411. That case arose, not upon a contract of sale, but upon an option which is a mere unilateral undertaking, and the subject-matter of it was a mining claim, a species of property subject to sudden, frequent, and great fluctuations in value. To make such property the subject of an option is to express that time shall be of the essence. *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479. Neither the transaction at bar nor the property involved were of a character to come within the decision referred to.

The evidence allunde the contract touching the intent of the parties as to time being of the essence was inadmissible, and had no probative value. The court should have held, as a matter of law, that time was not of the essence, and categorically instructed the jury accordingly.

[2] For substantial error in this regard, the cause must be retried; and, since this is so, attention is called to the fact that the effect of section 4936, Revised Codes, appears to have been ignored by every one. The plaintiffs could not rescind or claim a violation of the contract on account of time, as they seem to have done on September 27, 1910, without giving the defendant an opportunity to make tender of performance, with compensation for delay; on the other hand, the duty was imposed upon the defendant to make, within a reasonable time after September 25, 1910, a tender of performance, coupled with an offer to compensate for the delay, unless excused therefrom by the attitude of plaintiffs. What, under the circumstances, was a reasonable time was for the jury upon the evidence.

We see no reversible error in any other respect. The refusal of defendant's offered instruction No. 5 was wrong, but relatively unimportant.

[3] The questions asked touching the value of the lambs at Big Timber and Clyde Park on October 4th were improper, and the court correctly refused to permit them to be answered. The contract was in writing. Any modification of it was required to be in writing, unless executed. The counterclaim, to support which these questions were asked, is based upon an alleged oral, unexecuted modification. Independently of that, the questions had no relevancy to any matter in issue.

The judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

# BURLES v. OREGON SHORT LINE R. CO. et al

(Supreme Court of Montana. April 16, 1914.)

## 1. CARRIERS (§ 236\*)—TAKING UP PASSENGERS—ACTIONS—EXEMPLARY DAMAGES.

Under Rev. Codes, § 6068, defining compensation as the relief or remedy provided for the violation of private rights and the means of securing their observance, and section 6047, providing that, in an action for a breach of an obligation not arising from contract, where defendant has been guilty of oppression, fraud, or malice, punitive damages may be given, where it was alleged, and there was evidence tending to prove, that, though the engineer of a train saw a signal to stop, he failed to stop for a passenger, exemplary damages might be awarded, if the jury found that there was any oppression, malice, or fraud; Rev. Codes, § 4325, giving a right of action for the refusal of a railroad corporation to transport passengers for all damages sustained thereby not, as claimed, limiting such damages to compensatory damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 968-972; Dec. Dig. § 236.\*]

## 2. DAMAGES (§ 20\*)—TAKING UP PASSENGERS—ACTIONS—DAMAGES.

Under Rev. Codes, § 6068, providing that the measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not, if the disease from which a person was suffering was aggravated, her power of resistance weakened, or her death accelerated by the long and annoying wait at a railroad station, or failure to secure assistance at the earliest possible time by reason of the engineer's failure to stop a train, though properly signaled, the company was liable in damages, though it did not know of her illness or the probable serious consequences to follow from her missing the train; and the court properly charged that the loss of her strength and capacity to resist the disease so far as attributable to the carrier's wrongful acts might be considered as an element of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 55-57; Dec. Dig. § 20.\*]

## 3. CARRIERS (§ 236\*)—TAKING UP PASSENGERS—ACTIONS—EVIDENCE.

In an action against a railroad company which failed to stop a train upon signal for a passenger suffering from an internal hemorrhage, evidence that there were no accommodations at the place where she was compelled to wait for ten hours for the next train was admissible to support the testimony that she suffered in consequence of being compelled to wait there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 968-972; Dec. Dig. § 236.\*]

## 4. EVIDENCE (§ 127\*)—RES GESTÆ—INDICATIONS OF PAIN OR MENTAL SUFFERING.

In an action against a carrier for failing to stop a train on signal for a passenger suffering from an internal hemorrhage, evidence that during her wait for the next train she manifested her suffering by moaning was properly admitted, under the rule that apparently spontaneous manifestations of present feeling, as distinguished from declarations describing feelings, are original evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

## 5. EVIDENCE (§ 598\*)—WEIGHT AND SUFFICIENCY—PREPONDERANCE OF EVIDENCE.

The preponderance of the evidence does not depend alone on the number of witnesses testifying to a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.\*]

# 6. TRIAL (§ 236\*)—CREDIBILITY—GROUNDS OF CREDIBILITY.

It was proper to charge that, in determining upon which side was the preponderance of the evidence, the jury should consider the opportunities of the witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest in the suit, and the probability or improbability of the truth of their statements in view of all the other evidence, facts, and circumstances.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.\*]

Appeal from District Court, Beaverhead County; J. B. Poindexter, Judge.

Action by E. L. Burles, as administrator of Goldie May Burles, deceased, against the Oregon Short Line Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

J. L. Wines and T. J. Harrington, both of Butte, for appellants. Lyman H. Bennett, of Virginia City, and J. H. Alvord, of Helena, for respondent.

**HOLLOWAY, J.** This action was prosecuted by the administrator of the estate of Goldie May Burles, deceased, to recover damages alleged to have been suffered by her during her lifetime as the proximate result of defendants' refusal to stop train No. 3 at Barrett's Station on June 27, 1910, and carry her to Butte. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appealed.

At the time this cause of action arose, Barrett's was a station on the main line of the defendant company's road, and train No. 3, bound for Butte, was scheduled to stop there upon being flagged. On June 27, 1910, that train, in charge of defendant Hughes as engineer, reached Barrett's on time, at 3:42 a. m. There is not any dispute that this plaintiff and the deceased, his wife, reached the station in time; that the wife was then suffering from some internal hemorrhage, and was on her way to Butte for surgical treatment; that train No. 3 did not stop; that plaintiff and his wife were forced to remain at the section house at Barrett's for ten hours, until the next train for Butte arrived; that there were no accommodations there; that as a result the wife suffered intensely, her strength and power of resisting the ravages of the disease were greatly lessened, and that she died about the time she reached the hospital in Butte, on the afternoon of the same day. The plaintiff contends in his pleading and evidence that he went upon the track at the station or section house and, when he saw the train approaching, waved his hat until the engineer gave two short blasts of the whistle, the usual signal of recognition of the fact that the flag had been seen, and an indication of an intention to stop, but that in willful disre-

gard of their duty, the defendants did not stop the train, with the consequences enumerated above.

[1] 1. The trial court instructed the jury that they might award exemplary as well as compensatory damages, if they found that the defendants were guilty of oppression, malice, or fraud. Counsel for appellants are mistaken in assuming that section 4325, Revised Codes, limits the recovery, in a case of this character, to actual compensation. That section does not do more than merely declare just what the rule of law applicable in an ordinary negligence action would be in the absence of the statute. 3 Hutchinson on Carriers (3d Ed.) § 1421; *Thomas v. Southern R. R. Co.*, 122 N. C. 1005, 30 S. E. 342.

It is true that, "as a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance" (section 6038, Rev. Codes); but "in any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant" (section 6047). In this action recovery is not predicated alone upon the negligence of these defendants. The theory of plaintiff's complaint and his evidence is that the engineer saw the signal to stop and gave recognition by appropriate blasts of the locomotive whistle, and then, in willful disregard of the rights of the plaintiff and his wife, refused to stop the train. That punitive damages may be recovered under such circumstances is the rule well-nigh universal. *Arzaga v. Villalba*, 85 Cal. 191, 24 Pac. 656; *Wilson v. N. O. & N. E. R. R. Co.*, 63 Miss. 352; *Fell v. Northern Pac. R. R. Co.* (C. C.) 44 Fed. 248; 1 *White's Personal Injuries on Railroads*, §§ 176, 177; 3 *Hutchinson on Carriers*, § 1440.

A case very similar in its facts to this one was presented to the Supreme Court of North Carolina, in *Williams v. Carolina & W. R. Co.*, 144 N. C. 498, 57 S. E. 216, 12 L. R. A. (N. S.) 191, 12 Ann. Cas. 1000, and upon the question now under consideration the court said: "If the plaintiffs went to the usual place for receiving passengers a reasonable time before the arrival of the train, and were able, ready, and willing to pay their fare, they were entitled to be carried to the next station. *Phillips v. Southern R. Co.*, 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; 1 *Fetter, Carr. Pass.* § 228. If they gave the requisite signal, it was the duty of the engineer to stop the train so that they might take passage on it. If he did not see the plaintiffs by reason of mere negligence in not keeping a proper lookout ahead of his train, the defendant would be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

liable only for actual damages resulting from the failure to stop the train; but, if he did see them, and willfully refused to stop for the purpose of receiving them on the train as passengers, the defendant would be liable to punitive damages, in addition to those which are merely compensatory."

[2] 2. Complaint is made of instruction No. 10 in so far as it permitted the jury to consider, as an element of damages, the loss upon the part of Mrs. Burles of her strength and capacity to resist the disease from which she suffered, so far as that loss was attributable to the wrongful acts of the defendants. While it is true that the defendants were not responsible for Mrs. Burles' sickness, they cannot escape the consequences of their acts upon that score. Section 6068, Revised Codes, provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." If the disease from which Mrs. Burles was suffering was aggravated, or her power of resistance weakened, or her death accelerated by the long and annoying wait at Barrett's and the failure to secure surgical assistance at the earliest possible time, defendants, by whose wrongful acts these consequences were brought about, must respond in damages; and it is wholly immaterial that they did not know at the time of the fact of her illness or the probable, serious consequences to follow from her missing the train. This rule is so universally recognized by the courts and text-writers that a single reference will suffice. 3 Hutchinson on Carriers, § 1432, and cases cited.

[3] 3. The trial court did not err in admitting evidence that there were not any accommodations at Barrett's, where Mrs. Burles was compelled to stay for ten hours, or until the arrival of the next train for Butte. If this plaintiff, for instance, had been wrongfully put off the train at Barrett's, he could show the surroundings as reflecting upon the extent of the inconvenience he suffered. The same rule is applicable here. Negligence is not predicated upon the failure of the defendants to provide accommodations at Barrett's; but the complaint is made that Mrs. Burles was, by the wrongful acts of the defendants, forced to remain at a place where there were not any accommodations, and evidence of this fact was competent as reflecting upon the probability of plaintiff's story that she suffered in consequence of being compelled to wait at that point, and under the circumstances as they were there presented. Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333.

[4] 4. Complaint is made that plaintiff was permitted to testify that during the wait at Barrett's his wife manifested her suffering

by moaning. The evidence was properly admitted. In Abbott's Mode of Proving Facts (2d Ed.) 345, it is said: "The apparently spontaneous manifestations of present feeling by demeanor, gesture, outcry, moan, tears, and the like, as distinguished from declarations describing feelings, are original evidence."

[5, 6] 5. Finally, it is insisted that the evidence is insufficient to justify the verdict. It is not controverted that plaintiff gave a proper signal to stop the train; but it is most earnestly urged upon us that the evidence is overwhelmingly preponderant that the engineer did not see it and could not have seen it under the circumstances of the case as narrated by the plaintiff, and that no answering signal was given. It is true that the engineer, the fireman, and brakeman on the train at the time each testified that the stop signals—two short blasts of the whistle—were not given, and the engineer, fireman, and two other employees of the company expressed opinions that a person in the situation of the plaintiff, dressed as he was, could not be seen for 1,000 feet, and that the engineer could not have distinguished that he was attempting to stop the train for more than "200 or 300 feet" (Hughes); "300 or 400 feet" (Palmer); "200 feet" (Hale); "350 or 400 feet" (Elwin). The plaintiff testified that he was about 1,000 feet from the train when his signals were answered by the engineer. L. K. Adams, a witness for the plaintiff, testified that he had stopped this same train at Barrett's during April and May, by merely waving his hand, when the train was 1,000 feet away, and that his signal had been seen and answered. The preponderance of the evidence does not depend alone upon the number of witnesses who testify to a fact. The court very properly told the jury that, in determining upon which side was the preponderance of the evidence, they "should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial."

In view of the many facts and circumstances appearing upon this record which the jury might have considered as supporting plaintiff's story, and which they doubtless did consider in weighing the evidence given by the witnesses for the defendants, we cannot say that a different result should have been reached.

We do not find any reversible error in the record. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

**NORTHERN PAC. RY. CO. v. HAUSWIRTH.**  
(No. 3371.)

(Supreme Court of Montana. April 16, 1914.)

**1. INJUNCTION (§ 126\*)—RIGHT OF WAY—ACTIONS FOR INTERFERENCE—BURDEN OF PROOF.**

Where a railroad company, which relinquished to the United States a section granted to it, reserving a right of way 200 feet in width on either side of its main line as then constructed and operated, brought suit for damages and to enjoin defendant from preventing its employes' going upon lands claimed to be within the right of way for the purpose of changing the location of the road, the burden was on it to show definitely the location of the main line at the date of the relinquishment, and that the land involved was within the strip reserved.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 276; Dec. Dig. § 126.\*]

**2. APPEAL AND ERROR (§ 694\*)—RECORD—FORM—STATEMENT OF EVIDENCE.**

Under Supreme Court rule 7, subd. 3 (44 Mont. xxx, 123 Pac. xi), providing that, in equity cases and matters and proceedings of an equitable nature wherein questions of fact arising on the evidence are to be submitted for review, the testimony shall be presented by question and answer, in an action by a railroad company for damages and to enjoin interference with a change in its line of road involving the question as to the location of its right of way, it was not entitled to a determination on the merits of an appeal from a judgment for defendant, where the evidence, particularly that relating to the location of the right of way, was in narrative form in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.\*]

**3. APPEAL AND ERROR (§ 1009\*)—PRESUMPTIONS IN SUPPORT OF JUDGMENT—OMISSIONS FROM RECORD.**

Where, on appeal in an action by a railroad company, which, in relinquishing a section to the United States, reserved a right of way across such section, described by reference to its main line as then located, to enjoin interference with a change in its line involving a question as to the location of the right of way, maps and charts by reference to which witnesses testified relative to the location of the main line at the date of the relinquishment were not in the record, the trial court's finding was conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

**4. QUIETING TITLE (§ 34\*)—COMPLAINT—SUFFICIENCY.**

In an action by a railroad company, a complaint alleging its title to a right of way, that its employes were about to enter upon a portion of the right of way for the purpose of double-tracking and changing its line, and that defendant, with force and arms, prevented them from entering thereon and performing such work, and that, unless enjoined he would prevent the railroad company from completing the work, thereby causing great and irreparable damage, did not state a cause of action to quiet title, under Rev. Codes, § 6870, authorizing an action by any person against another claiming an interest or estate in real property adverse to him for the purpose of determining such adverse claim, as it did not allege that defendant

asserted a claim to any part of the right of way adverse to plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.\*]

Appeal from District Court, Missoula County; F. O. Webster, Judge.

Action by the Northern Pacific Railway Company against A. Hauswirth. From a judgment for defendant, plaintiff appeals. Affirmed.

Gunn & Rasch, of Helena, for appellant.  
Elmer E. Hershey, of Missoula, for respondent.

BRANTLY, C. J. This action was brought by the plaintiff to recover of the defendant damages for unlawfully interfering with its agents and servants while engaged in construction work upon the portion of its right of way which lies within and across the W. ½ of the N. W. ¼ of section 17, township 11 N., range 15 W., of the Montana principal meridian, in Missoula county, and also to obtain relief by way of injunction to prevent like conduct by the defendant in the future, which, it is alleged, he threatens to continue.

On March 11, 1903, the plaintiff, being the owner of section 17 as successor of the Northern Pacific Railroad Company, by virtue of the grant to the latter by the federal government to aid in the construction of its road and telegraph line, and having elected to avail itself of the provisions of the act of Congress (30 Stat. at Large, p. 597), relinquished it to the United States. The reason for this election was that, prior to the official survey of the public lands in that locality, one Jacob S. Maresellis had made a homestead settlement which included the W. ½ of the N. W. ¼ of the section, and desired to secure patent therefor. In its relinquishment the plaintiff expressly reserved a right of way 200 feet in width on either side of its main line, "as the same is now constructed and operated on, or over or across said described premises." On August 26, 1904, Maresellis secured patent, and on May 11, 1908, conveyed to Sylvia May Hauswirth, the wife of the defendant, the deed, expressly excepting the right of way of plaintiff. When this controversy arose, the plaintiff's engineers and employes were engaged in double-tracking that portion of the line extending from Garrison to Missoula, and otherwise improving the track conditions by straightening curves, reducing grades, etc. To accomplish this, it became necessary to shift the line in places from one portion of the right of way to another. The plaintiff's fence, extending along the north side of its track, had theretofore stood at a distance of 50 feet from it. On March 10, 1909, the plaintiff's employes, desiring to borrow material from the right of way on that side, and presuming that it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

extended to the full width of 200 feet from the center of the main track, were proceeding to move the track 150 feet further toward the north, when they were stopped by the defendant. Thereupon this action was brought.

After derailing the plaintiff's title and stating the character of the work being done, the complaint alleges: "That on or about March 10, 1909, and when a portion of the men so employed by this plaintiff were about to enter upon a portion of the right of way of this plaintiff, situated in the west one-half of the northwest one-quarter of section seventeen (17) above referred to, the same being a portion of the right of way so reserved by this plaintiff across said premises as hereinabove described, for the purpose of carrying on said work of construction and line change, and in the preliminary stages thereof, the defendant, with force and arms, entered upon said lands, and prevented the said servants and employés of this plaintiff from entering thereon and performing said contemplated work, and threatened to inflict bodily injury upon them if they attempted so to do and persisted therein, and now threatens to inflict such bodily injury if said servants and employés should at any subsequent time attempt to enter upon said lands and prosecute such work; and that by his said actions and conduct the said defendant has prevented this plaintiff from carrying on the said work above referred to, and will, unless enjoined by this court, forever prevent this plaintiff from completing said work, and thereby cause great and irreparable damage to this plaintiff; and that, for the reasons aforesaid, the plaintiff has no plain, speedy, adequate, or complete remedy at law, and irreparable injury would result from the delay of giving notice of this application for restraining order. Plaintiff further alleges that, by and because of the interferences of defendant as aforesaid, it has been damaged in the sum of five hundred dollars."

Upon the filing of the complaint, supported by affidavits, the court granted a temporary injunction. The defendant answered, putting in issue the right of plaintiff to any portion of the land north of the fence. The parties waived a trial by jury. The court having heard the evidence, denied plaintiff's motion for findings and judgment in its favor, dismissed the action, and awarded defendant judgment for his costs. The plaintiff has appealed.

[1-3] Counsel for plaintiff have submitted the case to this court upon the theory that it is an action, under section 6870 of the Revised Codes, to determine an adverse claim by the defendant. They contend that the evidence clearly and undisputably establishes the fact that it reserved its right of way to the full extent of 200 feet on either side of its main track, as it was located and operated at the time of the relinquishment, and thus put beyond controversy its title and

right to the possession of it. Hence there is no justification in the evidence, they say, for a finding for the defendant. This would be a correct statement of the situation, did the evidence as presented in the bill of exceptions disclose, with any degree of certainty, the location of the reserved strip through the Hauswirth land. The reservation made at the time of the relinquishment was not of a right of way generally over any portion of section 17 in controversy, but by its terms it limited plaintiff's right to the use of a strip 200 feet in width on either side of its main line, as it was then constructed and operated. In order for the plaintiff to obtain any relief, the burden was upon it to show that it was being prevented by defendant from using some portion of the strip thus reserved. As a part of its case, it was incumbent upon it to locate definitely the position of the main line of its road at the date of the relinquishment. The condition of the evidence is such that it cannot be determined from it whether the defendant unlawfully and wantonly interfered with plaintiff's agents and their operations, or whether he was within his rights in preventing a trespass upon his wife's land. In the first place, the body of the evidence is in narrative form. This is particularly true of all that portion of it which was introduced for the purpose of locating the main line of track as constructed on March 11, 1903. Because of this omission to observe the rule applicable to such cases, the plaintiff is not entitled to have a determination of the appeal on the merits. Rule vii, subd. 8, 44 Mont. xxx, 123 Pac. xi; *Gilmore v. Ostronich*, 48 Mont. —, 137 Pac. 378. Passing by the omission to observe the rule, it appears, in the second place, that, since the location of the main line of track as it was originally constructed, it has twice been shifted further toward the north. In describing these changes, the witnesses referred to maps and charts, indicating the location of the line at different times by the use of the words "here," "there," etc. For illustration: The principal witness testified in this connection as follows: "There have been two changes made in that main line; that is all I know of. That is, this old line and the present new one, excepting here coming this way. There would be two changes—three lines. The first line would be the old grade. The second line was run in 1901-02, and the third was run in 1908-09." The maps and charts do not accompany the record. Without the aid of them we cannot understand the purport of these and similar statements made by other witnesses. We therefore cannot undertake to say that the trial court did not assign to them their proper force and significance. *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 585. For this reason we must, of necessity, accept the finding of the trial court as conclusive, whether we adopt the theory of the case as we have stat-

ed it, or the theory of counsel for the plaintiff.

[4] Again, if we accept the theory of counsel that the action is one to quiet plaintiff's title under section 6870 of the Revised Codes, we reach the same result. The complaint does not allege that the defendant asserts a claim to any portion of the right of way adverse to the plaintiff. Hence it does not state a cause of action.

The judgment is affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

### SCHMITT et al. v. JENSON et al.

(No. 2086.)

(Supreme Court of Nevada. May 4, 1914.)

**GUARDIAN AND WARD (§ 112\*)—CUSTODY AND CARE OF WARD'S ESTATE—REAL PROPERTY.**

By a divorce decree and also by agreement of the parties, community property of husband and wife—a house and lot—was "set aside for the use, support, maintenance, and education of the minor children." *Held*, that the purposes of the trust included any disposition necessary for the support and education of the children, and hence the execution of a mortgage by the guardian for \$3,000 for the purpose of paying off a prior mortgage and saving the property as a home for the children was within the purposes of the trust and authorized.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 401-404; Dec. Dig. § 112.\*]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action to foreclose mortgage by Lizzie K. Schmitt and John Schmitt, Jr., executrix and executor, against Charlotte E. Jenson and others. From a judgment of foreclosure for plaintiffs, defendants appeal. Affirmed.

Stoddard, Moore & Woodburn, of Reno, for appellants. W. A. Massey, of Reno, for respondents.

**TALBOT, C. J.** By this appeal it is sought to have set aside a decree of foreclosure of a mortgage which was executed under the following circumstances: On February 23, 1906, while the house and lot covered by the mortgage belonged to Thomas Dougherty and Lottie E. Dougherty, his wife, as community property, they entered into the following agreement relating thereto: "It is hereby stipulated and agreed by and between Lewers & Huskey, attorneys and agents for Lottie E. Dougherty, and Thomas Dougherty, that in case suit is brought by the said Lottie E. Dougherty against the said Thomas Dougherty, for a divorce from the said Thomas Dougherty and the said suit is prosecuted to a final decree of divorce, then and in that case, Lottie E. Dougherty and her attorneys, Lewers & Huskey, will have stated in and as a part of said decree of divorce, that the real property now belonging to the said Lot-

tie Dougherty and the said Thomas Dougherty, to wit, a cottage situated at the corner of Sixth and Ralston streets, in Reno, Nevada, and now occupied by the said Lottie E. Dougherty and her four minor children, Elvin, Edith, Chester and Thomas, shall be set aside for the sole and separate use, support, maintenance and education of the said minor children, and that the custody and care of the said minor children shall be left and remain with the said Lottie E. Dougherty during her good behavior and subject to change by order of the proper court at any time upon a proper and sufficient reason therefor; and both parties hereto understand and agree that the said decree of divorce shall also contain an order that the said Thomas Dougherty shall pay off the mortgage now standing against the said property and leave the same, within a reasonable time, clear of all incumbrances for said minor children. This stipulation is for the purpose and solely for the purpose of settling the rights of the undersigned parties to the community property and to the custody of their said minor children, in case a divorce is granted to the said Lottie E. Dougherty."

In a decree of the district court for Washoe county, dated the 6th day of June, 1906, granting Lottie E. Dougherty a divorce from Thomas Dougherty, and referring to and following the foregoing agreement, it was adjudged that the house and lot be "set aside for the use, support, maintenance and education of the minor children" of the parties named in the agreement, and the household furniture belonging to the plaintiff and defendant was given to Lottie E. Dougherty, the plaintiff in that action. The custody of the children was awarded to the mother. At the time of the execution of the agreement and the rendition of the decree dissolving the marriage and setting the real property over for the support, education, and maintenance of the minor children, the property was subject to a mortgage which had been executed on the 7th day of August, 1903, by Thomas and Lottie E. Dougherty to the Bank of Nevada for \$1,000 and interest. On the 12th day of October, 1907, Lottie E. Dougherty, for the purpose of administering the property mentioned, under the supervision and direction of the court, for the support, maintenance, and education of the minor children, was duly appointed and qualified as guardian of their persons and estates. On the 24th day of March, 1908, upon petition and notice, for the purpose of preserving the property from foreclosure and sale under the mortgage mentioned, which then remained unsatisfied, and for the purpose of securing funds for the support and education of the minor children, she obtained an order of the court directing her as guardian to remortgage the property for the sum of \$3,000. Pursuant to the direction of the court by that order, and

for the purpose of securing funds to preserve the property and secure money for the support, maintenance, and education of the children, she borrowed \$3,000, and to secure the payment thereof executed the mortgage ordered foreclosed by the decree in this case. During the six years since the execution of this mortgage, no part of the principal or interest has been paid.

For the appellants it is contended that the district court had no power to authorize the guardian to borrow the \$3,000 or to execute the mortgage, and that it is not enforceable against the property of the wards because at the time it was executed there was no statute in this state authorizing the guardian to mortgage or incur real estate of the ward. Cases are cited holding that a guardian has no power to make a mortgage on the ward's real estate unless authority be conferred upon him by statute, upon his obtaining an order of the proper court. If it be admitted that these decisions relate to property belonging to a ward through inheritance, or otherwise unconditionally, they are inapplicable in this case because this property did not so belong to these minors. As the community property of the parents, they could sell it or mortgage it, as they had previously done, or could impress it with a trust which might necessitate or authorize its sale or incumbrance by mortgage. It was legal and laudable for the father and mother to provide that the property should be set over for the support, maintenance, and education of the children, who had and acquired no right to it separate from this trust condition.

The Revised Laws provide:

"The court, in granting a divorce, shall make such disposition of, and provision for, the children, as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children." Section 5840.

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it, for the benefit of the children." Section 5841.

No one but the parents, as the owners of the community property, or the court, had any power over the property at the time of the action for divorce; and the setting aside of the property, whether considered as authorized by either or both the agreement of the parties or the decree of the court, must be deemed conclusive for the purposes of the trust, which included any disposition of the property necessary for the support and education of the children. Consequently, the execution of the mortgage for \$3,000 for the purpose of paying off the prior mortgage for

\$1,000, and saving the property from foreclosure and sale under the prior mortgage, so that it could be retained as a home for the children and additional money secured for their support and education, was within the purposes of the trust, and authorized.

The decree of the district court is affirmed.

NORCROSS and McCARRAN, JJ., concur.

## PETERSON v. PITTSBURG SILVER PEAK GOLD MINING CO.

(No. 2090.)

(Supreme Court of Nevada. April 28, 1914.)

### 1. TRIAL (§ 29\*)—RULINGS ON EVIDENCE—REMARKS BY TRIAL JUDGE.

In ruling on the admissibility of evidence, the trial judge should confine his remarks strictly to that question, and not make unnecessary statements, such as that the evidence will do no harm, or as to one of the attorneys being a good fellow, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.\*]

### 2. TRIAL (§ 29\*)—HARMLESS ERROR—REMARKS OF TRIAL JUDGE.

Remarks by the trial judge which are calculated to mislead the jury or prejudice the rights of either party are reversible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.\*]

### 3. APPEAL AND ERROR (§ 1046\*)—HARMLESS ERROR—REMARKS OF TRIAL JUDGE.

In denying a motion to strike certain evidence, the trial court remarked, "I don't think the testimony does you any harm," and, in overruling an objection to an interrogatory, stated to appellant's attorney, "You are not on rebuttal testimony, but I will allow it just to show you that we give every leeway possible, possibly more than the court should," and, in ruling on a motion to strike an answer, also stated to counsel, "I have known you a long time, and I like you, and you are a good fellow; but, when you come to the trial of a case, I know an attorney is ambitious; I know he wants to do everything in the world; and I admire that; but don't step beyond the bounds." Held that, while the trial judge's remarks were improper, they were not reversible error, in absence of a showing of prejudice to appellant therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.\*]

### 4. APPEAL AND ERROR (§ 901\*)—BURDEN OF SHOWING ERROR.

The parties claiming error on appeal must clearly establish it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.\*]

### 5. NEGLIGENCE (§ 98\*)—CONTRIBUTORY NEGLIGENCE—COMPARATIVE NEGLIGENCE.

Rev. Laws, § 5651, providing that, in actions against a mine owner for damages for injuries to an employe, the employe's contributory negligence shall not bar a recovery, where it was slight and the employer's negligence was gross in comparison, substitutes for the common-law rule of contributory negligence the rule of relative or comparative negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 165; Dec. Dig. § 98.\*]

**6. MASTER AND SERVANT (§ 217\*)—RISKS ASSUMED.**

While a miner must use reasonable care for his own safety, he does not assume the risk of a hidden danger created in his place of employment by other employes, over whom he has no control, and of which he has no warning or notice, so that a miner would not assume the risk of injury from drilling into an unexploded hole, left in that condition by a previous shift of workmen, of which he had no notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**7. MASTER AND SERVANT (§§ 101, 102\*)—MASTER'S DUTIES—SAFE PLACE OF WORK.**

The master must furnish a reasonably safe place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**8. TRIAL (§ 45\*)—OFFER OF EVIDENCE—SUFFICIENCY.**

In a miner's action for personal injuries, defendant offered in evidence a conversation between witness and plaintiff some time after the accident to show, as stated by counsel, that the action was instituted in bad faith, with knowledge by plaintiff that he knew that the shift boss and defendant were not responsible for his injury, and that he alone was responsible, and to contradict any evidence of negligence by defendant, and to prove its claim that the accident was not caused by its negligence, and to contradict plaintiff's evidence tending to show negligence by defendant. *Held* that the offer was sufficient to warrant admission of a declaration against interest by plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.\*]

**9. EVIDENCE (§ 200\*)—ADMISSIONS—DECLARATIONS AGAINST INTEREST.**

What a party voluntarily admits to be true may be reasonably taken to be true, notwithstanding that the admission is contrary to his interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 684-686; Dec. Dig. § 200.\*]

**10. EVIDENCE (§ 222\*) — DECLARATIONS AGAINST INTEREST.**

The voluntary statement of one injured, made after the accident, and relating thereto, is admissible, if relevant, for consideration by the jury in connection with the other evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786-800, 803-808; Dec. Dig. § 222.\*]

**11. EVIDENCE (§ 222\*)—ADMISSIONS.**

Every prior statement of a party inconsistent with his present claim tends to throw doubt upon it, and is admissible in evidence as an admission against interest, regardless whether, when the statement was made, it was in his own favor or against his interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786-800, 803-808; Dec. Dig. § 222.\*]

**12. EVIDENCE (§ 265\*)—ADMISSIONS—WEIGHT.**

The weight to be given to an admission or declaration against interest is for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

**13. APPEAL AND ERROR (§ 232\*)—PRESENTATION BELOW—GROUNDS OF OBJECTION—ADMISSION OF EVIDENCE.**

Where an objection to evidence was sustained, not because of the form of the offer, but on the ground that the evidence was not admissible for the purpose offered, appellant cannot claim on appeal that the evidence was properly

excluded because the offer was not in proper form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.\*]

**14. APPEAL AND ERROR (§ 1027\*)—HARMLESS ERROR—PREJUDICIAL EFFECT.**

Unless an error substantially affects the rights of the complaining party, so that it could be reasonably claimed that a different result might have been reached, had the error not occurred, it is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.\*]

**15. APPEAL AND ERROR (§§ 1050, 1056\*)—HARMLESS ERROR—RULINGS ON EVIDENCE.**

Error in admitting or excluding evidence on material issues is reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166, 4187-4193, 4207; Dec. Dig. §§ 1050, 1056.\*]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by Robert S. Peterson against the Pittsburg Silver Peak Gold Mining Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed and remanded for new trial.

Samuel Platt, of Carson City, and George Martinson, of San Francisco, Cal., for appellant. Dixon & Miller, of Reno, for respondent.

**McCARRAN, J.** This is an action in damages for personal injuries, alleged to have been sustained by the respondent through the negligence of the appellant, in whose employ he was engaged.

The record discloses that the respondent, Peterson, on the 14th day of June, 1911, was a member of the 6 p. m. shift in the Mary mine, and on the date of the accident was engaged as a machine driller in the Valcalda tunnel. At about 1 o'clock on the morning of the 15th of June, the respondent, while so engaged, drilled into an unexploded hole left by the previous shift. The result of his act was an explosion, by reason of which one member of the shift was instantly killed, another died in nine days thereafter from the injuries received, another was more or less seriously hurt, and the respondent received serious injuries.

The trial was had before a jury in the Second judicial district court, and a verdict was rendered in favor of respondent in the sum of \$29,250. The appellant in this case, defendant in the court below, interposed and especially pleaded contributory negligence on the part of respondent, assumption of risk, and an executed release in accord and satisfaction.

From the judgment rendered in favor of respondent, and from the order denying appellant's motion for a new trial appeal is taken to this court.

The appellant sets up four major grounds upon which it relies for reversal, namely:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Prejudicial statements and remarks made by the court during the course of the trial; erroneous rulings as to the admissibility of testimony made during the course of the trial; failure on the part of the respondent to establish the negligence of appellant; and errors of the trial court in giving certain instructions and refusing certain other offered instructions.

Assignment No. 53 has to do with the remarks of the court made in ruling upon the motion of appellant to strike certain testimony. The court in that instance ruled against the moving party, and, in the course of his ruling, made this remark: "I don't think the testimony does you any harm."

Assignment No. 77 is with reference to the remarks of the court in overruling an objection made by counsel for respondent to an interrogatory propounded by counsel for appellant, in which the court said: "I will tell you. (Addressing counsel for appellant.) Just as soon as this went in evidence, or you could have called Mr. Jussen right after they were put in evidence, or you could do it afterwards. You are not on surrebuttal testimony, but I will allow it just to show you that we give you every leeway possible, possibly more than the court should."

Assignment No. 76 is with reference to the remarks of the court, presumably addressed to counsel for appellant, while he was cross-examining a witness. The transcript is as follows:

"Q. Now you were not there were you, when this explosion occurred? A. I hope not. Q. And all that you know about the explosion was what you speculated upon or the conclusions you drew after you went up there; is that true? A. Yes, sir.

"Mr. Miller: Object; it is a compound question.

"Mr. Hairston: And a misleading question.

"The Court: Sustain the objection.

"Mr. Platt: Exception on the ground it is proper cross-examination.

"Mr. Miller: Move the answer be stricken out.

"The Court: I will tell you. I have known you a long time, and I like you, and you are a good fellow; but, when you come to the trial of a case, I know an attorney is ambitious; I know he wants to do everything in the world; and I admire that; but don't step beyond the bounds."

To the latter remark exception was taken by counsel for appellant.

All of these remarks set up as assignments of error by appellant were made in the presence and hearing of the jury, and were excepted to by counsel for appellant. It is difficult to understand why remarks of the character appearing in the record in this case are necessary at all on the part of the trial court. While it is true that not every remark of the trial court will constitute reversible error, where it is made with refer-

ence to the admissibility of evidence, yet there is nothing of which a *nisi prius* judge should be more careful than in his remarks or assertions made with reference to admitted or rejected testimony during the course of a trial. The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is oftentimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, is liable, however unintentional, to mould the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.

[1] A trial judge's ruling upon the admissibility of testimony is a ruling based solely upon the law of evidence; his comments or assertions or declarations have no place in the ruling, save and except in so far as they may express his idea as to the applicability of the matter presented, based upon the rules of evidentiary law. As to whether or not an attorney is a good fellow or not, a good fellow plays no part in the enforcement of a rule admitting or excluding testimony. As to whether or not a particular piece of testimony does harm or does not do harm is not for the court to say, and remarks upon this phase, made in the presence of the jury can have no beneficial effect; they are better left unsaid.

[2, 3] If remarks made by the judge in the progress of a trial are calculated to mislead the jury or prejudice either party, it would be grounds for reversal. We are not inclined to view the remarks made by the trial judge in this case in that light. *Deshler v. Beers*, 32 Ill. 368, 83 Am. Dec. 274.

[4] While it may be reasonable to assume that remarks of the trial judge, such as those complained of in this case, may have an influence prejudicial to one or the other side of the case, yet, in view of the rule that the party who alleges error must establish the same clearly, we would not disturb the judgment in this case by reason of the errors assigned with reference to the remarks of the trial court. *McMahon v. Eau Claire*, 95 Wis. 640, 70 N. W. 829.

Appellant assigns as error the refusal of the trial court to grant appellant's motion for a nonsuit and for an instructed verdict. In this respect it is the contention of the appellant that an employé, injured from drilling into an unexploded shot, is held to assume the risk as being one incident to his employment, and further contends that the doctrine which requires the master to furnish a reasonably safe place for his employés to work is not applicable, where the object of the work performed is to continually change the place.

[5] In reviewing this phase of the case, it must be observed that, by statutory enactment in this state, the common-law rule of fellow servant has been modified, and the common-law rule of contributory negligence has been superseded by statutory rule, which is more or less properly termed the rule of "relative" or "comparative" negligence. Sections 5649 and 5651, Revised Laws; *Lawson v. Halifax*, 36 Nev. 596, 135 Pac. 611.

While many of the authorities relied upon by counsel for appellant would sustain his contention in jurisdictions where the common-law rule of fellow servant prevails, they are not applicable under statutes such as ours. In other cases relied upon by appellant, the statement of the facts discloses that the party injured was a machine driller following himself with no intervening shift, and had personal knowledge that one or more of the holes which he himself had charged had failed to explode. These cases are not analogous to the one at bar, for the reason that the record here discloses that the respondent worked alternate shifts, and that it was his duty, in the course of his employment, to set up his machine and drill immediately following the explosion of a round of holes drilled and charged by the preceding shift, and hence could have no personal knowledge of the failure of any one of the holes to explode. There is a substantial conflict in the testimony as to whether or not the respondent was warned, or had any notice, that the preceding shift had left an unexploded hole. In fact, the record strongly bears out the contention of respondent that he had no notice. It appears to be almost conclusively established that the appellant company had no regular system whereby notice of unexploded holes were bulletined or reported by the off-going shift. Whatever may be said as to dangers incident to the employment of mining, however forceful it may be contended that missed holes are frequent occurrences in mining operations, and that such is known to the average miner, it cannot, in our judgment, be successfully argued that in modern mining operations, where one group of men follow and take up the work of a previous group, they should assume the risks attendant upon latent or immediate dangers left by those who had previously been engaged in prosecuting the work at the same place. This is especially true in view of modern mining appliances, methods, and regulations. However diligent the servant should be, however painstaking in looking out and caring for his own safety, he should not be expected to assume either the mistakes of those who preceded him in the same vocation, or their failure to carry out the work in the usual and customary manner. Especially is this true in the case of a missed hole left by a previous shift, hidden and obscure as it would necessarily be, where the on-coming shift receives no warning or notice of its

existence, they could not, in reason, assume the risk of a danger which, under ordinary circumstances, they could not expect to exist.

[6] Reasonable care and reasonable diligence in securing his safety is, of course, required on the part of a miner, to the end that he shall not, by his own willful negligence, bring about his own destruction or his own injury, but, when a hidden danger is placed by others over whom he has no control, and from whom he may receive no warning or notice, in a place where he is to perform his services, he should not be required to assume the risk thereof. As was stated in the case of *McMillan v. North Star Min. Co.*, 32 Wash. 579, 73 Pac. 685, 98 Am. St. Rep. 908: "Dangers arising from a missing blast cannot be classified with dangers which are incidental to nature's hidden forces, and which cannot be known or foreseen by human prescience."

If the respondent in this case had belonged to the shift on which one of the round of holes charged had failed to explode, he would necessarily be charged with notice of such danger, and, under such conditions, he might be held to assume the risk if he returned to the place and drilled into the unexploded hole; but, belonging, as he did, to another group of men, he could not be expected to assume the risk of dangers hidden and unusual, arising from an unexploded hole, being in no position from which he could have actual knowledge of such danger, and receiving no notice from persons having such knowledge.

[7] Under such conditions and following the rule that the master is bound to furnish a reasonably safe place in which for the servant to perform his duty, and is bound to throw about the servant reasonable protection, it became the positive duty of the master to provide either reasonable means, or, at least, reasonable methods, to notify the servant of the extra hazard which he was about to encounter, where an unexploded hole was left in the very place where the servant was bound to perform his services.

From the record in this case, it is disclosed that it is customary in some mines, and a positive rule in others, that the off-coming shift shall give notice of missed holes by posting on a blackboard or by other methods. The object and natural effect of such rules or customs is to give notice of an unusual danger caused by the presence of missed holes in the place where the on-coming shift is about to work. It serves as a warning to those who are about to enter the place in order that they may use reasonable diligence and extra precaution to determine the location of the missed holes and to guard against the dangers. It appears in this case no such rule was prescribed and no such custom adhered to. The miner who enters the workings unaware of this unusual danger cannot, in reason, be said to assume

this additional risk. *Shannon v. Consol.*, etc., 24 Wash. 119, 64 Pac. 160; *McMillan v. North Star*, 82 Wash. 579, 73 Pac. 685, 96 Am. St. Rep. 908; *Polaski v. Pittsburg*, 134 Wis. 259, 114 N. W. 437, 14 L. R. A. (N. S.) 952.

The appellant in this case, by its pleadings, set up a release as having been signed by respondent subsequent to the accident and at a time at which he was being treated by specialists in the city of San Francisco. This release, in the form of a signed instrument, was introduced in evidence in behalf of the appellant. It is our judgment that, in view of the substantial conflict of evidence surrounding the signing of this instrument, the jury was warranted in finding, as it did by its general verdict, that the respondent should not be bound by the release. The evidence tended to establish that the release was signed in the office of Mr. Jussen, the general superintendent of the appellant company in the city of San Francisco; that there were present at the time of the signing Mr. Jussen, the superintendent, and a representative of a casualty company; that the respondent was alone, although it was established by the evidence brought out on cross-examination of respondent's witnesses, and also by the direct evidence of appellant's witnesses, that in all business transactions, other than that of the signing of this instrument, respondent had transacted business by and through his wife. Moreover, it is established that, at the time of the signing of this instrument, the respondent could not read, and that his hearing was materially impaired by reason of the injuries previously sustained. Notwithstanding the fact that the representatives of the appellant company had on former occasions dealt with the respondent by and through his wife in all matters pertaining to his injuries and treatment, on this particular occasion it appears that Mr. Jussen, the superintendent of the company, called the respondent, Peterson, to his office in the absence of Peterson's wife, and requested him to sign an instrument, which, according to the testimony of Mr. Jussen and Mr. Lloyd, had been prepared in the office of the casualty company prior to the meeting at which the respondent signed the same, and was prepared by the representative of the casualty company prior to any consultation or meeting with respondent.

It appears from the record in this case that the respondent, after being treated in the hospital in San Francisco for the injuries sustained, returned to Blair, Nev., on or about the 3d day of September, 1911, and continued his employment with the respondent company, and that he was assigned to a position running a compressor and continued in such employment until the middle of April, 1912.

There are many assignments of error contended for by appellant in this case applicable to rulings of the court made as to the

admissibility of testimony. In view of the fact that it is our judgment that this case must be reversed by reason of a ruling of the trial court hereafter discussed, we shall take up but one of these assignments.

During the course of the trial, the witness Meyers was produced on behalf of the appellant, and the proceedings applicable to appellant's assignment No. 25 are as follows:

"Q. (By Mr. Platt): Did you ever have a conversation with Mr. Peterson at any time subsequent to the accident? A. I talked to him about it afterwards; yes. Q. And where was that conversation? A. In the compressor room. Q. Will you please tell us where, as near as you can remember? A. By the stove there. Q. About what time was it? A. Along in the evening, probably half past 7 or 8 o'clock. Q. In what month, day of the month, as near as you remember? A. I think it was in September, sometime; I don't remember. Q. Of what year? A. 1911. Q. And what was Mr. Peterson doing in the compressor room at that time? A. Running the compressor. Q. What was that conversation?

"Mr. Hairston: I will ask what his purpose is. Do not know whether it is revelant or not.

"Mr. Platt: The purpose of this conversation is to show that Mr. Peterson, by his own declaration, did not hold Mr. Meyers or the defendant company liable for this accident.

"Mr. Hairston: Object on the ground it is immaterial, irrelevant, and incompetent, and has nothing to do with this cause of action.

"Mr. Platt: I would like to make the offer a little more specific. We make this offer for the following reasons: First, to show that this action was instituted in bad faith, with the knowledge upon the part of the plaintiff, when it was instituted, that he himself knew that Mr. Meyers the shift boss and the defendant company was not responsible for the injury and that he, himself, was responsible; second, we offer it for the purpose of contradicting any manner of evidence or imputed evidence of the negligence of the defendant company, and in sustaining the contention of the defendant's answer that the alleged injury was not caused by and through the contributory negligence of the defendant; and we offer it, in the third instance, to contradict and impeach the testimony of the plaintiff's witnesses tending to show negligence upon the part of the defendant company. We offer it as a part of the res gestae of this action. We offer it as a declaration made by the plaintiff himself to an employe of the company, which employe was engaged as a shift boss in the employ of the defendant company at the time of the accident, and which declaration contradicts flatly the declaration set up in the complaint in this action. We introduce it for the further reason that it is a complete and adequate defense to this action. That is why we offer it.

"Mr. Miller: Argues.

"Mr. Platt: I don't desire to argue it; I will take a ruling on it.

"Mr. Hairston: Argues.

"The Court: The offer is denied.

"Mr. Platt: Exception upon the grounds stated in the offer, without repeating the grounds separately and distinctly. Q. Now, Mr. Meyers, did you have a conversation with Mr. Peterson in the month of September, 1911, in which he stated to you that he recognized that you or the company were not responsible for that accident?

"Mr. Hairston: Object to that as leading, suggestive, and incompetent.

"Mr. Platt: If the court please, we desire the record preserved by asking a direct question in support substantially of the offer we made.

"The Court: Sustain the objection.

"Mr. Platt: Take an exception on the grounds stated in the original offer. Q. Now, in order, if the court please, that I may get a ruling on the question directly in relation to the ruling on the offer we have made, I desire to ask this man: Mr. Meyers, state whether or not you had a conversation with Mr. Peterson concerning the subject-matter of this action at any time subsequent to the time of the accident.

"Mr. Miller: Object.

"The Court: I will allow that question. Q. Just answer the question 'Yes' or 'No.' A. Yes, sir. Q. When was that conversation?

"Mr. Miller: Object; incompetent, irrelevant and immaterial.

"Mr. Platt: Take your honor's ruling, if the court please. We made the offer, and we want to get a ruling of the court now. We desire to ask the question under the objection of counsel, in order that we may get the ruling on the question we ask.

"Mr. Miller: Same objection; irrelevant, incompetent, and immaterial.

"The Court: Sustain the objection. When you state what is the purport of the conversation.

Mr. Platt: I gave your honor the purport of the conversation.

"The Court: Sustain the objection.

"Mr. Platt: We ask an exception upon the grounds stated in the offer, which we don't desire to repeat, and which we will consider now repeated in *hæc verba*.

"Mr. Miller: All right.

"Mr. Martinson: And on the further ground that the purported—that the questions and the offer made would indicate that there was an admission on the part of the plaintiff to the same effect, going to the merits of this controversy."

[8] The offer of evidence, as indicated by the record, and as declared by counsel for appellant in his statement to the trial court, was that of a declaration against interest, made by respondent to the witness Peterson. This was clearly indicated, in our judgment,

by the statement made by counsel, wherein he set forth to the trial court the reasons upon which he based the offer, and indicated thereby the nature of the answer which he expected from the witness; the witness having already testified that a conversation had taken place.

[9] The offer of the testimony made by appellant in the court below was clearly based upon the rule that whatever a party voluntarily admits to be true, though the admission be contrary to his interests, may reasonably be taken for the truth. Where a man voluntarily admits a fact, which fact and which admission is contrary to his interests, ordinary motives that sway or form human conduct suggests belief in his utterances. Such declarations or utterances, although made outside of the direct proceedings, and without the sanction of an oath, are nevertheless sufficient, when the proper foundation is laid for their admission, to imply a reasonable presumption of their truth—at least until there is a showing to the contrary.

In the case under consideration, the respondent, by his pleadings, alleged the negligence of the plaintiff company, and by his own testimony, and by the testimony of witnesses offered in behalf of his contention, circumstances were related tending to establish the fact that the accident was caused by reason of the negligence of the appellant. The issues were squarely joined in this case on the question of negligence. It was the province of appellant, under the pleadings in the case, and in view of the issues, to disprove negligence or liability for the accident out of which respondent received the injuries. Any voluntary statement that respondent might have made subsequent to the accident as to the cause of the accident, or as to the agencies that brought about the accident, or as to his own responsibility or acts in bringing about the accident, if such were made, might be produced by and from the party or parties to whom such utterances were made, on behalf of the contention of appellant that the accident was not brought about by its negligence.

Speaking upon this subject, Professor Wigmore in his work on evidence says: "Just as a witness' testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony, so also the party is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim. This is the simple theory upon which a party's admissions—of the informal sort, which might better be termed 'quasi admissions'—are every day received in evidence on behalf of his opponent. The witness speaks in court through his testimony only, and hence his testimony forms the sole basis upon which the inconsistency of his other statement is predicated. But the party, whether he himself takes the stand

or not, speaks always through his pleadings, and through the testimony of his witnesses put forward to support his pleadings, hence the basis upon which may be predicated a discrediting inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him. Thus, in effect, and broadly, *anything said by the party may be used against him as an admission*, providing it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony." Wigmore on Evidence, vol. 2, § 1048; Jones on Evidence, § 235; Ruling Case Law, vol. 1, p. 468.

Admissions of a party against his interest are competent in negligence cases, as in other cases, says Mr. Thompson in his commentaries on the law of negligence, and this same declaration is indorsed in Elliott's "Treatise on the Law of Evidence." Thompson's "Commentaries on the Law of Negligence," vol. 6, § 7738; Elliott on Evidence, vol. 3, § 2510; Brown v. Calumet River, etc., 125 Ill. 600, 18 N. E. 283; Weiti v. Cohen, 157 App. Div. 65, 141 N. Y. Supp. 870; Smith v. Smith (Iowa) 140 N. W. 659; Nirsley v. Brulaker, 192 Pa. 388, 43 Atl. 967.

In the case of Helman v. Pittsburg, etc., Co., 58 Ohio St. 400, 50 N. E. 986, 41 L. R. A. 860, the Supreme Court of Ohio, in passing upon this question, said: "The defendant, therefore, has the right to introduce any evidence which tends to weaken or disprove the facts necessary to be established to make out the plaintiff's case; i. e., the facts constituting the conditions upon which the action is given by the statute. If death had not ensued, the deceased could not recover damages for his injuries, if it should be established on the trial that his injuries were caused by his own carelessness or negligence; and his statements after the injury, and while in his right mind, tending to show that the injury was caused by his own negligence and carelessness, would be good evidence against him in an action brought in his own behalf during his lifetime."

[19] The voluntary declaration or statement of a person injured, at any time after the accident, is proper evidence to go to the jury, and, so far as it may be treated as an admission, it should be considered in connection with all the other circumstances in the case, and in the light of all the circumstances under which it is given. Its weight and significance is for the jury. Perigo v. C., R. I. & P., 55 Iowa, 326, 7 N. W. 627; Sterling v. De Laune et al., 47 Tex. Civ. App. 470, 105 S. W. 1169.

In the case of Walker v. Brantner, 59 Kan. 117, 52 Pac. 80, 68 Am. St. Rep. 344, the superintendent of the railroad on which deceased received his injuries was called as a witness for the defendant company, and stated, among other things, that he had a talk with Brantner, the deceased. He was then asked

the question: "I will ask you what he said with reference to what he did about looking for an engine on the Frisco after he had stopped his engine and whistled?" This question was objected to by the plaintiff, on the ground that it was incompetent. This objection was sustained, and the company offered to prove certain statements made against the interest of the deceased subsequent to the accident. The objection to the offer was sustained, and the testimony excluded. The Supreme Court of Kansas, in passing upon the question, said: "It may be that some of the statements which the defendant claimed it would prove were in the nature of expressions of opinion, or deductions from other facts; yet, being the statements of Brantner (the deceased) with reference to the occurrence, they were admissible as declarations against interest. At the time the statements were made, Brantner alone had a cause of action against the railroad company for the injury."

In the case of Gulzoni v. Tyler et al., 64 Cal. 334, 30 Pac. 981, the Supreme Court of California said: "The evidence of what the plaintiff said when asked whether he blamed anybody on the boat should not have been stricken out. Evidence of what he said in regard to the occurrence was admissible for the defense. If he expressed an opinion as to who was to blame, the defendants were entitled to have the benefit of it."

In the case under consideration, the question propounded to the witness Meyers called for a statement as to the conversation between the witness and the plaintiff, Peterson. Counsel for appellant, in his offer and statement made to the trial court, set forth, summarily at least, what he expected to prove by the witness. It was to the effect that the plaintiff had expressed the knowledge to the witness Meyers that the defendant company was not responsible for his injuries, and, moreover, that he had expressed himself to the witness Meyers to the effect that he himself was responsible. It was offered by the appellant as a declaration made by the plaintiff himself against his own interest, at a time subsequent to the commencement of the action, and while he was in the employ of the appellant company. It might be contended that the statement, if such was testified to by the witness Meyers, would have little or no effect with the jury, but its weight and effect are matters upon which we have no right to pass. The jurors alone were the ones to weigh the evidence for whatever it might have been worth, but, whatever its weight might have been, or whatever effect it might have had, the defendant was entitled to it. If at that time the plaintiff, respondent herein, voluntarily made statements contrary to the position taken by him at the trial and contrary to the declarations in the complaint, or contrary to the theory of the plaintiff's case, the defendant

was entitled to offer such statements or declarations in evidence, where the proper foundation was laid.

In the case of *Holman v. Boston, etc., Co.*, 20 Colo. 7, 36 Pac. 797, it appears from the statement of facts, as set forth in the opinion, that an offer very similar to the offer made to the trial court in this case was made by the defendant, and the Supreme Court of Colorado, speaking through Mr. Chief Justice Hayt, said: "The evidence offered was proper, and should have been admitted. The witness was a party plaintiff to the action, and his admissions were competent evidence against him. As the defendant was not permitted to testify in reference thereto, we must assume that he would, but for the erroneous ruling of the court, have testified that this plaintiff, at the time, admitted that the fire occurred without fault on the part of defendant. Testimony of such an admission was proper as substantive evidence, and should have been allowed to go to the jury. \* \* \* And we are unable to say that the verdict upon the last trial might not have been different had the rejected evidence been admitted. Much or little weight might have been given it in the discretion of the jury, or its effect might have been entirely overcome by other evidence; nevertheless it was competent, and should have been submitted to the jury." *Grand Lodge v. Taylor*, 24 Colo. App. 106, 131 Pac. 783.

This court, speaking through Mr. Chief Justice Lewis in the case of *Rollins v. Strout*, 6 Nev. 150, speaking of admissions in general, said: "The general rule is that, when the proof of acts done by a person is admissible, any declarations accompanying them which tend to explain such acts or the motives controlling them are likewise admissible. The rule is certainly not confined to such declarations as may be made against the interest of the person making them. Such declarations are received under another rule and for different reasons. When made against interest, they are received even when not accompanying such acts."

While the decision in the *Rollins-Strout* Case, *supra*, was not strictly in point as being applicable to the case under consideration, nevertheless this court, in the last sentence of the above quotation, indorsed the general rule applicable to admissibility of admissions against interest, and, while the court in that case did not go into the subject at length, it being one not essential to the decision, the rule applicable to the admissibility of evidence of that character was asserted, even though it might be considered in the form of obiter dicta.

[11, 12] The offer in this case, made by the appellant in the trial court, being that of a statement of the party plaintiff against his own interest is admissible, upon the principle that every prior statement of a party to an

action exhibiting any inconsistency with his present claim, or theory upon which he presumes to maintain his case, tends to throw doubt upon it; this regardless of whether, at the time he was speaking, he made the utterances in his own favor, or against his own interest. It has been asserted on authority that an admission against interest is equivalent to affirmative testimony for the party offering it. This may be true only as to admissions which presume to state facts against the declarant's interest at the time of stating them. But, whatever may be the weight or significance to be given to admissions against interest, or declarations inconsistent with the contention of the party who makes them, it is nevertheless a rule that, when a party to a civil action was made an admission of fact material to the issue, it is admissible against him. The weight and consideration to be given to such admission or declaration, whether great or nil, is for the jury. *Jones on Evidence* (2d Ed.) c. 9.

While it is true that courts generally hold that admissions or declarations against interest are not conclusive as to the effect of what the declarant stated, yet such admissions should be considered in connection with the circumstances, and given such weight as they are entitled to in deciding whether or not the party spoke with mature consideration and in regard to his legal rights, or whether he meant the defendant was not to blame for any lawful intention to injure him. *Cooper v. Central Rd.*, 44 Iowa, 134; *Central Rd. v. Mooseley*, 112 Ga. 914, 38 S. E. 350.

While it is true in this case that, if the respondent did make a declaration against his interest or against his general position, as assumed in his pleadings and by his evidence in the trial, the jury would not have been bound to find that the evidence in that respect was conclusive of his negligence. But, however this may be, the evidence, if such there was, should have gone to the jury. *Martinson v. Nat., etc., Co.*, 166 Mass. 4, 43 N. E. 513; *Copley v. Union Pac.*, 28 Utah, 361, 73 Pac. 517; *Binequicz v. Hagland*, 103 Minn. 297, 115 N. W. 271, 15 L. R. A. (N. S.) 1096, 14 Ann. Cas. 225.

Counsel for respondent contend that the offer was not in proper form to constitute a good tender of evidence, and they state: "This is not in proper form to constitute a good tender of evidence. To make it a good tender, it ought to have stated the facts offered to be proved, and not to state the legal effect of the facts offered to be proved. The alleged tender was lacking in not being specific, it was too general in character, and it would be difficult, if not impossible, for the court to understand what evidence was offered."

[13] As will appear from the record, however, the trial court did not sustain the objection on this theory. It is manifest that the trial court sustained the objection, not

by reason of the form of the offer, or the manner in which the offer was made, but rather by reason of the purpose of the offer. The record, as heretofore quoted, discloses that the attorney for appellant stated to the court:

"Take your honor's ruling, if the court please. We made the offer, and we want to get a ruling of the court now. We desire to ask the question under the objection of counsel, in order that we may get a ruling on the question we asked.

"Mr. Miller: Same objection; irrelevant, incompetent, and immaterial.

"The Court: Sustain the objection. When you state what is the purport of the conversation."

From this it will appear that the court sustained the objection of counsel for respondent not by reason of the form of the offer, but by reason of the intentment of the offer, thereby holding that its purpose was subject to the objection interposed. From this it further appears that the court thoroughly understood the object and purpose of the offer, and from the statement made by counsel for appellant to the trial court as to the scope and substance of the offer, and the purpose and object of the same, it is manifest that the court understood what evidence was offered, and ruled it out by reason of its purpose.

Respondent further contends that it was not error on the part of the court to rule against the admission of the offered evidence, inasmuch as it was not shown definitely and specifically to be pertinent to the issues involved. To this it may be said that the major issue involved in this case was the negligence of the appellant company, and any element of competent evidence going directly to that issue was admissible, where a proper foundation was laid for its admission. Counsel for respondent raise no question in their objection to the foundation laid for the admission of the testimony. Moreover, it is our judgment that the foundation was properly laid and the offer was made in good season.

[14] Unless an error complained of is such as to substantially affect the rights of the complaining party to such an extent that it might reasonably contend and assert that, were it not for the error complained of, a different result might reasonably have been expected, it would be harmless.

[15] Where the error complained of was one having to do with the admissibility or nonadmissibility of testimony, and especially where that testimony goes directly to the issue or issues in the case, its weight and significance being for the jury to determine, a ruling upon that point is so vital that an error made in that respect is, in our judgment, one of sufficient importance and consequence to demand reversal.

The judgment and order appealed from should be reversed, and the cause remanded for a new trial.

It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

## FERRO v. BARGO MIN. & MILL. CO.

(No. 2099.)

(Supreme Court of Nevada. April 28, 1914.)

### 1. MINES AND MINERALS (§ 112\*)—LIEN LAW—CONSTRUCTION.

The lien law for securing payment for labor on mining property is not to be construed strictly, as in derogation of common law, but liberally, as remedial.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

### 2. MINES AND MINERALS (§ 114\*) — LIEN CLAIMS—JOINDER OF CLAIMS.

The statute giving right of lien to both contractors and laborers, a lien claim against mining property is not void for joinder of a claim of lien under a contract of employment by the day with one under a contract of employment for a specified amount of work, at an agreed price per foot; the work being continuous and of the same character under both contracts.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236; Dec. Dig. § 114.\*]

### 3. MINES AND MINERALS (§ 114\*) — LIEN CLAIMS—PARTIES.

Where under a joint contract of two for work on mining property, half the contract price is to be paid each severally, they need not join in a lien claim, but one of them may alone file such a claim for half the amount.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 236; Dec. Dig. § 114.\*]

Appeal from District Court, Washoe County; John S. Orr, Judge.

Action by Luigi Ferro and others against the Bargo Mining & Milling Company. From a judgment of dismissal as to plaintiff Ferro, he appeals. Reversed and remanded.

Dixon & Miller, of Reno, for appellant. Massey & Springmeyer, of Reno, for respondent.

NORCROSS, J. Appellant and several other lien claimants joined in an action to foreclose certain labor liens filed upon certain mining claims, the property of respondent. A demurrer was sustained as to the cause of action of the appellant, Ferro, and as to him judgment of dismissal was entered. From such judgment Ferro has appealed.

So much of the complaint, as involves the questions presented on appeal, reads as follows: "That on or about February 25, 1910, C. Virgilio, as the manager of said corporation, being duly authorized thereto, employed claimant as a miner to work in, on, and about said claims, for a daily wage of \$5, payable monthly; that under said contract of employment plaintiff during the months of May, June, July, and August, 1910, worked

for 87 days, such labor being of the total value of \$435; that plaintiff received during said months board from said corporation of the value of \$87; that no other part of said sum has been paid, and that there is now due him a balance of \$348 thereon; that on or about the month of August, 1910, said defendant employed C. Virgilio and plaintiff to sink a certain shaft on said Bargo claim a depth of 89 feet, agreeing to pay all expenses of sinking same, including labor and materials, and agreeing upon the completion thereof to pay to plaintiff and said Virgilio the sum of \$25 per foot after deducting such expenses, half of said balance to be paid to each; that under said contract plaintiff and said Virgilio caused said shaft to be sunk said distance; that after deducting said expenses there was due from said defendant to plaintiff, as his half of said balance, the sum of \$540, no part of which has been paid, and all of which is now and has been, since the completion of said work, due and payable; that there were no terms or conditions to said contracts of employment other than those hereinabove set forth; that the work and services performed by plaintiff under said contracts was the same in character under each contract, and constituted one continuous transaction; that there were not, at the time of filing the lien hereinafter mentioned, and are not now, any just credits or offsets against the sum of \$888 due plaintiff under said contracts; and that said work and services were all performed on that part of said mine known as the 'Bargo' claim, said work being in furtherance of a common system tending to the uniform development of the other contiguous claims constituting said mine, as aforesaid; that prior to the expiration of 50 days from the time when plaintiff last performed labor on said mine under said contracts of employment, to wit, on December 13, 1910, plaintiff made and executed his claim of lien upon said mine, \* \* \* for the said balance of \$888, then due and owing under said contracts, and, after duly verifying same, caused said claim of lien to be recorded on said 13th day of December, 1910, in the office of the county recorder of Washoe county, \* \* \* a copy of which claim of lien is hereto attached, \* \* \* and made a part of this complaint." The copy of the claim of lien filed, attached to the complaint as an exhibit, does not vary, in any substantial particular, from the allegations in the complaint as above quoted. The respondent demurred for want of sufficient facts, for misjoinder of causes of action, and the uniting in one cause of action of two separate causes of action, in that the separate contract with Ferro had been joined with the contract with Ferro and Virgilio, for defect of parties in the nonjoinder of Virgilio, and for the insufficiency of the lien in joining the Ferro contract.

[1, 2] It is the contention of respondent that the claim of lien is fatally defective, be-

cause it is based on two contracts, one an individual contract of employment of appellant alone, the other, a joint contract of appellant and another as original contractors; that hence "there cannot be a tacking of such contracts by Ferro." The object of the lien law is to secure payment to those who perform labor upon mining property, or who perform labor upon or furnish material in the construction of any building or other works, specified in the statutes, for such labor performed or material furnished. In construing or applying the provisions of any statute, the purpose or object of the statute should ever be kept in mind, and a construction or application should be avoided which sacrifices substance to a mere matter of form. Some of the earlier decisions construing or applying lien statutes were inclined to give a strict construction or application, upon the theory that such statutes were in derogation of the common law, a strict construction being the general rule in such character of statutes. These statutes are now regarded as remedial laws, and are given a liberal construction. *Skyrme v. Occidental M. & M. Co.*, 8 Nev. 220; *Hunter v. Truckee Lodge*, 14 Nev. 28; *Malter v. Falcon M. Co.*, 18 Nev. 212, 2 Pac. 50; *Maynard v. Ivey*, 21 Nev. 244, 29 Pac. 1090; *Porteous Co. v. Fee*, 29 Nev. 380, 91 Pac. 135; *Tonopah L. Co. v. Nevada Am. Co.*, 30 Nev. 456, 97 Pac. 636; *Lamb v. Goldfield L. M. Co.*, 37 Nev. —, 138 Pac. 902.

As said by this court in the recent case of *Lamb v. Goldfield L. M. Co.*, supra, "while there must be a substantial compliance with the essential requisites of the statute, such pleadings and notices as the law requires should be liberally construed in order that justice might be promoted and the desired object might be effected."

There is no contention that appellant did not have, under the statute, the right of lien security for all that is alleged to be due him for labor performed, but it is contended that he has lost this valuable right, not because he failed to file a lien, but because he has improperly joined two lien rights and there has been a nonjoinder of parties in one of the lien claims. We think these objections ought not to be well taken.

In the *Skyrme Case*, supra, the court said: "The manner in which the work was conducted in the Occidental mine is quite common in many of the mines in this state. In the prosecution of the work it is necessary to run tunnels and crosscuts, and sink winzes; and while, as a general rule, the laborers are employed by the day, it is often the case that some of them will take a contract to do this kind of work at a stipulated price per foot, and within a few days after their contracts are completed either go to work by the day, or take other contracts in the same mine. It would be a harsh and unreasonable rule of construction in these cases to hold that the statute required separate liens to be filed for each contract to enable the laborer to secure



his wages. \* \* \* In the case at bar there was not in reality any new employment. The character of work was the same, viz., labor and work done on the mine. The amount to be paid varied with the peculiar character of the work at different times. We have carefully considered all the testimony, and are satisfied that there was not in the eye of the law any such stoppage or change of work as created independent jobs or contracts requiring the filing of separate liens. The miners worked under the direction of the foreman of the Occidental M. & M. Co., as well under the contracts as when working by the day. We think it was proper to include the work done under the contracts with the work done by the day, and to treat the employment as one continuous transaction for the purpose of ascertaining the time within which the liens should be filed. *Singerly v. Doerr*, 62 Pa. 12; *Fitch v. Baker*, 23 Conn. 567." We think the *Skyrme Case* is authority for holding that the lien claim is not void because of a joinder of a claim of lien under a contract of employment by the day with a contract of employment for a specified amount of work at an agreed price per foot, less certain deductions, the work being continuous and of the same character under both contracts. See, also, *Capron v. Strout*, 11 Nev. 304. To hold otherwise, would, as we have above stated, be a sacrifice of the substance for a mere matter of form. While the statute in force at the time the lien claim in question was filed provided a longer time in which an "original contractor" might file his claim of lien than that allowed other lien claimants, there is nothing in the statute prohibiting the joining in one lien claim of rights of lien as an original contractor and for labor as an employé, where the same party has both such rights of lien. Where, as in this case, the character of the work performed was the same and the work was continuous, fine distinctions ought not to be drawn as to the character of the two contracts, where, in substance, they were the same, when to do so would defeat a substantial right. The cases of *Malcomson v. Wappoo Mills* (C. C.) 85 Fed. 907, and *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310, cited by respondent, are not in point, for those cases considered statutes giving liens to laborers only, and not to contractors. Our statutes give rights of lien both to contractors and laborers, and the only distinction ever made was as to the time in which a lien might be filed, and this distinction was practically abolished by the amendment of 1911. Rev. Laws, § 2217.

[3] The contention that the lien should be held invalid because *Virgillo* should have been joined as a necessary party in the lien claim and in the suit based on the claim is without substantial merit. Under the allegations in the complaint, while the work was to be performed jointly, when the contract

was completed, one-half of the contract price per foot, after deducting all expenses, was to be paid to each severally. So far as the validity of the lien claim in question is concerned, we think a court would not be justified in holding the same invalid because the contract was joint in character. We do not wish to be understood as holding that in every joint contract it is unnecessary to join all the parties in a lien claim. There may be cases in which the substantial rights of a defendant would be injuriously affected by such a holding. Such, however, is not this case.

Courts are established to do justice between litigants. Statutory provisions regulating procedure are but aids to courts in the accomplishment of the purpose for which they were created. Forms of procedure are convenient and necessary, and justice can best be administered, in the great majority of cases, by requiring a substantial compliance with established rules, but courts should always bear in mind that procedure is but a means unto an end, and that end the doing of justice between parties litigant.

In the case at bar, *Ferro*, according to the complaint, performed labor of considerable value upon the property of defendant. The statute gave a right of lien for the purpose of securing to him payment for his services rendered, and made the property he had helped to develop liable for the amount of his claim. He has substantially complied with the provisions of law in filing his claim of lien. He is entitled to a liberal construction of the lien law. His right of lien should not be defeated by technicalities which do not affect the substantial rights of defendant.

Judgment reversed and cause remanded.

TALBOT, C. J., and McCARRAN, J., concur.

ACHENBACH v. KINCAID, County Assessor, et al.

(Supreme Court of Idaho. Feb. 25, 1914. Rehearing Denied May 5, 1914.)

#### 1. STATUTES (§ 225\*)—CONSTRUCTION.

Various statutory provisions in contemporaneous legislation affecting the same subject-matter should be so construed, if possible, that all may stand, and the will of the Legislature be carried into effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.\*]

#### 2. STATUTES (§ 141\*)—ENACTMENT—AMENDMENT.

Section 1644, Rev. Codes, as amended by act of March 7, 1911 (Laws 1911, p. 565), was not in existence as such at the time the Highway Commission Act (Laws 1913, p. 567) § 19, was passed, although said Highway Commission Act by its title purports to amend said section 1644, Rev. Codes; therefore it was not necessary to set forth said section, as amended, in the Highway Commission Act, in order to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—34

comply with section 18, art. 3, of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

**3. STATUTES (§ 121\*)—TITLE AND SUBJECT-MATTER—HIGHWAY COMMISSION ACT—EXEMPTION FROM TAXATION.**

Section 19 of the Highway Commission Act (Laws 1913, p. 567), providing for exemption from taxation of motor vehicles, does not come within the inhibition of section 18, art. 3, of the Constitution, as being legislation upon a subject different from that expressed in the title of the act, inasmuch as such exemption is germane to the general object and plan of the act, is manifestly connected with it, and made for the purpose of carrying the act into effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. § 121.\*]

**4. TAXATION (§ 25\*)—LEGISLATIVE POWER—EXTENT.**

In matters of taxation the Legislature possesses plenary power, except as such power may be limited or restricted by the Constitution. It is sufficient warrant for the exercise of this power in a given instance if there be found in the Constitution no prohibition against what the Legislature has attempted to do.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. § 25.\*]

**5. TAXATION (§ 193\*)—EXEMPTION OF MOTOR VEHICLES—VALIDITY OF STATUTE.**

The provisions of section 19 of the Highway Commission Act (Laws 1913, p. 567), exempting motor vehicles from taxation, are within the express grant of power contained in section 5, art. 7, of the Constitution, which provides that "the Legislature may allow such exemptions [from taxation] from time to time as shall seem necessary and just."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 309; Dec. Dig. § 193.\*]

**6. TAXATION (§ 211\*)—EXEMPTION OF MOTOR VEHICLES.**

*Held*, that it was the intention of the framers of the Constitution to confer upon the Legislature the sole right to determine what property should be exempt from taxation, and the Legislature having provided such exemption in the Highway Commission Act with reference to automobiles, motor cycles, and motor vehicles, such property was not subject to taxation in Ada county for the year 1913, and the county commissioners and assessor of said county properly refused to cause such property to be assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 347, 348, 364, 379; Dec. Dig. § 211.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Petition for writ of mandate by Henry Achenbach to compel William Kincaid, County Assessor, Ada County, Idaho, and the Board of County Commissioners to assess all motor vehicles that escaped taxation for the year 1913, under the Highway Commission Act. Demurrer to petition sustained, and petitioner appeals. Affirmed.

Harry S. Kessler, of Boise, for appellant. R. L. Givens, Harry Keyser, and E. P. Barnes, all of Boise, for respondents. J. H. Peterson, Atty. Gen., and E. G. Davis and Pence & Koelsch, all of Boise, amici curiæ.

BUDGE, District Judge. On July 22, 1913, appellant filed in the district court of the Third

judicial district within and for Ada county, Idaho, his petition for an alternative writ of mandate, to be directed: First, to William Howell, August Carlson, and William Briggs, constituting the board of county commissioners of said Ada county, commanding them to enforce and compel an assessment of all property within said Ada county at a fair cash value, and in particular all automobiles, motor cycles, and other motor vehicles that escaped taxation for the year 1913; and, second, to William Kincaid, county assessor of Ada county, requiring him to assess at a fair cash value and make due return on all taxable property of said county, particularly all automobiles, motor cycles, and other motor vehicles that escaped taxation for the year 1913. It is alleged in said petition that there were on the second Monday in January, 1913, and at the time of the filing of said petition, about 700 automobiles, motor cycles, and other motor vehicles within said Ada county, of the aggregate value of \$1,000,000; that the said assessor had failed, during the period fixed by law, or at all, to assess the same, and that said William Howell, August Carlson, and William Briggs, sitting as a board of equalization of said county for the year 1913, had failed, neglected, and refused to enforce and compel the assessment of said property by said assessor; that unless an assessment of said property for said year is made, appellant, who is a taxpayer of said county, will be compelled to pay an unjust and unfair proportion of taxes. It is further alleged in said petition that respondents justify their failure to assess said property, or cause the same to be assessed, by reason of the provisions of section 19, c. 179, Sess. Laws 1913, p. 568, but it is alleged that said section is null and void, for the reason that it contravenes sections 2, 4, and 5, art. 7, and sections 16-19, art. 3, of the Constitution of this state. A general demurrer was filed to the petition, and by the trial court sustained. Appellant thereupon declined to plead further. Judgment was entered, dismissing the action, and the case is here on appeal from said judgment.

The twelfth session of the Legislature passed an act which was approved March 13, 1913, of which the following is the title: "Creating a state highway commission, prescribing its duties and defining its powers; authorizing the employment by said state highway commission of convicts in the state penitentiary on state highways; requiring the registration with the secretary of said state highway commission of motor vehicles and of dealers in, and manufacturers of, motor vehicles, and requiring the payment of annual fees for such registration; creating a state highway fund and appropriating the moneys in such fund; prescribing rules and regulations for operating and running motor vehicles on the public highways of the state; defining the powers of counties, cities

and incorporated villages with reference to licensing and regulating motor vehicles; amending section 1644 of the Revised Codes of Idaho relating to property exempt from taxation so as to exempt duly registered motor vehicles from taxation; prescribing penalties for violations of the provisions of this act, and making disposition of fines and penalties collected from such violations; and repealing section 1061 of the Revised Codes of Idaho and all acts and parts of acts in conflict with this act."

Section 19 of said act (Sess. Laws 1913, pp. 567, 568), upon which respondents rely for their justification in refusing to assess or cause to be assessed for the year 1913 automobiles, motor cycles, and other motor vehicles, provides: "Sec. 19. The registration fees imposed by this act upon motor vehicles (other than the registration fees required of dealers and manufacturers), shall be in lieu of all taxes general or local, and all motor vehicles required by this act to be registered and for which an annual fee is to be paid to the secretary of the state highway commission, and which motor vehicles have been so registered and the required fee has been so paid, shall be exempt from taxation." It will be noticed from the reading of the title to said act that the following appears therein: "Amending section 1644 of the Revised Codes of Idaho relating to property exempt from taxation so as to exempt duly registered motor vehicles from taxation." There is no provision in said act other than said section 19, which provides for the exemption from taxation of such property, and it is first contended by appellant that said section is invalid for the reason that, inasmuch as by its title the act purports to amend section 1644, that section as amended should have been set forth in full as required by section 18, art. 8, of the Constitution, which provides: "No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length."

Section 1644, Rev. Codes, was amended by an act approved March 7, 1911 (Sess. Laws 1911, p. 565), and on March 13, 1913, the Legislature passed the present revenue law, which in terms not only repealed the provisions of said section as it was amended in 1911, but also re-enacted the same as a part of said revenue act of 1913. Sess. Laws 1913, pp. 173, 175, 176.

[1, 2, 3] It will thus be noticed that on the same day that section 1644, Rev. Codes, was eliminated by repeal, it was referred to in the title of the Highway Commission Act as being amended by said act; and it is the duty of the court, if it is possible to do so, to so construe these acts as to carry out the will of the Legislature, and, if possible, harmonize these statutory provisions so that both may stand.

Section 4 of the Revenue Act (Sess. Laws 1913, pp. 175, 176), and which, as before stat-

ed, is substantially a re-enactment of section 1644 as amended (Sess. Laws 1911, p. 565), specifies the classes of property which shall be exempt from taxation, and in this section automobiles, motor cycles, and other motor vehicles are not included, but by the Highway Commission Act, approved on the same day as the Revenue Act, provision is made for the exemption of this class of property. In providing for such exemption no reference is made to the new revenue act, in fact said section 19 makes no reference to any other legislation whatsoever.

It is true that in the title to the act of which it is a part, section 1644, Rev. Codes, is referred to, but there was really no such section in existence, because in the first place that section had been amended by the Laws of 1911, and, secondly, if such reference can be considered as applying to said section as amended in 1911, it was rendered useless by the repeal of said section on the very day that the said Highway Commission Act took effect. It cannot well be said that section 19 of the Highway Commission Act contravenes the Constitution in failing to set forth at full length section 1644, when said section was no longer in existence, and, technically speaking, had not been for about two years. If said section 19 is amendatory of any law, it by implication amends the new revenue act, not directly, because no reference is made to said act, but by implication, and when such is the case the constitutional provision has no application, for it has been declared that statutes which amend others by implication are not within the provisions of the Constitution requiring amendments to be set forth at length. Cooley's Constitutional Limitations (7th Ed.) p. 216, text and cases cited in note 5 thereof.

[3] It is next contended that said section 19 of House Bill 179 of the Session Laws of 1913, p. 558, contravenes the provisions of section 16, art. 8, of the Constitution, which section provides: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title." It is the theory of the appellant that, in view of the fact that section 19 provides for an exemption from taxation of a certain class of property, it is legislation upon a different subject, and one not connected with the subject of legislation covered by the remainder of the act. With this contention we cannot agree. By referring to the title of said act heretofore quoted at length, it is evident that the general object and purpose sought to be attained by the Legislature is the creation of a highway commission, which shall have power to lay out, build, construct, improve, alter, or discontinue the state highways, and otherwise have general supervision over the same for the

maintenance and care thereof, and to provide revenue for the accomplishment of said purposes. While it may be technically said that the provision of section 19 of said act, which exempts motor vehicles from taxation, does not properly have to do with the making of provision for the carrying out of the purposes of the act, it does have an indirect connection, because the property mentioned in said section by earlier provisions of the act is burdened with a certain license tax, and, in order to complete the plan which the Legislature had in mind in laying said burden upon said property, section 19 was necessary to prevent an injustice by relieving said property from what would otherwise have been a double burden.

The object and purpose of the said constitutional provision, as stated in *Pioneer Irrigation District v. Bradley*, 8 Idaho, 310-317, 68 Pac. 295, 101 Am. St. Rep. 201, was "to prohibit the practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection; to prohibit 'hodgepodge' or 'logrolling' legislation. *Cooley's Constitutional Limitations*, p. 172." In the case just cited, this court declares: "In *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788, the Supreme Court of Minnesota, in commenting on a section of the Constitution of that state which provides that 'no law shall embrace more than one subject, which shall be expressed in the title,' said: 'It [said provision] was not intended to embarrass legislation by making laws more restrictive in their scope and operation than is reasonably necessary in order to conserve the purpose for which the constitutional limitation was adopted; hence it must be liberally construed, and in a common sense way'—and quotes as follows from *State v. Cassiday*, 22 Minn. 324, 21 Am. Rep. 765: 'If the Legislature is fairly apprised of the general character of an enactment, by the subject expressed in the title, and all its provisions have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such a character, the requirement of the Constitution is complied with. It matters not that the act embraces technically more than one subject, one of which only is expressed in the title, so that they are not foreign and extraneous to each other, but blend together in the common purpose evidently sought to be accomplished by the law.' " In said case the court also quotes as follows from *Cooley's Constitutional Limitations* (8th Ed.) 172: "There is scarcely any subject of legislation that cannot be divided and subdivided into various heads, each of which might be made the basis of a separate act, and in which the connection between them may be made a matter of controversy. If the provisions of a statute all relate directly or indirectly to the

same subject, have a natural connection, and are not foreign to the subject expressed in the title, it is permissible to unite them in the same act. The objections should be grave and the conflict between the Constitution and statute palpable before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one subject."

We, therefore, conclude that the act is not in conflict with section 18, art. 3, of the Constitution, but on the contrary clearly comes within the principles announced in the decisions of this court construing said section, which are in accord with the great weight of authority in construing similar constitutional provisions.

[5] It is next contended that said act violates sections 2 and 5, art. 7, of the Constitution. Section 2 provides: "The Legislature shall provide such revenue as may be needed, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article herein otherwise provided. The Legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax: Provided, the Legislature may exempt a limited amount of improvements upon land, from taxation." Counsel contends that said section provides three methods for raising of revenue, to wit, property tax, license tax and per capita tax; that it cannot be contended that the registration fee for automobiles is a per capita tax, and that they are not license taxes, because such a tax can only be levied upon a business as contradistinguished from the ownership or possession or right of ownership of the property, as stated in *Re Gale*, 14 Idaho, 761-764, 95 Pac. 679, that therefore, of the three methods of taxation, this registration fee must be considered as a property tax, and, being fixed according to the horse power of the motor vehicles, rather than by valuation thereof, as required in said section of the Constitution, therefore the said law violates said provision. To this contention we reply that in this case we are not concerned with the determination of the validity of the state Highway Commission Act in providing for said registration fee. That question is not properly before us. We are here called upon only to determine the validity of section 19 of said act, which exempts motor vehicles from taxation. That portion of section 5, art. 7, which it is contended is violated by section 19 of the state Highway Commission Act, reads as follows: "All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just

valuation for taxation of all property, real and personal."

It is contended that the law providing for a registration fee for automobiles and other motor vehicles contravenes the foregoing constitutional provision, because such a tax violates the principles of uniformity, and counsel present quite a lengthy argument to sustain this contention. We must say, as we have heretofore said with reference to section 2, art. 7, that we are not concerned in this case with the question of the validity of the said Highway Commission Act in so far as it provides for the registration fee for motor vehicles. That question in our opinion is not properly before us in this proceeding.

The respondents justify in this case upon the ground that section 19 of said act exempts such property from taxation, and if the said section, providing for such exemption, is valid, the decision appealed from should be affirmed, irrespective of whether the registration fee provided for by other sections of the act is valid or invalid. To our minds section 19, exempting motor vehicles from taxation, is clearly within a subsequent clause of section 5, art. 7, of the Constitution, which provides, "The Legislature may allow such exemptions [from taxation] from time to time as shall seem necessary and just, \* \* \*" and if we are correct in this view, the defense of the respondents is complete, irrespective of whether the registration fee which other provisions of the act attempt to fasten upon motor vehicles is constitutional or otherwise. When the clause just quoted, relating to the power of the Legislature to make exemptions from taxation, was under consideration by the constitutional convention, it was thoroughly discussed by some of the ablest lawyers of the state, and by the great weight of opinion it was considered advisable to confer upon the Legislature the full and complete discretionary power to exempt from taxation such property as it might seem to the Legislature should, under all the conditions and circumstances, be relieved from the tax burden.

In volume 2 of the Idaho Constitution convention proceedings commencing on page 1703, there appears a report of the debate upon said proviso. It appears that numerous amendments were offered, providing for the exemption of household goods, tools, implements of industry, etc., and finally Mr. Batten, a member from Alturas county, declared that: "There should be some provision (in substance and effect) so that all property should be taxed, except such as the Legislature might deem it expedient to exempt. When this suggestion was made, Mr. Ainslie declared: "If that is done, sir, there is no restriction upon the Legislature as to the amount of property they can exempt from taxation." Volume 2, p. 1722. And again he declared: "It leaves it altogether in the hands of the Legislature. There will be no

constitutional restrictions upon them whatever." Volume 2, p. 1725. Mr. Hasbrouck stated: "I am in favor of leaving the whole matter to the Legislature from time to time as these matters shall arise." Volume 2, p. 1741. And Mr. Gray declared: "As stated before, I have confidence in the Legislature, and I believe they will be as competent to handle this question as this body is." Volume 2, p. 1758. Mr. John T. Morgan, who was later Chief Justice of this court, and who was the author of the said clause of the Constitution, at page 1761 says: "We have a very good law upon the statute book now, which exempts certain classes of property, among others mining claims. This amendment I have submitted leaves this matter entirely to the Legislature. I hope we will be satisfied to leave it to the Legislature, where I think it belongs." It is very clear, from these statements and numerous others which might be quoted, that the constitutional convention intended that the Legislature should have the sole right to determine what property should be exempt from taxation, and, having provided for such an exemption so far as automobiles, motor cycles, and motor vehicles are concerned, this court must hold that such property was not subject to taxation in Ada county for the year 1913, and that the county commissioners and assessor of said county were justified in refusing to assess the same, or cause the same to be assessed.

[4] As to the question of taxation: The Legislature possesses plenary power, except as such power may be limited or restricted by the Constitution. It is not necessary that the Constitution shall contain a grant of power to the Legislature to deal with the question of taxation. It is sufficient proof of its power if there be found in the Constitution no prohibition against what the Legislature has attempted to do.

As stated by the Supreme Court of Oregon in the case of the State v. Cochran, 55 Or. 157, 105 Pac. 884: "A state Constitution, unlike a federal Constitution, is one of limitation and not a grant of powers, and any act adopted by the Legislature not prohibited by the state Constitution is valid, and the inhibition must expressly or impliedly be made to appear beyond a reasonable doubt." See *St. Joe Improvement Co. v. Laumierster*, 19 Idaho, 66, 112 Pac. 683; *Walter v. City of Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994; *People ex rel. Simon v. Bradley*, 207 N. Y. 592, 101 N. E. 766.

In passing on the constitutionality of a statute, every reasonable doubt as to its validity will be resolved in favor of sustaining the statute. *People v. Rose*, 203 Ill. 46, 67 N. E. 746; *Board of Trustees of House of Reform v. City of Lexington*, 112 Ky. 171, 65 S. W. 350; *Commonwealth v. Barney*, 115 Ky. 475, 74 S. W. 181; *State v. Thompson*, 144 Mo. 314, 46 S. W. 191; *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508.

An act of the Legislature will not be declared unconstitutional unless in plain violation of some provision of the Constitution. *Brady v. Mattern*, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291.

The court in construing a statute must adopt such construction as will sustain the constitutionality of the statute where that can be done without doing violence to the language thereof. *State v. Barrett*, 172 Ind. 169, 87 N. E. 7. The courts must, as far as possible, uphold and give effect to all statutes enacted by the Legislature. *Commonwealth v. International Harvester Company of America*, 131 Ky. 768, 115 S. W. 755.

We have no hesitancy in saying that we are not thoroughly converted to the advisability of exempting any particular class of property from taxation, but, on the contrary, firmly believe that all property of every kind and description should bear its just proportion of taxation, and uniformity and equalization of taxation are just as essential as taxation. However, we are not disposed to declare the law to be other than we find it. The Legislature is answerable to the people, and if unfortunately through legislative enactment certain property has been exempted from taxation, the people will correct the error through the Legislature, where alone the power exists.

Judgment is affirmed. Costs awarded to respondents.

SULLIVAN, J., concura.

AILSHIE, C. J. (concurring specially). I agree that the Legislature had the power under the Constitution to exempt automobiles from taxation if they saw fit to do so. The language of the Constitution itself leaves the matter in doubt, but the debates had in the constitutional convention over the adoption of section 5, art. 7, make it very clear that it was the intention of the convention to confer unlimited power of exemption on the Legislature. I feel, however, that the determination of the foregoing question does not dispose of this case. It is set up in the complaint, and constitutes the second assignment of error in the briefs, that this act of the Legislature violates sections 2 and 5, art. 7, of the Constitution, in that it attempts to raise revenue by taxation according to the *horse power* of automobiles instead of according to the *valuation* thereof. *The act is a revenue act, and not a police regulation.* It is clear to me that the Legislature would never have exempted this property from taxation by *valuation*, if it had not believed it could tax it by the *horse power* as provided for in the Highway Act. So if the act is unconstitutional for failure to tax automobiles by valuation, the exemption section (19) would fail also, and the property would be taxable as any other property under the general revenue laws of the state.

I feel that it is the duty of this court to pass upon that phase of this question as it is squarely presented and involved in the present case.

I concur in the construction placed on sections 2 and 5 of article 7 in so far as the opinion considers them, but I am satisfied that we have not done our whole duty in the case when we drop it there.

#### ALLEN v. KANE et al. (No. 11,483.)

(Supreme Court of Washington. April 27, 1914.)

##### 1. COMMON LAW (§ 7\*)—ENGLISH STATUTES.

St. 13 Eliz. c. 5, declaring that conveyances with intent to defraud creditors shall be void, is a part of the common law of the state.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 7; Dec. Dig. § 7.\*]

##### 2. FRAUDULENT CONVEYANCES (§ 206\*)—"CREDITOR"—WHO IS.

The term "creditor," within the common-law rule that conveyances with intent to defraud creditors shall be void, includes not merely the holder of a fixed and certain present debt, but every one having a right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing out of contract or tort, and includes one entitled to damages for breach of contract to convey real estate, notwithstanding the abandonment of his action for specific performance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 629, 630; Dec. Dig. § 206.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1718-1726; vol. 8, pp. 7622, 7623.]

##### 3. FRAUDULENT CONVEYANCES (§ 241\*)—SUIT TO SET ASIDE—JUDGMENT CREDITORS.

A creditor cannot proceed in equity to subject property conveyed by the debtor to defraud creditors, until his claim has been reduced to judgment, and execution issued thereon.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696-726; Dec. Dig. § 241.\*]

##### 4. FRAUDULENT CONVEYANCES (§ 206\*)—FRAUD OF GRANTOR—ACTS CONSTITUTING.

A vendor who breaches his contract to convey to the purchaser, and who thereafter immediately conveys to a third person all his property, thereby preventing the purchaser from obtaining relief for the breach, is guilty of fraud, and the conveyance is fraudulent as against the purchaser.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 629, 630; Dec. Dig. § 206.\*]

##### 5. FRAUD (§§ 50, 58\*)—EVIDENCE—PRESUMPTIONS.

Fraud is never presumed, and the party alleging it must prove it by clear and convincing evidence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47, 55-59; Dec. Dig. §§ 50, 58.\*]

##### 6. FRAUDULENT CONVEYANCES (§ 298\*)—INTENT OF GRANTOR—EVIDENCE.

The fraudulent intent of a grantor charged with making a conveyance to defraud his creditors may be proved by circumstantial evidence, and the fact that a grantor, on eve of a suit against him, transfers all of his property

to another is persuasive evidence of a fraudulent intent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 892-895; Dec. Dig. § 298.\*]

**7. FRAUDULENT CONVEYANCES (§ 301\*) — KNOWLEDGE OF GRANTEE—EVIDENCE.**

Evidence *held* to show that a grantee obtained knowledge of his grantor's intent to defraud creditors before he had paid the full consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

**8. FRAUDULENT CONVEYANCES (§ 160\*) — FRAUD OF GRANTEE—LIABILITY.**

Where a conveyance was made to an innocent grantee with intent by the grantor to defraud creditors, and the full price was not paid, the land must be held subject to the payment of prior debts of the grantor, to the extent of any payments made on the price after notice to the grantee of the fraudulent purpose, but this rule does not apply where payment was made in notes, which were actually negotiated by the grantor so as to render the grantee liable for their payment.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 512-514; Dec. Dig. § 160.\*]

**9. FRAUDULENT CONVEYANCES (§ 156\*) — INSOLVENT DEBTOR—PREFERENCES.**

Though an insolvent debtor may honestly prefer a creditor, though it exhausts the whole of his property, yet there can be no legal preference where the purpose of the debtor was fraudulent, and the preferred creditor had knowledge thereof.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 496, 496; Dec. Dig. § 156.\*]

**10. FRAUDULENT CONVEYANCES (§ 160\*) — INSOLVENT DEBTOR—PREFERENCES.**

Where a creditor, without notice of his debtor's insolvency and of his intention to prefer the creditor, purchased all the property of the debtor, but, before full payment of the price, received notice of the debtor's intention to defraud other creditors and of an appropriation by the debtor of a part of the price, the conveyance was void as against the other creditors to the amount of any payments made after notice.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 512-514; Dec. Dig. § 160.\*]

**11. FRAUDULENT CONVEYANCES (§ 160\*) — INSOLVENT DEBTOR—PREFERENCES.**

Though a creditor, to secure a preference, may pay a not unreasonable excess above the debt on the price, for a conveyance made by the debtor, the creditor will not be protected after knowledge of the grantor's fraudulent design to defraud other creditors, unless he can show that the preference could not be secured without the additional payment.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 512-514; Dec. Dig. § 160.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Laura Allen against Ida M. Kane and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Jay C. Allen, of Seattle, for appellant. Grover E. Desmond and John E. Ryan, both of Seattle, for respondents.

ELLIS, J. In this action the plaintiff sought to set aside, as in fraud of her rights, a transfer of property from the defendants Kane to the defendant Atwood, and to subject the property to the lien of a judgment against the defendants Kane in favor of the plaintiff. The property conveyed by the Kanes to Atwood is described as lot 6, block 44, Pontius' Second addition to Seattle, lot 4, block 2, McNaught's addition to Seattle, and lot 16, block 406, Seattle tidelands. This, it is claimed, was the separate property of Mrs. Kane. On November 5, 1910, the defendants Kane entered into a contract with the plaintiff to sell to her the tideland property. The plaintiff gave her check for \$1,000 as earnest money. Shortly after making this contract, the defendants Kane, becoming dissatisfied, sought to be released from the contract. This was refused. The plaintiff's husband, as her attorney, examined the abstract of title to the tidelands, and, finding certain liens against them which the plaintiff had not agreed to assume, wrote the defendants Kane a letter, demanding that these liens be removed. This letter was received by the defendant Mrs. Kane on November 22, 1910. She immediately wrote a letter to the plaintiff, refusing to carry out the contract, canceled her duplicate of the contract, and placed this letter, the canceled duplicate, and the plaintiff's check, given in earnest, upon the desk of the plaintiff's attorney; he being absent. This was about 3 o'clock in the afternoon. Late that same afternoon the defendants Kane conveyed the tideland property, together with the other property above described, which, as the evidence fairly shows, was all of the property owned by the defendants Kane, to the defendant Atwood. The evidence shows that the consideration for this conveyance was the cancellation of a note held by the defendant Atwood against the defendants Kane upon which there was due about \$2,490, the payment of \$200 in money, and an agreement on Atwood's part to convey to the defendants Kane six lots in Pettit's University addition to Seattle, and 40 acres of land in Skagit county. The property conveyed by the Kanes to Atwood was valued at the time at about \$76,000. It was subject to incumbrances amounting to \$56,000. Atwood took the property subject to these. The property which he was to convey to the Kanes was then valued by the parties at \$17,500. At the same time, Atwood entered into a contract with the defendants Kane, giving them the exclusive right for one year to sell all of the property which they conveyed to him at a minimum price of \$76,000; they to receive any amount realized over that sum as their commission for such sale. Meanwhile the Kanes were to retain the possession and management of the property conveyed to Atwood. The deed from the Kanes to Atwood was recorded early on the morning of No-

vember 23d, but neither the contract creating the Kanes exclusive agents to sell the property, nor the agreement of Atwood to convey the six Seattle lots and the Skagit county acreage to the defendants Kane, was ever recorded. The plaintiff placed the contract which she held for the purchase of the tide-lands on record also early on the morning of November 23d. On November 25th she brought suit against the Kanes and Atwood for specific performance of this contract. Subsequently she dismissed the action as to the defendant Atwood, recast her complaint to one sounding in damages, and prosecuted the suit against the defendants Kane, recovering a judgment for damages in the sum of \$2,130.28 and costs. Thereafter execution was issued upon this judgment, and levied upon all of the property which the Kanes had conveyed to Atwood. In November, 1911, while this first suit was pending, Atwood entered into a modified agreement with the defendants Kane, canceling his agreement to convey to them his Seattle lots and the Skagit county acreage, in consideration of his payment of \$2,500. He then paid them \$250 in money and gave his nonnegotiable note for \$2,250, which note he has since paid, part of it subsequent to the levy of the plaintiff's execution on the land conveyed to Atwood. In May, 1912, the present action was brought to subject that property to the lien of the judgment. A trial was had to the court without a jury. The trial court made no formal findings of fact or conclusions of law, but in his decision on the merits, which is found in the record, he held in substance that the plaintiff was not a creditor of the defendants Kane at the time of the transfer to Atwood; that the evidence was not sufficient to show that Atwood had notice of any fraudulent design on the part of the defendants Kane, if they had such design, nor sufficient to show that Atwood was to hold the property in trust for the Kanes. The court held that Atwood therefore took the property free from any and all claims of the plaintiff. Judgment was entered, dismissing the action with costs. The plaintiff appealed.

The record presents three questions, the solution of which must determine the case: (1) Was the respondent Ida M. Kane a debtor of the appellant within the meaning of the law relating to fraudulent conveyances? (2) Was the conveyance from the respondents Kane to the respondent Atwood a fraudulent conveyance? (3) Assuming that it was, was the respondent Atwood a participant in that fraud?

[1] 1. The respondents contend, and the trial court held, that there was no debt existing from Mrs. Kane to the appellant at the time of the sale from Mrs. Kane to the respondent Atwood, so that, if Atwood held the title for himself and not in trust for the Kanes, he held it free from the judgment against Mrs. Kane rendered upon the appel-

lant's claim. If this position be found sound, it of course ends the discussion. The statute of 13 Eliz. c. 5, which is the prototype of all statutes touching fraudulent conveyances, provides in effect that all conveyances made with the intent to hinder, delay, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, etc., should be deemed and taken as void and of no effect. This statute is a part of the common law of this state. *Wagner v. Law*, 3 Wash. 500, 502, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784, 28 Am. St. Rep. 56; *Bates v. Drake*, 28 Wash. 447, 455, 68 Pac. 961.

[2] According to the decided weight of authority, the term "creditor," as used in this connection, embraces others than those who are strictly and technically creditors in the narrow sense of that term. *Bump, Fraudulent Conveyances* (4th Ed.) § 502. It includes not merely the holder of a fixed and certain present debt, but every one having the right to require the fulfillment of any legal obligation, contract, or guaranty, or a legal right to damages capable of judicial enforcement, whether growing out of contract or tort.

"The character of the claim, if it is just and lawful, is immaterial. It need not be due, for, although the holder cannot maintain an action until it is due, he nevertheless has an interest in the property as a fund out of which the demand ought to be paid. \* \* \* A contingent claim is as fully protected as one that is absolute. A liability as surety is within the statute as much as a liability as principal. The statute embraces all pecuniary damages incurred by reason of the obligation of a contract, whether of an ascertained amount or only sounding in damages, and whether actually asserted or only demandable." *Bump, Fraudulent Conveyances* (4th Ed.) § 503.

"In a multitude of cases it has been repeatedly adjudged that a party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors. \* \* \* The date when the agreement or obligation came into existence governs in determining the complaining or attacking creditor's rights. As elsewhere shown, a person whose claim arises from a tort, such as libel or slander, is a creditor. The date the tort or injury was committed governs in determining the creditor's status, where the conveyance was made in pursuance of a fraudulent design to defeat the judgment which might be recovered upon it." *Wait, Fraudulent Conveyances* (3d Ed.) § 90.

"The term 'creditors,' as employed by the statute, has been construed liberally, and not in a narrow, strict, or technical sense. Whoever has a right, claim, or demand, founded on contract, whether contingent or absolute, for the performance of a duty, or for the



payment of damages if the contract should not be fully performed, has been regarded as a creditor, within the meaning of the statute, against whom a voluntary conveyance will not be supported, though no breach of the contract, furnishing a cause of action, may occur until after the execution of the conveyance. *Bibb v. Freeman*, 59 Ala. 615; *Foot v. Cobb*, 18 Ala. 585; *Gannard v. Enslava*, 20 Ala. 732." *Anderson v. Anderson*, 64 Ala. 403, 405. See, also, *Thomson v. Crane* (C. C.) 73 Fed. 327; *Hatfield v. Merod*, 82 Ill. 118; *Fearn v. Ward*, 80 Ala. 555, 2 South. 114; *Sargent v. Saimond*, 27 Me. 539; *Loughbridge & Bogan v. Bowland*, 52 Miss. 546; *Keel v. Larkin*, 72 Ala. 498.

[3] Some confusion seems to have arisen in counsel's mind because of the fact that, though the law of fraudulent conveyances makes the fraudulent transfer void as to all creditors thus broadly defined, still it does not give to such creditors any new process or procedure for the enforcement of their claims. Such creditors must still proceed to reduce their claims to judgment and issue execution thereon before they can proceed in equity to subject the property conveyed in fraud of their rights to the payment of their claims. *Bump, Fraudulent Conveyances* (4th Ed.) § 535. This, however, is a very different thing from assuming, as counsel assumes, that a creditor is not a creditor until his credit has been reduced to a judgment and a specific lien attached to specific property. The transfer is, of course, valid until it is attacked in a legal way, and it can only be attacked after the creditor's claim is reduced to judgment. The creditor, though a creditor before such judgment, must proceed to appropriate the property which he seeks to subject, by a due course of law. After his claim has been reduced to judgment, he can subject to its payment property which has been conveyed in prejudice of his pre-existing right as a creditor on which the judgment is founded. *Lillard v. McGee*, 4 Bibb (Ky.) 165. This is not only the general rule, but it is the established law of this state, clearly recognized by our decisions. Though we have held that a creditor cannot, prior to reducing his claim to judgment, enjoin the transfer of the debtor's property on the suspicion that a threatened transfer may be tainted with a fraudulent intent, and cannot subject the debtor's property to the payment of his claims until he has reduced his claim to judgment (*O'Day v. Anbaum*, 47 Wash. 685, 92 Pac. 421, 15 L. R. A. [N. S.] 484), we have also held that one taking a voluntary conveyance, though, at the time of the conveyance, the claim of the creditor had not yet been reduced to judgment, cannot, as against such claim, be considered an innocent purchaser, and that thereafter, when the claim of the creditor shall have been reduced to judgment, the creditor may assert it against one taking a voluntary conveyance of the property. *Bates*

*v. Drake*, 28 Wash. 447, 68 Pac. 961; *Sailaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, 47 L. R. A. (N. S.) 320. Obviously the same rule would apply to a purchaser for value with notice.

In *Bates v. Drake*, the facts were, in all respects, closely analogous to those presented by the record here, save that the conveyance sought to be avoided was a voluntary conveyance, whereas the conveyance here was for value, but it is claimed the purchaser was affected with notice that the conveyance was made for the purpose of defrauding the creditor. In the case cited, the creditor's claim was a mere right to damages at the time of the conveyance, but had been reduced to judgment and an execution levied before it was sought to set aside the conveyance. In this phase of the case, it is an exact parallel with the case in hand. We there said: "The statute of 13 Eliz. c. 5, which is a part of the common law of this state (*Wagner v. Law*, 3 Wash. 500-502, 28 Pac. 1109 [29 Pac. 927] 15 L. R. A. 784, 28 Am. St. Rep. 56), provided that all conveyances made with the intent to hinder, delay, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., should be deemed and taken as void and of none effect. In those states where a similar statute is in force, or which recognize this statute as being a part of their common law, it is the almost uniform holding that a person having a claim against another for damages sounding in tort is a creditor of that other within the meaning of the rule, and this holding, we think, is supported by the better reason."

There can be no question that, both upon sound reason and sound authority, the appellant here was a creditor of the respondent Kane at the time of the conveyance to the respondent Atwood. The abandonment of her action for specific performance in no way affected her rights as a creditor.

[4-6] 2. It is seriously urged that the respondent Kane was not guilty of fraud as against the appellant in making the transfer of her property to the respondent Atwood. It is argued that the owner of property, who contracts to convey to a designated vendee, may, notwithstanding that fact, sell the same property to another without being guilty of fraud. This is true only in a limited sense. While a breach of contract is not technically designated as a fraud, it is nevertheless true that every willful breach of a contract has in it an element of fraud. At any rate, the breach of contract assumed would create the vendee in the first supposed contract of sale a creditor of the vendor, within the meaning of the law relating to fraudulent conveyances. If, thereafter, the vendor, by conveying to another not only the land contracted to the vendee, but also all of his other property, thus makes himself execution proof, he defrauds the first vendee, and the conveyance clearly falls within the law relating to fraud-

ulent conveyances. It is true that fraud is never presumed and, where alleged, must be proved by clear and convincing evidence. It is sometimes said that fraud is easily charged and hard to disprove. This is true, but it is also true that fraud is easily committed and hard to prove. A fraudulent intent is seldom confessed or blazoned upon a banner. In most cases it can only be proved by circumstantial evidence, and there is no circumstance more persuasive and more often recognized by the courts as convincing than the fact that a debtor, on the eve of a suit against him, transfers all of his property to another, thus placing it beyond the reach of execution. The respondent Kane, after having repeatedly sought a release from her contract with the appellant, wrote the appellant a letter repudiating the contract in the afternoon of November 22, 1910, and, before sunset of the same day, transferred not only the property covered by the contract, but all other property of which she was possessed, to the respondent Atwood, giving him an absolute conveyance of the property, and taking back a contract giving her the exclusive agency to sell and control the property for one year. She also took, as part payment, a contract for the conveyance of other property from the respondent Atwood, but withheld that contract from the records, thus insuring that property against execution upon any judgment which might be rendered in the threatened suit of the appellant for breach of the contract which she had repudiated. While it is true that some feeble effort was made by the respondent to prove that, at the time, she and her husband owned other property not conveyed to Atwood, an examination of the evidence convinces us that, at the time, they had, and she knew that she had, no other property in which there was a living equity. We are convinced that the respondents Kane were mainly, if not wholly, moved by a fraudulent motive in their hasty transfer of all of their property to the defendant Atwood.

[7] 3. Was the respondent Atwood a participant in this fraudulent design? Upon this point the evidence, though strongly persuasive, is not clear and convincing. Atwood testified positively that, at the time he received the conveyance, he not only did not know that the respondents Kane had contracted to convey the tidelands to the appellant, but that he then did not even know that they were acquainted with the appellant or her husband. While the circumstances surrounding the transaction and the terms upon which the conveyance to the respondent Atwood was made raise a strong suspicion that it was originally understood that he should hold the lands in secret trust for the respondents Kane, both he and the respondents Kane deny that such was the intention. We shall not further discuss this phase of the evidence. Let it suffice to say that it is not altogether sufficient to con-

vince us that the respondent Atwood, at the time of this conveyance, knew of his grantors' fraudulent purpose. His own testimony, however, makes it plain that, after he had knowledge which ought to have convinced any reasonable man of the fraudulent purpose of the conveyance to him, he entered into the new agreement whereby he paid to the Kanes \$2,500 in lieu of a conveyance to them of the Seattle lots and Skagit county acreage which he had agreed to convey as a part of the consideration of his original purchase. This modified contract was made with full knowledge of appellant's claim. Some of the payments thereunder were made after the appellant's claim had been reduced to judgment and an execution thereon levied upon the property here in question. In the light of preceding developments of which he was cognizant, it taxes credulity beyond reasonable limit to suppose that he did not then know of the fraudulent purpose of the Kanes. Any reasonable man would then have known that one of the reasons of the respondents Kane for accepting this small payment in lieu of a conveyance of the real estate which he had agreed to convey at a valuation of \$17,500, and which his testimony shows was worth at least \$8,500, was to avoid taking real estate which could be subjected to their debts. He was not justified in assuming that the money he then paid would be applied by the Kanes upon the appellant's judgment.

[8] It is a rule certainly supported by sound equitable considerations and sustained by much respectable authority that where a sale and conveyance is made to an innocent purchaser, but with fraudulent design on the grantor's part, and the full purchase price be not paid at the time, the land, notwithstanding the original innocence of the purchaser, will be subjected to the payment of antecedent debts to the extent of any payments made upon the purchase price after notice to the purchaser of the grantor's covinous purpose. "The facts, as found by the court, strip the defendant, Fulton, of all right to be held as an innocent purchaser without notice. The claim of the plaintiffs does not seek for more than half the land, or half the purchase money. Fulton has not yet paid more than half the purchase money, so giving to him the most favorable position that has yet been allowed by any of the courts of our sister states, and he cannot be considered an innocent purchaser without notice in this case. 'It is well settled, moreover, that, to entitle a purchaser to protection, the consideration of the purchase must not only be valuable but must have been wholly or partially paid or executed. *Vattier v. Hinde*, 7 Pet. 252 [8 L. Ed. 675]; *Doswell v. Buchanan's Ex'r*, 8 Leigh [Va.] 365 [23 Am. Dec. 280]; *Dillard v. Crocker*, Speers Eq. [S. C.] 20; *Bush v. Bush*, 3 Stob. Eq. 131 [51 Am. Dec. 675]; *Kyles v. Tait's Adm'r*, 6 Grat. [Va.] 44; *Cole v. Scot*, 2 Wash. [Va.] 141." 2 *White's Lead. Cas. in Equity*. It is

held both in this country and in England that actual payment is in general necessary to the character of a purchaser for valuable consideration; and that giving security or executing an obligation for payment will not be sufficient." *Paul v. Fulton*, 25 Mo. 157, 163. *Arnholz v. Hartwig*, 73 Mo. 485; *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200; *Massie v. Enyart*, 32 Ark. 251; *Parkinson v. Hanna*, 7 Blackf. (Ind.) 400; *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221; *Bump, Fraudulent Conveyances* (4th Ed.) § 184, p. 212. There may be authorities sustaining a contrary rule, but none have been cited. In any event, the rule which we have announced is the only equitable rule. It does not deprive an innocent purchaser of the benefit of his bargain, nor does it permit him consciously to aid the vendor in his fraudulent purpose. It is the only rule which would prevent the purchaser from compounding his agreement to pay in land by a payment of a less sum in money, thus speculating upon the vendor's fraud.

For obvious reasons, an exception to the rule which we have announced exists where payment has been made in notes of the purchaser, negotiable in their character and actually negotiated, so as to render him liable to pay them at all events. *Paul v. Fulton*, 25 Mo. 157, 164. The facts here do not invoke that exception. *Atwood's* note was neither negotiable nor negotiated.

[9] The respondent *Atwood* contends that he had the right to take a conveyance of all of this property because he, as a creditor to the extent of \$2,490, due upon the note which he held against the respondents *Kane*, had the right to secure a preference, and the respondents *Kane* had the right to give him the preference. It is true that in this state an insolvent debtor may prefer one or more of his creditors, even if it exhausts the whole of his property to do so. *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35. *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; *Troy v. Morse*, 22 Wash. 280, 60 Pac. 648; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347; *Holt Mfg. Co. v. Bennington*, 73 Wash. 467, 132 Pac. 30. But we have never held that this can be done where it appears that the purpose of the insolvent debtor was fraudulent and the preferred creditor had knowledge of that purpose. As we said in *National Surety Co. v. Udd*, supra: "But it must be done in good faith. The debt paid must be real, the payment actual, the consideration adequate. It must not be designed to prevent other creditors ever being paid. The preferred debt must not be used as a colorable consideration to protect the debtor's property from other claims or to delay or hinder their enforcement."

[10] Though the mere fact of notice of the debtor's insolvency and of his intention to

prefer, and that it may actually defeat the collection of other debts or defeat an execution, will not injuriously affect the preferred creditor, yet if, coupled with notice of these intentions, the purchaser, at any time before the payment of the purchase price or any part of it, receives notice that the vendor's purpose was not merely to give him a preference, but in addition thereto, to place his property out of the reach of other creditors, appropriating any part of the purchase price to his own use, such notice will injuriously affect the preferred creditor and render the conveyance to him void pro tanto.

"A transfer, however, may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts. While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid, or to use the debt of the preferred creditor as a colorable consideration to screen and protect his property from their claims, or to delay, hinder, and embarrass them in the enforcement of their demands." *Bump, Fraudulent Conveyances*, § 172.

"The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors." *Bump, Fraudulent Conveyances*, § 174.

[11] Though a creditor, in order to secure a preference, may pay a not unreasonable excess above the debt on the purchase price (*National Surety Co. v. Udd*, supra), he will not be protected in so doing, after knowledge of the grantor's fraudulent design, nor, in any event, unless he can show that the preference could not be secured without the additional payment. In the case before us, even granting that the respondent *Atwood* merely sought a preference, the evidence charges him with notice of the fraudulent design of the respondents *Kane* before he made any additional payment, save the \$200, and there is no evidence whatever that he could not have secured the preference without purchasing all of their property. He thus wholly fails to bring himself within any equitable principle which would protect him in paying anything over and above his credit and the \$200, in order to secure a preference.

Upon the whole record, we find that the respondents *Kane* were debtors of the appellant, within the meaning of the law relating to fraudulent conveyances, from the time of their breach of the contract with the plain-

tiff; that the respondents Kane conveyed all of their property to the respondent Atwood with intent to defeat this claim; that the respondent Atwood had notice of this fraudulent design before paying the full purchase price; and that he therefore holds this property subject to an equitable lien in favor of the appellant for the amount of her judgment, which lien is in turn subject to Atwood's first payment of \$2,700 on his purchase.

The judgment is reversed, and the cause is remanded, with direction to enter a decree in accordance with this opinion.

CROW, C. J., and CHADWICK, MAIN, and GOSM, JJ., concur.

**STATE ex rel. LINDSEY v. DERBYSHIRE,**  
Clerk of Superior Court. (No. 11,762.)

(Supreme Court of Washington. April 25, 1914.)

**1. STATUTES (§ 124\*)—SUBJECTS AND TITLES.**

The title of Laws 1913, c. 126, entitled "An act providing for the appointment of official court reporters, \* \* \* prescribing their duties, \* \* \* and providing for their compensation and the manner of their appointment," is sufficient to embrace section 4 thereof, requiring the parties to a civil action to pay the sum of \$1 as stenographers' costs.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184-186; Dec. Dig. § 124.\*]

**2. STATUTES (§ 109\*)—SUBJECTS AND TITLES.**

The mention of a particular subject in the title of a statute is notice of all things germane to that subject in the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. § 109.\*]

**3. STATUTES (§ 124\*)—SUBJECTS AND TITLES.**

Laws 1913, c. 126, entitled "An act providing for the appointment of official court reporters, prescribing their duties, oath of office, and qualifications," would embrace, as germane to the title, sections 6 and 7, permitting the reporter's transcription of the testimony to be read in evidence upon proof that the witnesses are dead, etc., and providing for the certification of the transcript of the reporter's notes after he has ceased to be such.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184-186; Dec. Dig. § 124.\*]

**4. APPEAL AND ERROR (§ 843\*)—REVIEW—QUESTIONS CONSIDERED.**

Where defendant clerk of court, who is sought to be compelled by writ of mandate to file a complaint, refused to file it solely on the ground that relator failed to pay the one dollar stenographers' costs required by Laws 1913, c. 126, § 4, and not because of any of the provisions of sections 6 and 7, relating to the use of the stenographers' transcript, the validity of sections 6 and 7 need not be determined on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

**5. STATUTES (§ 64\*)—CONSTITUTIONALITY—INVALID IN PART.**

Laws 1913, c. 126, § 1, requires each superior court judge, in counties or judicial districts having a population of over 30,000, to

appoint an official court stenographer. Section 2 requires the stenographer to take shorthand notes of the testimony and file them with the clerk. Section 3 provides per diem compensation. Section 4 provides that in each civil action \$1 shall be paid to the clerk by plaintiff upon filing his complaint, and the same sum paid by defendant upon appearing, which sums shall be taxed as costs and known as stenographers' costs, and it shall be paid by the clerk into the county treasury. Section 5 requires the reporter to make a transcript of the proceedings, to be filed with the clerk, and prescribes the cost of such transcripts, and further provides that, when an accused shall show inability to pay for a transcript, the judge may order one to be made by the reporter for which he shall be paid the amount prescribed. Section 6 makes the report prima facie a correct statement of the testimony which may be read in evidence, upon proof that the witness is dead, etc. Section 7 provides for the certification of the transcript by the reporter after ceasing to be such. Section 8 provides for the appointment of a reporter pro tem. Section 9 makes the reporter the amanuensis to the court in certain cases except in first-class counties. Section 10 gives the use of the files to the reporter on giving the clerk a receipt therefor. Section 11 provides for the furnishing of supplies by the county for reporting criminal cases. Section 12 provides for substitute reporters, and section 13 provides "this act shall not apply to any county having a population of 200,000 or over." Held, that any unconstitutionality in sections 6 and 7 would not make the remainder of the act unconstitutional; those provisions being severable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

**6. TAXATION (§ 40\*)—UNIFORMITY.**

The act is not a revenue act, and hence does not violate Const. art. 7, §§ 1, 2, and 9, guaranteeing a uniform and equal rate of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68-89; Dec. Dig. § 40.\*]

**7. CONSTITUTIONAL LAW (§ 205\*)—SPECIAL PRIVILEGES.**

Eliminating the last section thereof, the act does not violate Const. art. 2, § 28, prohibiting special laws granting corporate powers or privileges, or article 1, § 12, prohibiting the granting of privileges to a particular class of corporations, etc., other than municipal, which are not equally granted to all corporations, etc.; the classification of the act for the purpose of appointing court stenographers being by judicial districts according to population and not by counties as such.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

**8. CONSTITUTIONAL LAW (§ 208\*)—CLASS LEGISLATION.**

A statute is not class legislation if it applies alike to all persons similarly situated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\*]

**9. STATUTES (§ 94\*)—GENERAL AND SPECIAL LAWS—LAWS AFFECTING COUNTY GOVERNMENT—VALIDITY.**

The act does not violate Const. art. 11, §§ 4 and 5, guaranteeing uniform laws for county government and township organization and for the election of county and township officers; the act relating to judicial districts and not to counties as such and not affecting county government or county officers.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 104; Dec. Dig. § 94.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**10. CONSTITUTIONAL LAW (§ 249\*)—COURTS (§ 42\*)—EQUAL PROTECTION OF LAW.**

The act does not violate Const. U. S. Amend. 14, § 1, relating to the equal protection of the law; that amendment not prohibiting the states from classifying their citizens for the purpose of judicial administration if the classification be based upon a real distinction in view of the purposes of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. § 249;\* Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.\*]

**11. CONSTITUTIONAL LAW (§ 46\*)—CONSIDERATION OF CONSTITUTIONAL QUESTIONS.**

A court will not pass upon a constitutional question or decide that a statute is invalid unless the decision is necessary to a determination of the case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.\*]

**12. STATUTES (§ 64\*)—INVALIDITY—INVALID IN PART.**

Any invalidity in section 13 of the act (Laws 1913, c. 126), in that such classification was unreasonable and arbitrary, would not affect the validity of the remaining sections, since it cannot be said that the Legislature would not have enacted the remainder even if that section were eliminated.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

**13. STATUTES (§ 64\*)—INVALIDITY IN PART.**

The unconstitutionality of a part of a statute does not justify declaring the remainder invalid unless the provisions are so connected and dependent upon each other that it cannot be presumed that the Legislature would have enacted the valid part without enacting the invalid part.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Proceedings by the State, on the relation of E. R. Lindsey, against Glenn B. Derbyshire, as Clerk of the Superior Court of Spokane County, Washington. From an order denying a peremptory writ of mandate, relation appeals. Affirmed.

Codd, Hutchinson & Codd, of Spokane, for appellant. Cannon, Ferris & Swan, Geo. H. Crandall, and Ira Honefenger, all of Spokane, for respondent.

ELLIS, J. This is an appeal by the relator from an order of the superior court of Spokane county sitting en banc, refusing a peremptory writ of mandate to compel the defendant, as clerk of the court, to file a complaint in a civil action, tendered for filing by the relator, with the \$4 filing fee prescribed by Rem. & Bal. Code, § 497, but without tender of the additional \$1, required by chapter 126, Session Laws of 1913, p. 386 et seq. The act is entitled: "An act providing for the appointment of official court reporters in the state of Washington, prescribing their duties, oath of office, and qualifications, and providing for their compensation and the manner of their appointment." The provisions of the act may be condensed as follows: Section 1 makes it the duty of each superior court

judge, in counties or judicial districts having a population of over 30,000, to appoint an official court stenographer, prescribes the standard of qualifications for eligibility, provides for removal for incompetency, misconduct, or neglect of duty, and fixes the official bond of the person so appointed. Section 2 provides for the taking of accurate shorthand notes of the testimony, exceptions, and all other oral proceedings in each cause by such stenographer upon request of either party or upon direction of the presiding judge, of his own motion, and for the filing of such notes in the office of the clerk of the trial court. Section 3 provides for payment of the official reporter at the rate of \$10 per diem of actual attendance, pursuant to direction of the court, out of the county treasury as other expenses of the court are paid. Section 4 declares: "In each civil action hereafter commenced the sum of one dollar (\$1) shall be paid by the plaintiff at the time of the filing of the complaint to the clerk of the court, and at the time of the appearance of the defendant, or any defendant appearing separately, there shall be paid in to the clerk of the court one dollar (\$1), and these sums so paid shall be taxed as costs in the case, and collected from the unsuccessful party in said action, and shall be known as stenographers' costs, and shall be paid by the clerk of said court into the county treasury of the county in which said action is commenced." Section 5 provides that, on request of the court or of either party or of his attorney, the official reporter shall make an accurate transcript of the testimony and other proceedings, which, when certified as provided, shall be filed with the clerk for the use of the court or either party, and prescribes fees of 15 cents per folio for the original, and five cents per folio for carbon copies of such transcripts, to be taxed as other costs, and closes with the proviso: "That when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act." Section 6 provides that the report of the official reporter, when certified as provided, shall be prima facie a correct statement of such testimony or other oral proceedings, and may thereafter, in any civil cause, be read in evidence as competent testimony upon proof that the witness who gave it is then dead or without the jurisdiction of the court, subject to all objections as though the witness were present and testify-

ing in person. Section 7 provides for the certification of the transcript of the notes of an official reporter after he has ceased to be such. Section 8 provides for the appointment of a reporter pro tem. in the absence or inability of the official reporter to act. Section 9 makes the official reporter the amanuensis to the court under certain conditions, except in counties of the first class. Section 10 insures the use of the files by the official reporters or reporters pro tem. on giving the clerk a receipt therefor. Section 11 provides that supplies for reporting criminal cases shall be furnished by the county, and that such supplies in all other cases shall be furnished by the stenographer. Section 12 provides for the substitution, on request of either party, of another reporter from the same or another judicial district to report a given action. Section 13 declares: "This act shall not apply to any county having a population of two hundred thousand, or over."

It is admitted that Spokane county constitutes a judicial district and has a population of over 30,000 and less than 200,000.

The appellant contends that the act is void for the following reasons: (1) That it embraces subjects not germane to that expressed in its title, thus impinging section 19 of article 2 of the state Constitution, which provides that no bill shall embrace more than one subject, and that shall be expressed in its title; (2) that the act is, in effect, a taxing act, impinging sections 1, 2, and 9 of article 7 of the state Constitution, which provide, respectively, for taxation of property in proportion to value, for taxation upon a uniform and equal rate, and that taxation for corporate purposes by municipalities shall be uniform with respect to persons and property; (3) that the act makes an arbitrary classification of the counties of the state, thus impinging paragraph 6 of section 28 of article 2 of the state Constitution, which prohibits the Legislature from enacting any private or special laws for granting corporate powers or privileges, and section 12 of article 1, prohibiting the granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations; (4) that the act is violative of section 4, art. 11, of the state Constitution, guaranteeing uniform laws for county government, and section 5 of the same article, prescribing uniform laws for the election of county and township officers; (5) that the act denies to the citizens of the state equal protection of the laws, contravening the first section of the fourteenth amendment to the federal Constitution.

[1, 2] 1. The appellant argues that the provision in section 4 of the act for an additional filing fee of \$1 invalidates the act, urging that this is a matter in no way germane to the subject expressed in the title. The mention of a given subject in the title is notice of all things germane to that subject in

the act. We have so held in a multitude of cases. "This court has often held that the title of an act, in order to comply with the constitutional provisions above quoted, need not be an index to the contents of the act; that the purpose of the title is to call attention to the subject-matter of the act so that any one reading it may know what matter is being legislated upon, and it is sufficient when it is broad enough to accomplish that purpose. For the various provisions constituting the act, the body of the act must be consulted; the title being neither expected nor required to give details. *State v. Scott*, 32 Wash. 279, 73 Pac. 365; *State v. Fraternal Knights and Ladies*, 35 Wash. 338, 77 Pac. 500; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36; *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462; *State ex rel. Zenner v. Graham*, 34 Wash. 81, 74 Pac. 1058; *Shortall v. Puget Sound Bridge & Dredging Co.*, 45 Wash. 290, 88 Pac. 212 [122 Am. St. Rep. 899]; *State v. Winsor*, 50 Wash. 407, 97 Pac. 446." *State ex rel. Zent v. Nichols*, 50 Wash. 508, 518, 97 Pac. 728, 730. See, also, *State v. Hall*, 24 Wash. 255, 64 Pac. 153; *Seattle National Bank v. Ally*, 66 Wash. 610, 120 Pac. 94; *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 Pac. 337; *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140; *Sorenson v. Kittitas Reclamation Dist.*, 70 Wash. 528, 127 Pac. 102. The title here in question expressly indicates that the act includes provisions for the appointment, duties, and qualifications of official court reporters, and contains provision for their compensation. Clearly, the act is intended to cover the whole subject of official reporters, and the title so indicates. It would seem that no more than a bare statement of the fact should be necessary to demonstrate that any provision for their compensation, whether by fees, legislative appropriation, or otherwise, is germane to a title expressly stating that the act contains matter "providing for their compensation." A thing so self-evident cannot be further clarified by argument, or reinforced by citation of precedent.

[3-5] It is also contended that sections 6 and 7 of the act relate to perpetuation of testimony and that there is nothing in the title of the act to which these matters are germane. In so far as these sections relate to the duties of the official reporter or the certification of the transcript of his notes, they are clearly germane to the title. The provisions for the use of the transcript present a much closer question; but, as we view the act, that question is not before us. In the first place, these particular sections are not involved in this appeal. *Hammer v. State*, 173 Ind. 199, 89 N. E. 850, 852, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034. The respondent, so far as the record shows, did not refuse to file the complaint because of either of these provisions, but simply because of the appellant's failure to pay the fee prescribed by section 4 of the act. In the

second place, even if we concede that sections 6 and 7 are not germane to anything in the title, a point which we refrain from passing upon, the concession would not affect the result. These sections are not essential to the integrity of the act as a whole, and their elimination would not defeat the main purpose of the act. They are distinct and severable provisions. Where unconstitutional provisions are thus severable, it is the established law of this state that their unconstitutionality will not render the remainder of the act unconstitutional. *Nathan v. Spokane County*, 35 Wash. 25, 76 Pac. 521, 65 L. R. A. 336, 102 Am. St. Rep. 888; *State v. Merchant*, 48 Wash. 69, 92 Pac. 890; *Gantenbein v. Pasco* (rehearing) 71 Wash. 635, 129 Pac. 374, 131 Pac. 461.

[6] 2. We find no merit in the claim that the act runs counter to sections 1, 2, and 9 of article 7 of the state Constitution, guaranteeing a uniform and equal rate of taxation. The act is not, in any just sense, a revenue act. The fee prescribed is not a tax. It is a fee having the same direct relation to the future service to be performed by the official reporter that the fee of \$4, provided for in *Rem. & Bal. Code*, § 497, has to services to be performed by the clerk. It is not a graduated tax based upon the value of the property or the amount of money involved in the litigation, as was the law of 1903, prescribing a sliding scale of fees based upon the value of the estates in probate cases, which was held a disguised property tax in *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 1 L. R. A. (N. S.) 152, 109 Am. St. Rep. 874. An examination of that case makes the distinction here indicated too plain to require further comment. *State ex rel. Bell v. Frazier*, 36 Or. 178, 59 Pac. 5.

[7] 3. Eliminating the last section of the act, which we shall presently consider, the act does not make an arbitrary classification repugnant to the inhibition of the Constitution against laws granting special corporate powers or privileges, or granting special privileges to persons or corporations, other than municipal. Appellant's argument proceeds upon the theory that the classification is one of counties; that San Juan county and Skagit county, each having a population of less than 30,000, together form a single judicial district of 30,000 inhabitants, are subject to the operation of the act, and are thus placed in a different class from all other counties of the state having a population of less than 30,000. The vice of this argument lies in the mistaken assumption that the classification is a classification of counties as such. It is essentially a classification of judicial districts and not of counties except as they coincide with or go to make up the judicial districts of the state. Eliminating the thirteenth section, the act applies to every judicial district having a population of over 30,000, and to no judicial district having a less population.

Viewed, then, as a classification by population, the act is uniform in its application, and must remain so, since there is nothing in the act limiting its operation only to judicial districts now having a population of 30,000 or over. It must be construed as applying to every judicial district if, and when, it hereafter acquires that population, though now having less.

[8] So viewed, is the classification by population a valid classification? Classification of cities, counties, and other legal subdivisions of states upon the basis of population has been almost universally upheld by the courts, both state and federal, when population bears any reasonable relation to the purpose and subject-matter of the given legislation. According to the great weight of authority, no legislation is obnoxious to the inhibition against class legislation when its provisions apply alike to all persons similarly situated. To be valid it need not apply to persons not similarly situated. Persons are not similarly situated if there is any reasonable difference in their relation to the purposes of the legislation. Wherever such a difference can be found, as related to population, the question whether it shall be made the basis of classification is one of legislative discretion. "But it is urged that no reason has been assigned for limiting the operation of the act to counties having a population of not less than 70,000 and more than 90,000, and thus necessarily excluding the counties of Shelby and Davidson, each having a population, according to the federal census, largely in excess of 90,000. To this objection, it may be said, as to Davidson, that the Legislature may have found as a reason for its exclusion that it was covered by turnpike built and controlled by private chartered companies, and in the matter of Shelby that the public has already perfected a network of good roads, under a system entirely satisfactory. But while the courts frequently find and assign reasons for legislative classification, yet it is by no means uniformly so. And it does not follow, because the reason for the classification is not disclosed in the face of the act, that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the lawmaking body which do not appear upon the face of a statute, and for the courts to strike it down because not readily perceptible might well be criticised as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action. The true question in each case is: Is the classification capricious, unreasonable, or arbitrary?" *State ex rel. v. Condon*, 108 Tenn. 82, 96, 65 S. W. 871, 874. See, also, *State ex rel. Bell v. Frazier*, 36 Or. 178, 59 Pac. 5; *McCarter v. McKelvey*, 78 N. J. Law, 3, 74 Atl. 816, 138 Am. St. Rep. 583; *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33



L. R. A. 437, 60 Am. St. Rep. 450; Lloyd v. Smith, 176 Pa. 213, 35 Atl. 199; Cook v. State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177; Pierce v. Kimball, 9 Greenl. (Me.) 54, 23 Am. Dec. 537; State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; 1 Lewis' Sutherland Statutory Construction (2d Ed.) § 217.

If, therefore, there can be found any sane, reasonable ground for a distinction between judicial districts having less than 30,000 inhabitants and those having more than that number, in their relation to the purposes of the act, and its practical application, we have no warrant for saying that the classification so made is arbitrary. Viewed in the light of these general principles, it is clear that there is such a distinction between districts of a larger population and districts of a smaller population in their relation to the purposes and practical application of the act here in question. Districts of the smaller population would necessarily be those rural in their character, not including any populous cities. In such districts, there is, of course, and will always be, comparatively little litigation. The fees provided by the act, as the Legislature may well have concluded, might not, in such districts, provide a fund sufficient to meet the purposes of the act. There is thus a distinct relation between the population of a given district and the law in question. Where the exact line between the larger and the smaller populations should be drawn is necessarily a matter of legislative discretion. This is manifest, since populations too small to meet the purposes of the act and populations sufficiently large to meet these purposes would necessarily merge into each other at some point. That exact point can, of course, never be ascertained, yet the line must necessarily be drawn somewhere, and the determination of that point by the Legislature will not be disturbed. On both reason and authority, we hold that the classification of the judicial districts of the state in two classes, those having a population of over 30,000 and those having a population of under 30,000, is not, in its relation to the purposes of the act, so illusory and unsubstantial as to make the classification unnatural, arbitrary and capricious.

[8] 4. Nor do we find the law contrary to the provisions of sections 4 and 5, art. 11, of the Constitution, guaranteeing uniform laws for county government and township organization, and uniform laws for the election of county and township officers. The act in question has nothing whatever to do either with county government or with county officers. It is a law relating to judicial districts; not to counties as such. It has not even the remotest relation to county or township organization or government, or to the election of county or township officers.

[16] 5. Whether the act in question is obnoxious to the first section of the fourteenth amendment of the Constitution of the United States is a question which concerns the power of the state government in its relation to the federal government. This amendment was never intended to prevent the different states of the union from classifying their citizens for the purposes of legislation or judicial administration wherever that classification is based upon any real distinction in its relation to the purposes of the law. This amendment contemplates not only persons, but classes of persons. It has no application to local or municipal laws or regulations that do not injuriously affect or discriminate between persons or classes of persons within the places, municipalities, or jurisdictions for which such regulations are made. If every person residing or being within such subdivision, municipality, or jurisdiction is accorded the equal protection of the laws there prevailing, there is no violation of the inhibition of the federal Constitution. This is the settled law as declared by the Supreme Court of the United States, and, the question being a federal question, the decision of that court is final. The principle here involved was passed upon by that court in the case of Bowman v. Lewis, 101 U. S. 22, 25 L. Ed. 989. In that case, mandamus was sought to compel the St. Louis Court of Appeals to grant an appeal from a judgment of that court to the Supreme Court of Missouri. By the Constitution and laws of Missouri, an appeal lay to the Supreme Court of that state from any final judgment or decree of any circuit court except those in certain named counties, and the city of St. Louis, for which counties and city there was established a separate Court of Appeals, having exclusive jurisdiction of appeals from, and writs of error to, the circuit courts of those counties. From this Court of Appeals, an appeal lay to the Supreme Court only in certain cases, but similar cases arising in the circuit court of any other county than those above mentioned, and the city of St. Louis would be appealable directly to the Supreme Court. It was contended that this judicial system was in conflict with the fourteenth amendment of the federal Constitution in that it denied to suitors in the courts of St. Louis and the counties named the equal protection of the laws. The Supreme Court of the United States, rejecting this contention, said: "If this position is correct, the fourteenth amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only \$5 could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense



is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case. If, however, we take into view the general objects and purposes of the fourteenth amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has no respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. \* \* \* The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory, and another system for another portion. \* \* \* If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." See, also, *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. 350, 30 L. Ed. 578; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047.

We are constrained to hold that the act in question, exclusive of the last section, does not violate either the letter or the spirit of any provision of the state or federal Constitutions in its relation to the question here presented.

[11] But it is urged that the last section is an additional classification by population, founded upon no reasonable distinction in its relation to the purpose or practical operation of the law. We do not so read this section. It is not a classification, but a limitation on the general classification already

made in the first section of the act. If we were called upon to pass upon its constitutionality, we might find difficulty in sustaining this limitation. It might be difficult to find any sound distinction between judicial districts of over 200,000 in population and those under that population, having any reasonable relation to the general purposes or practical application of the act. But, unless the other provisions of the act and this limitation or saving clause are so palpably dependent upon each other, so intimately connected in meaning, and so essentially and inseparably connected in substance that it cannot be presumed that the Legislature would have passed the one without the other, then the act must stand, even if the limitation fall. In that event, the constitutionality of this last clause is a moot question so far as this case is concerned, since it does not affect Spokane county either as a county or as a judicial district. No court will gratuitously pass upon a constitutional question or decide a statute or any part of it invalid. "In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable." Cooley, *Constitutional Limitations* (6th Ed.) p. 196.

[12] It is therefore incumbent upon us first to determine whether the body of the act and the limiting clause are so inseparably connected in purpose and substance that the one cannot stand without the other. It is plain that the act is a complete act, perfectly capable of feasible operation without the aid of anything found in the last section. The question is thus reduced to this: Assuming the last section invalid, would the Legislature have passed the act without that section had its attention been directed to the illegality of that section? In other words, are we justified in assuming that the Legislature knowingly would have sacrificed the act entirely to the limitation contained in the last section? Obviously, the question being one of motive, no sure and certain rule can be laid down as applicable in all such cases.

[13] Judge Cooley, as we believe, formulated a rule as nearly exact as any that can be devised. It is this: "Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the Legislature would have

passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." *Cooley, Constitutional Limitations* (6th Ed.) pp. 210, 211, 212.

It is too obvious for doubt that the dominant motive of the act was to remove, so far as possible, the court reporter from private influence by making him independent of private employment. On this motive there can be no question that a majority of both branches of the Legislature were fully agreed. This motive is as palpably sane and just, and the act is as palpably feasible of application to judicial districts of 200,000 or more population as to those of less than that number. Since the Legislature must be presumed to have been agreed upon this prevailing wholesome motive, applicable as well without the limitation as with it, and since it is thus apparent from the act itself that influences were brought to bear at the last moment, inducing the adoption of the limitation in the last section, else it would have been included as an exception in the first section itself, are we justified in assuming that, had the Legislature been then advised that the limitation was unconstitutional (assuming that it is unconstitutional), it would not have refused to sacrifice the entire act to this afterthought? We think not, since so to assume would be to ascribe unworthy motives to the legislative body. The question

is a close one, but we believe, in the light of the act itself, we are justified in assuming that the Legislature, under the circumstances supposed, would have adhered to the dominant purpose of the act, and passed it without the limitation had it then been advised that the limitation would probably or possibly defeat that dominant purpose. In this we are not without the authority of precedent. The Legislature of Iowa passed a law prohibiting the manufacture and sale of intoxicants in that state. A distinct section of the act provided for a submission of the question to the voters of that state and for an official statement of the result, and provided that, "if it shall appear from such official statement, that a majority of the votes cast as aforesaid upon said question of prohibition, shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, A. D. 1855," but provided that the portions of the act relating to the election should go into effect immediately on publication of the act. The court held the section providing for the submission to the people void as an unconstitutional delegation of the legislative function, but sustained the remainder of the act. The court said: "This leads us to the next step, which is whether the whole act, or the eighteenth section only, is invalid. It is assumed, for the present, that the matter was submitted to the people in the largest and broadest sense. This is unconstitutional and void. But an act void in part is not necessarily void for the whole. If sufficient remains to effect its object, without the aid of the invalid portion, the latter only shall be rejected, and the former shall stand. This doctrine is clearly maintained in the Massachusetts cases. *Fisher v. McGirr* and other cases, 1 Gray (Mass.) 1, [61 Am. Dec. 381]; [*Campbell v. Mississippi Union Bank*] 6 How. (Miss.) 625; *State v. Cox*, 3 Eng. (8 Ark.) 437; *Commonwealth v. Kimball*, 24 Pick. (Mass.) 361; *Norris v. Boston*, 4 Metc. (Mass.) 288; *Clark v. Ellis*, 2 Blackf. (Ind.) 10. Now, the prohibitory act of Iowa is a complete act in all its parts, without the eighteenth section, submitting it to the people. No part depends, for its efficacy or practicability, on that section. It can be carried into effect as well without it, as with it. That section relates to nothing but the vote, the returns, publication of the result, and like matters. Testing this act, then, by the same rules which are applied to others, we see no reason why the whole act should be declared unconstitutional and void. It was not the vote of the people which was unconstitutional, but it was the submission to the people; and that part of the act was and is invalid, if it submitted the question whether it should be the law or not; and the vote was, to a legal intent, nugatory. It effected nothing." *Santo et al. v. State of Iowa*, 2 Iowa, 165, 205, 206 (63 Am. Dec. 487). The

court seems to have argued that the submission to the people was not whether the act should become a law or not, but only whether it should take effect. This, however, seems to us a distinction without a difference. The decision, in its net result, gives clear support to the views which we have expressed on the statute before us.

The decision in *Santa v. Iowa*, so far as we have been able to learn, has never been overruled, but was reaffirmed in *Weir v. Cram*, 37 Iowa, 649, as applied to the validity of a law restraining stock from running at large. The last section of that law required a submission to a vote of the people of each county to determine whether the law should be in force in such county. The court held the submission clause invalid, and, referring to *Santo v. Iowa*, said: "The sole difference between that act and the one under consideration is in the extent of the popular vote by which the statutes are to become operative. In the first instance, the vote of the people of the whole state adopted or rejected the law; in the last, it may be adopted or rejected in the separate counties by the vote of the electors thereof. The principles involved in each case are the same—the law depends in each instance upon a popular vote for validity. Following *Santo v. State*, which has been too long acquiesced in and too often approved by this court to be now questioned, we hold that the act of 1868, c. 144, is of force without regard to the vote which it provides shall be taken to determine the question of its adoption by the people." The Supreme Court of Indiana has decided the question both ways. In *Maize v. State*, 4 Ind. 342, that court held that a liquor license law, complete in itself, without the part relating to a township vote for its adoption, which was held invalid, was the law of the state, with that part stricken out. The same court, in *Meshmeier v. State*, 11 Ind. 482, overruled *Maize v. State*, supra, apparently without necessity, but by a divided court. In *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302, the Court of Appeals of that state held that an act fixing the time of election a year later than that formerly fixed by statute, and extending the term of office of the former incumbent one year, was valid as to the first provision, though the last provision was held unconstitutional. It would seem that the court, in that case, went much further in sustaining the constitutional part of the law, as separable from the unconstitutional, than we are required to go in the case before us. The Supreme Judicial Court of New Hampshire lays down the rule which we here invoke in the following broad terms: "An act may be in part beyond legislative authority, and within it for the residue; and, if the act is capable of being administered in the parts which are within the power of the Legislature to enact, it will so far be valid. *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am.

Dec. 381; *State v. Wheeler*, 25 Conn. 290; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487." *Town of East Kingston v. Towle*, 48 N. H. 57, 65, 97 Am. Dec. 575, 585.

Under the rule thus broadly stated, there can be no question but that the act here involved can be administered without regard to the last section, and should therefore be held valid without regard to that section. It may be objected that, without the limiting clause, this act extends to at least one judicial district to which it would not otherwise extend, and that therefore, to that extent, to hold the act valid, disregarding the limitation, would be judicial legislation. This argument, however, is not sound, if the court is ever permitted, in any case, to indulge the probable intention of the Legislature to sustain the validity of any act, where a separable provision is unconstitutional. "If the legislative purpose as expressed in the valid portions of the act can be accomplished, independently of the unconstitutional portion, and considering the entire act, it cannot be said that the Legislature would not have passed the valid portion had it been known that the invalid portion must fall, effect will be given to so much as is good." 1 Lewis' Sutherland, Statutory Construction (2d Ed.) p. 580. "There is a difference between an 'exception' and a 'limitation.' When a statute upon a subject of a general nature is made to extend to the whole state in one part thereof, and then in another part an attempt is made to limit its operation to territory less than the state, the limitation may be disregarded; because to give it effect would render the whole statute unconstitutional; and such construction should be given, when reasonable, as will uphold the statute rather than one which would defeat it." 1 Lewis' Sutherland, Statutory Construction, p. 598; *Wilmot v. Buckley*, 60 Ohio St. 273, 54 N. E. 272.

This court has upheld the view here expressed, even in a case where the separable unconstitutional provision was contained in the act as a proviso to the only section involved. It was not necessary to sustain that section to save the act as a whole. In *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 65 L. R. A. 336, 102 Am. St. Rep. 888, the section of the revenue law relating to taxation of transitory stocks of merchandise (Laws of 1899, p. 295) was held valid, though the proviso giving a rebate to the owner of the goods of a part of the tax proportional to the part of the assessment year he was not in the county was rejected as invalid. Clearly, there can be no stronger presumption that the Legislature would have passed that section without the proviso than that it would have passed the act here under consideration without the limitation. In the *Nathan Case*, this court quotes the following language from 1 Kent's Commentaries, p. 463, as quoted in Black on Interpretation of Laws, p. 278: "There is a distinction in some of the books

between a saving clause and a proviso in the statute; though the reason of the distinction is not very apparent. \* \* \* It may be remarked that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause, and it is difficult to see why the act should be destroyed by the one and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected." The court continues: "Be this rule of construction as it may, the foregoing distinction is without significance, as applied to the facts in the action at bar, since we have reached the conclusion that the proviso of the above statute is void on constitutional grounds, and must therefore be rejected. Eliminating the proviso from the above section 12 of the act of 1895, such enactment seems to be complete in itself, fully authorizing the assessment, levy, and collection of the tax in question." The rule in the Nathan Case is followed with unreserved approval in *McKnight v. Hodge*, 55 Wash. 289, 297, 104 Pac. 504, 40 L. R. A. (N. S.) 1207, and *Shook v. Sexton*, 37 Wash. 509, 514, 79 Pac. 1093.

When we consider that if the limitation contained in the last section of the act here in question be held inseparable, if unconstitutional, it would annul, not alone one provision of the act, but the whole act, and wholly defeat the dominant purpose of the Legislature as clearly declared in the first section and carefully worked out in the other eleven sections, this case presents much stronger ground for holding the limitation separable and not controlling, than is found for so holding the proviso in the Nathan Case.

Concluding, as we do, that even if the last section of the statute in question be held unconstitutional, it alone should be rejected, and should not be permitted to defeat the dominant motive of the Legislature in passing the act, it is manifest that whether or not this last section be held unconstitutional is immaterial in this case. Being immaterial, we defer a determination of its constitutionality until it shall be raised in a case to which its decision is essential. We hold that, in any event, the remainder of the act is constitutional and valid.

The judgment of the trial court is affirmed.

CROW, C. J., and GOSE, CHADWICK, and MAIN, JJ., concur.

CULBERTSON v. GILBERT HUNT CO.  
et al. (No. 11,269.)

(Supreme Court of Washington. May 5, 1914.)

VENUE (§ 41\*)—CHANGE OF VENUE—DISCRETION.

The county, where the action against a corporation and two individuals, for wrongful at-

tachment, was pending, being the one where the attachment was levied and the action in which it was issued was tried, and a more convenient place of trial as concerns the attendance of witnesses, and one where the corporation had an office for transaction of business, there was, under Rem. & Bal. Code, §§ 206, 207, 209, as to venue and change of venue, at least no abuse of discretion in refusing change to another county, asked for solely on the ground that the individual defendants are residents thereof, and that the corporation has an office there.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

Department 2. Appeal from Superior Court, Whitman County; Thomas Neill, Judge.

Action by Thomas Culbertson against the Gilbert Hunt Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Samuel R. Stern, of Spokane, for appellants. Chas. R. Hill and R. M. Burgunder, both of Colfax, for respondent.

PARKER, J. This is an action to recover damages which the plaintiff claims resulted to him from a wrongful issuance of an attachment, and the levying of the same upon his property at the instance of the defendant Gilbert Hunt Company. Verdict and judgment were rendered against the defendants, from which they have appealed.

It is contended by counsel for appellants that the trial court erred in denying their motion for a change of venue to Spokane county, made upon the sole ground that the defendants Mitchell and Brewer are residents of that county, and that Gilbert Hunt Company has an office in that county. The attachment was levied upon the property of respondent in Whitman county, and the action in which the attachment was issued was also tried and disposed of in that county, though it was originally commenced in Spokane county. Appellant Gilbert Hunt Company is a corporation, and has an office for the transaction of its business in Whitman county. Its home office is in Walla Walla county. Whatever damages respondent is entitled to recover in this action were occasioned in Whitman county by the seizure of his property therein under the attachment. Whitman county was a more convenient place of trial of the cause than Spokane county would be in so far as the attendance of witnesses is concerned, which manifestly was the principal convenience to be considered in the trial of this case. We are quite clear that the trial judge acted well within the bounds of his judicial discretion in denying the motion for a change of venue to Spokane county. Indeed, had he granted the motion, there would, it seems to us, have been much more room for arguing that he thereby abused his discretion. Rem. & Bal. Code, §§ 206, 207, 209.

Contention is made that the evidence does

not support the verdict and judgment. We deem it sufficient to say that a review of those portions of the evidence to which our attention has been called convinces us that it was ample to warrant the conclusions reached by the jury.

Other errors are claimed by counsel for the appellants. We think they do not call for a discussion. They were in any event not prejudicial to appellants' rights.

The judgment is affirmed.

CROW, C. J., and FULLERTON, MORRIS, and MOUNT, JJ., concur.

# BOWDEN et ux. v. WALLA WALLA VALLEY RY. CO. et al. (No. 11,647.)

(Supreme Court of Washington. April 23, 1914.)

## 1. STREET RAILROADS (§ 114\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence, in an action for injuries from a collision between an automobile and a street car, held to sustain a finding of contributory negligence by the automobile driver.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

## 2. STREET RAILROADS (§ 99\*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

The driver of an automobile approaching a street car crossing must make reasonable use of his senses for his own safety, and is negligent if he does not look out for a car at a point which will enable him to determine whether he can get across, and an automobile driver who, on approaching an interurban railway crossing, took his last look at the crossing at 175 feet therefrom, and did not afterwards look for an approaching car, was guilty of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.\*]

Department 2. Appeal from Superior Court, Walla Walla County; Edw. C. Mills, Judge.

Action by Joseph H. Bowden and wife against the Walla Walla Valley Railway Company and another. From a judgment for plaintiffs, defendants appeal. Reversed and remanded, with directions.

Rader & Barker, of Walla Walla, for appellants. John F. Watson, of Walla Walla, for respondents.

MORRIS, J. Appeal from a judgment in an action to recover for personal injuries, received by respondents in a collision between their automobile and one of appellant company's cars. The errors assigned are in failing to grant motions for nonsuit and for judgment notwithstanding verdict. The testimony of respondents is to the effect that, on January 26, 1913, a bright, sunny day, at about 3:40 p. m., they approached the crossing where the collision occurred, driving at about 20 miles an hour; that the top of the automobile was up, and the side curtains on

the left-hand side; that, when about 150 to 175 feet from the crossing, they looked up and down the track, but saw no car coming, and heard no whistles or other signals of an approaching car; that they did not again look, but, reducing the speed of the automobile to about 15 miles an hour, drove onto the crossing; and that, as they reached the track, the car, seen then for the first time, came upon them from the left, hitting the automobile at about the front seat. The exact location of this crossing does not appear in the record, but it was evidently a country crossing. Mr. Bowden testifies that he was familiar with the crossing, and made it every afternoon; that from a point 100 feet from the crossing he could see a car 200 feet away; that at 50 feet he could see a car 250 to 300 feet; and at 40 feet a car 300 feet away would be in plain sight. The first witness for respondents was riding in the car, saw the automobile approaching the car, and thinks the automobile and car were running at about the same speed. The people in the automobile were not looking toward the car, and seemed to be unconscious of its approach. This witness does not recall hearing any whistles blown, although he says they might have been blown. The next witness for respondents was also in the car, says he heard two short whistles blown for the stop at the crossing, but heard no other whistles. The remaining testimony in chief in behalf of the respondents was as to the result of the collision and the nature and extent of the injuries to both respondents. Appellants then moved for a nonsuit, which the court denied, saying: "With considerable misgivings I deny the motion for a nonsuit in this case. It does seem to me that there is a scintilla of evidence as to negligence on the part of the railroad company, and therefore I will deny the motion and allow an exception."

From a review of this testimony, we think the lower court was in error in not granting a motion for nonsuit. Whether or not there was, as said by the lower court, "at least a scintilla of evidence as to negligence upon the part of the railroad company" need not be discussed.

[1] The basis of the motion was the contributory negligence of the respondents, and this, we think, is clearly established by their own testimony. It clearly appears that, as the car and automobile were approaching the crossing at about the same rate of speed, if respondents had looked to the left, the direction in which the car came, at any point from 40 to 100 feet, before reaching the crossing, the approaching car could have been seen from 200 to 300 feet away. These are not facts discovered for the purpose of testimony in this case, but facts which had been within the knowledge of the respondent Joseph H. Bowden for some time, as he crossed at this point every afternoon, and knew it and its

surroundings well. The only look he gave in the direction from which the car came was at a point from 150 to 175 feet away, looking through the window in the curtain. The car must have been in plain sight at that time, according to the testimony of the witnesses for respondents, who were in the car, and could see the respondents approaching the car, paying no attention to the car, and apparently unconscious of its approach.

[2] The driver of an automobile approaching such a crossing as the one in this case must make reasonable use of his senses to guard his own safety, and the failure to do so is negligence. Such a person cannot take a last look at 150 to 175 feet distant from the crossing, and then shut his eyes and go blindly forward. While we shall not attempt to say within what distance respondents should have looked for an approaching car before attempting the crossing, the law does require that such a look must be taken within such a distance as to enable one to ascertain whether or not there is an approaching car in sight. *Beeman v. Puget Sound T., L. & P. Co.*, 139 Pac. 1087, just decided, and cases there cited. Had respondents taken such precaution, this accident would not have happened.

The jury returned a verdict in the sum of \$300. We shall not refer to the character of the injuries sustained by respondents. It is enough to say that the sum of \$300 is wholly inadequate to compensate for the injuries sustained. Special damages were proven to the extent of nearly \$250, and it is evident from the size of the verdict that the jury believed that the respondents were not blameless, and must, for this reason, bear the larger part of the burden of the resulting damages. The following cases are in point: *Woolf v. Washington R. & N. Co.*, 37 Wash. 491, 79 Pac. 997; *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744, 23 L. R. A. (N. S.) 1224; *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458; *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392.

Having reached this conclusion, we will not discuss the case as made by the testimony of the appellants.

Reversed and remanded, with directions to dismiss.

CROW, C. J., and MOUNT and PARKER, JJ., concur.

ALDREDGE v. OREGON-WASHINGTON  
R. & NAVIGATION CO. et al.  
(No. 11,739.)

(Supreme Court of Washington. April 28, 1914.)

1. RAILROADS (§ 328\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, who had driven a skittish horse some distance along a highway parallel to rail-

road tracks, made no attempt to look for trains before turning onto a crossing where the view was obscured by high weeds. *Held* that, as he did not stop and listen, and made no effort to look for trains, he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1057-1070; Dec. Dig. § 328.\*]

2. TRIAL (§ 178\*)—VIEW—RIGHT OF COURT TO CONSIDER.

Where the judge and jury viewed the place where plaintiff was injured, the court, in ruling on a motion for directed verdict, may consider the view, in connection with other evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 401-403; Dec. Dig. § 178.\*]

3. WITNESSES (§ 29\*)—FEES—ALLOWANCE.

Witnesses from another state are entitled to mileage from the state line to the point of trial.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 67-69; Dec. Dig. § 29.\*]

Department 2. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Otto Wesley Aldredge against the Oregon-Washington Railroad & Navigation Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

Thos. H. Brents and John F. Watson, both of Walla Walla, for appellant. Dunphy, Evans & Garrecht, of Walla Walla, and A. C. Spencer and W. A. Robbins, both of Portland, Or., for respondents.

MOUNT, J. Action for personal injuries.

At the close of all the evidence offered at the trial of the case in the court below, the court directed a verdict in favor of the defendants. The plaintiff has appealed from the judgment entered thereon.

It appears that on the 22d day of October, 1912, while the plaintiff was driving across the tracks of the defendant railroad company, he was run down by a train. The horse which he was driving was killed, or so badly injured that it was necessary to kill him, the wagon was destroyed, and the plaintiff's leg was broken, and he was otherwise injured. The plaintiff was injured at a crossing of the railroad company described in the record as "Offner's crossing." This crossing is about a mile west of Thirteenth street in the city of Walla Walla. College Place road, which is immediately south of the railroad, extends directly west from Thirteenth street to Offner's crossing. This road is a common public road 60 feet wide. The railway track of the defendant company runs alongside and parallel with College Place road from the city of Walla Walla to Offner's crossing. The right of way of the railroad company is 100 feet wide. It adjoins the highway. The railroad track is about the middle of the right of way of the railroad company. The traveled way is 75 or 80 feet distant from the tracks of the railroad company. As the railway tracks leave Thr-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

teenth street in Walla Walla, the railroad is constructed upon a grade above the level of the adjoining land. As it goes west, the grade is gradually reduced to about the level of the ground. At Offner's crossing, where the accident occurred, there is a small cut about  $1\frac{1}{2}$  feet in depth below the level of the natural surface of the land. College Place road, at the place where Offner's crossing turns north, is about  $3\frac{1}{2}$  feet higher than the top of the rails of the railroad; so that there is a slight decline of about 4 feet in 100 in descending from College Place road to the railroad tracks at Offner's crossing.

On the 22d day of October, 1912, the plaintiff was driving west on College Place road in a covered laundry wagon, which was being drawn by one horse. This laundry wagon was inclosed, and at the sides where the driver sat were windows about 12 by 14 inches in size. The front of the cover was open. Along the right of way of the railroad company, between the tracks thereof and the traveled road, weeds had grown up. At Offner's crossing it appears that there was a bush and some weeds which were from 6 to 9 feet tall. When the plaintiff came to Offner's crossing, he was driving in a jog trot. He did not stop, look, or listen for the train, but drove upon the track in front of the train. His statement is, in substance, as follows: I was driving westerly along the College Place road in a covered laundry wagon, with the horse traveling in a jog trot, the wind was blowing, and I knew nothing of the train coming; didn't know that there was a train running out at that time. As the horse turned from the College Place road onto the Offner crossing, I looked, but did not see anything. I went by some bushes, and saw the train coming right onto me. It was then too late to stop the horse or do anything else. The horse was right on the track. I didn't hear any bell, and no whistle was blown within hearing distance or bell rung, or I should have heard them. The next thing I was piled up in the brush. The road leading over Offner's crossing turns north from the College Place road; that is, it turns to the right; the road was on some little decline. I was driving a fairly good horse, but he was skittish of the railroad, and, when crossing railroad tracks, you had to watch him.

There was evidence to the effect that the train consisted of three cars and the locomotive; it was running at about its usual rate of speed—from 25 to 30 miles an hour—on a slight downgrade, with a light throttle; it was making no noise, except the noise of the wheels upon the rails as they crossed the fishplates or joints.

At the close of the plaintiff's evidence, the defendants moved the court for a nonsuit for the reasons: First, that the evidence proved that the plaintiff did not stop, look, or listen, but drove upon the crossing without paying any attention to what he was doing, and was

therefore guilty of contributory negligence; second, that, before crossing the railroad track, it was the duty of the plaintiff to look and listen at a place where an observation of the track could be made, which he failed to do; and, third, that the plaintiff drove upon the track directly in front of the moving train without taking any precautions for his safety. This motion was denied by the court, and the defendants' evidence was then offered. At the close of all the evidence, the court and the jury viewed the premises where the accident occurred, and thereafter a motion for a nonsuit was made upon substantially the same grounds as heretofore stated. The court sustained the motion, and directed a verdict for the defendant, saying: "I recognize the rule that it is the duty of the court where there are disputed questions of fact, or where different inferences might be drawn by reasonable men from the facts in evidence, that it is the duty of the court to submit that question to the jury. If this case were before the court now on the oral testimony given in the courtroom here, I would permit it to go to the jury, but I think the court is entitled to take into consideration what was disclosed on the view as well as the jury is. While it is true that the burden of proof of contributory negligence is upon the defendant, and the burden of proof practically includes that condition, it is also true that the burden of proof of the last clear chance doctrine is upon the plaintiff. The duty of the engineer is not to look to the side of the track as he is running, but to the track ahead of him. He is not bound to expect a man is going to turn in that way across the road when he is driving along the road parallel to the track. From the evidence in this case and from the view in the case, if this man had looked, he could have seen, and, if he had listened, he could have heard, and the testimony is that he did neither of those things. It is clear that, if he had stopped, he could have both heard and seen. From the evidence there is only one point from which he could not have seen that train or heard it, and that was behind the growth of bushes and weeds. Assuming, then, that the growth testified to was much higher than it is now; that evidence, as it will be remembered, was he was in a wagon. There is no contention that he stopped at all, and, while it is regrettable, in my mind, it seems to me it is the duty of the court to direct a verdict, or set aside the judgment notwithstanding the verdict. The horse, as testified to, was a skittish horse, and was afraid of trains; consequently, if he could not see or hear the train, it was his duty to take a little more precaution than with a horse that had no fear. He was familiar with this crossing. He had crossed it many times as a laundryman. Years ago he had crossed it as a hack driver. He was just as familiar with conditions as defendants. My view of the law on this is that it is the

duty of the court to direct the jury to return a verdict for the defendants, and I do so."

[1] Counsel for the appellant, with much earnestness, and with many quotations from authorities, argue that the court should have submitted the question of contributory negligence to the jury; that it was error for the court to decide, as a matter of law, that the appellant was guilty of contributory negligence. We deem it unnecessary to review the many authorities cited upon this subject and discussed in the briefs; for it seems clear to us, from all the facts in this case, that there can be no question that the appellant was guilty of contributory negligence in driving upon the railroad track without taking some precautions for his safety. The evidence shows affirmatively and conclusively that the appellant took no precautions whatever for his safety. When he was driving along the public highway parallel with the railway tracks, by simply looking back he could have seen the approaching train. It is true, when he turned to his right to cross the railway tracks at Offner's crossing, there were some bushes and weeds which some of the witnesses testified were from 6 to 9 feet high. Yet, before coming to those weeds, and after passing them, the track, or train at least, was plainly to be seen, if the appellant had looked in its direction. This he failed to do, and drove upon the track immediately in front of the train, so that the engine struck his horse and wagon, killed the horse, demolished the wagon, and injured the appellant. It is inconceivable, under these facts, how any reasonable man could say that the appellant was not guilty of contributory negligence. About 300 feet before he reached the turn at Offner's crossing he passed a man driving in the same direction, and coming from the opposite direction was another witness who saw the appellant, and saw that he was about to drive upon the track in front of the train, and attempted to warn him, but the warning, if the appellant heard it, was unheeded. These witnesses saw the train, saw it approaching the crossing, and saw the danger into which the appellant was driving. This case is a much weaker case in favor of the appellant than the case of *Holland v. Northern Pacific Railway Co.*, 55 Wash. 286, 104 Pac. 252, because in that case the approaching train was obscured by a cloud of dust raised by the wind. The plaintiff in that case stopped, looked, and listened before attempting to cross the railroad track. After he had done this, and not seeing the train, he drove upon the track and was injured. The court in that case directed a verdict in favor of the defendant, and we affirmed the judgment.

In the case of *Woolf v. Washington Ry. & Navigation Co.*, 37 Wash. 491, 79 Pac. 997, we held that a traveler who drove a team upon a railroad crossing at a point where, for a

considerable distance, he had an unobstructed view of an approaching locomotive was guilty of contributory negligence as a matter of law, where he drove onto the crossing either without looking, or looked and whipped up his horses in an endeavor to cross ahead of the engine.

In *Johnson v. Washington Water Power Co.*, 73 Wash. 616, 132 Pac. 392, we held that the driver of a wagon was guilty of contributory negligence, where he saw an approaching street car 700 feet away and drove onto the track without looking just before doing so.

See, also, *Bowden v. Walla Walla Valley Ry. Co.*, 140 Pac. 549.

Many other cases of this character might be cited from this court to the same effect; but the cases already cited are sufficient to show that the trial court did not err in holding that the plaintiff was guilty of contributory negligence as a matter of law, and therefore not entitled to recover.

[2] Counsel for the appellant argue that the court erroneously considered the view of the premises as evidence, and therefore directed a verdict. The court was, no doubt, authorized to consider such view the same as the jury; and, when it appeared to the court from the testimony of witnesses and the view that certain facts existed, the court then could consider such facts as established facts in the case. *Seattle & Montana Ry. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

[3] The appellant also argues that the court erred in allowing certain witnesses from the state of Oregon who attended upon the trial of the case mileage from the state line to Walla Walla. This court has uniformly held that it is proper to allow such mileage to such witnesses. *Carlson Bros. v. Van de Venter*, 19 Wash. 32, 52 Pac. 323; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644; *Wohlforth v. Kuppler*, 137 Pac. 477.

The judgment appealed from is therefore affirmed.

OROW, C. J., and MORRIS and PARKER, JJ., concur.

#### RALSTON et al. v. ROYAL INS. CO., LTD., OF LIVERPOOL. (No. 11,705.)

(Supreme Court of Washington. May 8, 1914.)

##### 1. INSURANCE (§ 229\*)—CANCELLATION—NOTICE—SIGNATURE.

The notice of cancellation of an insurance policy, though signed only in the name of the insurance company's agents, in the same manner that the policy was signed, is sufficient; the letter accompanying it advising insured the company was demanding the cancellation.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 500-508; Dec. Dig. § 229.\*]

##### 2. INSURANCE (§ 229\*)—CANCELLATION—NOTICE—EFFECT.

The notice of the insurer to insured, stating that if the premium is not paid by a cer-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tain hour, the policy "will stand canceled for nonpayment of premiums without further notice," is a notice of cancellation, and not a mere expression of intention to cancel at a future time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.\*]

**3. INSURANCE (§ 229\*)—CANCELLATION—NOTICE—TIME OF NOTICE.**

Though an insurance policy provides that it may be canceled on five days' notice, a notice naming an hour, within five days after receipt of it, when, if premium is not paid, the policy will stand canceled, is not void, but becomes effective five days after its receipt.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.\*]

**4. INSURANCE (§ 232\*)—CANCELLATION.**

Insured being notified that if the premium is not paid by a certain time the policy will stand canceled without further notice, and payment not being made, and the manager of the insurer's agent directing the policy to be canceled on the books of the company, there is a cancellation in fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 504; Dec. Dig. § 232.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Bowman Ralston and another against the Royal Insurance Company, Ltd., of Liverpool. Judgment for defendant, and plaintiffs appeal. Affirmed.

Arctander & Jacobsen, of Seattle, for appellants. Granger & Clarke, of Seattle, for respondent.

**MAIN, J.** The purpose of this action was to recover upon a fire insurance policy. The facts are substantially as follows: On September 25, 1912, the Royal Insurance Company, through its agent, Calhoun, Denny & Ewing, incorporated, issued to Bowman Ralston an insurance policy covering household furniture. Among the articles included was a piano. As to this it was provided that loss, if any, should be payable to Eilers Music House, as its interest might appear. The term of the policy was for one year from the 24th day of October, 1912, to the 24th day of October, 1913. The clause in the policy covering the right of cancellation was this: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." The premium or consideration for which the policy was issued was the sum of \$18.88. This at no time has been paid. On February 4, 1913, the following notice of cancellation by registered mail was sent to both Ralston and the Eilers Music House, and was received on the day following: "Notice of Cancellation for Nonpayment of Premium. Seattle, Wash., Feb. 4, 1913. To Mr. Bowman Ralston, 1408 Second Avenue, City, and Eilers Music House, Mortgagee: 3rd & University, City. You are hereby notified, that payment has not been made at this office of the premium of \$18.88 under policy No. 705877, dated October 24th, 1912, for \$1250.00

covering on household goods and piano issued for you on application of yourself in the Royal Insurance Company, Ltd., of Liverpool. Demand is therefore made on you for said premium, and unless the same be paid on or before 12 o'clock noon of the ninth day of February, 1913, at our office in Seattle, Washington, said policy including the mortgage agreement, if any, will stand canceled for nonpayment of premium, without further notice, and all liability thereunder immediately cease and determine after said hour and date. In event of cancellation as above, you will be held liable for the pro rata earned premium of \$1.87, which must be paid at our office, or to our collector without delay. Calhoun, Denny & Ewing, by E. Arnold, Agent, Office 201-7 Alaska Bldg." On February 13, 1913, the property covered by the policy was damaged or destroyed by fire. Thereafter, and on the 12th day of April, 1913, the present action was instituted to recover the loss sustained by the fire. After the issues were formed the cause came on for trial before the court without a jury. A judgment was entered dismissing the action. The plaintiffs appeal.

The only question presented upon the record is whether the insurance policy had been canceled prior to the time the fire occurred.

[1] It is first argued that the cancellation notice was not the act of the insurance company because it did not purport to be signed by it. But this contention is without merit. On the face of the policy, after what purports to be the signature of the insurance company, there is the signature of Calhoun, Denny & Ewing, as agent. During the trial the appellants admitted that the agent, Calhoun, Denny & Ewing, at the time of the issuance of the policy had, and ever since have had, written authority from the insurance company to cancel policies. When the notice of cancellation was sent, it was accompanied by a letter which advised Ralston that the company was demanding the cancellation of the policy if the premium were not paid. It would seem that nothing further need be said upon this point.

[2] It is next argued that the notice served did not purport to be a present cancellation, but indicated only an intention to cancel at a future time, conditioned upon the nonpayment of the premium. Many authorities are cited sustaining the rule that a notice which only shows an intention to cancel at a future time, and upon noncompliance with certain conditions, is not sufficient. A review of these authorities would render little, if any, aid, as each case must depend to a large extent upon the language of the cancellation notice. In the present case the notice is more than a mere expression of an intention to cancel at a future date; it is an unequivocal declaration that if the premium is not paid on or before 12 o'clock noon of the day named, then

the policy "will stand canceled for nonpayment of premium without further notice." Language could hardly make it plainer that it was the intention, if the premium were not paid as indicated, that then the policy was canceled, and this without further notice. We think the record shows that Ralston so understood the notice. After the fire he called upon the manager of the insurance department of Calhoun, Denny & Ewing, and desired to pay the premium and have the policy reinstated. Ralston denied that he in this conversation recognized that the policy had been canceled. But the weight of the evidence is against his position. On the same day he addressed a letter to W. M. Calhoun, of Calhoun, Denny & Ewing, in which he stated that he would esteem it a great favor if Mr. Calhoun would influence his company to audit the claim. In this letter he makes no claim that the policy had not been canceled. A notice of cancellation, which states that the policy will stand canceled without further notice, at a certain time, unless the premium be paid, works a rescission of the contract of insurance if there be not a payment of the premium prior to the time that the notice of cancellation becomes operative.

In *Bergson v. Builders' Ins. Co.*, 38 Cal. 541, it is said: "The company having notified the insured that, if the balance of the premium was not paid by the 31st day of December, the company would cancel the policy on the following day—that is, treat it as rescinded—and the money not having been paid by the day mentioned, the company had the right to treat it as rescinded from that time. No further act was requisite on the part of the company to effect the rescission. No money was required to be returned to the insured, for none was due them; and notice that the contract had been rescinded was not necessary to be given, for they were already informed that it would be rescinded if they did not pay the premium, and the notice would not have enabled them to have protected themselves in any manner, under the contract, nor to have avoided or obviated the rescission."

[3] It is also claimed that the cancellation notice was void because it fixed the date of cancellation as the 9th, at 12 o'clock which was only four days after the delivery of the notice, and the policy provided that it might be canceled upon five days' notice. Under this clause of the policy, no notice of cancellation could be effective until five days after its delivery. The notice was delivered on the 5th. The fire occurred on the 13th. It thus appears that more than five days had expired between the time of the receipt of the notice and loss occasioned by the fire. The notice would become effective five days after it had been received, notwithstanding the fact that it specified a shorter period. In *Commercial Union Fire Ins. Co. v. King* (Ark.)

156 S. W. 445, the policy upon which the action was based required a five days' notice of cancellation. The letter of cancellation stated that: "We will cancel this policy tomorrow," which would be only one day's notice instead of five. It was held that the notice of cancellation became effective five days after its receipt by the assured.

[4] One other argument will be noticed. It is claimed that no cancellation in fact took place. The notice of cancellation was so unequivocal in terms as to admit of no doubt that at the expiration of the time specified, if the premium had not previously been paid, the policy would in fact stand canceled, and this, as already stated, without further notice. The evidence also shows that the manager of the insurance department of Calhoun, Denny & Ewing, directed that the policy be canceled upon the books of the company.

Finding no merit in any of the assignments of error, the judgment will be affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

#### JETT v. OLD NAT. BANK BLDG. CO. (No. 11,751.)

(Supreme Court of Washington. May 8, 1914.)

APPEAL AND ERROR (§ 977\*)—DISCRETION OF TRIAL COURT—CONDITIONAL ORDERS FOR NEW TRIAL.

The action of the trial court in granting a motion for new trial after verdict for plaintiff, unless he will accept a reduced judgment, will not be disturbed, unless the court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Keenan, Judge.

Action by W. M. Jett against the Old National Bank Building Company. From an order granting a new trial after judgment for plaintiff unless he accepts a judgment for a less sum, he appeals. Affirmed.

Lucius G. Nash and S. A. Mann, both of Spokane, for appellant. Cannon, Ferris & Swan, of Spokane, for respondent.

MAIN, J. The purpose of this action was to recover damages for personal injuries alleged to be caused by negligence chargeable to the defendant. On the 9th day of August, 1912, the defendant owned and operated in the city of Spokane a 15-story office and bank building. In this building were installed elevators operated by electric power. On the date mentioned the plaintiff entered one of these elevators for the purpose of being conveyed to an upper story in the building. Owing to what he claims was the negligence of the operator of the elevator, he was thrown out of the elevator and precipitated

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the bottom of the shaft, sustaining the injuries on account of which recovery is sought. After the issues were formed, the cause was tried before the court and a jury. A verdict for the plaintiff in the sum of \$8,000 was returned. Thereafter the defendant moved the court for judgment non obstante veredicto, and in the alternative for a new trial. The former motion was overruled; the latter was granted, unless the plaintiff within 10 days from the entry of the order filed an election to accept a judgment for \$2,500, in which event the motion for new trial would be denied. The plaintiff declined to make the election to accept judgment for the sum named, and appealed from the order.

The only question which the record presents is whether the court in entering the order that the appellant accept the sum of \$2,500, or in the alternative granting a new trial, abused its discretion. From a consideration of the entire record we are unable to hold that there was an abuse of discretion. Since there is to be another trial, we refrain from making any detailed reference to or comment upon the facts. Upon the authority of the following cases, the judgment will be affirmed: *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *McOwen v. Electric Co.*, 48 Wash. 362, 93 Pac. 513; *Hammond v. Hillman*, 73 Wash. 298, 131 Pac. 641.

Affirmed.

CROW, C. J., and ELLIS, GOSB, and CHADWICK, JJ., concur.

STATE ex rel. BROWN, Justice of the Peace,  
v. SUPERIOR COURT FOR KING  
COUNTY et al. (No. 11,921.)

(Supreme Court of Washington. May 8, 1914.)

PARDON (§ 4\*) — SENTENCE — COMMUTING BY JUSTICE — STATUTES — "CONVICTION."

Laws 1913, c. 28, § 2, subd. 2, gives no authority to a justice of the peace to suspend or commute the sentence of one convicted and sentenced to imprisonment for willful nonsupport of wife or children; it merely giving authority to take a recognisance for payments for the wife or children, instead of imposing fine or imprisonment, and "conviction" in the clause authorizing such order "before trial or after conviction," meaning, in view of the language of subdivision 3, "conviction and sentence," after a finding of guilty, and before imposition of sentence.

[Ed. Note.—For other cases, see Pardons, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1584-1591.]

Department 2. Writ of review, on the relation of Fred C. Brown, Justice of the Peace for Seattle Precinct, King County, against the Superior Court for King County, and A. W. Frater, as one of the judges thereof, to review the granting of a writ of prohibition. Affirmed.

Tucker & Hyland, of Seattle, for relator. John F. Murphy, of Seattle, for respondent.

MOBRIIS, J. This writ calls for an interpretation of chapter 28, p. 71, Laws of 1913, known as the "Lazy Husband" act. The relator is one of the justices of the peace for Seattle precinct. On October 14, 1913, a complaint was filed by Viola Mikkelsen, charging her husband, James Mikkelsen, with willfully failing and neglecting to furnish support for his wife and minor children. Under this complaint James Mikkelsen was taken into custody, and on the 20th of October a hearing was had upon the complaint, when the justice found the defendant guilty as charged, and sentenced him to imprisonment in the King county jail for the period of 182 days at hard labor, and further ordered that the defendant be placed at work upon the public roads or highways during the term of 182 days, and that the board of county commissioners pay to the wife \$1.50 per day out of the general fund for the support of the said wife and children. A commitment was duly issued to the sheriff, and, in pursuance of the judgment and the commitment, Mikkelsen was placed at work upon the public highways. Subsequently, and on February 21, 1914, the relator issued an order, directed to the sheriff, commanding him to bring the body of James Mikkelsen before him at his courtroom on the 25th day of February, 1914; whereupon the prosecuting attorney of King county sued out a writ of prohibition in the lower court, alleging in his petition, in substance, that the purpose and intent of the relator in ordering Mikkelsen to be brought before him was to commute the unexpired jail sentence. The application for the writ coming on to be heard in the lower court, relator appeared and moved to quash, which motion was denied. Relator electing to stand upon his motion, final judgment granting the writ was entered. Relator now comes to this court seeking this writ to review the decision of the lower court in granting the writ of prohibition.

The application for the writ here suggests but one question: Did the relator have power to suspend or commute the sentence of James Mikkelsen? Leaving out any question as to the validity of a statute attempting to confer upon justices of the peace the power to commute sentences, let us examine this statute to ascertain if such power can be inferred from its language. The act (Laws 1913, c. 28), so far as it is here material, is as follows:

"Sec. 2. In any case numerated in the previous section, the court may render one of the following orders:

"1st. Should a fine be imposed it may be directed by the court to be paid in whole or in part to the wife, or to the guardian, or

to the custodian of the child or children, or to an individual appointed by the court as trustee.

"2nd. Before trial, or after conviction, with the consent of the defendant, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly during such time as the court may direct, to the wife or to the guardian, or custodian of the minor child or children, or to an individual appointed by the court, and to release the defendant from custody or probation during such time as the court may direct, upon his or her entering into a recognizance, with or without sureties, in such sum as the court may direct. The condition of the recognizance to be such that if the defendant shall make his or her appearance in court whenever ordered to do so, and shall further comply with the terms of the order and of any subsequent modification thereof, then the recognizance shall be void, otherwise to remain in full force and effect.

"3rd. Where conviction is had and sentence to imprisonment in the county jail is imposed, the court may direct that the person so convicted shall be compelled to work upon the public roads or highways, or any other public work, in the county where such conviction is had, during the time of such sentence. And it shall be the duty of the board of county commissioners of the county where such conviction and sentence is had, and where such work is performed by persons under sentence to the county jail, to allow and order the payment, out of the current fund, to the wife, or to the guardian, or the custodian of the child or children, or to an individual appointed by the court as trustee, at the end of each calendar month, for the support of such wife, child, or children, ward or wards, a sum not to exceed one and fifty one-hundredths dollars for each day's work of such person."

Manifestly such power is not to be gathered from the words "shall be subject to change by it from time to time as circumstances may require," as found in subdivision 2 of section 2, as that language unquestionably refers to a change in the order requiring the weekly payment of money for the support of the wife or children. Neither can it be bottomed upon the words "before trial or after conviction," as found in the same subdivision, for, notwithstanding the strenuous argument of relator in support of his contention that the phrase "after conviction" means after sentence, the act when read as a whole negatives such a contention. Numerous cases have been cited as to the proper meaning to be given the word "convic-

tion" in criminal statutes; whether it means the finding of guilty by either court or jury, or the status of a defendant after the finding of guilt and the imposition of judgment and sentence. It is enough to say that sometimes it means the one thing and sometimes it means the other, and we must look to the context to ascertain the real meaning to be given in the particular case. Looking to subdivision 3, we find this language: "Where conviction is had and sentence to imprisonment in the county jail is imposed, \* \* \* where such conviction is had, during the time of such sentence, \* \* \* where such work is performed by persons under sentence."

These expressions clearly indicate that in framing this act the Legislature had in mind a clear distinction between "conviction" and "sentence," that by conviction a finding of guilt was meant, and that by sentence was meant the judgment of guilt and imposition of penalty. So that the words "after conviction" in subdivision 2 must be read as meaning after conviction, and before the pronouncement of sentence. It is evident that, upon a determination of guilt, section 2 confers three distinct powers upon the justice of the peace in making up his final order or judgment: (1) He may impose a fine; (2) he may require the defendant to enter into a recognizance to pay a certain sum weekly during such time as the court may direct to the wife or other person named by the court, in which case the defendant may be released from custody; (3) he may sentence the defendant to the county jail and direct that such imprisonment shall be worked out upon the public highway or other public work. The justice of the peace is thus provided with three alternatives in making up his final judgment. He may choose any one of the three. But, when he has chosen and made his judgment final, his power is at an end.

We therefore conclude that the relator had no power to order the defendant before him for the purpose of commuting his sentence, and that the writ below was properly issued.

Judgment affirmed.

CROW, C. J., and ELLIS, PARKER, and GOSE, JJ., concur.

#### KENT LUMBER CO. v. CLARKE.

(No. 11,485.)

(Supreme Court of Washington. May 8, 1914.)

1. ABSTRACTS OF TITLE (§ 1\*)—REQUISITES, MAKING, AND SUFFICIENCY.

An abstract of title need not show proceedings in the land office as a basis for title, but only the issuance of a final receipt or patent, as an examiner of the abstract, if he so desired, could then investigate the proceedings of the land office.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 2. PUBLIC LANDS (§ 35\*)—HOMESTEAD ENTRIES—TITLE OF ENTRYMAN.

A homestead entryman has, after making final proof and before the issuance of a patent, an equitable title to the land entered on, which he could convey by deed or devise by will.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.\*]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge pro tem.

Action by the Kent Lumber Company, a corporation, against Arthur Clarke to recover \$500 earnest money. From a judgment in defendant's favor, the plaintiff has appealed. Affirmed.

E. H. Guile, of Seattle, for appellant. Peters & Powell, of Seattle, for respondent.

CROW, J. The contract of sale on which the earnest money was paid reads as follows: "Received from Kent Lumber Company, Smith, Manager, the sum of \$500 earnest money as part purchase price for the following described property, to wit: Southeast one-fourth of section two, Tp. 22, range eight east, King county, Wash. The purchase price of said property to be the sum of \$12,000 on the following terms, viz.: \$2,500 cash, including the amount of this receipt, \$3,500 in one year, \$6,000 in two years at 7% interest. Agree to deliver said property to the said (Smith), his heirs or assigns, free and clear of liens or encumbrance of every kind or nature. The purchaser to have 20 days for examination of abstract from date of delivery of same. In the event of the title to said property not proving to be merchantable, upon examination, or if it could not be made so within a reasonable time, then the said earnest money to be refunded to the purchaser. Otherwise to be forfeited to the undersigned as liquidated damages. \* \* \* Dated at Seattle, Wash., this 15th day of April, 1909. Arthur Clarke. A. E. Smith."

The pleadings show that, pursuant to this agreement respondent delivered to appellant an abstract of title, which, after examination, it refused to approve, claiming that it failed to show a merchantable title. Calling attention to the fact that it did not file its proposed statement of facts until the ninety-first day after the entry of judgment, appellant in its brief frankly concedes that in a discussion of this appeal it must be limited to the question whether, under the issues raised by the pleadings, the findings are sufficient to sustain the conclusions of law and final judgment. The trial court, in substance, found that the contract had been entered into as above set forth; that appellant paid respondent the sum of \$500 earnest money; that on or about April 19, 1909, respondent delivered to appellant an abstract of title; that on May 10, 1909, appellant rejected the abstract, contending that the will

of one Maggie Thrasher, who had made a homestead entry on the land, was insufficient to vest title in Mary Damburat, her legatee, who was respondent's grantor; that Maggie Thrasher had no devisable interest; that her title passed to and vested in her heirs at law; and that the abstract failed to disclose any judicial determination as to who her heirs at law were. The court further found that in the year 1891 Maggie Thrasher entered upon the land, then unsurveyed, under the homestead law of the United States; that the land was surveyed in December, 1900; that, upon the filing of such survey, Maggie Thrasher made the requisite proof before the officers of the local land office showing her settlement, occupation, and residence, and her improvement of the land as required by the federal statutes; that her proof was thereupon transmitted to the General Land Office of the United States with the approval of the local land office; that it was approved, and the matter was finally closed by a decision of the general land office on May 4, 1901; that Maggie Thrasher died on May 11, 1901; that previously thereto she executed her last will and testament, whereby she devised all her property, specifically including the land here involved, to her mother, Mary Damburat, upon whose application a patent for the land was issued in the year 1902, running to the heirs of Maggie Thrasher, deceased; that Maggie Thrasher died a spinster, leaving surviving her, as her sole heir at law and next of kin, her mother, Mary Damburat, and leaving no father, children, or issue of her body; that at the time of her death she was a resident of King county; that her will was probated in the superior court of King county in the year 1902; that Mary Damburat, her mother and sole legatee, was qualified as executrix, without bond, and was directed to settle the estate without the intervention of any court; that Mary Damburat, as sole heir and legatee, conveyed the land to respondent, Arthur Clarke; that the abstract of title, supplemented by public records of the land office, to which appellant's attention was directed, disclosed a merchantable title in respondent to the land, which he tendered to the appellant, but that appellant, without cause, refused to accept the same.

[1, 2] Although it is not as clearly stated as it possibly might be in the findings that all facts found appear from the abstract, we are justified in assuming that they did so appear, and that the abstract did disclose such facts. This assumption does not seem to be seriously contested by appellant; its principal contention being that the findings do not disclose the proof made by Maggie Thrasher before the local land office, or the subsequent proceedings of the General Land Office thereon. In response to this suggestion, respondent well insists that no abstract of title would or-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dinarly show proceedings in the land office as a basis of title, but would only disclose issuance of a final receipt or patent; that an examiner of the abstract, if he so desired, could then investigate the proceedings of the land office. It is not contended that the abstract failed to show the issuance of the final receipt to the heirs of Maggie Thrasher; in fact, the contrary is conceded. The trial court found that the requisite proof was made by Maggie Thrasher; that such proof, and the approval of her entry by the local land office, were transmitted to the United States General Land Office, and were later approved by that office on May 4, 1901. This all occurred prior to Maggie Thrasher's death. Appellant concedes that it is in no position to question the findings of the trial court, in the absence of the evidence. Although Maggie Thrasher died after her final proof had been made, and before the final receipt or patent had been issued, yet she had an equitable and transferable interest in the land, which she could convey by deed or devise by will. *Peterson v. Sloss*, 39 Wash. 207, 81 Pac. 744; *Sayward v. Thompson*, 11 Wash. 706, 40 Pac. 379.

In the *Peterson* Case we said: "The patent, however, was issued under the homestead law, and the respondent and her grantors knew, and were chargeable with notice, that the patent was preceded by final proof, and that the entryman had full power to convey or incumber the property at any time after final proof was made. \* \* \* The title was an equitable one, it is true, but the right to transfer it is acknowledged by all the authorities."

In *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989, 132 Am. St. Rep. 986, this court, in defining a merchantable title, said: "Appellant's contract calls for a 'good and marketable title.' The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt; in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion; he can only demand such title as a reasonably well-informed and intelligent purchaser, acting upon business principles, would be willing to accept." See, also, *Moore v. Elliott*, 76 Wash. 529, 136 Pac. 849.

On the record before us it is manifest that Maggie Thrasher had an equitable title; that she devised the same to Mary Damburat, her mother, who was her only heir at law; that her last will was duly probated in the superior court of King county; that the patent to her heirs, inured to the benefit of her legatee; that Mary Damburat, as such legatee, conveyed the title to the respondent; and that respondent, having such title, tendered the same to the appellant; that, having done so, he tendered a merchantable title, and fully complied with all the requirements of his

contract; and that the appellant wrongfully rejected the same.

The judgment is affirmed.

MAIN, ELLIS, GOSE, and CHADWICK, JJ., concur.

# SHRADER v. DOWNING et ux. (No. 11,772.)

(Supreme Court of Washington. May 8, 1914.)

## 1. PARTNERSHIP (§ 92\*)—MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS—INDIVIDUAL TRANSACTIONS.

One partner may not profit for himself individually out of the partnership business, or out of private transactions which should have been conducted in the partnership name; but he may buy and sell real estate or other property, if the transaction is disconnected with the partnership business, and is not in competition therewith, and if he is under no duty to conduct it for the firm.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 139; Dec. Dig. § 92.\*]

## 2. PARTNERSHIP (§ 92\*)—MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS—INDIVIDUAL TRANSACTIONS.

A member of a firm engaged in selling real estate on commission, who bought a tract with his own money, platted it, and placed it with the firm for sale, on the usual commission, the firm having no funds with which to buy, and an effort having been made to get another to do it, was not liable to account to the firm for his profit on the transaction.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 139; Dec. Dig. § 92.\*]

## 3. PARTNERSHIP (§ 121\*)—MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS—ACTIONS BETWEEN PARTNERS—EVIDENCE.

Evidence, in an action between partners for an accounting, held to justify the conclusion of the trial court that the transaction conducted by the defendant was not intended or understood to be a firm transaction.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 183½-184½; Dec. Dig. § 121.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Alonzo N. Shrader against Walter W. Downing and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Jas. Hart, of Auburn, and Myers & Johnstone, of Seattle, for appellant. Knickerbocker & Gordon, of Auburn (Milo A. Root, of Seattle, of counsel), for respondents.

FULLERTON, J. The appellant, Shrader, and the respondent Walter W. Downing were formerly partners engaged in the real estate and insurance business as A. N. Shrader & Co., at the city of Auburn, in King county. During the existence of the partnership, Downing purchased a tract of land, containing some five and a fraction acres, which he platted into lots and blocks as an addition to the city of Auburn, calling it Downing & Shrader's addition. Downing caused the streets therein to be graded, certain sidewalks to be built, and placed the property in the hands of the firm of A. N. Shrader &

Co. to be sold, at prices fixed by himself, on a 10 per cent. commission. When ready for market the addition cost \$6,694.48, all of which was advanced by Downing. Subsequent to the purchase of the property a one-fourth interest therein was contracted to one W. S. Gill at the price it cost Downing; Gill paying therefor \$1,000 in cash, and agreeing that the balance of the cost of the one-fourth interest should be deducted by Downing out of the first moneys received from the sale of the property. Downing and Shrader both joined in the contract with Gill. The adventure proved profitable; the sale of the lots amounting to some \$4,000 over and above the original cost price and the expenses of making the sale. Shrader claimed an interest in these profits, contending that the purchase was made on behalf of and for the benefit of the partnership. Downing refused to recognize this claim, and the present action was brought by Shrader against Downing and his wife to establish an interest in the property, and for an accounting. On the trial the court ruled that the enterprise was the individual adventure of Downing, and that the partnership of A. N. Shrader & Co. had no interest therein, entering judgment accordingly. From this judgment, Shrader appeals.

[1] It is undoubtedly the rule, as the appellant contends, that one member of a partnership must act in the utmost good faith towards his copartners, and that, if he purchases property for his individual benefit when the firm itself is entitled to the advantage of such purchase, or secures a valuable contract for himself which it was his duty to obtain for the firm, he will be treated as a trustee for the firm with reference to the transaction, and be compelled to account to his copartners for the profits acquired by reason thereof. But the rule does not absolutely prohibit a member of a partnership from engaging in enterprises in his own behalf, nor does it make all property acquired by a member of a partnership during its existence the property of the firm. The applicability of the rule depends on the facts of the particular case. One partner may not make a profit for himself individually out of the partnership business, or out of the transactions which he conducts privately which in justice and equity ought to have been conducted in the partnership name; but he may, without laying himself liable to account, buy and sell real estate or other property with his individual means, if the transaction is disconnected from the partnership business, is not conducted in competition or rivalry therewith, and he is under no duty to conduct the transaction on behalf of the firm. Any other rule would prevent a member of a partnership from investing his private funds.

[2] In the case before us it is clearly shown that the partnership itself had no funds with which to purchase this particular property,

and that it could not obtain the necessary funds on the credit of the partnership assets. Its business, in so far as such business related to real estate, was that of selling real estate on commissions. It could handle the deal only by obtaining outside aid, and the record shows that an attempt was made to induce a third person to purchase the property, put it into a condition for sale, and allow the partnership to sell it for the usual commission customary in such cases. This effort failed, and only after such failure did the respondent take it up himself. In doing so he deprived the partnership of nothing. On the contrary, he conferred on it a distinct gain; all that it would have obtained had the original intention been carried into effect. Since, therefore, he placed the property in the hands of the partnership for sale, and paid to the firm the usual commission thereon, he has done all that good faith towards the partnership required him to do, and was entitled to the excess profit.

[3] We think, also, that the evidence justifies the conclusion of the trial court that the present claim of the appellant is something of an afterthought. He was in a position to take a share in the original enterprise when it was entered into, yet he never offered to do so; he accepted his share of the commissions as they were earned from time to time by sales of the property, without offering to allow them to go to the respondent as a reimbursement in part for the money the respondent had advanced; and he made no direct claim of interest until after it became evident that a profit was to be realized. It would seem that, if what he now claims was his original understanding, he would not have let his partner take the entire burden and risk of the adventure.

While there are circumstances in the record which may point to a contrary conclusion, the most potent of which perhaps is the fact that the appellant joined as a party in interest in the contract with Gill, we think on the whole that the evidence justifies the conclusion of the trial court, rather than the claim of the appellant.

The judgment is affirmed.

CROW, C. J., and PARKER, MORRIS, and MOUNT, JJ., concur.

STATE ex rel. HORAN v. SAVIDGE, Commissioner of Public Lands, et al.  
(No. 11,797.)

(Supreme Court of Washington. May 5, 1914.)

1. PUBLIC LANDS (§ 185\*)—DISPOSAL OF STATE LANDS—TIDELANDS—CANCELLATION OF SALE—POWER OF LAND COMMISSIONER.

Under Rem. & Bal. Code, §§ 6799-6805, providing for the sale by the state of tidelands to be used "for oyster planting purposes only," and section 6804 providing that, if said land be used by the purchaser for other than the purposes specified, then, upon the application

by any citizen to the state land commissioner, such sale may be canceled, the commissioner had no power to cancel a sale merely because the purchaser had failed to use it for oyster planting purposes, since the power conferred upon the commissioner must be exercised in strict compliance with the terms of the statute, and it empowers the commissioner to cancel the sale upon one ground only, viz., that the land is being used for purposes other than those specified.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 598; Dec. Dig. § 185.\*]

## 2. PUBLIC LANDS (§ 185\*)—SALE OF TIDE- LANDS—POWER OF COMMISSIONER—STATUTE —CONSTRUCTION.

The rule that all grants from the state shall be strictly construed against the grantee had no application where the only question was as to the power vested in the state land commissioner under Rem. & Bal. Code, § 6804, empowering him to cancel sales of state lands for oyster planting purposes when they were being used for other purposes, and hence did not negate the rule that a strictly statutory power must be strictly construed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 598; Dec. Dig. § 185.\*]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Proceedings by the State of Washington, on the relation of J. E. Horan, against Clark V. Savidge, Commissioner of Public Lands, and M. H. Gates and husband, to cancel a sale of state tidelands. From a judgment of the lower court sustaining a decision of the commissioner in favor of defendants, relator appeals. Affirmed.

Frank C. Owings, of Olympia, for appellant. Kerr & McCord, of Seattle, for respondents.

MORRIS, J. [1] Appellant instituted proceedings before the commissioner of public lands, seeking to cancel a deed to state lands under the provisions of the act of March 2, 1895, found in sections 6799 to 6805, Rem. & Bal. Code, providing for the sale by the state of tidelands to be used "for oyster planting purposes only." Cancellation of this deed was sought upon two grounds: (1) That the purchaser had wholly failed to use the land for the planting and cultivation of oysters, and (2) that the land was being used for hunting purposes. The commissioner held there was no evidence to show that the land was used for any purpose other than the cultivation of oysters, and, having so held, refused to make a finding upon the first contention that the land was not being used for the planting and cultivation of oysters, upon the ground that the power vested in his office to cancel deeds issued under this act could be exercised only when it appeared that the lands were used for purposes other than the cultivation of oysters, as provided in section 9 of the act (section 6804, Rem. & Bal. Code): " \* \* \* If said land be used by the purchasers or any successors in interest of such purchaser in whole or in

part for other than the purposes specified in this chapter, then upon application by any citizen to the state land commissioner such sale may be canceled. \* \* \* " Relator then sued out a writ of review to the lower court, and, upon reviewing the decision of the commissioner, it was in all things sustained by the lower court, and relator appeals.

It is not contended by the relator that his evidence establishes the fact that the land is used in whole or in part for any other purpose than the cultivation of oysters; his contention here, so far as he makes any contention upon the facts, being that the purchaser has failed to use the lands for planting and cultivation of oysters. It is doubtful if the evidence establishes either contention raised by relator. But, since there is a legal question which is decisive of the appeal, it will not be necessary for us to pass upon any question of fact. It needs no citation of authority to establish the principle here controlling that a purely statutory power must be exercised in strict compliance with the terms of the statute, and that when under a statute special power is conferred upon officials, and the manner of its exercise specifically pointed out, such power must be exercised only in the prescribed manner. *State ex rel. Sieler v. Virnig*, 137 Pac. 1039. This statute empowers the state land commissioner to cancel the sale upon one ground only, and that ground is that the land is being used in whole or in part for other than the purposes specified in the act. Here the power is special, and its exercise is limited to one cause. If the cause does not exist, the power is lacking.

A like question was determined in *State ex rel. Bussell v. Callvert*, 33 Wash. 380, 74 Pac. 573, interpreting the act of March 16, 1897 (Laws 1897, p. 229), relating to the leasing of state lands. Section 25 of the act, being section 6687, Rem. & Bal. Code, provides that the commissioner of public lands should declare a forfeiture of all such lands for nonpayment of annual rent after 60 days' notice to the lessee, and it was held that no power vested in the state land commissioner to forfeit leases for any reason other than the nonpayment of rent. In so holding the court said: "This is the only provision of the law, so far as we are advised, authorizing the forfeiture or cancellation of leases by the commissioner. And, as it is admitted that no rent was due upon the lease at the time of the attempted forfeiture, it would seem logically to follow that the commissioner had no legal authority or power to cancel it, and that his declaration of forfeiture was without force or effect as to the rights of the relator. It cannot be presumed that the Legislature intended to clothe the commissioner of public lands with power to annul leases formally executed by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



the state for any reason other than that specifically mentioned in the statute. \* \* \*

This case is decisive. If the state land commissioner cannot forfeit a lease except for the cause specified in the statute; upon the same reasoning he cannot cancel a deed except for the cause specified in the statute.

[2] Relator contends that the application of this rule is negated by that other rule that all grants from the state shall be strictly construed against the grantee. We cannot see the application of this last rule to the question before us. No question is here raised as to what passed by the grant from the state. Neither is the power of the state to make the grant nor the right of the grantee to receive it questioned. Nor does any question arise as to the intent of the grant. The sole question is as to power vested in the state land commissioner under this statute clothing an administrative officer of the state with quasi judicial powers. State ex rel. Abbott v. Ross, 62 Wash. 82, 113 Pac. 273. In that case it was held that the power of the state land commissioner to cancel grants under this statute was not violative of any constitutional limitation, although two of the judges expressed grave doubts as to the validity of a statute conferring power on the commissioner to forfeit a grant for a breach of a condition subsequent. Inferentially this case supports a holding that, if this power be sustained, it will not be enlarged beyond the language conferring it.

The judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

# WILD ROSE ORCHARD CO. v. CRITZER et al. (No. 11,552.)

(Supreme Court of Washington. May 5, 1914.)

## 1. PLEADING (§ 373\*)—WAIVER OF PROOF.

Though both allegation and proof of damages, and that they have not been paid, are necessary to a recovery upon an attachment bond, yet, where no objection that the complaint did not allege that the damages were unpaid was raised by demurrer, the only defense pleaded or raised during the trial being that the attachment was issued on the advice of counsel and with probable cause, there being a tacit acceptance of the fact of nonpayment both in the pleadings and throughout the trial, there was a waiver of proof of nonpayment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1217-1236; Dec. Dig. § 373.\*]

## 2. ATTACHMENT (§ 350\*)—WRONGFUL ATTACHMENT—ACTIONS—EVIDENCE.

In an action upon an attachment bond, evidence held to sustain a finding that defendant, the attaching creditor, had no reasonable or probable cause to believe the grounds stated in the affidavit upon which the attachment was issued, viz.: That plaintiff was about to dispose of its property with intent to delay its creditors, or convert it into money to place it beyond the reach of its creditors.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1272-1289; Dec. Dig. § 350.\*]

## 3. ATTACHMENT (§ 352\*)—WRONGFUL ATTACHMENT—ACTIONS.

What facts and whether the particular facts in a given case constitute probable cause for an attachment are exclusively for the court, and what are the facts, where there is any controversy in reference thereto, is exclusively for the jury, unless one is waived.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1304, 1305; Dec. Dig. § 352.\*]

## 4. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EVIDENCE.

Error in rejecting evidence was harmless, where it was afterwards admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by the Wild Rose Orchard Company against William Critzer and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Harris Baldwin, of Spokane, for appellants. E. O. Connor, of Spokane, for respondent.

ELLIS, J. This is an action for damages for an alleged wrongful attachment against the attaching creditor and his sureties on the attachment bond. On February 18, 1911, the defendant Critzer brought an action against the plaintiff herein upon a promissory note, and in that action sued out a writ of attachment and caused it to be levied upon personal property of the plaintiff herein. The present action was tried to the court without a jury. At the close of the evidence, the defendants moved for a judgment in their favor. The motion was denied. The court found, in substance, that on February 18, 1911, the plaintiff owned 160 acres of land in Spokane county, was engaged in the orchard and nursery business, growing fruit trees, selling orchard tracts by the acre, issuing to purchasers bonds secured by a trust deed on lands so sold, each acre of which was cultivated and planted to orchard, and owned and used daily, in the prosecution of its business, certain described personal property, including, among other things, a team of horses, all of a value of \$1,500; that on that date the defendant Critzer, in his suit on the note above mentioned, made an affidavit for an attachment, alleging that the plaintiff was about to dispose of its property with intent to delay its creditors, and was about to convert its property or a part thereof into money for the purpose of placing it beyond the reach of its creditors; that at the same time the defendant Critzer executed and filed a bond for attachment in the sum of \$850, with the defendants Freeman and Olson as sureties thereon, and thereafter caused a writ of attachment to issue, under which the sheriff of Spokane county, on February 19, 1911, took into his possession the personal property of the plaintiff, and held it until June 16, 1911, when the attachment was finally dismissed;

that the defendant Critzer took into his possession the team of horses, and kept them in his possession and from the possession of the plaintiff up to May 14, 1911; that the attachment was dissolved by the superior court of Spokane county on March 3, 1911; that an appeal was taken by Critzer from the order of dissolution to the Supreme Court of this state, which appeal was dismissed in that court on June 16, 1911. The evidence fully sustains the foregoing finding.

Though the court made no specific finding of the fact; it seems to be admitted that the note was paid a few days before the time set for the trial of the main action, in which the attachment was issued, and that this payment led to the final dismissal of the appeal. The court also found that there was no reasonable cause for a belief on Critzer's part of any of the grounds alleged in his affidavit for the attachment; that, while the orchard company owed certain debts and its property was incumbered, there was no intention to sell or dispose of its property with intent to delay its creditors, or with intent to convert its property into money for the purpose of placing it beyond the reach of its creditors; that there was no reasonable cause for the issuance of the writ; and that it was wrongfully sued out. The court further found that the plaintiff herein was compelled to employ an attorney to resist the attachment, the reasonable value of whose services is the sum of \$100, and that the plaintiff was injured by reason of being deprived of the use of its personal property, and being deprived of the use of its horses, in the sum of \$332.50. Upon appropriate conclusions of law, a judgment was entered in favor of the plaintiff for these sums and costs. The defendants appealed.

The appellants claim that the court erred: (1) In overruling their motion for judgment, because there was no averment in the complaint nor direct proof that the damages for which plaintiff sues have not been paid; (2) in finding that there was no reasonable cause for the attachment; (3) in rejecting evidence offered tending to show reasonable cause; (4) in holding the evidence sufficient to prove any damage.

[1] 1. That both allegation and proof of damages, and that they have not been paid, are necessary to a recovery in an action upon an attachment bond is, of course, too well recognized as an abstract principle of law to admit of controversy. *Church v. Campbell*, 7 Wash. 547, 35 Pac. 381. But it does not follow that a tacit acceptance of the fact of nonpayment, as a fact, both in the pleadings and throughout the trial, does not constitute a waiver of proof of that fact. In the present case no demurrer was interposed to the complaint, and the only defense pleaded in the answer or raised during the trial was that the attachment was issued on the advice of counsel and with probable cause.

No objection on the ground mentioned was offered to the introduction of the evidence tending to show a want of probable cause and the damages suffered. No motion for a nonsuit was interposed at the close of the respondent's evidence on the ground of failure to prove nonpayment, or upon any other ground. The defense that the attachment was rightfully sued out and the evidence offered in its support were a tacit admission that the damages had not been paid. Even now there is no claim that any damages had been paid or any payment tendered. It would be a clear sacrifice of substance to form to reverse the judgment because a thing, which the nature of the only defense pleaded tacitly admits, was not formally alleged and proved. In *Knapp & Spalding Co. v. Barnard & Co.*, 78 Iowa, 347, 43 N. W. 197, where the question arose upon the sufficiency of a counterclaim of damages for wrongful attachment, the court, recognizing the general rule, but refusing to apply it to a situation such as here presented, said: "In this case the alleged wrongful suing out of the writ, and the damages which defendants were entitled to recover therefor, were the only issues tried. The question of payment was not in any manner raised. It was contended by appellant that the writ was rightfully sued out; that it had not been guilty of any wrongful act; and that defendants had not sustained any damages which constituted a valid claim against plaintiff. Under these circumstances, we think plaintiff should be held to have waived the right to take advantage of the omission of the answer now urged."

[2] 2. A careful consideration of all the evidence touching the subject convinces us that the appellant Critzer had no reasonable or probable cause to believe the grounds stated in the affidavit upon which the attachment was issued. His own investigation seems to have been very superficial. He made certain inquiries of the appellant Olson, who was chief stockholder in another company to which the respondent owed a debt of \$700. He testified that Olson told him that the real estate of the respondent was so incumbered that it could not be reached by judgment; that he (Olson) had threatened to sue, and Wright, the manager of the respondent, had replied that nothing could be collected from the respondent. Critzer further testified that his brother also told him there was no use suing, as he had brought suit against the respondent, and Wright had told him, if he thought he could get anything, to go ahead and get it. He also testified that one Reep, who had been employed as foreman by respondent, told him that the respondent owed Reep considerable money, and had offered to turn over the team of horses in payment. He testified that he saw the respondent's nursery stock, but admitted that he did not know what it was worth, and made no investigation as to its value.

Finally he admitted that he never knew or heard of the respondent trying to dispose of its land or personal property, except the team of horses.

The advice of the attorney was, according to the attorney's own testimony, based upon what the appellant Critzer had told him, and upon his own investigation of the records in the auditor's office, which disclosed that the respondent had no unincumbered real estate. The attorney also testified that Wright told him that the company could not pay the note at the time, but hoped to be able to pay it soon. What Critzer told him the attorney did not disclose. Presumably it was no more than Critzer himself testified to. If it was anything more specific, then it is fair to assume that it was not true. There was evidence that the respondent had a considerable acreage of nursery stock, which, if properly marketed, would have sold for \$15,000. There was no evidence that Critzer's attorney knew anything about this nursery stock, or was ever informed of it, or had any knowledge of its value. It seems clear that he did not know all of the facts when he advised the attachment. If Critzer told him the truth, he told his attorney nothing as to the value of this nursery stock, and told him of no sale, or attempted sale, or contemplated sale, either of his own knowledge or according to rumor, except what Wright had said concerning the team. What Critzer claims to have learned, combined with what his attorney had learned from the records, taken as established facts, were no more than sufficient to raise a suspicion that the respondent might be insolvent. They were by no means sufficient to raise even a suspicion that it was transferring or contemplating a transfer or sale of any of its property to defeat its creditors. Insolvency alone is no ground for attachment. Rem. & Bal. Code, § 648. It is clear that the combined knowledge of both Critzer and his attorney did not constitute a sufficient basis for the affidavit upon which the attachment was issued.

[3] The appellants, however, insist that probable cause will be presumed when the attachment is issued upon the advice of an attorney. Many authorities hold that probable cause is only material where exemplary damages are involved, and that advice of an attorney is no defense to a claim for actual compensatory damages. *Birmingham Dry-Goods Co. v. Finley*, 122 Ala. 534, 26 South. 138; *Yarborough v. Weaver*, 6 Tex. Civ. App. 215, 25 S. W. 468; *Schofield v. Territory*, 9 N. M. 526, 56 Pac. 306; 4 Cyc. 861; *Waples on Attachment and Garnishment* (2d Ed.) § 1018. This court, however, has held that probable cause is a question of law, in this far, at least, that probable cause will be presumed when the action has been commenced by the advice of attorneys to whom has been submitted all the facts in the case. *Levy v.*

*Fleischner, Mayer & Co.*, 12 Wash. 15, 40 Pac. 384.

Under the provisions of our statute (Rem. & Bal. Code, § 654), which makes proof that there was no reasonable cause for the attachment necessary to a recovery on an attachment bond for wrongful attachment, that decision seems inevitable. But that case, which goes as far as any to which our attention has been called, holds the presumption of probable cause arises from the advice of an attorney only when it appears that all of the facts have been submitted to the attorney. What facts and whether the particular facts in a given case constitute probable cause is a question exclusively for the court. What are the facts existing in the given case, where there is any controversy in reference thereto, is a question exclusively for the jury, unless a jury is waived. *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697; *Burton v. St. Paul, M. & M. Ry. Co.*, 33 Minn. 189, 22 N. W. 300. As pointed out in *Voss v. Bender*, these rules apply even where the attachment is issued pursuant to the advice of an attorney.

Applying these rules to the present case, the evidence justified a finding that there were no facts showing, or reasonably tending to show, that the respondent was disposing of, or seeking to dispose of, any of its property for the purpose of defrauding its creditors. Such being the particular facts, it follows, as a matter of law, and as a question exclusively for the court, that they did not constitute probable cause for the issuance of the attachment on the grounds upon which it was issued. It appearing that the attorney, in giving his advice, acted upon imperfect knowledge, in that he was not possessed of all of the facts in the case, his advice does not raise a presumption of reasonable cause, even under the rule declared in *Levy v. Fleischner, Mayer & Co.*, supra, much less under that rule as explained in *Voss v. Bender*, supra. The trial court committed no error in holding that there was no probable cause for this attachment, and that it was wrongfully issued.

[4] 3. We find no merit in the claim that the court erred in rejecting evidence offered tending to show reasonable cause for the attachment. The record shows that the same evidence which was at first rejected was afterwards admitted, and much more of the same character.

4. Neither do we find any merit in the claim that the evidence of damages was insufficient to sustain the judgment. The damages were confined to the actual damages. Nothing was allowed as punitive or exemplary damages. The court, in the course of the trial, received no evidence of general damages, but limited the damages to those sustained on account of the loss of the use of the team of horses. We fail to find that the damages recovered were excessive, or

that they were not sustained by a fair preponderance of the evidence.

The judgment is affirmed.

CROW, C. J., and MAIN, GOSE, and CHADWICK, JJ., concur.

**FRAIR v. CASWELL. (No. 11,683.)**

(Supreme Court of Washington. May 5, 1914.)

**1. APPEAL AND ERROR (§ 272\*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE—EXCEPTIONS.**

Actual notice of the filing of findings of fact is equivalent to service of notice thereof, within the statute requiring the filing of exceptions to findings of fact within five days after service of the findings, or of notice of the filing thereof; and appellant, who files a motion for new trial, though there has been no service of the findings, or of notice of filing, must file exceptions within five days, or the sufficiency of the evidence will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. § 272.\*]

**2. WITNESSES (§ 255\*)—EXAMINATION—REFRESHING RECOLLECTION.**

A party furnishing a bill of particulars, in which each item of damage demanded is set forth, may, on the trial, use the bill to refresh his memory.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

**3. COSTS (§ 184\*)—WITNESSES—TAXATION.**

Where the allegations of the complaint were put in issue by the answer, plaintiff could call witnesses to prove his case, without anticipating admissions of defendant by failure to introduce controverting evidence; and where plaintiff recovered judgment, the fees of the witnesses were properly taxed as costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715-736; Dec. Dig. § 184.\*]

Department 2. Appeal from Superior Court, King County; E. K. Pendergast, Judge.

Action by Chester Frair against E. W. Caswell. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin Korstad and Chas. E. McAvoy, both of Seattle, for appellant. Leopold M. Stern and J. W. Russell, both of Seattle, for respondent.

**FULLERTON, J.** The respondent brought this action against the appellant to recover for an injury to his automobile, alleged to have been caused by the negligent act of a servant of the appellant. On a trial had before the court sitting without a jury, findings of fact were made in favor of the respondent, on which a judgment was entered for \$400.

[1] The principal errors assigned by the appellant question the sufficiency of the evidence to sustain the findings and judgment. The respondent, however, insists that these questions are not before the court, for want of sufficient exceptions to the findings. The objection, we think, is well taken. The findings were filed by the judge with the

clerk of the court on May 27, 1913. On May 29, 1913, the appellant moved for a new trial. This motion was heard and decided adversely to the appellant on July 22, 1913, and six days later written exceptions to the findings were taken and filed. The statute requires exceptions to findings of fact, taken in this form, to be filed within five days after service of the findings of fact on the party excepting, or after service of a written notice of the filing thereof. There is an affidavit in the record in which it is alleged that no service of the findings or judgment was made upon either the appellant or his attorneys. But actual notice is equivalent to service, and it is shown, by the fact that the appellant filed a motion for a new trial on May 29, 1913, that he had actual notice of the decision upon that day. To have been in time, the exceptions should have been filed within five days after that date, and a filing of such exceptions on July 28, 1913, was therefore not in time.

[2] The respondent, on the motion of the appellant, furnished the appellant with a bill of particulars, in which he particularized the several items of damage caused the automobile by the collision of the team therewith. At the trial, when the respondent was on the stand, he was unable to recall from memory each of the particular items, and the court permitted his counsel, over the objection of the appellant, to call his attention to the omitted items. It is objected that this was error, but we think it proper practice. The items were several in number, and it would have been remarkable, had the respondent been able to recall each of them without refreshing his memory in some manner. For counsel to direct the witness' attention to the items was not only his right, but his duty, if he is to render his client a full measure of service.

[3] Some six certain witnesses were called by the respondent and testified to matters pertaining to the accident, and witness fees for them were allowed by the court in the taxation of the costs. It is objected that this was improper, because, it is claimed, they testified to no fact not admitted by the appellant. But, while it may be true that they testified to facts which the appellant did not controvert by evidence, the matters testified to tended to support the allegations of the complaint, all of which were put in issue by the answer. The respondent could not anticipate admissions on the part of the appellant, and it was his privilege to prove his case in the strongest manner possible. There was no undue accumulation of evidence, and we think the court properly allowed the fees of the witnesses as costs.

The judgment is affirmed.

CROW, C. J., and MORRIS, PARKER, and MOUNT, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## TACOMA RY. &amp; POWER CO. v. CITY OF TACOMA. (No. 11,610.)

(Supreme Court of Washington. May 7, 1914.)

## 1. ELECTRICITY (§ 4\*)—STREETS—FRANCHISES—CONDITIONS—POWER OF CITY.

Under Rem. & Bal. Code, § 7507, subd. 7, authorizing cities of the first class to regulate the use of streets, to authorize or prohibit the use of electricity at, in, or on any of the streets, and to prescribe the conditions on which the same may be used, and regulate the use thereof, a city of the first class, in granting a franchise to a corporation to use the streets to furnish electricity for power and heat, was authorized to impose as a condition that it should not furnish electricity for lighting or generating electricity for lighting, and providing that the franchise should be void and subject to forfeiture in case of a breach of such condition.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.\*]

## 2. ELECTRICITY (§ 4\*)—FRANCHISES—CONDITIONS—ABROGATION.

Public Service Commission Law (Laws 1911, c. 117) deals only with questions of safety, efficiency, rates, and equality of public service, and hence sections 8, 30, and 33 did not abrogate a condition in an electric franchise previously granted by a city of the first class to a railway and power company, providing that it should not furnish electricity for lighting.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.\*]

## 3. ELECTRICITY (§ 4\*)—FRANCHISES—FORFEITURE.

Where a city granted complainant company a franchise to use the streets for the distribution of electricity for heat and power, and for lighting street cars, provided it should not furnish power for lighting and generating electricity for heating generally, and declared that the franchise should be void in case of complainant's failure to perform any of the conditions specified, and, if the failure be not corrected within 30 days after notice, the franchise should be terminated and complainant's property forfeited to the city, complainant's failure to cease furnishing electricity to a railroad company for lighting for more than 30 days after notice to desist was ground for termination of the franchise and forfeiture of the property.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.\*]

## 4. ELECTRICITY (§ 4\*)—FRANCHISES—FORFEITURE—EVIDENCE.

In a suit to enjoin a city from forfeiting an electric franchise for alleged breach of a condition binding complainant not to furnish electricity for lighting, consisting of the furnishing of electricity for lighting purposes to a railroad company after notice to desist, evidence that it would cost the railroad company from \$1,000 to \$1,500 to readjust its system so as to take power for lights from the city instead of from complainant was immaterial.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.\*]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Suit by the Tacoma Railway & Power Company against the City of Tacoma. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. B. Howe, of Seattle, and John A. Shackelford, of Tacoma, for appellant. T. L. Stiles and Frank M. Carnahan, both of Tacoma, for respondent.

GOSE, J. This is a bill in equity to enjoin the city of Tacoma from forfeiting a franchise. The city filed an answer and a cross-complaint, asking that the franchise be declared forfeited. Issues were joined, the cause was tried, and ultimated in a judgment in favor of the city, terminating the franchise. The plaintiff has appealed.

The respondent, the city of Tacoma, is a city of the first class, and, since 1893, has owned and operated a municipal lighting plant. In 1912 it qualified itself to take over the entire lighting business of the city. The appellant owns and operates a street railway system in the city of Tacoma. In 1890 the Legislature passed an act (Laws 1890, p. 131) classifying cities, and empowering cities of the first class to frame their own charter. It also empowered them (Rem. & Bal. Code, § 7507, subd. 7): "To lay out, establish, open, \* \* \* or otherwise improve streets, alleys, avenues, \* \* \* and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof."

In pursuance of this power, the respondent framed an independent charter, and amended the charter in 1896, prohibiting the legislative power of the city from granting to any person or corporation a franchise, privilege, or right "to sell or supply water or electric lights within the city of Tacoma to the city or any of its inhabitants," as long as the city owns a plant or plants for that purpose and is engaged in the public duty of supplying water or light, subject to the exception that the city might grant a franchise to supply water or electric light to any part of the city not supplied or furnished by the city plant, "to cease and determine at such time as the city of Tacoma shall furnish and provide water and light in said section or part of the city." This amendment was carried into the charter of 1909. In harmony with this charter, the city council in 1905 adopted an ordinance granting to the appellant, its successors and assigns, for a period of 25 years, "the right, privilege, authority, and franchise" to erect and maintain poles, lines, and conduits, and to stretch wires thereon along, across, and underneath the streets and alleys of the city, for the purpose of transmitting, distributing, and selling electric current, to be furnished and used for the purpose of furnishing "power and heat, or either of them," for power and heating purposes, and "for lighting street cars," and

providing that it should not "furnish power to be used for lighting or generating electricity for lighting." It was provided that the stipulations in the ordinance should not prevent the city from granting the appellant, "by special permit," the right to furnish electric current "for lighting purposes," subject to the provisions of the city charter and the laws of the state, "such permit, however, to be revocable at any time at the option of the city."

The ordinance further provided: "Sec. 2. That each and every right, privilege and authority and franchise by this ordinance granted, shall without the passage of any resolution, ordinance or any action of any kind whatsoever, on the part of the city of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the commissioner of public works of said city, under the directions and authority of the city council of said city to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the serving of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the conditions herein, the said grantee, its successors or assigns, shall also forfeit and surrender to the city of Tacoma, all poles, lines, wires, or other property that may be located or constructed in pursuance hereof, within the city of Tacoma, unless the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said city of Tacoma."

Another section of the ordinance provided that the grant was subject to the right of the city at any time, on 30 days' notice to the grantee, to repeal, change, or modify the grant if the franchise granted was not exercised in accordance with the provisions of the ordinance; "and the city council reserves the right so to do, and this section shall be considered as a cumulative and additional remedy to that provided by section 2 of this ordinance."

Another section of the ordinance in express terms reserved to the city the right to maintain and operate an electric light, heat, and power plant.

The appellant filed an acceptance of the ordinance as follows: "And the said Tacoma Railway & Power Company, by its manager and upon due authority of its board of di-

rectors, agrees to be bound by the conditions, limitations, and obligations set forth and contained in said ordinance."

In December, 1908, the appellant entered into a contract with the Northern Pacific Railway Company, wherein it obligated itself to furnish to that company, at its depot in the city and at its shops in South Tacoma, all the electric power that it uses "for power purposes and for lighting purposes, for a period of ten years from the date of said contract." On the 2d day of April, 1913, the city, then being qualified to take over all the lighting business within its boundaries, passed a resolution revoking the permit, which it had theretofore granted to the appellant, to furnish electric current for lighting purposes, and providing that from and after April 15th following it should cease to furnish any current for that purpose. On April 21st following the council passed a resolution, reciting that the appellant was then supplying electric current to be used directly and indirectly for lighting purposes. The resolution directed the commissioner of public works to notify the appellant that, in case of failure to comply with the terms and conditions of the ordinance before the expiration of 30 days after service of the notice, the city would consider the franchise granted by the ordinance null and void, and would claim a forfeiture of all poles, wires, lines, and other property located or constructed in pursuance of the ordinance, unless the same should be removed within 60 days, as specified in section 2, and that the council would repeal the ordinance. The notice was served on April 23d. The appellant declined to comply with the notice, and, on the 22d day of May, commenced this action, praying that the appellant be enjoined from repealing the ordinance or declaring the same null and void, and praying that it be enjoined from asserting a forfeiture. The city answered, setting forth the matters and things to which we have adverted, and praying that the appellant be enjoined from furnishing electric power in the city, to be used directly or indirectly for lighting purposes; and that the ordinance to which reference has been made, "and every right, privilege, authority, and franchise granted thereby," be forfeited, and declared to be null and void. It was adjudged that all the powers granted by the ordinance had been forfeited by the appellant in continuing to furnish the Northern Pacific Railway Company with power for lighting; that the ordinance should be null and void and of no further effect; that the appellant should be no longer entitled to exercise any privileges under it "except to remove its poles, lines, wires, and other property from the streets of said city"; that the appellant be enjoined from maintaining poles, lines, or stretching or maintaining wires thereon, in, over, upon, or across the streets or alleys of the city, and from trans-

mitting electric current over said lines or wires for the purpose of furnishing "power or heat, or for any other purpose" arising out of, or dependent upon, such ordinance. It was further adjudged that, unless the appellant shall, "within sixty days after the entry of this decree, remove its poles, wires, and other property from the streets, alleys, and public places of the city, the same shall be thereupon forfeited to, and be the property of, the city of Tacoma."

The appeal presents four principal questions: (1) Was the condition in the ordinance that the appellant should not furnish electricity for lighting purposes a valid one; that is, did the city have the power to so limit the franchise? (2) If so, was the limitation abrogated by the public service commission law (Laws 1911, p. 543)? (3) Did the refusal of the appellant to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warrant the court in adjudging a forfeiture? (4) Did the court commit error in excluding certain testimony? These questions will be treated in the order stated.

[1] In respect to the first question, there seems little room for a difference of opinion. The statute quoted (Rem. & Bal. Code, § 7507, subd. 7) expressly empowers cities of the first class to regulate and control the use of streets, and to "authorize or prohibit" the use of electricity at, in, or upon any of the streets," and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof." Broader language could hardly be used. It is obvious that the Legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter. *State ex rel. Telegraph Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116; *Western U. Tel. Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495.

In the *Coverdale* Case, in considering a similar question, the court said: "The unqualified right to grant or refuse at discretion carries with it the right to impose any terms on the grant not forbidden by law."

Authority from the Legislature to regulate and control the use of the streets, to vacate them, to authorize or prohibit the use of electricity upon the streets, and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof, is so broad in its nature that it is clear the Legislature intended to empower cities of the first class to hedge any such privileges with all the conditions that the state itself could impose. The charter adopted by the people in pursuance of this authority shows that the people intended to reserve to themselves the exclusive right to furnish light to the city and its inhabitants, to the extent of the ability of the city, and no statute has been cited which qualifies or limits

the right of the people of cities of the first class to do so.

The authorities cited by the appellant are upon facts and conditions so variant, and upon statutes so dissimilar, that they afford little or no aid in the solution of the question. In *Crawford Elec. Co. v. Knox County Power Co.*, 110 Me. 285, 86 Atl. 119, it was held that electric power was a commodity, and that the right to furnish it for light and power is not a sovereign privilege, but a business which was open to any individual without special legislative grant, provided he secured a permit from the municipal officers.

[2] In respect to the public service commission law and sections 8, 30, and 33, which are relied upon by the appellant, it seems sufficient to say that that law deals only with the questions of safety, efficiency, rates, and equality of public service. The power to grant a limited franchise is still in the city. No power was given to the public service commission to grant, modify, or abrogate franchises or contracts arising out of franchises, except in regard to rates and the regulation of service in respect to its safety, efficiency, and equality. It was not the purpose of the act to enlarge franchises, or to require the performance of acts being exercised under a franchise which could not be legally exercised, or for a longer period than such acts could be legally exercised. The appellant has cited *State ex rel. Webster v. Superior Court*, 87 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78; *Seattle Elec. Co. v. City of Seattle* (D. C.) 206 Fed. 955; and *Worcester v. Street Ry. Co.*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591. In the *Webster* Case it was held that the right to fix the rates of telephone companies was vested in the public service commission. In *Seattle Elec. Co. v. Seattle*, Judge Rudkin held that the public service commission law withdrew from cities the power to fix rates for street car service. In the *Worcester* Case it was held that the state had the power to abrogate the limitations and conditions contained in a franchise. None of these cases are apposite to the question before us.

[3] The forfeiture was adjudged under section 2 of the ordinance, which we have quoted. The authority to declare the forfeiture is so clearly expressed as to remove the question from the sphere of debate. The ordinance authorized a forfeiture of the franchise for a breach of any of its conditions, and provided for a forfeiture of all poles, lines, wires, or other property located or constructed in pursuance of the ordinance, "unless the same are removed within sixty days, and said streets, alleys, and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said city of Tacoma." An additional remedy was given to the city to repeal, change, or modify the grant for a breach of its conditions upon 30 days' notice. But this section expressly pro-

vides that the remedy thereby reserved is "cumulative and additional" to the remedy provided in section 2. The resolution of April 2d revoked the special permit theretofore given to the appellant to furnish electricity for lighting purposes, to become effective on April 15th. The resolution of April 21st gave the appellant notice that the city would terminate its franchise altogether if it did not, within 30 days, cease to furnish electricity for lighting. It further gave notice that, upon a failure to comply with its demands, it would claim a forfeiture of all instrumentalities used in pursuance of the ordinance, unless the same were removed within 60 days, as specified in section 2 of the ordinance. The appellant disregarded both resolutions, and continued to furnish current for lighting after the 30 days had expired. No reason is suggested why the forfeiture should not have been declared, other than the equitable maxim that equity abhors a forfeiture, and that courts will always proceed with great caution in directing the forfeiture of a franchise, and will only do so in clear cases. These principles, of course, mean that ordinarily property will not be declared forfeited where the franchise or contract leaves a discretion in the court. It is well settled that a city may declare a forfeiture of a franchise where matters of substance or of contract have not been complied with by the beneficiary. *State ex rel. Sylvester v. Superior Court*, 60 Wash. 279, 111 Pac. 19; *Union Street R. Co. v. Circuit Judge*, 113 Mich. 694, 71 N. W. 1073; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.

In the Michigan case the city was proceeding regularly to declare the relator's franchise forfeited upon grounds expressly reserved in the ordinance. The relator thereupon filed a bill in equity to restrain the city from taking the threatened action. The court held that the city was proceeding in exact accordance with the terms of the ordinance, and could not be restrained. In the *Sylvester* Case an ordinance repealing a franchise was sustained, on the ground that the franchise had not been accepted within the time prescribed in the ordinance, although no express power to do so was reserved.

The appellant cites and relies upon *Wakefield v. Village of Theresa*, 125 App. Div. 38, 109 N. Y. Supp. 414; *City of Topeka v. Water Co.*, 58 Kan. 349, 49 Pac. 79; *Illinois, etc., v. Doud*, 105 Fed. 129, 44 C. C. A. 389, 52 L. R. A. 481; *State v. Real Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109; *People v. Los Angeles, etc., Gas Co.*, 150 Cal. 557, 89 Pac. 108; *Commonwealth v. Newport, etc., Turnpike Co. (Ky.)* 97 S. W. 375. In the *Wakefield* Case the contract did not provide for a forfeiture. Moreover, the equities of the owner of the lighting plant were so preponderant that it would have been a gross

miscarriage of justice to declare a forfeiture. In *City of Topeka v. Water Co.*, a forfeiture of a franchise was sought upon grounds not covered by the forfeiture clause contained in the ordinance, but for an alleged breach of other parts of the ordinance. The court denied a forfeiture, for the reasons stated, and upon the familiar equitable principle that equity does not look with favor upon forfeitures, and will not ordinarily declare a forfeiture under such circumstances where there is another adequate remedy. *Illinois, etc., v. Doud* is substantially to the same effect.

In *State v. Real Estate Bank*, it was said: "Where the Legislature has prescribed certain conditions upon which a corporation shall forfeit its franchises, those conditions supersede the common law, and they alone will constitute a just ground of forfeiture. But, where the act of incorporation is silent as to what shall create a forfeiture, the common-law doctrine is in full force. \* \* \* Courts will always lean against a forfeiture."

In *People v. Los Angeles, etc., Gas Co.* the defendant was exercising a right given by the Constitution of the state where no power of forfeiture was reserved. In *Commonwealth v. Newport, etc., Turnpike Co.* the court said that, the Legislature not having defined the causes for a forfeiture of the franchise, a broad discretion rested in the courts to be exercised in an equitable manner.

The testimony shows that the appellant furnished electric power to the Northern Pacific Railway Company both at its depot and at its shops in South Tacoma, at 2,300 volts, and that the railway company did its own transforming. The appellant sought to show that the city was not in a position, at the time it served its notice, or within the 30 days, to take over the whole load at South Tacoma. The evidence makes it clear that it was able to supply the railway company with power for lighting purposes.

[4] This is all the city by either of its resolutions sought to do. The appellant further sought to show that it would cost the railway company from \$1,000 to \$1,500 to readjust its system so as to take power for lights from the city. This is beside the question. The record shows that the city was in a position to supply the railway company with all needed power for lighting purposes upon short notice. Moreover, the railway company is not here complaining. It is apparent from the record that the railway company could have qualified itself to receive power from the city for all its lighting purposes within the 30 days; at least, it is not shown, and no attempt was made to show, that it could not do so. Under these circumstances, it is not necessary to apply the rule that a judgment will be held in abeyance where the rights of a public service company are involved, to the end that the public service will not be hampered.



The appellant also offered to prove a conversation with the respondent's superintendent of lights and with its city attorney, prior to the passage and service of the resolution of April 21st. This was excluded by the court, upon the ground that, upon that date, the city itself took definite action, of which the appellant was duly advised. There was no error in the rejection of any of this testimony.

The appellant, after the service of the second notice, and for more than the 30-day period named in the resolution and fixed in the ordinance, proceeded, in willful disregard of the limitations of the city charter, the ordinance, and the notice, to supply current for lighting purposes to the Northern Pacific Railway Company, and cannot therefore complain that it has been held to the terms of its bond.

Counsel say in their reply brief that the decree of forfeiture "includes the lines by which the power for operating the street cars of appellant is transmitted from the city limits to the central station." We find nothing in the record to justify this statement. The judgment is limited to the franchise in question and the instrumentalities erected and used thereunder.

Affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

#### MALMO v. SHUBART. (No. 11,607.)

(Supreme Court of Washington. May 8, 1914.)

##### 1. SALES (§ 465\*)—CONDITIONAL SALES—FILING OF CONTRACT—RESIDENCE OF CORPORATION.

The residence of a corporation, within Rem. & Bal. Code, § 3670, requiring filing of a contract of conditional sale in the county where the buyer resides, is where it has its principal place of business.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.\*]

##### 2. SALES (§ 465\*)—CONDITIONAL SALE CONTRACT—FAILURE TO FILE—RIGHTS OF IMMEDIATE PARTIES.

As between the immediate parties to a conditional sale contract, their rights are not disturbed by failure to file it, as required by Rem. & Bal. Code, § 3670, to protect the seller against purchasers from and creditors of the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.\*]

##### 3. SALES (§ 474\*)—CONDITIONAL SALES—FILING OF CONTRACT—"CREDITOR."

"Creditors," within Rem. & Bal. Code, § 3670, making absolute, as to subsequent good faith creditors, a conditional sale contract, where the property is placed in the buyer's possession, unless filed as provided, are those only who have acquired some kind of lien, and do not include general unsecured creditors extending credit without knowledge of the delivery or possession of the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Intervention, in the action of C. Malmo against the Washington Rendering & Fertilizer Company and others, by the Puget Sound Machinery Depot, to reclaim property from Charles Shubart, receiver. Judgment for the receiver, and intervener appeals. Reversed and remanded.

Ira Bronson, of Seattle, for appellant. Willett & Oleson, of Seattle, for respondent.

MORRIS, J. [1] The question here submitted is whether or not an unrecorded conditional sale contract is good as against a receiver representing subsequent general creditors. Our statute (Rem. & Bal. Code, § 3670), provides that contracts of this character, where the property is placed in the possession of the vendee, shall be absolute as to subsequent creditors in good faith, unless, within ten days after taking possession, a memorandum of the sale be filed in the auditor's office of the county where the vendee resides. The vendee in this instance was a corporation having its principal place of business at Seattle, in King county. Its residence, therefore, in legal contemplation, was in King county, although the property covered by the contract was in Kitsap county. The vendor filed the contract in Kitsap county. This was not a compliance with the statute, and the contract must be regarded as not filed within the meaning of the law. First National Bank v. Wilcox, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203.

[2, 3] The appellant contends that, inasmuch as we have held in *Heal v. Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211, and *Pacific Coast Biscuit Co. v. Oswald*, 137 Pac. 483, that the word "creditors," in the chattel mortgage statute, means creditors who have acquired some form of lien on the mortgaged property, a like reasoning demands giving a like meaning to the word "creditors" in the conditional sales statute, while respondent contends there is such a distinction between the two instruments that the reason for the first holding will not support appellant's contention. The distinction between the two instruments is not to be denied. A chattel mortgage imposes a lien upon personal property to which the mortgagor has title and which is generally in his possession, while a conditional sale contract evidences only a change of possession of the property from the vendor to the vendee and, contrary to the common-law rule that possession evidences ownership, gives notice that the ownership does not follow possession but remains in the vendee. The one instrument evidences a lien against the legal title; the other is the assertion of the legal title as against the presumption of possession. The purpose of requiring a public record in both cases is the same, so far as the rights of creditors are concern-

ed; that is, to prevent the one in possession of the property from pledging it to secure the debt of one creditor, and then using it as an unincumbered asset to incur other obligations. As between the parties themselves, there is no distinction between the two instruments in that the failure to record does not disturb the rights of the immediate parties. *Wittler-Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629. There is therefore no good reason, so far as we can discover, that demands a holding that the third persons, whose rights are protected in the one statute, are of a different class from those whose rights are protected in the other. If, therefore, the word "creditors," in the chattel mortgage statute, means those only who have acquired some form of lien, by the same process of reasoning the same meaning must be given to the same word in the conditional sales statute, since the purpose of both statutes is the same. There can be no question but that such a rule follows the great weight of authority. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Holt v. Crucible Steel Co.*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756; *In re Great Western Mfg. Co.*, 152 Fed. 123, 81 C. C. A. 341; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435; *John Deere Plow Co. v. Anderson*, 174 Fed. 815, 98 C. C. A. 523; *Hamilton v. Beggs Co. (C. C.)* 179 Fed. 949; *Nauman v. Bradshaw*, 193 Fed. 350, 113 C. C. A. 274; *Big Four Imp. Co. v. Wright*, 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223; *Am. Clay Mach. Co. v. Brick Co.*, 87 Conn. 369, 87 Atl. 731; *Clark v. Richards Lumber Co.*, 68 Minn. 282, 71 N. W. 389; *Bradley, Clark & Co. v. Benson*, 93 Minn. 91, 100 N. W. 670.

The creditors represented by the receiver in this case were general, unsecured creditors, who had extended credit to the insolvent without knowledge that the property described in the conditional sale contract had been delivered to or was in the possession of the insolvent. It follows that, as against them, the conditional sale contract is good.

The judgment is reversed. The cause will be remanded for the entry of a new decree in accordance herewith.

CROW, C. J., and PARKER and MOUNT, JJ., concur.

CARLSON v. DRUSE et ux. (No. 11,661.) (Supreme Court of Washington. May 8, 1914.)

1. REFORMATION OF INSTRUMENTS (§ 36\*)—COMPLAINT—SUFFICIENCY.

Under Rem. & Bal. Code, § 258, subd. 2, requiring a complaint to contain a plain and concise statement of the facts constituting the cause of action, the complaint, in a suit to reform a deed, which alleges that the grantor staked off a definite tract containing 2½ acres, exclusive of roads, and gave the grantee an earnest money receipt, and later conveyed 2½ acres, including the roads, that the difference

between the amount conveyed and the amount claimed was about half an acre, and that the purchase price was \$2,500 per acre, states a cause of action based on a material and mutual mistake.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

2. APPEAL AND ERROR (§ 1170\*)—QUESTIONS REVIEWABLE—DEFECTS IN PLEADINGS.

Where evidence admitted under objection showed sufficient ground for reforming a deed, the defect in the complaint for the reformation of the deed, arising from failure to state the mistake with sufficient definiteness, was not availing on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4086, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

3. REFORMATION OF INSTRUMENTS (§ 45\*)—GROUNDS—EVIDENCE.

To warrant a reformation of an instrument, the evidence must be clear and convincing that it is not what the parties intended it to be.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

4. REFORMATION OF INSTRUMENTS (§ 45\*)—MISTAKE—EVIDENCE—SUFFICIENCY.

In a suit to reform a deed, evidence held to justify a finding of a material and mutual mistake in the deed.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

5. REFORMATION OF INSTRUMENTS (§ 25\*)—MISTAKE—EVIDENCE—SUFFICIENCY.

A deed of real estate may be reformed so as to carry out the actual intention of the parties, where there has been a material and mutual mistake, but no fraud, though the mistake may be due to the negligence of one or both of the parties.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 84-90; Dec. Dig. § 25.\*]

6. REFORMATION OF INSTRUMENTS (§ 32\*)—TIME TO SUE—LACHES.

A delay of two years in suing to reform a deed does not bar the action, where the delay has not prejudiced defendant.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 119-121; Dec. Dig. § 32.\*]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by Gus T. Carlson against Daniel L. Druse and wife. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

McAulay & Meigs, of North Yakima, for appellants. Davis & Morthland, of North Yakima, for respondent.

GOSE, J. This action was brought to reform a deed. Decree for the plaintiff. The defendants have appealed.

The complaint alleges, in substance, that the appellants owned 5½ acres of land, definitely describing it, including a road along the west side of the tract 33 feet in width, and a road along the north side of the tract 20 feet in width; that the respondent purchased the north 2½ acres of the tract at \$2-

500 per acre, after the appellant husband had measured the ground and set a stake to mark the south boundary line; that upon the same day the appellant prepared and delivered an earnest money receipt, reciting that he had received the first payment "on purchase price of two and one-half acres of land," a part of a definitely described tract; that later the appellants conveyed to the respondent  $2\frac{1}{2}$  acres of land, including both roads; that the lands staked off, including the roads, contained about 3 acres; and that after the execution of the earnest money receipt, the appellants moved the stake north about 45 feet, and took, and have since held possession of, such strip of land. The receipt and the deed are made part of the complaint, and will be more fully set forth later. The prayer is for a reformation of the deed so as to embrace the lands staked off, by metes and bounds description.

[1] A general demurrer to the complaint was interposed and overruled. This is the first error claimed. While it would have been better pleading to describe the tract of land which the respondent claims to have purchased, by metes and bounds, yet we think the complaint states a cause of action. In substance it alleges that the appellant staked off a definite tract of land containing  $2\frac{1}{2}$  acres exclusive of roads, gave the respondent an earnest money receipt, and later conveyed him  $2\frac{1}{2}$  acres, including the roads. The difference between the amount conveyed and the amount claimed is about a half acre. The purchase price was \$2,500 per acre. The mistake, if any, was a material one; and the facts alleged sufficiently show that the mistake was mutual. Our statute (Rem. & Bal. Code, § 258, subd. 2) requires that a complaint shall contain a plain and concise statement of the facts constituting the cause of action. In this class of cases the complaint must show the real agreement, the written one, and wherein the writing fails to embody the real agreement. 34 Cyc. 970, 972, 973. The complaint discloses a material and mutual mistake, and points out the mistake with sufficient definiteness. *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751; *Dennis v. Northern Pacific R. Co.*, 20 Wash. 320, 55 Pac. 210; *Rosenbaum v. Evans*, 63 Wash. 506, 115 Pac. 1054; *Bruce v. Grays Harbor Drug Co.*, 68 Wash. 668, 123 Pac. 1075.

[2] Moreover, should it be conceded that the complaint was defective, if the evidence, although admitted under objection, discloses sufficient reason for reforming the deed, the error will be treated as technical and unavailing at this stage of the proceedings. *Sjong v. Occidental Fish Co.*, 138 Pac. 313. In that case the court said: "But a different rule obtains when the trial court treats a defective complaint as sufficient, and permits each side to fully present his evidence upon the real issue in the case. In such instances this court is enjoined by statute to hear such

causes upon their merits, disregard all technicalities, and to consider all amendments which could have been made as made. Rem. & Bal. Code, § 1752 (P. C. 81, § 1255). True, if it appears that the complaining party has been surprised or misled by the want of sufficient allegations in the pleadings, and has thereby been prevented from fully presenting his case to the jury, the error is fatal to the verdict; but nothing of this sort appears in the present record." The same may be said of the case at bar. Both parties submitted testimony in support of their respective views of the transaction.

[3] To warrant a reformation, the evidence must be clear and convincing that the writing is not what the parties intended it to be. *Dennis v. N. P. R. Co.*, supra; *Rosenbaum v. Evans*, supra; *Bruce v. Grays Harbor Drug Co.*, supra. In *Beverly v. Davis*, recently decided, we held that clear and convincing evidence was required to establish that an absolute deed, with an option to repurchase, was intended as a mortgage.

[4] The crucial question in this case is, Have the respondents shown a mutual mistake by clear and convincing evidence? After the appellant husband set a stake to represent the south boundary of the tract, he drew with his own hand, and delivered to the respondent, an earnest money receipt as follows: "No. Yakima, Wn. April 20th, 1910. Received of Gus T. Carlson, one hundred dollars, first payment on purchase price of two and one-half acres of land, being a part of the northwest quarter of the southeast quarter of the southwest quarter of section twenty-three, township thirteen north, range eighteen, east of W. M. The purchase price being six thousand two hundred and fifty dollars." On the 10th day of May following, the appellants executed and delivered to the respondent a statutory warranty deed, whereby they conveyed to him the "north  $2\frac{1}{2}$  acres of north  $\frac{1}{2}$  of west  $\frac{1}{2}$  of west 30 acres in S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 23, township 13 north, range 18, E. W. M." The respondent's testimony is that, at the suggestion of one Hasselstrom, he looked over the appellant's land, and that on the 20th day of April, 1910, he and Hasselstrom called upon the appellant husband with a view to making a purchase; that the appellant and Hasselstrom measured the tract with a tapeline; that they began at the south and measured along the east side of the west road; that the appellant set a stake, and said to the respondent that the north  $2\frac{1}{2}$  acres "comes to about there," "'just about here,' but he did not say exactly to an inch"; that the stake marked the south boundary of the north  $2\frac{1}{2}$ -acre tract; that the appellant then returned to his home; that about a half hour later the respondent and Hasselstrom went to the appellant's home and informed him that the respondent would take the north  $2\frac{1}{2}$  acres; that the appellant then drew with his

own hand and delivered the earnest money receipt. Respondent further testified that the north, east, and west lines were not pointed out, and that only one stake was set. The parties all agree that this stake was set on the east side of the west road. Hasselstrom said that there was but one measurement and one stake set; that the measurement was made along the east side of the west road. All the parties agree that, at the time the measurement was being made, and at the time the receipt was given and the deed executed, there was nothing said about roads. The respondent testified that some time in June he discovered that the stake had been moved to the north a distance of about 42 feet. One of his attorneys testified that in February, 1912, when he was discussing with the appellant the moving of the stake, appellant denied having any knowledge that the stake had been moved, but in a later conversation admitted that he himself had moved it, and said he assigned as a reason for moving the stake that he had made a mistake in his measurements, and that he had moved and reset the stake to correct the error. This the appellant denies. This witness further testified that, in the several interviews he had with the appellant, the latter mentioned no other stake. The appellants owned  $5\frac{1}{2}$  acres of land, which included two highways, one along the west side 33 feet in width, and one along the north side, 20 feet in width. The appellant testified that he owned  $5\frac{1}{2}$  acres, including the roads; that he measured off the south  $2\frac{1}{2}$  acres following the east line of the west road, and set a stake; that he then measured another half acre and laid a weed to represent the south boundary of the north  $2\frac{1}{2}$  acres. He said: "I did not suppose we would need two stakes, as I supposed he would know which piece he wanted. I said, 'Mr. Carlson, if you take the south  $2\frac{1}{2}$  acres, this will be your corner.' \* \* \* Then we measured on over, \* \* \* and measured a half acre more. We had no stake, and I looked around and found a large weed, or something of the kind, and put down right there." He testified that, some two weeks after the execution of the earnest money receipt, he moved the stake and reset it at the point where he had laid the weed, that the weed was then in place, and that he intended to sell "subject to the roads," but said nothing about roads. He admits that the stake was set just east of the east line of the west road. Upon this testimony we think the court was warranted in concluding that there was but one corner marked, and that corner was intended to be the southwest corner of the north  $2\frac{1}{2}$  acres. It seems improbable that the appellant would have placed a weed to mark the boundary line of orchard land that he was selling at \$2,500 an acre.

The decree provides that the appellants shall execute a deed to the respondent containing a description by metes and bounds which includes both roads subject to the ease-

ments of the two roads, and which with the roads contains about three acres. In this we think the learned trial court was in error. The respondent does not claim to have purchased  $2\frac{1}{2}$  acres plus the roads. His claim is that he purchased  $2\frac{1}{2}$  acres exclusive of the roads. He admits, however, that before making the purchase, when he was looking over the land with Hasselstrom, the latter told him that one-half of the north road (which was 40 feet in width) "comes off of the tract." Hasselstrom testified he told the respondent that there was 20 feet of the north tract embraced in the north road. We think it is clearly implied from all the testimony that the respondent intended to purchase the north  $2\frac{1}{2}$ -acre tract, including, but subject to, the north road. Both roads were plainly visible. He was not advised, however, that any part of the west road had been taken from the appellants' land. Hence it could not have been his intention to purchase subject to the west road.

[5] The appellants argue that the mistake was the result of the respondent's negligence, and that he cannot have his deed reformed. If this were true, there would be few contracts reformed. Mistakes in written instruments are usually due to negligence upon the part of one or both the parties, where there is no fraud. This court has uniformly taken the view that conveyances of real property may be reformed so as to effectuate the actual intention of the parties where there has been a material and mutual mistake, and where that mistake has been shown by clear and convincing evidence. *Dennis v. Northern Pacific R. Co.*, supra; *Rosenbaum v. Evans*, supra. In the first of these cases Judge Dunbar, speaking for the court, said: " \* \* \* Where the minds of the parties have met, but through mistake, no matter whose, the written instrument does not correctly state the agreement which the parties actually made, then it may be reformed so as to express that which the parties intended it should express."

[6] It is argued that the delay in the commencement of this action—about two years—should bar a recovery, or at least should create an inference against the respondent's version of the transaction. The respondent testified that he told the appellant in July, 1910, that the description in the deed was not correct; that it did not give him as much land as he was entitled to have. The delay has not resulted to the prejudice of the appellants. They have had the possession of and the proceeds of the land since they reset the stake. The tract was planted to bearing fruit trees at the time of the purchase. There being no intervening rights, the delay is not material. *Young v. Jones*, 72 Wash. 277, 130 Pac. 90.

We think the decree should be modified so as to give the respondent  $2\frac{1}{2}$  acres of land, including the 20-foot strip along the north side, which is subject to an easement for a

public highway, and so as to give him an easement in the public highway lying along the west side of the tract.

The case will be remanded, with directions to so modify the decree.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

STATE v. MARDESICH et al. (No. 11,586.)  
(Supreme Court of Washington. April 25, 1914.)

**1. CONSPIRACY (§ 43\*)—INFORMATION—VICTIMS OF CONSPIRACY—DESIGNATION.**

Where a conspiracy is directed against a particular person, he should be designated in the information; but, if the conspiracy is not directed against a particular person, it may be properly charged as an intended wrong against a class of persons or the general public, without a more specific designation.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.\*]

**2. CONSPIRACY (§ 43\*)—INFORMATION—REQUISITES.**

Where an information charged defendants with conspiracy to prevent others from fishing in the waters of Puget Sound who did not belong to a certain association, the information was not objectionable for failure to aver that the persons whom the defendants conspired to prevent from fishing had a lawful right to engage in that business.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.\*]

**3. CONSPIRACY (§ 47\*)—EVIDENCE.**

In a prosecution for conspiracy to prevent persons not connected with defendants' organization from fishing in Puget Sound, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.\*]

**4. CRIMINAL LAW (§ 112\*)—VENUE—CONSPIRACY.**

Where, in a prosecution for conspiracy, it appeared that an overt act pursuant to the conspiracy was committed in W. county, and that the conspiracy was continued in that county, the venue was properly laid there, though the conspiracy was formed in another county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220-226, 230; Dec. Dig. § 112.\*]

**5. CRIMINAL LAW (§ 814\*)—INSTRUCTION—APPLICATION—CONSPIRACY.**

Where defendants were indicted for conspiracy to prevent any one outside a certain combine from fishing in the waters of Puget Sound, the offense was complete when the agreement or confederation constituting the conspiracy was formed; and hence it was not error to refuse to charge that defendants could not be convicted for having hindered or interfered with any white man fishing on an Indian reservation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

**6. CONSPIRACY (§ 46\*)—OVERT ACT.**

Where defendants were indicted for conspiracy to prevent the taking of fish from Puget Sound by persons not members of defendants' combination, overt acts done in pursuance of the conspiracy did not constitute the

crime, but were only evidence that the conspiracy continued up to the time the acts were committed.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 104, 107; Dec. Dig. § 46.\*]

**7. CONSPIRACY (§ 27\*)—OVERT ACTS—FORCE.**

Where defendants were charged with conspiracy to prevent persons not belonging to a certain combination from taking fish from the waters of Puget Sound, it was not necessary that overt acts committed pursuant to such conspiracy should be characterized by force, as such acts might consist of threats, intimidation, or interfering or threatening to interfere with any tools, implements, or property belonging to or used by another.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. § 27.\*]

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Andro Mardesich and others were convicted of conspiracy, and they appeal. Affirmed.

S. M. Bruce, of Bellingham, for appellants. Frank W. Bixby and W. A. Martin, both of Bellingham, for the State.

MAIN, J. The defendants were charged with the crime of conspiracy. The amended information, after designating the defendants by name, charged: "Then and there being in Whatcom county, Wash., on or about the 14th day of April, 1912, the said defendants did then and there unlawfully and willfully conspire, confederate, and agree together that they would prevent any person or persons from fishing in the open waters of Puget Sound, except such person or persons as might agree to join with said defendants in said occupation, and in accordance with the terms of said agreement, and did then and there by threats, force, and intimidation, and by interfering and threatening to interfere with the property of certain other persons then and there used for fishing in the open waters of Puget Sound, prevent certain other persons from fishing, and from the use and employment of their property in said fishing; fishing in the open waters of Puget Sound then and there being a lawful occupation in which any person or persons had the right to engage in under the laws of the United States and the state of Washington. And so the prosecuting attorney, as aforesaid, doth accuse the said Andro Mardesich, Jack Trudvich, John Naterlin, Steve Gusich, Nick Mardesich, V. Pretigliani, Tony Buratovich, Peter Covich, Nick Flamengo, Lucas Carr, Dick Kenk, of the crime of conspiracy, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington." To this information, each of the defendants pleaded not guilty. The trial resulted in a conviction. Motion for new trial being made and overruled, the defendants appeal.

It is argued that the information charges

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

no crime, in that it does not charge the appellants with intention to injure any person in particular, and does not aver the persons whom the appellants sought to prevent from taking fish were citizens of the state of Washington, or qualified to engage in the business of fishing for a living. From a reading of the information, it appears that the appellants were charged with unlawfully conspiring and confederating together for the purpose of preventing any person or persons from fishing for herring in the open waters of Puget Sound, except such person or persons as might agree to join with the appellants. It is further charged that the appellants, by threats, force, and intimidation, and by interfering and threatening to interfere with certain other persons, did prevent other persons from fishing, and from the use and employment of their property therein.

The charge of conspiracy is founded upon Rem. & Bal. Code, § 2382, wherein it is provided: "Whenever two or more persons shall conspire \* \* \* (5) to prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof, \* \* \* every such person shall be guilty of a gross misdemeanor." By this statute, two or more persons are guilty of conspiracy when they agree or confederate together to prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force or threats or intimidation, or by interfering or threatening to interfere with any tools, implements, or property belonging to or used by another.

Section 2383 of the same act provides: "In any proceeding for (a) violation of section 2382, it shall (not) be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination." By this section, it should be noted, an overt act is not a necessary element of the crime.

[1] The first objection to the information is that it does not allege any specific persons against whom the conspiracy was directed. But it was not necessary to so allege. The rule is that, where a conspiracy is directed against a particular person, he should be designated in the indictment or information; but, where the conspiracy is not directed against any particular person, it may be charged as an intended wrong against a class of persons or the general public, without a more specific designation. 1 Wharton, Criminal Evidence (10th Ed.) § 93; 8 Cyc. p. 664.

In Cyc., at the volume and page mentioned, the rule is stated in this language: "Where the conspiracy is directed against a particular person, or the object of the conspiracy has been effected so that the person or persons intended can be ascertained, he or they

should be designated by name, or the reason why such designation is not made should be stated; but, where no intent as to any particular person was formed, it should charge an intended wrong against some person, persons, or class of persons, or the general public, without designating any particular individual."

[2] Neither is the information faulty, in that it fails to aver that the persons whom the appellants conspired to prevent from fishing had a lawful right to engage in that business. To so hold would be to indulge the presumption that the appellants, and those associated with them, were the only persons who had a right to fish for herring in the open waters of Puget Sound. The mere statement of the proposition carries its own refutation. The information answers the requirements of the law in a charge of the crime of conspiracy.

[3] The sufficiency of the evidence to sustain the charge of conspiracy is challenged. Much space in the brief of the appellants is devoted to this question. The record is long, and it would be impossible to epitomize herein the testimony. There was not only direct evidence of the formation of the conspiracy, and of the connection of the appellants therewith, but there were facts and circumstances shown by the proof from which it might reasonably be inferred. There was sufficient evidence to sustain the conviction. The evidence on behalf of the appellants would establish their innocence; but the question, under the conflicting evidence, was for the jury. During the spring of the year 1912, at different times, there were engaged in fishing for herring within the boundaries of Jefferson, Island, and Whatcom counties approximately 150 men of Austrian birth and certain Scandinavians. While within the jurisdiction of Jefferson county they, that is, the Austrians and the Scandinavians, entered into a combination by which they were to fish together and divide the proceeds; the purpose being to control the sale price of the product. After this arrangement had been consummated, they agreed and confederated together that they would prevent any one from fishing for herring in the open waters of Puget Sound, unless such person or persons joined the combination. The Scandinavians, being unwilling to participate in the means necessary to prevent others from fishing, withdrew from the combine. It was not the agreement to maintain the price of herring that constituted the conspiracy; but it was the understanding and agreement among them to prevent others from engaging in the business of fishing for herring.

[4] The venue in the present case is laid in Whatcom county. In order to sustain this, one of two things is necessary: Either that the conspiracy was continued and brought in to that county, or that an overt act in pursuance of it there took place. After the forum-

ation of the conspiracy, and the withdrawal of the Scandinavians therefrom, the Austrians as well as the Scandinavians went into Island county, and from there into Whatcom county, seeking the location where the fishing for herring was supposed to be the best. After the Scandinavians had withdrawn from the combine, they continued fishing. There is evidence that the conspiracy was continued by the Austrians in Whatcom county. There was also evidence of an overt act in pursuance thereof committed in that county. But it is claimed that, if any overt act were done, it was committed in preventing the Scandinavians from fishing on the Lummi Indian reservation, where neither they nor any other white man had a right to fish. This contention cannot be sustained. There is direct and positive evidence that the Austrians did interfere with an Indian there, whose rights to fish upon the reservation cannot be questioned.

[5] Error is also sought to be predicated upon the refusal of the trial court to instruct the jury that the appellants could not be convicted for having hindered or interfered with any white man fishing on the reservation. In this we think there was no error. The charge against the defendants was not that of hindering or interfering with any one in the taking of fish, but was the conspiring to prevent any one outside the combine from fishing. The offense is complete when the agreement or confederation constituting the conspiracy is formed. It is not necessary that an act in pursuance thereof be committed. In 1 Bishop, New Criminal Law, § 432, it is said: "The mere conspiring of two or more persons to do a wrong is an adequate act of crime without any step taken in pursuance of the conspiracy."

[6] The evidence showing interference of the appellants with the Scandinavians, even though it occurred upon the reservation, was admissible as showing an overt act. This overt act was not the crime, but only evidence that the conspiracy continued up to that time. In 8 Cyc. p. 687, the law is stated thus: "The venue in an indictment for conspiracy may be laid in the county in which the agreement was entered into, or in any county in which an overt act was done by any of the conspirators in furtherance of the common design. If the conspiracy is entered into within the jurisdiction of the court, the parties thereto are triable in that jurisdiction, notwithstanding the offense was to be committed without the jurisdiction; and, if a conspiracy is formed without the jurisdiction, an overt act committed by one of the conspirators within the jurisdiction is evidence of the crime within the jurisdiction where the overt act is committed."

[7] The overt acts shown by the evidence were not characterized by force; but this was not necessary. Such acts may be by threats,

intimidation, or interfering or threatening to interfere with any tools, implements, or property belonging to or used by another.

Finding no error, the judgment will be affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

### HURLEY-MASON CO. v. AMERICAN BONDING CO. (No. 11,906.)

[Supreme Court of Washington. May 8, 1914.]

MUNICIPAL CORPORATIONS (§ 346\*)—PUBLIC IMPROVEMENTS—BONDS—CONDITION—"SUPPLY."

Where the bond of a contractor for a city improvement provided that he should pay all laborers, mechanics, subcontractors, and materialmen, and all persons who should supply the principal or subcontractors with provisions and supplies for the carrying on of the work, and all just debts, dues, and demands incurred in the performance of the work, the word "supplies" covered and included the rental value of a pump and hoist derrick needed and rented by the contractor from plaintiff for use in the work; the word "supplies," being used to designate things consumed in, but which did not become a physical part of, the structure, other than labor, being distinguished from the word "materials," generally used to designate those things which did become a physical part of the structure.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 346.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6800-6803.]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by the Hurley-Mason Company against the Washington Engineering Company and the American Bonding Company. Judgment for plaintiff, and defendant bonding company appeals. Affirmed.

Hayden, Langhorne & Metzger, of Tacoma, for appellant. T. L. Stiles, of Tacoma, for respondent.

PARKER, J. This is an action upon a bond executed by the Washington Engineering Company, as principal, and the American Bonding Company, as surety, under section 1159, Rem. & Bal. Code, relating to contractors' bonds to secure debts incurred by them in the performance of public work. The defendant bonding company demurred to the complaint, which demurrer was, by the trial court, overruled. Thereupon the bonding company elected not to plead further, but to stand upon its demurrer, when judgment was rendered against it by the trial court, as prayed for in the complaint. From this disposition of the cause, the bonding company has appealed.

In the complaint it is alleged: "That heretofore, and on or about July 7, 1911, the defendant Washington Engineering Company entered into a contract in writing with the city of Tacoma, a municipal corporation of

the first class, located in said county of Pierce, to furnish the labor and material necessary for the erection of a certain vertical lift bridge over the Puyallup river for a consideration of \$132,654; and that thereupon, as required by law and the ordinances of said city, said Washington Engineering Company, as principal, and said American Bonding Company of Baltimore, as surety, executed and delivered to said city of Tacoma their bond obligatory, wherein and whereby they bound themselves jointly and severally in the penal sum of \$33,138.50, that the said principal would faithfully perform all of the provisions of said contract in the manner and within the times therein set forth, and would pay all laborers, mechanics, subcontractors, and materialmen, and all persons who should supply said principal or subcontractors with provisions and supplies for the carrying on of said work, all just debts, dues, and demands incurred in the performance of said work. A copy of said bond is hereto annexed and made a part hereof, being marked 'Plaintiff's Exhibit A.' That, in the performance of said work, said Washington Engineering Company required the use of a pump and a hoist derrick, and this plaintiff thereupon, at said defendant's instance and request, loaned and rented one pump and one hoist derrick to said defendant for use in the performance of said work and which said defendant used in its performance thereof." This is followed by an allegation of the reasonable rental value of the pump and hoist derrick, and also by an allegation of the filing of the plaintiff's claim with the city against the bond, as provided by section 1161, Rem. & Bal. Code. The conditions of the bond attached as an exhibit to the complaint, so far as we need notice the same here, are that the engineering company "shall pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply said principal or subcontractors with provisions and supplies for the carrying on of said work, all just debts, dues, and demands incurred in the performance of said work." These conditions of the bond are required by statute.

It is contended by counsel for the bonding company that the rental value of the pump and hoist derrick is not secured by the bond. Our problem is reduced to the inquiry: Do the words "provisions and supplies," as used in the statute and bond here relied upon by respondent, include the rental of the pump and hoist derrick furnished by respondent. This question comes at least very near, if not quite, being answered in favor of respondent by our decision in *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 615, 122 Pac. 837, where it was held that a bond containing these conditions, and given under this statute, secured the value of the services of teams with drivers furnished to the contractor by a third person. Some

observations were there made likening such service to labor, but the real ground upon which the holding rests is that the furnishing of the service of teams with drivers was the furnishing of "supplies," within the meaning of the law and the conditions of the bond. A number of decisions are relied upon by counsel for the bonding company which have to do with the construction of lien laws securing liens for labor performed upon, or material furnished in, the structure involved. We think, however, a critical reading of these decisions will demonstrate that they are not controlling here. We will notice the principal decisions so relied upon by counsel for appellant.

In *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670, it was held that a claim for the rental of scrapers due to their owner from a contractor, who used them in clearing and grading lots, was not a lienable claim under the statute giving a lien upon land in favor of one who, at the request of the owner, "clears, grades, fills in or otherwise improves the same." That statute does not give a lien to one furnishing provisions or supplies to the contractor.

In *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B, 225, we held that the mechanic's lien statute, which gives liens to "persons performing labor upon, or furnishing material to be used in, the construction" of buildings, etc., does not award a lien except for labor performed upon, and for material going into, and becoming a part of, the structure. "Provisions and supplies" are not mentioned in that law.

In *Troy Public Works Co. v. Yonkers*, 207 N. Y. 81, 100 N. E. 700, 44 L. R. A. (N. S.) 311, it was held that a lien law giving a lien upon certain funds for "materials" furnished to a municipal contractor does not give a lien for rent of a steam shovel leased to the contractor; the word "material," as there used, being held to mean that which is used in the creation of the mechanical structure. "Provisions and supplies" were not mentioned in the law securing the lien there sought to be established.

In *Potter Mfg. Co. v. Meyer & Co.*, 171 Ind. 513, 86 N. E. 837, 131 Am. St. Rep. 267, a lien law giving a mechanic's lien for labor performed on a structure was held not to secure the rent of a machine used by the contractor in the work. The words "provisions and supplies" were in no way involved in the lien right there claimed.

In *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706, there was involved compensation for the use of a well-boring machine hired to the contractor by its owner. It was held that the owner of the machine was not secured by a lien law giving a lien for "work and labor" performed and "materials" furnished, which law was silent as to "provisions and supplies."

In the following cases, the rights involved



were contractual and claimed under bonds or guaranties of the nature here involved:

In *Kansas City v. Youmans*, 213 Mo. 151, 112 S. W. 225, there was involved a guaranty contract, by the provisions of which the contractor was "to pay for the work and labor of all laborers and teamsters, teams, and wagons employed on the work and for all materials used therein." Under this contract, the guarantor was held not liable to pay for tools, implements, and appliances sold to the contractor, upon the ground that they were not "materials," within the meaning of the guaranty, since they did not enter into and become a part of the structure. "Provisions and supplies" were not there involved.

In *Standard Boiler Works v. National Surety Co.*, 71 Wash. 28, 127 Pac. 573, 43 L. R. A. (N. S.) 162, we held that repairs made upon a steam shovel used by the contractor in the construction of the improvement covered by his contract was not secured by the provisions of a bond given under this statute, conditioned as the bond is in this case.

In *City Retail Lumber Co. v. Title Guaranty & Surety Co.*, 72 Wash. 300, 130 Pac. 345, we held that the purchase price of railroad ties sold to a contractor to be used in a temporary track in the construction of an improvement covered by his contract was not secured by a bond conditioned as this bond is and given under this statute. These decisions were rested largely upon the theory that neither the repairs upon the shovel nor the ties furnished for the temporary railway entered into or became a part of the structure, nor were they consumed in the doing of the work, and were therefore not "provisions or supplies," within the meaning of the law and the conditions of the bonds.

It is argued by counsel for appellant that the use of the pump and hoist derrick furnished by respondents to the engineering company in this case belong, in principle, to the same class as claims for repairs upon the steam shovel and the purchase price of the ties involved in the two cases above noticed. We do not think so. It is not in this case a question whether or not the pump and hoist derrick were consumed in this work; we assume that they were not, at least not necessarily so, and that probably would be the test; but it is a question of whether or not their use may be regarded as the thing which was actually consumed in the performance of the work. We think that is the thing which was furnished and for which respondent is entitled to compensation. That use was a property right. It was entirely consumed and passed into the structure as much as labor thereon did, and was sold to the engineering company for that purpose by respondent, if the allegations of its complaint be true. It was not taken away by the contractor as a part of his tools and appliances, as the repairs upon the steam shovel and the railway ties were in the cases last above

noticed. A review of the decisions will show that "materials" are generally held to be only those things which go into and become a physical part of the structure, though explosives have been held to be materials (*Kansas City v. Youmans*, supra), while supplies have been held to mean that which is consumed in, but does not become a physical part of, the structure. The word "supplies" is used to designate things of this nature, other than labor. It must be conceded that this approaches very close to the line between secured and unsecured items under this statute and bonds given in pursuance thereof. That, however, does not argue for or against the holding that this is a secured item. The line of demarcation between secured and unsecured items must be found somewhere. We are of the opinion that, in view of the broad language of the statute, and the bond given in pursuance thereof, this item falls within the class of secured claims, however close to the line of demarcation it may be regarded as being.

The judgment is affirmed.

CROW, C. J., and FULLERTON, MOUNT, and MORRIS, JJ., concur.

#### JOHNSON et al. v. IRVINE LUMBER CO. (No. 11,178.)

(Supreme Court of Washington. May 7, 1914.)

##### 1. NAVIGABLE WATERS (§ 39\*)—TRANSPORTATION OF LOGS—JAM—INJURY TO BANKS—INSTRUCTIONS.

Where, in an action for injuries to the banks of a stream from a jam of 800 logs, the jury could have found that 600 of the logs did not belong to defendant, an instruction that if the jam was formed near plaintiffs' land which was damaged, and the logs forming the jam belonged to several owners, each of such owners would be liable for the whole injury, and plaintiffs might sue one or any number of the owners, was erroneous; such rule being applicable only if defendant owned a considerable number of the logs and failed to use reasonable care in protecting them after they were placed in the river, and its failure resulted in the forming of the jam which was not removed within a reasonable time, and constituted the proximate cause of the injury.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

##### 2. NAVIGABLE WATERS (§ 39\*)—TRANSPORTATION OF LOGS—INJURY TO BANKS—WAR RULES.

Rules promulgated by the Secretary of War, regulating the driving of logs in the navigable parts of the Snoqualmie and Snohomish rivers, under authority conferred by Act Cong. May 9, 1900, c. 387, § 172 (U. S. Comp. St. 1901, p. 3548), were in aid of navigation, and not for the protection of the owners of the banks of the rivers, and hence were inadmissible in an action by the owners to recover damages for injuries due to log jams.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

On rehearing. Reversed, with directions. For former opinion, see 75 Wash. 540, 135 Pac. 217.

GOSE, J. This is an action for damages for washing away a portion of the plaintiffs' land. It is alleged in the complaint that the defendant placed a large quantity of loose logs in the Snoqualmie river, a tributary of the Snohomish river, which were carried down the river by the current, unattended, and formed a jam in the Snohomish river at a point opposite the plaintiffs' land, that it permitted the jam to remain for a long period of time, and that the jam deflected the current of the river against the plaintiffs' land, washing away about nine acres and otherwise injuring it. There was a verdict and judgment for the plaintiff for \$5,000. The defendant appealed.

[1] For a fuller statement of the facts, reference is made to the former opinion. *Johnson v. Irvine Lumber Co.*, 75 Wash. 540, 135 Pac. 217. The evidence shows that there were about 800 logs in the jam, 600 of which were marked "double-bar-twelve." A few—how many is not stated—were branded "D. E.," which is admitted to be the appellant's registered mark. There was evidence which would have warranted the jury in finding that the 600 double-bar-twelve logs belonged to the appellant. There is no evidence that it owned any of the remaining 200 logs, except a few marked "D. E." The court instructed in effect that, if the jury should find from the evidence that a jam was formed at a point in the river near the land of the respondents, by reason of which their land was damaged, and if they should find that the logs forming the jam "were not all, or were not even mostly," the logs of the appellant, but that they belonged to several owners, each of the several owners of the logs forming the jam would be liable for the whole injury, and the respondents might sue one or any number, or all, of the owners.

We think this instruction was erroneous as applied to the facts of the instant case. The jury may have reached the conclusion that the 600 logs did not belong to the appellant. In that event there is no evidence that it owned more than a few of the logs. We adhere to the view that, if the appellant owned a considerable number of the logs, and failed to use reasonable care in looking after them after they were placed in the river, and its failure resulted in the formation of a log jam opposite the respondents' land, and the jam was not removed within a reasonable time, and its presence was the proximate cause of the injury to the land, the appellant is liable for the entire damage. This is upon the principle that the creation of the jam created a new condition, and that permitting it to remain an unreasonable length of time was negligence; that all the owners owed a common duty to remove the

jam, and that because of a common neglect of that duty the respondents were injured; hence there was a joint tort and a joint and several liability. We think, however, this view would be too harsh if the jury should reach the conclusion that the appellant owned only a few of the logs, and that the several owners acted independently of each other in putting the logs in the river. In such case it should only be held liable for the injury that it caused. But liberal damages should, because of the difficulty of apportionment, be awarded against it.

[2] The court admitted in evidence the rules promulgated by the Secretary of War, regulating the driving of logs in the navigable parts of the Snoqualmie and Snohomish rivers. These rules were promulgated pursuant to an act of Congress approved May 9, 1900 (31 Stats. at Large, 172, c. 387 [U. S. Comp. St. 1901, p. 3548]), authorizing the Secretary of War to make regulations governing the running of loose logs on certain rivers, including the Snoqualmie and Snohomish. The rules in effect provide that river drivers shall so conduct their operations as to prevent the formation of jams. The rules were not competent evidence. They were promulgated in aid of navigation, not for the protection of the owners of the banks of the rivers. If the respondents had sustained an injury while they were lawfully exercising a right of navigation, a different question would be presented.

For the reasons stated, the judgment is reversed, with directions to grant a new trial.

CROW, C. J., and ELLIS, CHADWICK, MORRIS, and MOUNT, JJ., concur.

WRIGHT et al. v. SUYDAM. (No. 11,664.) (Supreme Court of Washington. May 8, 1914.)

1. CONTEMPT (§ 50\*)—VIOLATION OF INJUNCTIONAL ORDER—PROCEEDINGS.

A contempt proceeding in a court of equity in aid of the court's original jurisdiction and the enforcement of its decree is not a new proceeding, and is not within Rem. & Bal. Code, § 1054, providing that in a proceeding for contempt the state is plaintiff, and the state need not be made a party.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 137-139; Dec. Dig. § 50.\*]

2. SPECIFIC PERFORMANCE (§ 132\*)—DECREE—PERFORMANCE.

A contract to purchase, which gives to the purchaser the right to collect surface and subterranean waters, though the supply of such waters on the premises then or thereafter owned by the vendor shall be cut off, gives a right not preserved to the purchaser under the statutory form of general warranty deed, and a decree compelling the specific performance of the contract is not performed by the execution of a warranty deed in statutory form.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 436-438; Dec. Dig. § 132.\*]

### 3. CONTEMPT (§ 20\*)—VIOLATION OF DECREE—ELEMENTS OF OFFENSE.

A contempt proceeding in a court of equity in aid of its original jurisdiction and in the enforcement of its decree is within Rem. & Bal. Code, § 1049, subd. 5, providing that disobedience of any decree shall be contempt of court, and is not governed by section 2372, making willful disobedience to the lawful process of court a misdemeanor, and willfulness need not be proved to support a conviction for contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.\*]

### 4. CONTEMPT (§ 75\*)—DISOBEDIENCE OF DECREE—PUNISHMENT.

Under Rem. & Bal. Code, §§ 1049, 1050, defining contempt as disorderly behavior toward the judge while holding court, a breach of the peace, or disobedience of any lawful judgment, and providing that when the contempt is not for disorderly behavior or a breach of the peace the fine imposed shall not exceed \$100, etc., the court, adjudging one guilty of contempt for failing to execute a deed in conformity to a decree of specific performance of a contract to sell, can impose a fine not exceeding \$100; it not appearing that the right or remedy of the adverse party was prejudiced by the disobedience.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 258-260; Dec. Dig. § 75.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

### 5. SPECIFIC PERFORMANCE (§ 132\*)—ENFORCEMENT OF DECREE—CONTEMPT.

The court, decreeing specific performance of a contract to convey real estate, need not appoint a commissioner to convey, as authorized by Rem. & Bal. Code, § 605, but may require the vendor to execute a conveyance within a specified time, or in the alternative commit him to jail until a deed is executed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 436-438; Dec. Dig. § 132.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Proceedings by George E. Wright, as executor and trustee, and others, against Hendrick Suydam for a judgment adjudging defendant guilty of contempt of court. From a judgment adjudging defendant in contempt, he appeals. Modified and affirmed.

See, also, 72 Wash. 587, 131 Pac. 239.

John W. Roberts, of Seattle, for appellant. Wright, Kelleher & Caldwell and Lane Summers, all of Seattle, for respondents.

MAIN, J. This is an appeal from an order of the superior court adjudging the defendant Suydam in contempt for failure to execute a deed in conformity with the court's decree. The original action was one for the specific performance of a contract for the sale of real estate, and has been twice before this court. 59 Wash. 530, 108 Pac. 610, 110 Pac. 8; 72 Wash. 587, 131 Pac. 239. On the 2d day of April, 1912, the superior court entered a judgment decreeing specific performance of the contract. This judgment provided that a deed should be executed substantially in the words and figures in the form of deed as therein set forth. This form of deed, among other things, gave to the

plaintiff certain rights to surface and subterranean waters. The provision covering this matter was as follows: "Together with the right also to collect upon the granted premises surface and subterranean waters and to use them upon the granted premises, even though thereby the supply of such waters should be cut off or reduced upon the premises owned by the said party of the first part upon August 14, 1908, or thereafter." The judgment also provided that the deed should be executed within 15 days and delivered to the clerk of the court, who was to deliver it to the plaintiff upon his paying into the registry of the court the sum of \$7,900, the purchase price. The form of deed set out in the judgment also provided: "This conveyance is made pursuant to and for the purpose of carrying out the terms of a certain contract bearing date of August 14, 1908, made by Hendrick Suydam in favor of W. Hammond Wright, and duly recorded in the auditor's office of King county, Washington, in volume 643 at page 284." The contract contained a provision covering surface and subterranean waters the same as that above set out as being in the form of deed provided in the judgment. From that judgment an appeal was prosecuted. On April 4, 1913, the opinion of this court affirming the judgment was filed.

Thereafter the defendant executed and caused to be handed to the plaintiff the statutory form of warranty deed. The plaintiff for the purpose of identification placed his initials thereon and returned it to the messenger by whom it had been presented to him. On the same day the plaintiff addressed a letter to the attorney for the defendant advising him that the property would be paid for in accordance with the decree. On May 22, 1913, the remittitur from this court was filed in the superior court. Upon the same day the purchase money was paid by the plaintiff into the registry of the court. On May 23, 1913, the defendant caused to be filed with the clerk of the court the deed upon which the plaintiff had previously placed his initials for identification. On May 26, 1913, the plaintiff prepared and caused to be presented to the defendant for his execution a deed in exact conformity with the decree. This deed, when it was presented, was accompanied by a letter advising the defendant that the purchase price had four days previously been paid into court, and requested the execution of the deed. The defendant advised the messenger who presented the deed and letter that he would either execute the deed during the day and return it to the plaintiff, or that he would communicate with him. On June 12, 1913, the defendant neither having executed the deed nor communicated with the plaintiff, the latter, upon application to the court, secured an alternative writ requiring the defendant either to execute the deed or show cause why he should

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not be adjudged in contempt of court for failure to so do. The defendant answered the show cause order, and in due time the cause came on for hearing, at the conclusion of which the court adjudged the defendant to be in contempt for failure to execute the form of deed as provided in the judgment for specific performance, and imposed upon him a fine in the sum of \$200 to be paid into the registry of the court, together with the costs of the proceeding; and also adjudged that, if the defendant did not execute and acknowledge the deed within five days, he be imprisoned in the county jail until he should execute and deliver the deed as ordered by the court. From this order the present appeal is prosecuted.

[1] The first point is that, this being a contempt proceeding, the state should have been added as a party plaintiff. In support of this position attention is called to section 1054, Rem. & Bal. Code. Construing this particular section in *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2, it was said: "The jurisdictional attack is made upon two grounds, it being first contended that, as the show-cause order of June 20th required the respondent to appear or be adjudged in contempt, it was a contempt proceeding, and as such should have been brought in the name of the state, under Rem. & Bal. Code, § 1054, providing that: 'In the proceeding for a contempt, the state is the plaintiff. In all cases of public interest, the proceeding may be prosecuted by the prosecuting attorney on behalf of the state, and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a complainant with the state.' This is not a contempt proceeding. Under our statute a proceeding in contempt is in the nature of a criminal proceeding, in which the only matter to be inquired into is the contemptuous act charged. This is a proceeding in a court of equity in aid of its original jurisdiction, in which the court is seeking the enforcement of its original decree; and, although the court required the respondent to appear in response to its order or be adjudged in contempt, the nature of the proceeding was not changed from one of equitable to one of criminal cognizance. It has long been the established practice in this state, in seeking the enforcement of alimony decrees, to entitle the proceeding in the original action, and such practice has been recognized in this court in *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, and *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535. Such, also, is the rule in other states. *Lyon v. Lyon*, 21 Conn. 185; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817. Had the respondent failed to appear and the court desired to move against him for his refusal, it would have been the commencement of a new proceeding, and, as such, brought under the contempt statute. But so long as the only question before the court in-

volves the construction and enforcement of its original decree, it was an equitable proceeding, properly brought under the original proceeding and properly entitled therein."

That was a divorce case, it is true. But the statute is there plainly and unequivocally construed. It cannot be said to mean one thing when invoked in a proceeding for contempt growing out of a divorce action, and another thing when invoked in a proceeding for contempt growing out of an action for specific performance. In the present case, as in the case cited, the proceeding is in a court of equity in aid of its original jurisdiction, in which the court was seeking the enforcement of the original decree. Whether the statute is correctly construed in the *Poland Case* we need not inquire. At most, it is but a rule of practice. As such it is desirable that the procedure be plain and uniform. The proper method of framing the title to the proceeding is not a matter of vital importance. Much controversy is waged in the briefs over whether the proceeding is a civil or a criminal contempt. But in the light of the holding in the case referred to, it is unnecessary to review this discussion. The pursuit of the remedy by contempt was not the commencement of a new proceeding as determined in the *Poland Case*, and was therefore not controlled by the contempt statute.

[2] Upon the merits it is argued that the appellant was not in contempt because the statutory form of warranty deed tendered was "just as good" or substantially equivalent in legal effect as the form of deed provided for in the judgment. At the time the contract of sale was executed, the land covered by it was a portion of a larger tract then owned by appellant. After the execution of this contract and prior to the entry of the decree of specific performance, the appellant had conveyed the entire tract to a third person. The contract of purchase, as appears from the excerpt set out in the facts stated, gave the respondents the right to collect surface and subterranean waters and to use them upon the premises, even though the supply of such waters upon the premises then or thereafter owned by the appellant should be cut off or reduced. The preservation of this right is provided for in the form of deed set out in the judgment. The right to collect water, even though the supply of such water upon the other premises be cut off or reduced, was a right which would not be preserved to the respondents under the statutory form of general warranty deed, but, as already stated, was a right reserved in the contract and provided for in the form of deed which the appellant refused to execute. For this reason, the deed tendered was not a substantial compliance with the decree. Whether it was substantially the same deed in other respects, in legal effect, we need not now inquire.

[3] It is claimed, also, that the proof does

not show that the appellant "willfully" refused to execute the deed, and therefore that he is not guilty of contempt. Under the Criminal Code, Rem. & Bal. Code, § 2372, "willful disobedience to the lawful process or mandate of a court" is made a misdemeanor, and may be punished as a criminal offense. The present proceeding, however, was not brought under that statute, but under the general statute covering contempts. Rem. & Bal. Code, § 1049, provides: "The following acts or omissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court: (1) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings; (2) a breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceedings; \* \* \* (5) disobedience of any lawful judgment, decree, order, or process of the court. \* \* \* " Under subdivision 5 of this section it is disobedience only, and not willful disobedience of any lawful judgment, decree, order, or process of the court that constitutes the contempt. The appellant in refusing to execute the deed provided for in the judgment was guilty of disobedience to the judgment.

[4] Section 1050, Rem. & Bal. Code, provides: "Every court of justice and every judicial officer has power to punish contempt by fine or imprisonment, or both: But such fine shall not exceed three hundred dollars, nor the imprisonment six months; and when the contempt is not (one) of those mentioned in subdivisions one and two of the last section, it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby, before the contempt can be punished otherwise than by a fine not exceeding one hundred dollars." Under this section the fine imposed cannot exceed \$100, unless the contempt is one of those mentioned in subdivisions 1 and 2 of § 1049. When the contempt, as in this case, is that defined in subdivision 5, before a fine can be imposed in excess of \$100, it must be made to appear that the right or remedy of the party to an action was defeated or prejudiced thereby. The record does not show that the right or remedy of the respondents was defeated or prejudiced by the contempt of the appellant. The court erred in imposing a fine in a greater amount than the sum of \$100.

[5] Error is further sought to be predicated upon that portion of the order in the contempt proceeding which requires the appellant within five days to execute and acknowledge in due form the form of deed provided for in the judgment in the original proceeding, or, in the alternative, be committed to the county jail until he shall execute and

deliver the deed. Rem. & Bal. Code, § 605, provides: "The several superior courts may, whenever it is necessary, appoint a commissioner to convey real estate: (1) When, by a judgment in an action, a party is ordered to convey real property to another, or any interest therein. \* \* \* " Admitting that under this statute the superior court might have appointed a commissioner to make the conveyance, it was not required to do so. No necessity was shown therefor. The court had jurisdiction of the appellant, and there was no reason why he should not execute the conveyance.

Some other questions are discussed in the briefs, but they do not possess sufficient merit to justify extending this opinion by their review.

The cause will be remanded, with directions to the superior court to modify the contempt judgment by reducing the fine from \$200 to \$100. In all other respects the judgment is affirmed.

CROW, O. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

#### LOS ANGELES OLIVE GROWERS' ASS'N v. POZZI. (L. A. 3231.)

(Supreme Court of California. March 23, 1914. Petition for Rehearing, April 22, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 406\*)—STREET IMPROVEMENT—TAXING POWER.

The authority conferred under street improvement acts to subject the property of a lot owner to a lien for his proportionate payment of an improvement, and providing further for a sale of the property assessed for delinquency in payment, proceeds from the taxing power of the state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 575\*) — TAX SALE—AMOUNT OF LAND.

Proceedings to enforce payment of assessments under street improvement acts are proceedings in invitum which must be strictly pursued, and, under an act subjecting only the land assessed to lien and sale, a sale under a description in excess of that in the assessment was void; and whether the owner's building was upon any part of the property described in the assessment, or whether he was injured by a sale of the excess, was immaterial.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1288; Dec. Dig. § 575.\*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Los Angeles Olive Growers' Association against Emil Pozzi. Judgment for plaintiff, and defendant appeals. Reversed.

Schweltzer & Hutton, of Los Angeles, for appellant. Anderson & Anderson, of Los Angeles, for respondent.

**LORIGAN, J.** This action is to quiet title to a small strip of land on the south side of Garibaldi street in the city of Los Angeles. Plaintiff had a decree in its favor, and defendant appeals. The point involved on this appeal is solely whether the judgment is sustained by the findings.

From the findings it appears that defendant is the owner of the strip of land in controversy unless deprived of his title thereto under a deed issued to the predecessor of plaintiff on a sale of the property under street improvement proceedings. As to such proceedings which were taken to improve Macy street in said city under "An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within municipalities, and also for the payment of such bonds" (Stats. 1899, p. 43), the court found that, after the improvement of said street, a portion of the property of defendant was assessed for such improvement; the description thereof in the assessment being a narrow strip of land running along Garibaldi street 239.99 feet, its southerly line 241.25 feet and its end lines being each 2 feet wide. The diagram accompanying the assessment made the description a little less than the assessment itself, and the certificate of the city superintendent of streets of the city of Los Angeles required by the act to be sent to the city treasurer gave a more general description of the land assessed than was contained in the assessment itself, and as so described included all the land described in the assessment and over a foot of land in addition. Thereafter the city treasurer, as provided in the act, issued a street improvement bond in which the land assessed was described as contained in the certificate of the city superintendent of streets. Default was made in the payment of the bond, and under the provisions of the act, on demand of the holder, the city treasurer caused the land to be sold, issued a certificate of sale and in due time a deed for the property. In the bond, proceedings for the sale, the certificate therefor, and the deed, the property was described as in the city street superintendent's certificate to the treasurer, which included more land in their descriptions and to the extent we have stated than was described in the assessment. In addition the court found that the defendant had erected a building on a portion of the lot sold under the street improvement proceedings, but not on any portion of the property as described in the assessment. The court awarded a decree to plaintiff quieting its title, not to the strip as described in the complaint which followed the description in the certificate of the superintendent of streets, the bond, certificate of sale, and deed, but strictly as contained in the assessment.

It is urged by the respondent that though the deed made pursuant to the street improvement proceedings, under which the plaintiff claims, contains a different descrip-

tion from and conveys a quantity of land in excess of what is included in the description in the assessment itself, as this excess in quantity was very little, and the decree quieting title did not include any land except what was described in the assessment, and as it is found by the trial court in effect that the defendant was not injured by this defect, the judgment as entered was proper. Counsel for respondent presents no authorities to sustain this claim nor any sound reasoning in its support. The case presented here under the findings is, in our opinion, analogous to a case where, in tax proceedings, a larger quantity of land is sold than was impressed with the lien of the assessment.

[1] The authority conferred under street improvement acts to subject the property of a lot owner to a lien for his proportionate payment of an improvement, and providing further for a sale of his property assessed for delinquency in the payment, proceeds from the taxing power of the state (*Engelbrecht v. Gay*, 158 Cal. 30, 109 Pac. 879), and the same general principles apply in the case of proceedings to enforce an assessment levied under such improvement acts as apply to the enforcement of ordinary tax liens.

[2] With regard to the latter, it is well settled that proceedings to enforce them are in invitum; and a failure to strictly comply with the statutory provisions prescribed as essential to effect a sale of the property for delinquent taxes renders the sale invalid. The rule is that in such proceedings, if there be included in the deed made pursuant to a tax sale more land than was assessed, the deed is void. In 37 Cyc. 1430, this rule is declared as follows: "The tax deed must show that the property conveyed is the same as that assessed, sold, and described in the certificate of sale; if it purports to convey more or other lands, it is not valid." This rule is equally applicable in the enforcement of assessments under street improvement acts. Those proceedings rest also for their authority on the taxing power of the state, and, like proceedings for the enforcement of ordinary taxes, are proceedings in invitum which must be strictly pursued. By the terms of the act under which the sale here in question was made, it was only the lot which was assessed which was subject to the lien, and the power of the city treasurer to make a sale was limited to a sale of the lot described in the assessment. He failed to comply with the act in this respect. He made a sale under a different description than in the assessment and sold more property than was subject to the lien of the assessment, and applying, as we think it should be applied, the same rule in determining the validity of the present sale and deed as is applied to a sale and deed made pursuant to proceedings for the enforcement of the lien of ordinary taxes, the sale here in question was void. As the deed was void, there was no warrant for the judgment of the court in

ignoring its invalidity and quieting title of plaintiff to the extent, at least, to the property that was embraced in the assessment. Plaintiff never acquired any title to it either as described in the assessment or in the deed. In this view, too, it is matter of no consequence whether the building of defendant was not upon any portion of the property described in the assessment. The finding in this respect as influencing the judgment proceeds upon the theory, doubtless, that defendant was not injured by a sale of a portion of his property in excess of what might lawfully be sold. But the right of the plaintiff to have a decree quieting title to the lot did not depend upon whether defendant had a building on a portion of it or not, but solely upon whether plaintiff acquired any title to the lot at all under the sale and deed by the city treasurer, and we hold that it did not.

The judgment is reversed.

We concur: MELVIN, J.; HENSHAW, J.

#### Petition For Rehearing.

LORIGAN, J. The petition for a rehearing is denied. The act under which the sale and deed here involved were made (Stats. 1899, p. 40) provides (section 4, subd. "h") that the owner of property sold under the street improvement proceedings may redeem from the sale within 12 months after it is made or at any time thereafter before application by the purchaser for a deed, on payment by the owner into the city treasury of the purchase money with interest at 1 per cent. per month. It stands to reason that, the larger a lot offered for sale is, the greater the sum bid and paid for it will be; and, where a quantity of land in excess of that described in an assessment is offered for sale, it may sell for a correspondingly higher price, and the owner to redeem would in that event have to pay an amount in excess of what should be justly charged against him if the law had been complied with. The right of redemption is a substantial right given to a delinquent owner under the act, and it can only be secured to him by a strict compliance with its terms whereby just the quantity of land impressed with the assessment lien shall be sold and no more. If it is possible for the city treasurer to sell just a small quantity in excess of the land described in an assessment, it is equally possible for him to sell a very large quantity and at such a figure as would make it difficult, if not impossible, for the owner to redeem, and the situation in every case where there was a departure from the requirements of the law would be complicated by the question of the excess in value of the land sold beyond that described in the assessment.

It is not at all difficult to comply with the plain provisions of the act, and the general rule calling for strict compliance with its terms, and which will preserve to the owner

of land assessed for street purposes his substantial rights, should be adhered to. While the rule of strict adherence to statutory requirements in enforcing the payment of taxes and street assessments may be sometimes relaxed where it clearly appears from all the acts done under the proceedings that no substantial right of the owner of the property charged with the payment of such taxes or assessment has been affected, there is nothing of that kind appearing in this case. All we have is the fact that the lot was described in the assessment as containing a certain quantity of land and the bond, certificate of sale, and deed described it as containing a larger quantity. What the amount of the assessment was or the amount for which it was sold does not appear. We have simply a case of a difference in description in the assessment and in the proceedings eventuating in a sale and a deed which would not in themselves present any ground for departing from the strict rule which we have applied.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; BEATTY, C. J.

In re WARNER'S ESTATE. (S. F. 6436.)  
(Supreme Court of California. April 17, 1914.)

#### 1. HUSBAND AND WIFE (§ 264\*)—COMMUNITY PROPERTY—EVIDENCE AS TO CHARACTER OF PROPERTY—SUFFICIENCY.

In a proceeding for the settlement of an executor's final accounts, contested by decedent's widow, evidence held to overcome the presumption of community property attaching to the possession of property by either spouse, and to show by clear, certain, and direct proof that realty in this state purchased by decedent with money sent by him from Illinois, where community property is not recognized, was his separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.\*]

#### 2. HUSBAND AND WIFE (§ 6\*)—PROPERTY RIGHTS—RIGHTS OF A WIFE.

At common law the husband, as against every person except his creditor, has a right to dispose of his personality in any manner he thinks proper during his lifetime, and during coverture the wife has no interest therein, except so far as the husband is liable for her support and maintenance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13-18; Dec. Dig. § 6.\*]

#### 3. EVIDENCE (§ 80\*)—PRESUMPTION—LAW OF ANOTHER STATE.

In the absence of a contrary showing, the law of a foreign jurisdiction is presumed to be the same as that of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

#### 4. HUSBAND AND WIFE (§ 246\*)—PERSONAL PROPERTY—NATURE OF OWNERSHIP—WHAT LAW GOVERNS.

The separate personal property enjoyed under the law of the domicile by one of the spouses when it was acquired is not lost by its investment in realty in another jurisdiction where the law of community property is in force.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 873; Dec. Dig. § 246.\*]

Department 2. 'Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Final accounting by Vespasian Warner, executor of John Warner, deceased, in which the widow filed objections. Judgment for contestant, and the executor appeals. Reversed.

L. L. Cory, of Fresno, for appellant. Frank H. Short and F. E. Cook, both of Fresno, for respondent.

MELVIN, J. It is agreed by counsel on both sides that but one point need be considered on this appeal, i. e., whether the reality of the deceased in this state was his separate property or was community property.

The matter comes here on appeal from a judgment sustaining contestant's objection to the executor's proposed final account and settling that account in accordance with the theory that the land was community property.

John Warner and the contestant were married in 1874, and resided in Clinton, Ill., until his death. During their married life John W. Warner sent from Illinois certain funds which were used to purchase real property in the state of California. This is the land out of which the controversy arose. Warner died testate; his will was probated in Illinois; ancillary administration was had in California; and in due time the executor, Vespasian Warner, filed his final account and petition for distribution. He prayed that all of the estate be distributed to him in accordance with the provisions of the will. The widow renounced her rights under the will and instituted this contest.

Appellant contends that it was proven at the trial substantially, and without contradiction, as well as stipulated, that in Illinois there is no law of community property, and that Mr. Warner possessed the money with which he bought the land in California as a citizen of Illinois, and that therefore the real estate partook of the nature of the money with which it was purchased, and was not community property.

The position of respondent, in brief, is this: Possession of property by either spouse in California raises the presumption that it is community property. There is also a presumption that the laws of Illinois are the same as those of California. There was not sufficient evidence, says respondent, to overcome these presumptions by proving, either that the law of Illinois does not recognize community interest in property acquired during the existence of the marriage relation, or by establishing the fact that the money sent to California by Mr. Warner for the purchase of land was his separate property earned in Illinois.

[1] It is undoubtedly true that the presumption which attends the possession of property by either spouse may only be over-

come by clear and certain proof that it is really separate property. *Meyer v. Kinzer*, 12 Cal. 251, 73 Am. Dec. 538; *Morgan v. Lones*, 78 Cal. 59, 20 Pac. 248; *Dimmick v. Dimmick*, 95 Cal. 328, 30 Pac. 547; *Jordan v. Fay*, 98 Cal. 287, 33 Pac. 95; *Davis v. Green*, 122 Cal. 366, 55 Pac. 9; *Rowe v. Hibernia Sav. & Loan Society*, 134 Cal. 405, 86 Pac. 569. This rule is admitted by appellant; but he insists that he sustained the burden cast upon him. The source of the money for the purchase of the Warner property was proven by the testimony of Mr. O. J. Woodward, the president of the First National Bank of Fresno. The witness stated that Mr. Warner had been engaged in the banking business in Clinton, Ill., from 1864 to the time of his death. He lived there and transacted his business there. He was a man of large wealth at the time of his death. He spent the greater part of his life in Clinton there acquiring the property by which his fortune was built up. He never resided in California. The money with which he purchased the land here in controversy was sent by Mr. Warner from the bank at Clinton, Ill. This testimony amounted to a strong showing that the money was possessed by him at the place of his domicile, and presumptively was subject to the law of Illinois. There was not a syllable of testimony contradictory of Mr. Woodward's statement. It is true that upon cross-examination he said he knew of Mr. Warner having some property in Iowa, and that it was impossible for him to state whether the money sent to California for the purchase of land was derived from transactions in Illinois or in Iowa or elsewhere. The witness also said that he could not tell whether the money was Mrs. Warner's or not, as it had no "earmarks on it." Of course it had no "earmarks" on it; but it did have the presumption attaching to it that the man who held it in Illinois, and sent it to California for the specific purpose to which it was applied, owned it under the law of his domicile. While strong proof of the nature of separate property is necessary, the law does not require demonstration, nor that all possible contingencies have been negated by the showing that the property was not owned by the marital community. In other words, the learned judge of the trial court was not justified in holding that the property was not subject to the laws of Illinois when Mr. Warner assumed to spend it as his own. At the trial one of Mrs. Warner's counsel said: "I will stipulate that the money that was paid for these two pieces of property now belonging to the estate of John Warner in California was sent out here to pay the purchase price of them at or near the date that the deeds were made."

There was direct, uncontradicted, positive testimony that Illinois has no law of community property resembling our Californian



statutes on that subject, but that the common law prevails in that state. Judge George B. Graham, a lawyer who had practiced for many years in the state of Illinois, was the only witness who testified upon this subject. He said that he was acquainted with the laws of the state of Illinois with respect to the ownership and distribution of property, and that in Illinois there is no community interest in property growing out of the marriage relation. There was, he said, a law of descent of property; but it did not change the common-law rule in that regard. In his examination the following question was asked by counsel, and the appended answer was given by Judge Graham: "Q. Now, with reference to the ownership of real and personal property in the state of Illinois at all times down to the present time you have testified to, what is the law of that state as to whom the property belongs that is owned during marriage? A. The property acquired by husband or wife during marriage becomes the property of the husband absolutely." He also stated positively that in Illinois property acquired by husband and wife during coverture is subject to the common-law rule, and always has been.

[2] The general rule of common law is well stated in 15 Am. & Eng. Ency. of Law, 834, as follows: "It may be stated as a general rule that at common law the husband, as against every person except his creditor, has a right to dispose of his personalty in any manner he thinks proper during his lifetime, and during coverture the wife has no interest in the property, except so far as the husband may be liable for her support and maintenance."

[3] Counsel for Mrs. Warner do not attack the verity of Judge Graham's statements, but say that the court was justified in disregarding his testimony on the ground that he had not been in active practice in Illinois for many years, and consequently his exposition of the law of that state did not and should not move the court against the presumption which prevails in the absence of a contrary showing that the law of a foreign jurisdiction is the same as that of California. We cannot agree with this view. The witness was a qualified expert who was allowed to testify as such. While the court is clothed with wide discretion in accepting or discarding testimony, this discretion is not so absolute that we may never question its exercise. There was no effort to impeach the witness, nor to show that the common-law rule was not in effect in the state where the Warners lived for so many years. Indeed the attitude of one of counsel for the widow showed that he did not seriously question the position of the proponent of the will that there is not community interest in property acquired in Illinois by residents of that state during coverture. In the early part of the hearing when it was sought to prove the law

of Illinois on behalf of the executor, the following colloquy occurred:

"Mr. Cory: In other words, the law with relation to real property in Illinois is that the wife has the common-law right of dower; the law of separate and community property does not exist there as in this state.

"Mr. Snow: Only I object on the ground that it is irrelevant, incompetent, and immaterial." We do not object to the law itself. We have stipulated what the law is; but we object to the introduction.

"Mr. Cory: You do not mean by 'incompetent' that that is not the law, but that it does not apply.

"Mr. Snow: Oh, no; that it does not apply to this case."

[4] While this may not amount to a stipulation regarding the law of Illinois, it shows that counsel for Mrs. Warner did not seriously question the interpretation of the law given by opposing counsel. There was therefore direct uncontradicted testimony from an expert upon this subject which the trial court was not justified in discarding. It follows that the finding upon the status of the property in California was erroneous, for it is well settled that separate personal property, enjoyed under the law of the domicile by one of the spouses at the time it was acquired, is not lost by its investment in real property in another jurisdiction where a different law is in force. Estate of Niccolls, 164 Cal. 369, 129 Pac. 278, was a proceeding very similar to this. The husband and wife had resided for many years in the state of Illinois, where the husband had acquired substantial means, first by the practice of the profession of medicine, and later by the investment of moneys, and by dealing in property acquired with funds furnished partly by him and partly by his wife. They brought the proceeds of the business to California and invested in real property from which, after Dr. Niccolls' death, the court set aside a homestead for the widow, on the theory that the land had belonged to the marital community. The finding that the land was community property was held not justified. We quote the following language from the opinion written by Mr. Justice Sloss: "The question, then is: What, according to the law of the state of Illinois, was the character of the property owned and acquired by Dr. and Mrs. Niccolls in that state, and by them brought to California? 'If a husband and wife acquire personal property in one state and then remove with the same into a state in which the community law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property.' Ballinger on Community Property, § 47; Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113, 68 Pac. 488. The record before us contains testimony, which is uncontradicted, that 'there is not in the state of Illi-

nois, by statute or as common law, any such thing as community property, whereby the husband and wife both have a community interest in property accumulated during the marriage relation.' It follows that the property accumulated during the marriage, whatever might have been its character if the parties had acquired it while domiciled in California, was not community property in Illinois. Consequently neither it nor any property for which it was exchanged became community property in this state."

Upon the authority of the above case and the cases cited in the opinion therein, the judgment in this case is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

DAVIS v. JOHN BREUNER CO. et al.  
(S. F. 6377.)

(Supreme Court of California. April 14, 1914.)

1. MUNICIPAL CORPORATIONS (§ 706\*)—ACTION FOR INJURY BY AUTOMOBILE IN STREET—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for an injury to a pedestrian struck by defendant's automobile at a street crossing, evidence held to support a finding by the court that plaintiff was guilty of contributory negligence precluding recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

2. APPEAL AND ERROR (§ 1010\*)—CONCLUSIVENESS OF FINDINGS.

Findings of the trial court will not, on review, be disturbed, if any of the evidence, upon a reasonable view thereof, supports them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

3. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREET AS HIGHWAY—CARE REQUIRED OF PEDESTRIAN.

A pedestrian, in crossing a busy street in the heart of the business district of a great city, must look both ways before starting to cross the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

4. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREET AS HIGHWAY—ACTION FOR INJURY—VIOLATION OF ORDINANCE.

In an action for an injury to a pedestrian by being struck by defendant's automobile at a street crossing, the fact that at the time of the accident defendant was violating a speed ordinance did not preclude a finding that plaintiff's own negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

Department 2. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by H. Davis against the John Breuner Company and G. B. Hollenbeck. From a judgment for defendants, plaintiff appeals. Affirmed.

Clinton G. Dodge, of San Francisco, and Philip M. Walsh, of Piedmont, for appellant. Hamilton A. Bauer, of San Francisco, and Snook & Church, of Oakland, for respondents.

MELVIN, J. Plaintiff sued for damages on account of personal injuries caused by an automobile, driven by defendant Hollenbeck, running him down on a public street of the city of Oakland. The case was tried by the court without a jury, and judgment was given in favor of defendants. This appeal is from the judgment, and from an order denying plaintiff's motion for a new trial.

It was alleged in the complaint and found by the court that at the time of the accident defendant Hollenbeck was guilty of negligence, in that he was driving at a rate of speed prohibited by an ordinance of the city of Oakland, and that, in further violation of said by-law, he failed to give any alarm or warning of the approach of the automobile before reaching the crossing where he injured plaintiff. But there were further findings that the said automobile would not have run against plaintiff if he had not been careless and negligent in crossing the street without looking to see if any vehicles were approaching, and that the injuries sustained by plaintiff were caused by his own negligence directly contributing thereto. There was also a finding that, although the defendant Hollenbeck was employed generally as a salesman by John Breuner Company, the other defendant, he was not engaged in his master's business at the time of the accident.

Appellant attacks both of these findings, as unsupported by the evidence. We will first examine the one involving contributory negligence, and, if that is supported, the other need not be considered, because obviously, if the driver of the motor car was not guilty of such negligence as made him liable under the facts revealed by the evidence, his principal would be also exonerated. *Bradley v. Rosenthal*, 154 Cal. 425, 97 Pac. 875, 125 Am. St. Rep. 171.

[1-4] The plaintiff testified that when he came south on the west side of Broadway he looked up and down Tenth street as soon as he passed the property line, and he saw no automobile approaching from the direction either of Franklin street to the east or Washington street to the west. He then crossed the sidewalk, a distance of 14 feet, and started across Tenth street. When 6 or 8 feet from the curb, he was struck by the automobile which approached from the east. When asked what direction he was looking when he was struck, he replied: "I was looking right straight in the center." On cross-examination, he said that when he stepped off the curbing into the roadway of Tenth street he was looking straight ahead. The only other witness to the direction in which

Mr. Davis was looking was the defendant Hollenbeck, who said that, when he saw plaintiff an instant before the impact of the vehicle against him, Mr. Davis had his head turned away over his right shoulder. This would direct his eyes away from the approaching motor car. Appellant insists that the trial court must have discarded Hollenbeck's testimony, because of the finding, directly contrary to his statement, that the automobile was moving at a rate of speed in excess of 10 miles an hour, the maximum rate allowed by the ordinance. But it does not follow that, because the court adopted the views of other witnesses on the difficult matter of rate of speed, the entire testimony of Mr. Hollenbeck was rejected and his statement upon a subject not of judgment and deduction, but of simple observation, was absolutely disregarded. Certain it is that there was enough testimony to justify the court in the conclusion that the plaintiff was guilty of contributory negligence barring his recovery. Unless the court having the duty of trying the case has violated its discretion, this court will not interfere, if any of the evidence, upon a reasonable view thereof, supports the findings and judgment. Here there was ample justification for the finding that the plaintiff walked heedlessly into danger, without taking the most ordinary precautions for his safety. It is the duty of a foot passenger to look both ways before starting to cross a street, particularly when, as in this instance, the street over which he intends to pass is a busy thoroughfare in the heart of the business district of a great city. *Niosi v. Empire Steam Laundry Co.*, 117 Cal. 257, 49 Pac. 185; *Brown v. Brashers* (App.) 133 Pac. 506. The mere fact that defendant Hollenbeck was violating an ordinance and was therefore, as matter of law, guilty of negligence did not preclude the court from finding that the plaintiff's negligence was the efficient and proximate cause of the injuries suffered by him. In all such cases the negligence of a plaintiff which directly contributes to the injury bars a recovery. *Flemming v. Western Pacific Ry. Co.*, 49 Cal. 253; *Jamison v. San Jose, etc., R. R. Co.*, 55 Cal. 595; *Nagle v. California Southern R. R. Co.*, 88 Cal. 92, 25 Pac. 1106; *Lambert v. Southern Pacific Co.*, 146 Cal. 236, 79 Pac. 873; *Shade v. Bay Counties Power Co.*, 152 Cal. 11, 92 Pac. 62; *Brown v. Pacific Electric Ry. Co.*, 138 Pac. 1005.

The conclusion which we have reached regarding the finding upon the subject of contributory negligence makes it unnecessary to discuss the finding that Hollenbeck was not acting as the agent of John Breuner Company when the accident occurred.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

PEOPLE on Inf. of WEBB, Atty. Gen., v. BANNING CO. et al. (L. A. 3077.)

(Supreme Court of California. April 11, 1914.)

1. NAVIGABLE WATERS (§ 37\*)—TIDELANDS—DISPOSITION BY STATE—INTEREST RESERVED. The right of a grantee of tidelands from the state is subject to a public easement for navigation and fishing.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-228, 285; Dec. Dig. § 37.\*]

2. PUBLIC LANDS (§ 144\*)—SALE OF SWAMP LANDS—VALIDITY.

Where tidelands were reserved from sale during designated periods, the approval of an application to purchase and the acceptance of the price and the issuance of a patent during such periods were without authority, and the patent was void.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 391-399; Dec. Dig. § 144.\*]

3. PUBLIC LANDS (§ 144\*)—SALE OF SWAMP LANDS—VALIDITY.

Where proceedings for the purchase of swamp lands were had during the time the lands were reserved from sale under the Constitution and Pol. Code, § 3488, patents to the lands were void.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 391-399; Dec. Dig. § 144.\*]

4. LIMITATION OF ACTIONS (§ 44\*)—RECOVERY OF STATE LANDS—"RIGHT OR TITLE."

The "right or title," under Code Civ. Proc. § 315, which provides that the state will not sue for any real property by reason of the "right or title" of the state thereto, unless it accrued within ten years before any action is commenced, refers to the right or title of the state to sue, and not to the right or title on which a right to sue is based.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 220-230, 232; Dec. Dig. § 44.\*]

5. ADVERSE POSSESSION (§ 7\*)—PUBLIC LANDS—RESERVATION FROM SALE—EFFECT.

A reservation of swamp lands of the state from sale by state statute is a mere restriction on the general power delegated to the officers of the state to sell swamp lands, and the lands may be acquired by adverse possession, unless dedicated to a public use.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 24-42; Dec. Dig. § 7.\*]

6. ADVERSE POSSESSION (§ 7\*)—PUBLIC LANDS—ACQUISITION.

Ordinarily the mere possession of state swamp lands by one not in privity with the state nor claiming under it is not adverse to the state; but, where there has been actual adverse possession for more than ten years under a patent issued by the state, an action by the state to recover the land is barred by the ten years' statute of limitations. Code Civ. Proc. § 315.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 24-42; Dec. Dig. § 7.\*]

7. APPEAL AND ERROR (§ 1033\*)—QUESTIONS REVIEWABLE—FINDINGS IN FAVOR OF APPELLANT.

A finding in favor of appellant cannot be reviewed, but must be assumed to be supported by sufficient evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4062-4062; Dec. Dig. § 1033.\*]

# 8. ADVERSE POSSESSION (§ 7\*)—PUBLIC LANDS—RUNNING OF LIMITATIONS.

Civ. Code, § 1007, providing that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto by prescription good against all, the running of limitations does not depend on the presumption of the existence of a grant, but operates on the state with respect to any property not dedicated to public use as soon as adverse possession thereof begins, without reference to the presumed existence of a lawful grant, and though the lands claimed under adverse possession were reserved by the state from sale.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.\*]

# 9. NAVIGABLE WATERS (§ 37\*)—SWAMP LANDS—LITTORAL RIGHTS.

The rights of an owner of swamp lands purchased from the state to littoral rights over adjacent tidelands and waters as owner of riparian lands are subject to the public easements for navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 87.\*]

# 10. ADVERSE POSSESSION (§ 8\*)—PUBLIC LANDS—DEDICATION TO PUBLIC USE.

Where tidelands of the state have been dedicated to a public use, there can be no adverse possession thereof sufficient to start the running of limitations against any action by the state or its authorized agencies to assert the public right or such possession as will give title by prescription to the adverse claimants against the public right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 14, 27, 43-57; Dec. Dig. § 8.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the People of the State of California, on information of U. S. Webb, Attorney General, against the Banning Company and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed in part, and reversed in part.

O'Melveny, Stevens & Millikin, of Los Angeles, for appellants. Anderson & Anderson, of Los Angeles, and U. S. Webb, Atty. Gen., for respondent.

**PER CURIAM.** Since the order was made in this case granting a rehearing after the judgment of this court rendered on December 20, 1913, the appellant, the Kerckhoff-Cuzner Mill & Lumber Company, has waived and abandoned all right or interest which it may have had in and to the small parcels of tidelands hereinafter mentioned, reserving only any rights it may have under any valid wharf franchises, and the parties thereupon have stipulated that the cause may again be submitted without further argument upon the other questions presented by the appeal. The rehearing was granted mainly for the purpose of again considering the question presented upon the claim to these tidelands. In view of this abandonment by said appellant, we find it unnecessary to consider the case further, being satisfied with the opinion

on the other questions discussed therein as heretofore filed. We therefore adopt the following portions of said opinion as the opinion of the court:

"The defendants appeal from the judgment and from an order denying their motion for a new trial.

[1] "This is one of the series of cases mentioned in the opinion of *People v. California Fish Co.* (L. A. No. 3060) 138 Pac. 79. The claim of the appellants that a patent for tidelands would convey to the patentee the absolute estate in the land free from the public easement for navigation and fishery, and the claim that land within two miles of the town of Wilmington, as incorporated by the act of 1872, was not reserved from sale, are both disposed of adversely to the appellants by the opinion in that case. No further discussion of those claims is necessary.

"In the present case, and in L. A. No. 3061, 140 Pac. 591, of the series of cases referred to, the appellants claim that they were in adverse possession of the land for more than ten years before the action was begun, and consequently that they have title thereto by prescription, and that the action is barred by the statute of limitations. Some minor questions involved are also omitted from case No. 3060. We proceed to the consideration of these questions.

[2] "The land here in controversy consists of two tracts, one known as tideland location 144, containing 198.65 acres, the other swamp land location 3088, containing 55.29 acres. One defendant also claims under tideland location 68, which in part overlaps swamp land location 3088. The application and survey for tideland location 68 were filed on December 23, 1878. The first payment was made on March 7, 1882. The last payment was on December 24, 1890, and the patent was issued on October 16, 1894. It does not appear that any payment was made during the interval between the repeal of the act incorporating Wilmington and the incorporation of San Pedro on March 1, 1888. Under the principles stated in case No. 3060 aforesaid, the land was reserved from sale from 1872 until 1887, when the Wilmington act was repealed, and again for the time ensuing the incorporation of San Pedro. Hence the approval of the application and survey, the acceptance of the purchase money, and the issuance of the patent for tideland location 68 were each without authority, and the patent therefor was void.

[3] "The land embraced in tideland location 144 and in swamp land location 3088 is all within two miles of the corporate limits of the city of San Pedro, incorporated March 1, 1888. From that date forward all these tidelands were reserved from sale by the constitutional reservation, and both the swamp land and the tide land were reserved from sale by section 3488 of the Political Code,

until the year 1901, when the reservation of swamp lands was eliminated therefrom by amendment. The application and survey for tideland location 144 were filed March 9, 1887. The approval thereof was made on May 14, 1888, which was after the incorporation of San Pedro, and there is no showing that any payment was made before that date. All the other proceedings leading up to the patent in No. 144, and all the proceedings in swamp land location 3088, occurred after said incorporation. The patents for both these locations were issued on October 16, 1894. It follows that both patents are void because of the fact that the lands were reserved during the time when the proceedings for the sale took place.

[4] "The defendants pleaded the bar of the statute of limitations contained in section 315 of the Code of Civil Procedure, which is as follows: 'The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless: (1) Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or (2) the people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.'

"The words 'right or title' in the first subdivision must of necessity refer to the right or title of the state to sue, not to the right or title upon which the state bases its right to sue. If this were not so, the state could not maintain an action in respect to land to which it held title for more than ten years prior to the beginning of the action, although the invasion of its rights which created the cause of action had been very recent and within ten years. This question was presented in *People v. Center*, 66 Cal. 564, 5 Pac. 263, 6 Pac. 481, and it was there held that the first clause should be construed as if it read: '(1) Such cause of action shall have accrued within ten years,' etc. We fully approve that decision and hold that to be the proper construction of the section.

[5] "The court found that a certain parcel of land in controversy had been held and occupied by the Kerckhoff-Cuzner Mill & Lumber Company, adversely to the state and under claim of title against it, continuously for more than ten years before the action was begun. Upon this finding it is contended that the action was barred by the aforesaid statute of limitations, and that title by prescription has been acquired thereto by that company. This land, for the most part, is embraced in swamp land location 3088 and is above the line of ordinary high tide, being of the class described as swamp land. Some small portion of the land thus occupied and claimed is tideland.

"Counsel for plaintiff, in argument, admit

that the swamp lands of the state are proprietary lands, capable of being acquired by adverse possession, if there is no rule of law which prevents the operation of the statute of limitations against the state with reference to them. They contend, however, that the reservation of the land from sale operated as a dedication to public use, or as a declaration that the lands are held in trust for public purposes, and that the statute of limitations does not run against the state with respect to land so dedicated or held, and consequently that the state cannot be disseized thereof by adverse possession. The court below took this view of the question. To sustain this point the plaintiff relies upon a passage from *Hoadley v. San Francisco*, 50 Cal. 275, to the effect that the land there claimed, being land granted by the United States to San Francisco for public use, was 'held for that purpose only' and could not be conveyed to private persons, and that, 'the city having no authority to convey the title, private parties are virtually precluded from acquiring it.' The argument from this case appears to be based upon the theory that the land there referred to was the entire body of land granted to San Francisco by the act of Congress of July 1, 1864 (13 U. S. Stats. 333, c. 194), proprietary in character and subject to sale by the city. A careful analysis of the case shows that this is not true. The land in litigation consisted of public squares which had been dedicated as such by the city and the state before the passage of the act of 1864. The congressional grant to the city of all the pueblo lands 'for the uses and purposes specified in the ordinance of said city, ratified by an act of the Legislature,' recognized the previous dedication of these public squares to public use as such, and gave them to the city in trust for that purpose. It was these squares, so dedicated, of which the court was speaking in the passage relied on, and not the proprietary lands included in the grant. The decision does not hold that lands granted by the United States to the state for general public purposes, as, for example, the school lands granted in aid of general education or the swamp lands granted for reclamation and tillage or other private use, are withdrawn from commerce, or held in trust for public use. The grant in that case, being, in effect, a grant by the United States to the city for public use as a public square, created a public trust which the city, having accepted, could not revoke, and hence it was held that the city could not be deprived of this public land by adverse possession or by the statute of limitations. It was a trust created by the holder of the paramount title. In the present case the reservation was made by the state itself. The state could revoke the reservation at any time. It was a mere restriction upon a general power delegated to its officers. No public purpose or public use was

declared. The swamp lands had not been previously dedicated to any public use. The reservation merely withheld them from sale. No dedication to public use is to be implied therefrom. The reservation left them in precisely the same condition as they were in before any law authorizing a sale was enacted; that is, as proprietary lands of the state subject to adverse possession and the running of the statute of limitations. *Ames v. City of San Diego*, 101 Cal. 390, 35 Pac. 1005; *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 196, 41 Pac. 291, 35 L. R. A. 33.

[6, 7] Ordinarily the mere possession of state lands of this character by one not in privity with the state, nor claiming under it, will not be adverse, so as to set the statute in motion. The state is deemed to acquiesce in such possession by private persons, and it is considered as permissive only. This is the basis of section 1006 of the Civil Code. But this is not necessarily the case, and as the court found that possession in this case was adverse to the title of the state, and as that finding cannot be here reviewed, since it is in favor of the appellant, it must be assumed to be supported by sufficient evidence.

[8] "Counsel for appellants also advance the proposition that the presumption of an ancient grant is the basis of the doctrine of prescription, and that there can be no such presumption where no grant could have been legally made. The Code defines the method of gaining such title and does not declare that it must be based on the presumption of a grant. Civil Code, § 1007. The running of the statute of limitations does not depend upon the presumption of the existence of any grant. It operates upon the state, with respect to any property not dedicated or held for a public use, as soon as adverse possession thereof begins, without regard to the existence or presumed existence of a lawful grant. By the section cited an adverse occupancy for the period of limitation confers title to the property occupied, regardless of the possible existence of a previous grant. This, of course, applies, so far as the state is concerned, to proprietary land alone. It does not apply to property dedicated to public use. See 46 Am. St. Rep. 492, note. We therefore hold that, as to swamp lands which have been held in actual adverse possession for more than ten years claiming under a state patent, the action is barred by the provisions of section 815 of the Code of Civil Procedure.

[9] "The defendants owning the swamp land claim littoral rights over the adjoining tidelands and waters, as owners of land riparian to the bay. It is unnecessary to discuss this claim at length. Such rights are not greater against the state than against the United States, with respect to the public easement for navigation held concurrently by the two sovereignties, the one for intrastate and general navigation, the other for inter-

state and foreign navigation. The private littoral rights to riparian proprietors are always subject and subordinate to the public easement for these purposes. *U. S. v. Chandler-Dunbar Co.*, 33 Sup. Ct. 687; *Gibson v. U. S.*, 166 U. S. 272, 17 Sup. Ct. 578, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; *Gilman v. Philadelphia*, 70 U. S. (3 Wall.) 725, 18 L. Ed. 96.

[10] "The part which is tideland is subject to the public uses of navigation and fishery, as is fully shown in the opinion in No. 3060. It is dedicated to the public uses. With respect to the public easement thus constituted, it is settled by a long line of decisions in this state that there can be no adverse possession sufficient to set in motion the statute of limitations against any action by the state or its authorized agencies to assert the public right or so as to give title by prescription to the adverse claimant against the public easement. This proposition was directly involved in *People v. Kerber*, 152 Cal. 733, 93 Pac. 878, 125 Am. St. Rep. 93. It was there held that the public easement was not affected, impaired, or destroyed by such adverse possession, no matter how long continued. We refer to the opinion in that case for a citation to the other cases in this state deciding the same proposition. Hence it follows that the claim under the statute of limitations and to title by prescription cannot in any wise affect the right of the state or of the public to use the land for public purposes connected with the aforesaid easements. See, also, Civ. Code, § 3490; *Mining Débris Case (C. C.)* 16 Fed. 25, 9 Sawy. 513; *Schneider v. Hutchinson*, 76 Am. St. Rep. note page 492."

The abandonment by the appellant of the claim to the small parcels of tideland adjoining this swamp land makes it unnecessary to consider the questions arising with respect to the right of the appellant to the subordinate fee of said land subject to the public easement for navigation under or by virtue of any adverse possession it may have had thereof. As to the swamp land so adversely held by the appellant, the judgment should be that said company is the owner thereof. With respect to the tidelands, the judgment should be that the appellant has no interest therein.

It is ordered that the judgment against the Kerckhoff-Cuzner Mill & Lumber Company be vacated, and that the court below proceed, upon the findings it has heretofore made in this action, to enter the judgment of the court declaring, in accordance with this opinion, the interest and title of the plaintiff and of the Kerckhoff-Cuzner Mill & Lumber Company, respectively, to the swamp land which that company had held in adverse possession for more than ten years before the action was begun.

The order denying a new trial is affirmed.

As to all the defendants, except the Kerckhoff-Cuzner Mill & Lumber Company, the judgment is affirmed.

PEOPLE et al. v. BANNING CO. et al.  
(L. A. 3061.)

(Supreme Court of California. April 11, 1914.)

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the People and others against the Banning Company and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed in part, and reversed in part.

O'Melveny, Stevens & Millikin, of Los Angeles, for appellants. Anderson & Anderson, of Los Angeles, and U. S. Webb, Atty. Gen., for respondents.

**PER CURIAM.** The appeals are from the judgment and from an order denying a new trial. The appeal of the Kerckhoff-Cuzner Mill & Lumber Company is taken separately from that of the others, but both appeals are presented upon the same transcript.

The case involves the land embraced in tideland location No. 68. First payment was made in 1882 and the last in the year 1890. The patent was issued therefor to William H. Banning on October 16, 1894. It is all within two miles of Wilmington.

The action is to quiet title to the entire tract of land embraced in the patents. A part of the land embraced in this location was involved in L. A. No. 3077, People v. Banning et al., 140 Pac. 587. All the questions determinative of the rights of the parties were fully discussed and decided in that case and in L. A. No. 3060, People v. California Fish Co., 138 Pac. 79. The court here, as it did in L. A. No. 3077, found that certain of the lands claimed by the Kerckhoff-Cuzner Mill & Lumber Company had been held by said company in actual adverse possession against the state for more than ten years, and that said lands are part of the swamp and overflowed lands of the state, lands held as proprietary lands and not subject to any public easement or trust. Our conclusion in the first-named case was that the action was barred by the statute of limitations as against that company. The court below also found that a certain small portion of the land held in adverse possession by the Kerckhoff-Cuzner Mill & Lumber Company was tideland, and it concluded that that defendant had gained no title whatever thereto by virtue of its adverse possession.

After the rehearing was granted in this case from the decision rendered therein on December 20, 1913, the appellant Kerckhoff-Cuzner Mill & Lumber Company waived and abandoned all claim it may have to the small parcels of tidelands adjoining the aforesaid swamp land, and which were included in its possession as above stated, reserving only its rights under any valid wharf franchises over said tidelands, and thereupon the parties submitted the cause upon the arguments already made. Upon this waiver the judgment should be against the defendant with respect to said tidelands. The judgment here will follow the judgment in L. A. No. 3077, aforesaid.

It is therefore ordered that the judgment against all the defendants except the Kerckhoff-Cuzner Mill & Lumber Company, and the order denying a new trial as to all, be affirmed.

The judgment against the Kerckhoff-Cuzner Mill & Lumber Company is reversed, and as to that company the cause is remanded, with directions to the court below to enter judgment

that the plaintiff take nothing against the said defendant with respect to the land which the court in the eleventh finding declared to have been in the possession of said defendant for more than ten years next before the beginning of this action and to be above the line of ordinary high tide, and that said defendant remain in possession thereof, and that said Kerckhoff-Cuzner Mill & Lumber Company recover its costs.

DEL MAR WATER, LIGHT & POWER CO.  
v. ESHLEMAN et al. (L. A. 3533.)†

(Supreme Court of California. April 11, 1914.  
Rehearing Denied May 11, 1914.)

1. CORPORATIONS (§ 394\*)—CONTROL AND REGULATION—POWER OF RAILROAD COMMISSION.

The Railroad Commission has no power to compel a corporation which owns property in private right, and has not dedicated it to any public use, to apply it to a public use of any kind.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1576; Dec. Dig. § 394.\*]

2. WATERS AND WATER COURSES (§ 188\*)—WATER COMPANIES—CONTROL AND REGULATION.

Under Public Utilities Act (St. [Extra Sess.] 1911, p. 55) § 67, making the findings of the Railroad Commission on questions of fact final and not subject to review, its findings that a water company was a public utility, and that it was operating a water system for compensation, were conclusive, unless the evidence on the subject was without conflict, so that the question was purely one of law.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.\*]

3. WATERS AND WATER COURSES (§ 201\*)—WATER COMPANIES—CONTROL AND REGULATION.

Public Utilities Act (St. [Extra Sess.] 1911, p. 36) § 35, authorizing the Railroad Commission to prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and providing that, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service, and section 36, authorizing the Commission to order additions, extensions, etc., to the existing plant, equipment, etc., of any public utility, do not authorize the Commission to compel a water company, which is applying a part of its water to public use in a limited territory, to lay new pipes, enlarge its territory, and devote its entire supply to public service in such territory as the Commission may find in need of water, and for which its supply is adequate, but merely authorize it to require public service corporations which have devoted their entire property to the use of the entire public, or shall have undertaken to supply a certain district, to furnish adequate service within the territory which it has undertaken to serve, especially as even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility without compensation; and hence, where it did not appear that a water company had held out that its water was for sale to the public generally, or to any persons except those within a town site, and within the subdivided lands of the land company which organized it, the Commission could not order it to furnish water to a party outside of such territory.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on rehearing, see 140 Pac. 948.

**4. WATERS AND WATER COURSES (§ 201\*)—  
WATER COMPANIES—CONTROL AND REGULATION.**

Sales of water by a water company to persons who come and take it away in barrels is not evidence of a dedication of the water owned by it to public use, nor the dedication of any of it to the supply of any particular territory.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 275; Dec. Dig. § 201.\*]

**5. WATERS AND WATER COURSES (§ 201\*)—  
WATER COMPANIES—CONTROL AND REGULATION.**

The owner of a water supply is not compelled to dedicate all of it to public use, but may dedicate a part only, reserving the remainder for private purposes, or for private sale or disposition, or may make a limited dedication, confining the use to such territory as he sees fit.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 275; Dec. Dig. § 201.\*]

In Bank. Original application by the Del Mar Water, Light & Power Company for a writ of review directed to John M. Eshleman and others, members of and constituting the Railroad Commission of the State of California. Order of the Commission annulled.

Edward G. Kuster, of Los Angeles, for petitioner. Max Thielen and Douglas Brookman, both of San Francisco, for respondents.

MELVIN, J. In this proceeding in certiorari this court is asked to review and set aside an order made by the Railroad Commission by which petitioner was directed to deliver from its water system a supply of water for the use of one Glass, who owns property in the Del Mar Heights tract, said Glass to pay one-half of the cost of extending petitioner's pipe line to the north boundary of said Del Mar Heights tract, the designated point of delivery.

The essential facts developed before the Railroad Commission are as follows:

In February, 1906, the South Coast Land Company was incorporated, and shortly afterwards bought the town site of Del Mar, with the exception of a few lots in the locality known as the "old town." The corporation also acquired other realty in that vicinity. In January, 1908, the South Coast Land Company entered into a contract with the Santa Fé Land Improvement Company by which the latter company leased to the former so much of its property on the San Dieguito ranch, six miles from Del Mar, as might be necessary for sinking wells. Under the terms of the lease, the lessee agreed not to pump more than 50 miner's inches of water during any 24 hours. The lessee likewise promised to pump for the lessor water not to exceed 50,000 gallons during each 24 hours for use on the lessor's ranch, and to furnish the Atchison, Topeka & Santa Fé Railway Company with water for certain specified purposes at Del Mar.

The South Coast Land Company, in February, 1908, brought about the incorporation of the Del Mar Water, Light & Power Company for the primary purpose of supplying water, light, and power to purchasers of land from the South Coast Land Company. To this water company the land company has assigned its lease from the Santa Fé Land Improvement Company for a water supply. The water company has constructed elaborate works by which pumping from two of three large wells which it has sunk on the leased property, it supplies its quota of water to the Santa Fé Land Improvement Company and its customers. These include 24 consumers on land bought from the South Coast Land Company and 17 inhabitants of that part of Del Mar known as the "old town." These latter are all of the consumers of water in said "old town," and they were found there when the land company bought the rest of the town site. They were occupying land not purchased from the South Coast Land Company, and were formerly supplied from wells which the said land company bought, but the use of which was discontinued when the Del Mar Water, Light & Power Company brought its new supply to the town. A very large quantity of water is furnished by this company to the hotel, garage, and power house on the South Coast Land Company. The company has on two occasions sold water to persons engaged in highway construction, and has occasionally supplied some water to farmers, who have hauled it away in barrels, although some applications for water to be removed in this way have been refused. The articles of incorporation of the water company give it general powers to sell water and to generate and furnish electricity for light and power, but no territorial limits are defined as setting aside the area to be served. The principal place of business is Del Mar. The Del Mar Heights tract on which the property of Glass is situated is surrounded on three sides by land belonging to the South Coast Land Company, but it is much more elevated in parts than any of the property of that corporation which is being supplied by the Del Mar Water, Light & Power Company. The Glass property is much higher than the reservoir on Inspiration Point, from which the water company conveys water to the property which has been sold by the South Coast Land Company.

After taking testimony regarding the operation of the water company and examining experts with reference to the amount of water which might be developed by the water company and its lessor on the latter's property (for the lessor had reserved the unlimited right to develop water on its own account, and has developed and is using a considerable and increasing amount), the Railroad Commission found that the Del Mar Water, Light & Power Company owns, controls, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



operates a water system for hire; that it may reasonably take the 50 miner's inches per day from the sands of the San Dieguito river under its contract with the Santa Fe Land Improvement Company; that the maximum consumption of water hitherto delivered by the water company has been about 8.61 miner's inches per day; that the company "will not within a reasonable time require said fifty (50) miner's inches of water for use on the lands owned by the South Coast Land Company, and that it will have on hand an additional supply of water in such an amount that it can reasonably and safely supply" the land of Mr. Glass; that the present plant of the water company will be adequate for a number of years to supply the inhabitants of the "old town" of Del Mar, the purchasers from the South Coast Land Company, and the settlers on Del Mar Heights tract; that the only additional piping necessary to the delivery of water at the border of said Del Mar tract would be a pipe line from the water company's tanks on Inspiration Point to the designated point of delivery. The Del Mar Water, Light & Power Company was directed to construct such pipe line, to collect one-half of the cost thereof from Mr. Glass, and thereafter to deliver water for his use at the point designated, charging 25 cents per 1,000 gallons. In the opinion of the Railroad Commission, the learned commissioner, Mr. Thelen, said with reference to the construction of this pipe line: "The engineering question of delivering water to or near the northern boundary of Del Mar Heights tract is a simple one. There was some conflict of testimony as to the exact location of the pipe, but all parties agreed that it is feasible to lay a pipe line from the tanks on Inspiration Point, through Arden Heights No. 6, to or near the northern boundary of Del Mar Heights tract. The distance from the tanks is about 4,300 feet. The South Coast Land Company, shortly after Arden Heights tract No. 6 is placed on the market, will have to lay a pipe line through that tract for its own purposes. The pipe line so laid can readily be used to supply water for use on plaintiff's property. Plaintiff can then pump the water from the point of delivery to his own property, as he has agreed to do."

The plaintiff mentioned is Mr. Glass, and the "Arden Heights tract No. 6" is a tract of land belonging, not to the water company, but to the South Coast Land Company. The opinion also contains the following paragraph: "As the South Coast Land Company might not need the pipe line throughout the entire extent of its Arden Heights No. 6 tract, at least for some time, it would not be fair to the defendant company to compel it to bear the entire cost of the installation of this pipe line, and on the facts of this case, I am of the opinion that the defendant company should construct this pipe line, but that one-

half of the cost should be borne by plaintiff. If other residents of Del Mar Heights tract later derive water through the same source, plaintiff may call upon them to share with him the outlay which he has made."

Petitioner, proceeding under section 67 of the Public Utilities Act (Stats. Ex. Sess. 1911, p. 55), contends: First, that the Commission exceeded its authority for the reason that the Del Mar Water, Light & Power Company is not a public utility; and, second, that, conceding for the purposes of argument the status of the petitioner as a public utility, the Railroad Commission has not regularly pursued its authority, and the authority pursued is beyond the power of the Legislature to confer.

It is not necessary at this point to review the constitutional and statutory authority under which the Commission acts, because it is conceded that if the petitioner is not engaged in a public use, the Commission has exceeded its jurisdiction. It is well to remember, however, that "a public utility" as defined by the Constitution (article XII, § 23) is, so far as a corporation like the petitioner is concerned, one owning, operating, or controlling a plant or equipment "for the production, generation, transmission, delivery or furnishing of heat, light, water or power, \* \* \* either directly or indirectly, to or for the public."

That the intention of the incorporators of the water company was merely to furnish an instrumentality for managing and operating the water department of the South Coast Land Company there can be little doubt. But the finding of the Commission that petitioner is a public utility is based, in part at least, upon its articles of incorporation. These are general in their terms, authorizing the company "to construct, buy, lease and otherwise acquire and dispose of, hold, manage, control and operate waterworks and distributing systems, ditches, canals, pipe lines, and all other means or appliances for the acquisition, sale or distribution of water for domestic, irrigation and all other purposes, also to sell and distribute water for domestic, irrigation and all other purposes." It is true that these provisions are broad, and that the company might, under its charter, engage in business as a public utility. The mere chartered authority does not, however, mark the nature of the operating corporation any more than the language of a notice of appropriation binds the appropriator to furnish all of the territory mentioned therein. Tyndale Palmer et al. v. R. R. Commission et al., 138 Pac. 997. It is the naked authority to do business, but unless it be pursued in a certain way, it does not make the corporation a public utility. It is true that the corporation did not, as it might have done, in its by-laws limit the use of its water to the purchasers of land from the South Coast Land Company and to the corporations which it was required to furnish with water under the terms of its lease. But

in practice its contracts were with the vendees of the land company. The serving of water to the 17 inhabitants of the "old town" of Del Mar was not sufficient to make the water company a public utility, offering its water to the general public. When the land company bought all the unsold lots of the town site its property surrounded the places of residence of these inhabitants of "old town." It bought and abandoned the old wells from which these people derived their supply, and its arrangement with the water company to serve water to them no more constituted the latter a public service corporation than did that contract by which the Santa Fé Land Improvement Company was to receive a certain quantity of the water which might be developed. The sales to contractors who were engaged in road building were no more significant than would be similar accommodations by a farmer from his wells, and the same thing may be said of the trifling amounts of water sometimes sold to neighbors and by them hauled away in barrels. That the water company had refused to furnish persons who had not purchased land from the South Coast Land Company was shown without contradiction; and, while the reasons assigned were sometimes the scarcity of water, the fact of refusal remains. The fact is highly significant. It is also significant that under the arrangement which the water company had with the land company the latter was furnished with a large amount of water through unmetered pipes for the use of its hotel and other buildings. All of these facts and circumstances indicate that the Del Mar Water, Light & Power Company was merely the incorporated water department of the South Coast Land Company. Indeed, the Railroad Commission, while holding that the water company was organized as a public utility, recognized some superior right to the water by the South Coast Land Company. The following quotation from the opinion illustrates this: "Where a water company has been organized as a public utility by the owners of a tract of land for the purpose, primarily, of developing that tract, and where the water company thereafter makes arrangements with the owners of water held in private ownership, as is the fact in this case, and water is developed, the owners of the land in question should certainly have, within reasonable limits, the first use of water so developed. Accordingly, if it appeared in this case that all the water which the water company may develop under its contract, and such additional water as it may secure from the Santa Fé Land Improvement Company, in case such additional water may be developed, is necessary for the reasonable development of the lands of the South Coast Land Company within a reasonable period of time, this Commission would not compel the defendant to supply water to outsiders."

It is explained in the brief that this lan-

guage merely meant that if in the future it becomes necessary to limit the territory to be served by the utility, it would be fair and reasonable to consider first the lands of the South Coast Land Company. If, however, the water company, has held itself out to the general public of Del Mar as willing to furnish water to that territory, why should the former *ownership* rather than the *location* of property be the controlling factor in case a subsequent limitation of the area to be served should become necessary? No logical reason presents itself to our minds why one part of the community should thus be favored, unless there be a recognition of the right of private contract between the water company and a selected class of customers, and the moment such right is recognized the status of the water company as a supposed public utility disappears. During the hearing and determination of the case the Railroad Commission sometimes recognized the practical identity of the two companies, yet insisted that the Del Mar Company was a public utility. For example, the Commission has ordered the water company to extend its pipe across the land of the other corporation, although the latter was not a party to the proceeding. We are of the opinion that the Del Mar Water, Light & Power Company never intended to engage in a public service, and that it did not do so. Whenever the land company sold a lot it agreed to conduct electricity and water to the property line, and the purchaser in each case entered into a contract with the water company for the continued furnishing of those commodities. The facts of this case bring it squarely within the principles announced in *Thayer v. California Development Company*, 164 Cal. 119, 128 Pac. 21. The Del Mar Water, Light & Power Company was organized for the purpose of selling water to the purchasers of real property from the South Coast Land Company. It has consistently adhered to that purpose. If the purchaser of land from a rival vendor desires water, he may develop it by buying water rights or by condemnation of water for himself and neighbors. He may not demand a part of the private supply of this petitioner. The determination that the petitioner is a public utility is erroneous, and the Railroad Commission is without jurisdiction in the premises. It has not been necessary to decide whether or not the Commission has judicial power authorizing it to determine such a controversy as this.

We might rest our decision upon the foregoing discussion and conclusion, but we deem it proper to notice some of the other contentions of petitioner. The Commission had no power to order the building of a pipe line across the land of the South Coast Land Company without compensation paid in advance. *Pacific T. & T. Co. v. Eschleman*, 137 Pac. 1138. This would amount to the taking the property without compensa-

tion. It is argued that, assuming the public character of the petitioner, the order for the construction of the pipe line is not void because condemnation proceedings might be necessary to carry it out. The case of *Wisconsin, Minnesota & Pacific R. R. v. Jacobson*, 179 U. S. 302, 21 Sup. Ct. 115, 45 L. Ed. 194, is cited as authority for this proposition. In that case it was held that the State Railroad and Warehouse Commission properly directed a railroad company to build a connecting track in such a way that to obey the order it would be necessary to go outside of the company's right of way and to condemn land for that purpose. That case was thus analyzed by Mr. Justice Henshaw in *Pacific T. & T. Co. v. Eshleman*, 137 Pac. 1131, as follows: "No court will question the justice of the *Jacobson* decision under the facts declared by the Supreme Court. But just criticism may be directed against an attempt to extend the decision beyond the court's own statement of the facts and the law, and beyond what could, by any possibility, have been in the minds of the jurists who pronounced it. The decision itself amounts to a declaration that under the authority of the state Constitution or statute, a commission or court, authorized to exercise the police power in the matter of the regulation of public utilities, may, in a proper case, order a physical connection to be made between the tracks of two nearby or intersecting railways, and that, though the execution of this order may involve the expenditure of money, and may result in the modification of the use of a portion of the railroad right of way over which the connecting track or tracks be carried, such an expenditure of money, when reasonable, and such a limited change of use of the right of way, on the demand of public interest or convenience, are but the outcome of a legitimate exercise of the police power, and do not constitute a taking of property without due process of law. Such is the decision, and the whole of the decision, of the *Jacobson* Case."

The order which we are here considering was an attempted exercise of the power of eminent domain without compensation paid in advance. It was not an exercise of the police power by way of proper regulation. There was no showing, as in the *Jacobson* Case, that the demands of the public justified the expenditure. Petitioner was ordered to construct at large expense a pipe line over property belonging to another corporation in order that one customer might be served with water at 25 cents per thousand gallons. There was no showing of a demand by the public, or any large portion thereof, for water to be delivered at the boundary of Del Mar Heights tract. True, it was ordered that the pipe should be large enough to serve the tract through which it was to pass—a part of the South Coast Land Company's property not yet on the market—but there was no direction that any one but Mr.

Glass could demand the service. He was ordered to pay one half of the cost of building the pipe line, and the petitioner was to get in return for the other half the privilege of selling water to him. If the Commission could decree such expenditure for one consumer, why could it not provide a similar system of service for each successive applicant, leaving the petitioner the doubtful privilege of collecting a toll which could not compensate it for the enormous outlay in many years, if ever? Of course the Commission would do no such unjust thing; but, unless its order that water be delivered to Glass should be amended, no other person would have the right to share it. In any view of the matter, the order as made deprives petitioner of property without compensation.

It is therefore annulled.

I concur: LORIGAN, J.

SHAW, J. (concurring). [1, 2] I concur in the conclusion that the order of the Railroad Commission should be annulled. The Railroad Commission has no power to compel a corporation which owns property in private right, and has not dedicated it to any public use, to apply it to a public use of any kind. But the Commission has found as a fact that the Del Mar Company is operating a water system for compensation, and in its opinion it states as a fact that the said company is "a public utility." In view of the provision of section 67 of the Public Utilities Act that the findings of the Commission on questions of fact shall be final and not subject to review, it cannot be held that this fact so stated in the opinion is not true, unless it should appear that the evidence on the subject was without conflict, so that the question would be purely one of law. I do not think that the question is necessary to the decision of this case.

The theory on which the Commission appears to have proceeded is, in my opinion, fundamentally wrong, taking the facts as found by the Commission itself. It appears from the record, and it is not disputed, that the Del Mar Company has a supply of water from which it has been for several years delivering water for compensation to persons who have purchased lots from the South Coast Land Company. Mr. Glass, the applicant in the proceeding before the Commission, claimed that he was entitled to water from said Del Mar Company as one of the public, or of the class, to whose use the water supply in charge of the Del Mar Company was dedicated. The Commission found in favor of Glass, and directed that the service be extended to him. The findings show that his land does not lie within the territory to which the Del Mar Company has been supplying, or offering to supply, its water. *Prima facie*, therefore, he has no right to share in the water. The conclusion of the

Commission that he is entitled to water from that company is based, so far as appears, on two facts: The first is that the articles of incorporation of the Del Mar Company confer upon it the power "to construct, buy, lease and otherwise acquire and dispose of, hold, manage, control and operate waterworks and distributing systems, ditches, canals, pipe lines and all other means or appliances for the acquisition, sale or distribution of water for domestic, irrigation and all other purposes; also to sell and distribute water for domestic, irrigation and all other purposes." The second is the following finding: "We find as a fact that the defendant, Del Mar Water, Light & Power Company, is owning, controlling, operating, and managing a water system for compensation within this state." The only other findings regarding the right of the applicant, Glass, state merely that the company has water in sufficient quantity to supply him in addition to the other persons already supplied, and that it is feasible to extend its plant by additional pipes to a point near enough to supply water to his land.

The fact that the articles of incorporation empower the company to engage in public service does not, of itself, constitute proof that it is engaged in such public service, or that it has dedicated such property as it may own to such public service. The powers given in the articles, as above quoted, do not necessarily imply an intention to engage in public service. One may acquire and hold a water supply and waterworks, and thereby distribute and sell water for domestic use and irrigation or other purposes, without engaging in public service. It may make such sales to particular persons, and in such a manner that the public would not be entitled to it. The mere fact, therefore, that a company having such powers has acquired a water supply and constructed waterworks constituting a system which it is operating for compensation does not necessarily justify the conclusion that it is engaged in public service, or that its water is dedicated to public use. The only effect of the adoption of such articles by a corporation is to give it the capacity to engage in such public service if it so desires. After having become incorporated in this manner, it has the power to engage in such service in the same sense that an individual has power to engage in such service. It may or may not do so, and until it does, it cannot be said to be subject to the jurisdiction of the Railroad Commission.

[3] A finding that the Del Mar Company owns and is operating a water system for compensation, and that it has a water supply sufficient in quantity to supply the applicant, Glass, is not the equivalent of a finding either that it is engaged in operating its plant for public use, or, if it is, that Glass is one of the persons entitled as a beneficiary to such use. It is evident, however, from the opinion of the Commission that it consider-

ed the finding that the company owns and operates "a water system for compensation" as the equivalent of a finding that it was engaged in applying its water to a public use. Treating this as its proper meaning, it is nevertheless apparent that the Commission is in error with respect to the effect of such a situation. Its theory is, apparently, that if such company is engaged in public service at all, and has applied any part of its water supply to public use, the whole of its property must be deemed to have been dedicated to the general public use and subject to the power of the Commission, and, further, that if it has by its dedication, evidenced either by direct declaration, or by contract, or by conduct, devoted its water supply to public use within a specified and limited territory, it has thereby put itself and all of its property within the jurisdiction and power of the Commission, and that, on the complaint of one desiring water, who is not within the territory so specified and limited, the Commission may compel the company to lay new pipes, enlarge its territory, and devote its entire supply to service for such additional territory as the Commission may find in need of the water, and for which the supply is adequate; in other words, that whenever the Commission finds a corporation engaged in public service and applying a part of its property to such service, it may take the entire property of the corporation and compel the dedication thereof to public use and direct its distribution to such portions of the public as the Commission may deem best. There are parts of the Public Utilities Act which seem to be based on the same theory. We refer to section 35 and section 36. These sections, taken literally, seem to empower the Commission to direct any public utility to extend its plant and enlarge the territory supplied by it in such manner as the Commission shall judge advisable. But a proper interpretation of these provisions must be that they are limited in their application to such public service corporations as may have devoted their entire property to the use of the entire public, or to those which may have undertaken to supply a certain district, such as a city, and dedicated their property to that service, and which afterwards may have failed or refused to give to such district an adequate service, or failed or refused to extend the system and supply to parts of the district, when it was within its means to have done so and such extension would not be unreasonable. In such cases it would be entirely proper to give such a commission power to compel adequate service within the territory which the corporation has undertaken to serve and to compel any reasonable extension of the service to other parts of such territory. But even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility, and thus take property for public use without condemnation and payment. The

provisions of this act could not authorize the Commission to compel such corporation to dedicate additional property to public use without additional compensation. When a corporation voluntarily devotes a part of its property to public use, it is to be presumed that it makes the dedication because it is satisfied with the return which it expects to receive, and in that way it is deemed to have been compensated for such dedication. But when it is forced to devote to public use additional property which it has not dedicated to public use, or is compelled to extend its service to supply uses or territory not embraced in the original dedication, it must, under our constitutional provisions, as a condition precedent, be compensated for the value of the new property taken or new use exacted. This may be done under the power of eminent domain. *Pacific T. & T. Co. v. Eshleman*, 137 Pac. 1119. The fact, therefore, that the company is the owner of and is operating a water system for compensation, and the fact that it has the power, by reason of its articles of incorporation, to engage in public service, are by no means sufficient to authorize the conclusion that any particular person is a beneficiary of the use which such company is administering, or that any of the outlying territory is entitled to the service. It still remains necessary to ascertain the fact that such person is such beneficiary; that he is within the district, and of the class, for which such dedication is made.

[4, 5] This fact the findings of the Commission do not cover. It is not claimed that there is evidence that the water company has held out that its water was for sale to the outside public generally, or to any persons whatever, except those within the original Del Mar town site and those within the subdivided lands of the land company. The Commission does not so find. The selling of water to persons who come and take it away in barrels is not evidence of a dedication of all the water owned by the seller to public use, nor of a dedication of any of it to the supply of any particular territory or area. In this state, where the territory needing water is vastly greater than the available water will supply, it is obvious that the district to be served from any source, or by any water service company, must be limited in extent. Indeed, the same is substantially true

of a water service anywhere. The supply is always limited, and the territory to which it is to be served must likewise be limited, otherwise the amount served to each person might, by constantly increasing demands, be made so small that it would be of no use to any one. There can be no doubt, therefore, that the owner of a water supply may make a limited dedication of it to public use, confining the use to such territory as he sees fit. Nor can there be any doubt that one owning a water supply is not compelled to dedicate all of it to public use, or that he may dedicate a part of it, only, to such use, reserving the remainder for private purposes or for private sale or disposition as he sees fit. Accordingly, our decisions have recognized and have repeatedly declared the right of a water company to make such limited dedication and to decline to furnish its water to persons not within the area it has undertaken to serve. *Leavitt v. Lassen Irr. Co.*, 157 Cal. 92, 106 Pac. 404, 29 L. R. A. (N. S.) 213; *Thayer v. Cal. Dev. Co.*, 164 Cal. 128, 128 Pac. 21; *Price v. Riverside*, 56 Cal. 433; *Hildreth v. Montecito*, 139 Cal. 29, 72 Pac. 395; 2 *Wiel on Water Rights* (3d Ed.) § 1281; *Lewis, Em. Dom.* (3d Ed.) §§ 254, 313. The facts stated in the Commission's findings and opinion do not show that the Del Mar Company ever offered its water for use to the territory in which the applicant, Glass, lived, or to any persons other than those buying lots from the land company or residing within the "old town" surrounded by the territory subdivided by the land company. Its dedication of its water, if it has made any, extended no further than that. There has been no dedication of the water to the use of any portion of the public outside of that area.

For these reasons I am of the opinion that, even if it should be conceded that the company is administering a public use, it does not appear that it is administering a use to which Glass is a beneficiary, or that Glass comes within the class of persons to which its water has been dedicated. This being so, the Commission has no power to compel an additional dedication, or to compel an extension of the service beyond that to which it is already dedicated, and its order directing the extension and additional service was in excess of its authority, and void.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.

**KOCH v. SPEEDWELL MOTOR CAR CO.**  
(Civ. 1809.)

(District Court of Appeal, First District, California. March 11, 1914. Rehearing Denied by Supreme Court May 9, 1914.)

**1. APPEAL AND ERROR (§ 854\*)—REVIEW—SCOPE AND EXTENT—REASONS FOR DECISION.**

The sustaining of a demurrer on a single ground was merely equivalent to giving that ground as a reason for the court's decision, and, if on appeal the demurrer be well taken upon any ground, the decision will be affirmed, regardless of the reasons assigned therefor by the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

**2. CORPORATIONS (§ 577\*)—REINCORPORATION AND REORGANIZATION—LIABILITIES OF ORIGINAL CORPORATION.**

The identity of a corporation is not destroyed, nor are its legal obligations obliterated, by mere reincorporation under the same or a different name; the transfer of the corporate assets from the old to the new corporation being considered in a proper case as having been done to hinder, delay, and defraud creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2308; Dec. Dig. § 577.\*]

**3. CORPORATIONS (§ 579\*)—REINCORPORATION AND REORGANIZATION—LIABILITIES OF ORIGINAL CORPORATION.**

A corporation organized as the Pacific Coast branch of an Ohio motor company, under the same name, but not appearing to be a mere continuation of the Ohio corporation, and to which the Pacific Coast business and assets of the Ohio corporation were transferred, under circumstances not creating an inference of fraud, could not be sued upon a liability of the Ohio corporation, which was presumably in being and not shown to be insolvent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313-2318; Dec. Dig. § 579.\*]

**4. CORPORATIONS (§ 577\*)—REINCORPORATION AND REORGANIZATION—IDENTITY OF ORIGINAL AND REORGANIZED CORPORATIONS.**

The mere fact that separately created and existing corporations bear the same name and deal in the same commodities will not suffice, even if the officers and stockholders of each corporation be the same, to create a merger of corporate capacity, identity, and liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2308; Dec. Dig. § 577.\*]

**5. CORPORATIONS (§ 579\*)—CORPORATE POWERS AND LIABILITIES—LIABILITY AS AGENT ON PRINCIPAL'S OBLIGATIONS.**

A corporation to which the Pacific Coast business and assets of an Ohio motor company were transferred, to create a general agency for the Ohio corporation, was no more liable upon an obligation of the Ohio corporation than any other agent would be liable upon his principal's obligations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313-2318; Dec. Dig. § 579.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by John W. Koch against the Speedwell Motor Car Company (Pacific Coast Branch). From a judgment for the defendant, plaintiff appeals. Affirmed.

Transfer to Supreme Court denied, 140 Pac. 600.

Nowlin, Fassett & Little, of San Francisco, for appellant. Samuel Knight, of San Francisco, for respondent.

LENNON, P. J. The plaintiff's complaint purports to plead three causes of action, separately stated, against the defendant, the Speedwell Motor Car Company (Pacific Coast Branch), a corporation organized and existing under the laws of the state of California, for (1) the cancellation of a promissory note in the sum of \$1,000, executed by the plaintiff to the Speedwell Motor Car Company, a corporation organized and existing under the laws of the state of Ohio, in part payment of the purchase price of a motor car sold to the plaintiff by the latter corporation; (2) for the recovery of the sum of \$848, alleged to have been paid by the plaintiff to the Ohio corporation on account of the purchase price of the motor car; and (3) for the value of sundry automobile accessories fitted by the plaintiff to the motor car in question, which were alleged to have been wrongfully appropriated and withheld by the Ohio corporation. Each of the several causes of action alleges, in substance, that the Ohio corporation, at the time of the making of the contract in question, was doing business in the state of California through the medium of an individual agent, one L. V. Lynch, from whom the plaintiff ordered a motor car at the agreed price of \$1,500; that the order as given to Lynch was accepted, and the car delivered by the Ohio corporation; that in payment for the car plaintiff gave the Ohio corporation the sum of \$500 in cash, and his promissory note for the balance of the purchase price, and thereafter paid the further sum of \$348 on account of the note. The plaintiff's complaint in each of the three causes of action further alleged, in substance, that the Ohio corporation, electing and attempting to rescind the contract of sale, took possession of the motor car, and refused to comply with the contract save upon the payment by the plaintiff of the sum of \$100 in addition to the sum of \$1,500 originally agreed upon as the purchase price of the motor car. Upon the refusal of the plaintiff to amend his complaint after a demurrer thereto had been sustained, judgment was entered for the defendant corporation, from which an appeal has been taken by the plaintiff.

Plaintiff's complaint evidently proceeded upon the theory that the defendant corporation was part and parcel of the Ohio corporation, and therefore should be subjected to the judgment prayed for. In this behalf, and as a basis for each of the several causes of action, the plaintiff's complaint alleged that the defendant Speedwell Motor Car Company (Pacific Coast Branch), was organized

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and financed subsequent to the transaction in suit by the Ohio corporation; that the Ohio corporation owned all but two shares of the capital stock of the defendant corporation; that the latter was "organized for the purpose of taking over the business theretofore conducted on the Pacific Coast by L. V. Lynch, an agent for the Speedwell Motor Car Company, an Ohio corporation," and that said Ohio corporation "turned over to said defendant corporation, the Speedwell Motor Car Company (Pacific Coast Branch), all of the business and assets on the Pacific Coast of the Speedwell Motor Car Company, an Ohio corporation, especially the business and assets theretofore in charge of its agent L. V. Lynch."

It is claimed upon behalf of the plaintiff that these facts are sufficient to show that both corporations are one and the same person in fact, law, and name. In other words, it is the contention of the plaintiff that all of the pleaded circumstances preceding, attending, and following the corporate creation of the defendant in this state show that the defendant was the Ohio corporation, merely masquerading in California corporate costume, and that therefore the legal responsibility of the defendant arising out of the transaction involved in the present case is as a matter of law coexistent and co-ordinate with that of the Ohio corporation.

This contention of the plaintiff is rested mainly upon the doctrine declared in a series of cases in this and other jurisdictions, to the effect generally that a corporation cannot evade its just debts, avoid the obligations of its contracts, or be made immune against tortious conduct, by merely changing its name and assuming the outward form of a new corporation. *San Francisco, etc., R. R. Co. v. Bee*, 48 Cal. 398; *Blanc v. Paymaster*, 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; *Higgins v. California Pet. Co.*, 122 Cal. 373, 55 Pac. 155; *Montgomery Web Co. v. Dienelt*, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; *Hibernia Ins. Co. v. Transportation Co.*, 13 Fed. 516, 4 McCrary, 432; *Printing Co. v. Over*, 69 Neb. 320, 95 N. W. 656; *Long v. Typewriter Co.*, 1 Tenn. Ch. App. 668.

[1] We are of the opinion that the complaint does not state facts sufficient to constitute a cause of action against the defendant corporation, and therefore it must be held that the demurrer was properly sustained, notwithstanding the fact that the lower court based its order sustaining the demurrer solely upon the ground that the plaintiff's three causes of action were uncertain in not respectively and specifically alleging that the note, money, and personal property in suit had been delivered into the possession of the defendant corporation. The defendant cannot be deprived of the right to be heard here upon any or all of the grounds of his demurrer merely because the court below designated a single ground as the reason for

its order sustaining the demurrer. The effect of such an order is merely to give a reason for sustaining the demurrer; and, so construed, it was tantamount to an order sustaining the demurrer in its entirety. Therefore, if the defendant's demurrer be well taken upon any ground, the order sustaining the demurrer will be affirmed, regardless of the reasons assigned therefor by the court below. *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Sechrist v. Rialto, etc.*, 129 Cal. 641, 62 Pac. 261. See, also, *Neale v. Morrow*, 163 Cal. 445, 125 Pac. 1052.

[2] The pleaded facts concerning the corporate creation of the defendant cannot be covered and controlled by the rule stated and applied in the series of cases hereinbefore cited, and so strongly relied upon by the plaintiff in support of the sufficiency of his complaint. The doctrine declared in those cases, as we understand it, is merely to the effect that where it is affirmatively alleged, or the pleaded circumstances show, that in truth the creation of a new corporation is but the continuation under a new charter of a pre-existing corporation, the new corporation will be held liable for the debts of the old corporation; and, where all of the assets and property of the old corporation have been transferred to the new corporation, such assets and property may be followed by a creditor of the old corporation, and be rightfully subjected to the satisfaction of a judgment obtained against the old corporation. In other words, it is the law generally that the identity of a corporation is not destroyed, nor are its legal obligations obliterated, by the mere fact of reincorporation under the same or a different name; and, in such a case, a transfer of the corporate assets from the old to the new corporation will, when warranted by the pleadings and proof, be considered, under the familiar principle of law applicable to fraudulent conveyances, as having been done to hinder, delay, and defraud the creditors of the old corporation.

[3, 4] No such situation is presented by the averments of the plaintiff's complaint in the present case. It does not appear, either expressly or impliedly, that the defendant corporation was created in California as a mere continuation of the Ohio corporation. It is not alleged that the entire business and assets of the Ohio corporation were assumed and absorbed by the defendant corporation; nor can it be fairly inferred from the pleaded facts of the present case that the Pacific Coast business and assets of the Ohio corporation were transferred to the defendant corporation in furtherance of a fraudulent design to defeat the demand of the plaintiff. In other words, the allegations of the plaintiff's complaint do not compel the conclusion that the corporate identity and liability of the Ohio corporation were merged in the defendant upon the latter's creation in California. To the contrary it affirmative-

ly appears that the defendant corporation and the Ohio corporation are, notwithstanding an identity of names and business, separate and distinct entities, existing and operating by virtue of separate and distinct charters. The mere fact that separately created and existing corporations bear the same name and deal in the same commodities will not suffice, even if the officers and stockholders of each corporation be the same, to create a merger of corporate capacity, identity, and liability. Beale on Foreign Corporations, § 771; Thompson's Commentaries, etc., § 7437.

Presumably the Ohio corporation is still in being; and, for aught that appears in the plaintiff's complaint, is sufficiently solvent, notwithstanding the transfer of a portion of its business and assets to the defendant corporation, to satisfy the demands of creditors.

[5] But apart from these considerations, it may be fairly inferred from the averments of the plaintiff's complaint that the Pacific Coast business and assets of the Ohio corporation were transferred to and held by the defendant corporation merely in the capacity of a general agent for the Ohio corporation. In short, the pleaded facts and circumstances of the plaintiff's complaint show merely the creation of a corporate agency rather than a merger of corporate identity. The question as to whether or not the defendant corporation could be legally created for the sole purpose of handling in a representative capacity the business of the Ohio corporation is not involved upon this appeal, and has therefore not been considered. Assuming the validity of such an agency, it follows that the legal liability of the defendant corporation upon the facts and circumstances of the present case is neither different from nor greater than that of an ordinary agent. Ordinarily an agent will not be held individually responsible for the obligations of his principal. It could not be successfully contended that plaintiff's complaint would have stated a cause of action against Lynch, the original agent of the Ohio corporation; and clearly a mere transfer of the Ohio corporation's Pacific Coast business and assets from Lynch to another individual agent, purely for the purposes of an agency, would not have made the latter responsible for the claim of plaintiff, nor have altered the situation of the parties to the present action with reference to their relative rights and obligations arising out of the transaction in suit. By a parity of reasoning it must be held that the mere fact that the Ohio corporation in good faith saw fit to transfer its agency on the Pacific Coast from a real to an artificial person of its own creation would not, in and of itself, operate to fasten the legal liability for its pre-existing obligations upon the shoulders of its corporate agent.

The conclusion which we have reached

and expressed concerning the sufficiency of the complaint necessarily defeats the plaintiff's cause of action against the defendant corporation, and renders unnecessary a determination of the question as to whether or not the demurrer was properly sustained upon the ground of uncertainty in the particulars stated in the order of the lower court. The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

KOCH v. SPEEDWELL MOTOR CAR CO.  
(S. F. 6881.)

(Supreme Court of California. May 9, 1914.)  
COURTS (§ 212\*)—APPELLATE JURISDICTION—MONEY JUDGMENT—EQUITABLE RELIEF.

An action for a money judgment for less than \$2,000 is within the appellate jurisdiction of the District Court of Appeal, and an application to transfer the cause to the Supreme Court will be denied, though the complaint asked for equitable relief, but did not allege facts on which such relief could be granted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513-515; Dec. Dig. § 212.\*]

In Bank. Action by John W. Koch against the Speedwell Motor Car Company (Pacific Coast Branch). From a judgment for defendant, plaintiff appealed to the District Court of Appeal. 140 Pac. 598. Application to transfer cause to the Supreme Court denied.

Nowlin, Fassett & Little, of San Francisco, for appellant. Samuel Knight, of San Francisco, for respondent.

PER CURIAM. The application for an order transferring this cause to the Supreme Court is denied. We deem it advisable to say, however, that the recital in the opinion of the district court that the first cause of action stated in the complaint is an action to cancel a promissory note is incorrect. The action is a suit to recover money amounting to less than \$2,000, and the appellate jurisdiction thereof was in the District Court of Appeal. While the prayer of the complaint asks for the cancellation of the note, there are no allegations of fact upon which to grant equitable relief or invoke equitable jurisdiction.

TOWN OF ST. HELENA v. SAN FRANCISCO, N. & C. RY. (Civ. 1196.)

(District Court of Appeal, Third District, California. Feb. 24, 1914. Rehearing Denied by Supreme Court April 25, 1914.)

1. STREET RAILROADS (§ 24\*)—USE OF STREET—FRANCHISES—CONSTRUCTION.

A franchise granted by a municipality to a railroad company to maintain tracks in its streets must, in case of doubt as to its interpretation, be construed in favor of the municipality and against the company.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 69-76; Dec. Dig. § 24.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. MUNICIPAL CORPORATIONS (§ 688\*)—FRANCHISES—CONTROLLING OF STREETS.**

A municipality cannot by contract, by granting a franchise to a railroad company to maintain tracks in the streets, divest itself of the power to control the streets for the public benefit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1486; Dec. Dig. § 688.\*]

**3. MUNICIPAL CORPORATIONS (§ 688\*)—IMPAIRING OBLIGATION OF CONTRACTS—STATUTES—ORDINANCES—VALIDITY.**

A franchise granted by a municipality to a railroad company to maintain tracks in the streets, which provides that the company shall grade the streets and maintain the same in proper repair in the same manner as the remainder of the streets, and which declares that the franchise is granted subject to laws or municipal regulations in force, or that may be subsequently enacted relating to the control of public streets, is not such a contract between the municipality and the company as invalidates a subsequent statute authorizing ordinances requiring special paving by the company and an ordinance enacted pursuant to it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1486; Dec. Dig. § 688.\*]

**4. STREET RAILROADS (§ 37\*)—ORDINANCES—STREET IMPROVEMENTS—PRESUMPTIONS.**

In the absence of anything to the contrary, the court must presume that a municipal ordinance, requiring a railroad company to pave the streets between its tracks, was adopted to promote the safety of the streets and the security of the public.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105, 106; Dec. Dig. § 37.\*]

**5. STREET RAILROADS (§ 36\*)—REGULATION OF STREETS—VALIDITY.**

A municipality may enact and enforce all reasonable regulations to protect the public or the manner in which its streets shall be used, and may make any reasonable regulation as to the manner in which the tracks of a railroad company shall be constructed and the condition in which they shall be maintained.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 92; Dec. Dig. § 36.\*]

**6. CONSTITUTIONAL LAW (§ 134\*)—OBLIGATION OF CONTRACTS—IMPAIRING OBLIGATIONS.**

A franchise granted by a municipality to a railroad company to maintain tracks in the streets, subject to laws and municipal regulations in force or that may be subsequently enacted, does not impair the power of the municipality in the exercise of its control of the streets or impose special paving regulations, and where the company has agreed to pave along its tracks, and there is no provision as to how the ties shall be laid or how the concrete foundation shall be placed or the rails secured, the municipality may make all reasonable regulations concerning the same, and such regulations do not impair the obligations of the contract evidenced by the franchise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344; Dec. Dig. § 134.\*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Mandamus by the Town of St. Helena against the San Francisco, Napa & Calistoga Railway. From a judgment of dismissal rendered on sustaining a demurrer to the petition, plaintiff appeals. Reversed.

Clarence N. Riggins, of Napa, for appellant. John T. York, of Napa, for respondent.

**BURNETT, J.** The petition was for a writ of mandate to require respondent to lay the street pavement along its tracks in a public street of petitioner as demanded by an ordinance duly passed by said town. The trial court held the ordinance invalid as impairing the contract created by the franchise of the railroad, and therefore sustained a general demurrer to the petition. The appeal is from the judgment of dismissal following the order sustaining the demurrer. The provisions of the franchise which are directly involved in this consideration are as follows:

"(1) That the said grantee, his heirs, or assigns, shall lay and maintain its tracks, flush with the official grade of all streets, alleys, lanes or other public highways, within the said town of St. Helena along or over which the said railroad shall be constructed and that said grantee, his heirs or assigns, shall grade said streets and maintain the same in proper repair, along or between the track or tracks and for a distance of two feet on each side of said track or tracks in the same manner as the remainder of said streets shall be required to be graded, or kept by the said town of St. Helena.

"(2) That the laying of said track or tracks, switches or other turnouts shall conform in all cases to the official grade, where the grade of any of the said streets has been established and such streets graded to such grade, and in all other cases as near to the natural grade of the street as practicable, and when at any time hereafter any part of the route shall be graded to the official grade, or the grade thereof be changed or altered by the board of trustees, the bed of the road and the tracks thereon shall be made to conform therewith. \* \* \*

"(8) This right or franchise is granted subject to all laws or municipal regulations now in force or that may be hereafter enacted relating to the controlling, or use, digging in or occupying of the public streets or concerning electric wiring within the town of St. Helena."

It appears from the complaint that the municipal authorities, in the latter part of 1912 and the early part of 1913, caused the roadway of Main street, for the full width thereof, except the portion occupied by the tracks of respondent and two feet on each side thereof, to be graded and paved with a 6-inch gravel foundation and 1½-inch asphalt wearing surface; that said work was done under the street improvement act of 1911 (Stats. of 1911, p. 730); that this construction was not of sufficient strength or durability for use between the tracks and on the sides, "because of the strain and stress to which said portions of said street would

be put by the passage of railroad cars and trains over and along the same." Reaching this conclusion, the board of trustees, on the 19th day of November, 1912, adopted an ordinance, which is set out in the complaint, requiring the railroad tracks on such streets and two feet on each side thereof to be graded and paved in the same manner and with the same material as the rest of the street, subject to the following modifications: "The tracks shall be laid flush with the official grade of said street, the rails to be secured to the ties, on tie plates three-fourths of an inch in thickness and the ties to be spaced at thirty inches apart center to center except at joints, where one tie will be placed under the end of each rail. Pockets under the rails between ties will be dug out and the entire width of the roadbed brought to the form shown on the plans hereinafter referred to, and said pockets and the space above the level of the base of the ties shall be filled with concrete thoroughly tamped and worked into said pockets and brought up solidly under the base of the rails and elsewhere brought to a true finish one and one-half inches below the official grade of said street and parallel thereto." Paving bricks were also required at certain points and the pavement surface was to be finished with asphaltic paving mixture. Certain other minor details were enumerated, and for further particulars reference was had to the plans and specifications prepared by the town engineer and filed in the office of the town clerk.

It appears also that after the passage of said ordinance respondent graded and paved said space with an asphalt wearing surface on a concrete basis, but failed and refused to comply with the provisions of said ordinance; that the pavement and foundations thereof so constructed by said respondent "soon became and still remain defective and out of repair in that the foundation began to break up and disintegrate, and the asphalt wearing surface to crack in many places, and to break away along the rails, and deterioration both of the foundation and wearing surface still continues and increases as time goes by, and will continue to increase, and is due to the acts of the respondent in failing, neglecting, and refusing to construct said pavement and foundations in the manner and form required by said ordinance"; that notice was given to the railroad to repair and reconstruct its improvement as required by said ordinance; "that the said defects in said pavement and its foundations will result in the damage and destruction of the pavement on the entire street; that it is unsightly and spoils the appearance of said street and makes the same unsafe and dangerous for other vehicles and persons lawfully using the same"; and that, for the reasons stated, petitioner is unable to let a contract for the doing of said work.

[1] It is not disputed that said franchise

constitutes a contract that is binding upon both parties, but it is claimed by appellant (and justly so under the authorities) that, in case of doubt as to the interpretation of said franchise, it must be construed in favor of the municipality and against the railroad.

[2] The first consideration that attracts attention is the provision in the contract that the franchise is granted "subject to all laws or municipal regulations now in force, or that may be hereafter enacted relating to the control, or use, digging in, or occupying of the public streets." Of course, regardless of such agreement, it is well settled that the municipality cannot abdicate its functions or by contract divest itself of power to control the streets for the benefit of the public. "The improvement, regulation, and control of the highways within a municipality call for the exercise of a delegated governmental power, a function which the municipality itself, neither by ordinance nor by contract, can surrender or impair." *McNeill v. City of South Pasadena*, 135 Pac. 32.

[3] But the parties to the said franchise saw fit to stipulate expressly that the valuable privilege granted should be subject to all laws and municipal regulations that might be adopted in pursuance of this power of control and regulation that is committed to the municipal authorities. It is difficult to understand how the parties could have expressed more clearly such intention.

Turning to the statutes of 1911, p. 763, we find in a law passed by the Legislature entitled "An act to provide for work in and upon streets, avenues, lanes, alleys, courts, places and sidewalks within municipalities," etc., in section 77 thereof, this provision: "Whenever any railroad track or tracks of any description exist upon the street or streets upon which the city council of any city has ordered an improvement to be made, and has excepted therefrom the portions used by the track, between the rails and for two feet on each side thereof, \* \* \* the said order, unless said city council shall by resolution theretofore passed have declared the contrary, shall be deemed to be and constitute a requirement that the person or company having said railroad track or tracks thereon shall improve the said portion with improvements similar in all respects to, with the same materials, under the same specifications and superintendence, and to the like inspection and satisfaction as those ordered to be performed by said order ordering the work: Provided, however, that the city council may by ordinance require increased depth of concrete between to the full depth of, or under the ties, or both, where and whenever the city council shall, in its judgment decide that this method of construction is necessary. The city council may also require by ordinance or otherwise, any person or company aforesaid, to pave alongside of and contiguous to its rails with special types of brick or

paving blocks." The statute then proceeds to specify the steps to be taken to enforce such ordinances.

The validity either of the law or of the said ordinance is not assailed in any way. Its constitutionality or reasonableness is not called in question. There is no contention, outside of the claim that it violates the franchise, that either said law or the ordinance is discriminatory or unjust or imposes an unwarranted burden upon respondent.

The situation seems, then, substantially to be this: The franchise was granted upon condition that it would be subject to "all laws and municipal regulations" relating to the streets; the municipal authorities passed such an ordinance, they were directly authorized by the Legislature to adopt such regulations, and there is no valid objection to the legal integrity of said ordinance or said law of the Legislature. As thus stated, it is not manifest how respondent can escape the duty imposed by the ordinance.

An attempt is made, however, to avoid this result by invoking the special provisions of the said franchise which, it is claimed, limit the liability of respondent to the expense incurred in repairing the street. No such construction is possible of this provision: "That said grantee, his heirs or assigns, shall grade said street and maintain the same in proper repair \* \* \* in the same manner as the remainder of said streets shall be required to be graded or kept by the said town of St. Helena." It is substantially the same as the provision considered in the case of *City of Jacksonville v. Jacksonville Street Railroad Co.*, 29 Fla. 590, 10 South. 590. Therein the franchise provided that respondent should keep the streets "in as good repair and condition as the said city keeps the balance of said streets." The city, having paved the balance of the street with cedar blocks, brought the proceeding in mandamus to compel the respondent to pave likewise. The latter claimed that it was under obligation to repair only. The Supreme Court of Florida, in the opinion, declared: "In determining the rights and duties of the respective contestants here, a liberal construction should obtain in favor of relator. The grant to the respondent of the right to use the streets for the prosecution of its business for profit is a benefit and privilege, and the rule is that such grants are construed against the beneficiaries. [Citing cases.] Taking the language of the contract between the parties here in its literal meaning, independent of the rule above stated, we think it cannot be confined simply to repairs. The respondent must not only keep the portions of streets in good repair, but in as good condition as the city keeps the balance of the streets. The word 'condition' is defined by Mr. Webster to mean 'mode or state of being; state or situation with regard to external circumstances; essential quality; property; attribute.' We must arrive at the

meaning of this ordinance from the language employed in it; and, under the rule of construction applicable in such cases, we think that, when the city paves the balance of the streets, the duty under it devolves upon the respondent company to pave between its tracks and two feet on each side. When the city paves, if the railroad company declines, it cannot be said that it keeps the parts of the streets in question in as good condition, or in as good state of being or essential quality as the city keeps the balance. The cases cited by counsel for respondent hold that the duty to repair does not include the duty to pave. They do not go beyond this, we think." The same may be said of the two cases upon which respondent relies here, namely, *City of Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Western Pav. & Supply Co. v. Citizens St. Railway Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770, 25 Am. St. Rep. 462. The former is distinguished in the *City of Jacksonville Case*, and the latter in the later *Indiana case of Columbus St. Ry. Co. v. City of Columbus*, 43 Ind. App. 265, 86 N. E. 83. For other authorities in support of appellant's contention, reference may be had to *New York City v. Harlem Bridge, etc., Co.*, 186 N. Y. 304, 78 N. E. 1072; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Dillon's Municipal Corporations* (5th Ed.) § 1276.

It may be added that the additional requirement as to the foundation and the surface of the paving between and on each side of the tracks for a distance of two feet must be considered in this proceeding as necessary in order to maintain said pavement in proper repair to correspond with the remainder of the street. We must presume, of course, that the municipal authorities were fully advised as to the situation, and that no effort was made or contemplated to harass or unjustly discriminate against respondent. Indeed, as already appears, the complaint itself sets forth the reason why the stronger foundation was required, and it seems quite reasonable.

[4] And it must be said that it does not appear that the other provisions are at all unreasonable or oppressive. We must assume that the regulations were adopted to promote the safety of the streets and the security of the public.

[5] In fact, there is no doubt that nearly if not all these regulations were within the general rule stated in 28 Cyc. 851, 852, as follows: "A municipality may enact and enforce all reasonable regulations for the protection of the public or to the manner in which the streets shall be used. \* \* \* It may make any reasonable and necessary regulation as to the manner in which the tracks of the railroad company shall be constructed and the condition in which they shall be maintained \* \* \* or require all work of construction and repair to be done under municipal direction and regulation." This

principle is illustrated and applied in a great many cases which have been cited by appellant. It is probably sufficient to add *Waterloo v. Waterloo St. Ry. Co.*, 71 Iowa, 193, 32 N. W. 329; *City of Baltimore v. Baltimore Trust & Guaranty Co.*, 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160; *Chicago, Burlington & Quincy Ry. Co. v. State ex rel. Omaha*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; *Western Union Telegraph Co. v. City of Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; and *City of Pomona v. Sunset Tel. & Tel. Co.*, 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788.

[6] The fact that these matters of detail are not specified in the contract cannot, of course, impair or affect the power of the municipality in the exercise of its control of the streets to impose such regulations. As suggested by appellant, it is plain that the franchise is not a limitation of the power of the municipality in these matters, but it is rather a limitation upon the power of the railroad, and any doubt about authority in the premises must be resolved in favor of the municipality.

In the *City of Waterloo Case*, supra, it was held that: "Where a city has granted to a corporation the privilege to construct and maintain a street railway in the streets and alleys of the city, the grant providing that the track of the railway shall be made to conform to the established grade of the streets, but containing no provisions as to the rail which shall be used on the track, or the gauge upon which it shall be constructed, the city, under its ordinary powers, has power to regulate the manner in which the track shall be constructed."

In the *Baltimore Case*, supra, the United States Supreme Court held that "the right of a street railway company under an ordinance granting permission to lay tracks in streets is subject to reasonable regulations by subsequent ordinances as to the use of streets," and that "an ordinance restricting a street railway company to a single track for 1,100 feet in a narrow and busy thoroughfare is not an unreasonable restriction of its rights, or a material modification of a prior ordinance granting the company permission to lay double tracks in the streets for many miles."

The same court, in the *Chicago, Burlington & Quincy Case*, supra, declared that "a contract between a city and a railroad company to participate in the construction of a viaduct in view of their mutual duty to the public is not violated by a statute and ordinance compelling the railroad company to repair"; and it was held that "the maintenance of a safe viaduct over railroad tracks at an important

street crossing \* \* \* cannot be taken out of the police power of the Legislature by contract between the city and railroad company."

In the case of *Laclede Gaslight Co. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798, the respondent held a franchise from the state of Missouri to supply the city of St. Louis with gas and other artificial light; the franchise providing that "to that end" it "may establish and lay down all pipes, fixtures, and other things properly required, in order to do the same." The city of St. Louis passed ordinances containing many regulations as to the manner in which the work should be done, and the Supreme Court of the United States held that the company was subject to such reasonable regulations as the city deemed best for the public safety and convenience. These and other cases lead irresistibly to the conclusion that since respondent here agreed in its contract to pave along its tracks, and there is no provision as to the manner in which the ties shall be laid or how the concrete foundation shall be placed, or the rails secured to the ties, or the character of the rails to be used, or whether or not paving shall be used, under the power in reference to the streets accorded to the municipal agents they have full authority to make all necessary and reasonable regulations concerning the same, and it cannot be held, from the record before us, that in any respect they have exceeded such authority.

The limitation upon the action of the municipality is clearly stated by Judge Dillon when he declares that the franchise is "property which cannot be destroyed or taken from the grantee or rendered useless by the arbitrary act of the municipal authorities in preventing the grantee from using the city streets for the purposes of the grant," and the regulations "must be such as are called for by a fair consideration of the public welfare, must be reasonable in their character, and must not be such as to defeat the purpose of the grant." Dillon's *Municipal Corporations* (5th Ed.) § 1269.

Even upon the strictest construction of the franchise in favor of respondent, there can be no possible doubt that a cause of action was stated against it in reference to the unsafe and dangerous condition of the pavement which the franchise expressly requires it to repair. If the ordinance is valid in part it should, of course, to that extent be enforced.

We are entirely satisfied, however, that no sufficient reason appears for holding said ordinance invalid in any respect, and the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

**TOWN OF ST. HELENA v. SAN FRANCISCO, N. & C. RY. (S. F. 6926.)**

(Supreme Court of California. April 27, 1914.)

**STREET RAILROADS (§ 37\*)—USE OF STREETS—FRANCHISES—OBLIGATIONS IMPOSED.**

A franchise to maintain tracks in streets of a town granted to a company under Civ. Code, § 498, requiring street railroads to plank, pave, or macadamize the entire length of the street used by their track, between the rails, and for two feet on each side, requires the company to either plank, pave, or macadamize the part of the street designated as the proper city authority may lawfully direct.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 103, 105, 126; Dec. Dig. § 37.\*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Mandamus by the Town of St. Helena against the San Francisco, Napa & Callstoga Railway. There was a judgment of the District Court of Appeal reversing a judgment of dismissal rendered on sustaining a demurrer to the petition (140 Pac. 600), and defendant petitions for rehearing. Denied.

Clarence N. Riggins, of Napa, for appellant. John T. York, of Napa, for respondent.

**PER CURIAM.** The petition of the respondent for a rehearing after judgment in the district court of appeal is denied.

The respondent, in support of its petition, contends that the franchise under which the respondent is operating does not require it to pave the streets, but only to grade them and keep them in proper repair between the tracks, and for two feet on each side thereof, and that the police power does not embrace the authority to compel a street railway occupying the streets of a city to pave the streets, between its tracks, or elsewhere, or at all; that such power must be founded upon the contract between the city and the company whereby the franchise is granted or upon some valid contract obligation of the company. It is unnecessary to consider whether or not the terms of the franchise of the defendant requires it to pave the streets. The franchise was granted under the provisions of section 498 of the Civil Code, and that section requires street railroads to "plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof." This can only mean that such company must either plank, pave, or macadamize that part of the street as the proper city authority may lawfully direct. It is a constituent part of the contract granting the franchise, though not expressed therein in terms. The company is therefore bound by contract to pave the street in accordance with the city ordinance, and it is not necessary to say whether or not the city, by virtue of its police powers alone, could compel it to do so.

**KELLY v. BARNET, Sheriff. (Civ. 1311.)**  
(District Court of Appeal, First District, California. March 9, 1914.)

**SHERIFFS AND CONSTABLES (§ 48\*)—SALE—PAYMENT OF BID—PURCHASE BY CREDITOR—COMMISSIONS.**

Under Code Civ. Proc. §§ 681-700, regulating sheriffs' sales upon execution, no distinction is made between judgment creditors as purchasers and others, and section 696, requiring payment of the purchase price in cash, applies to the judgment creditor who purchases, so that the sheriff is entitled to receive his commission for a sale to such purchaser.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 75; Dec. Dig. § 48.\*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by John F. Kelly against Frank Barnett, Sheriff. Judgment for the defendant, and plaintiff appeals. Affirmed.

Daniel O'Connell, of San Francisco, for appellant. John J. Allen, of Oakland, and Reid & Dozier, of San Francisco, for respondent.

**RICHARDS, J.** This is an appeal from a judgment entered after an order sustaining a general demurrer to the complaint; the plaintiff declining to amend.

The action was in the nature of an application for a writ of mandate to compel the defendant, as sheriff of Alameda county, to make, execute, deliver, and record a certificate of sale upon execution of certain real property, in favor of the plaintiff as the purchaser thereof at such sale. The following are the essential facts set forth in plaintiff's application for the writ: The plaintiff, as trustee in bankruptcy of the estate of James Treadwell, brought an action against one John Treadwell to recover the sum of about \$49,000 alleged to be due by the latter to said estate in bankruptcy, and in said action caused an attachment to be levied upon certain real property in the county of Alameda. The plaintiff obtained judgment in said action for the sum of \$49,719.77, and thereupon caused a writ of execution to issue and be levied upon said property. At the sale by the sheriff under said writ plaintiff was the only bidder, and he bid in the property for the full sum of his judgment and costs, which then aggregated the sum of \$50,400.43. At the time of the levy of the writ of execution plaintiff paid the defendant, as sheriff, the sum of \$25 on account of the costs and expenses of such levy and sale; but he has not paid or tendered to the defendant, as such sheriff or otherwise, any other sums of money on account of said sale or of the sum bid by the plaintiff as the purchaser thereof; but in lieu thereof he has tendered to the defendant, as sheriff and as the officer conducting said sale, a receipt for the full amount of plaintiff's bid for the property, and has thereupon demanded that the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendant, as such sheriff, make, issue, deliver, and cause to be recorded a certificate of such sale in plaintiff's favor. The defendant, as sheriff, declines to do this for the reason that his commissions upon the sale, amounting to the sum of \$258.93, have not been paid.

The appellant's contention is that, being the judgment creditor in the action wherein the execution was issued and the execution sale conducted, and having bid in the property for the amount of his judgment and costs, he was not required to go through the formality of paying over to the sheriff the amount of his bid in cash in order to have the sheriff repay it to him in satisfaction of his judgment; and that, in lieu of making such payment, he was entitled to hand the sheriff a receipt in full of the amount due on the judgment as the equivalent of the cash to be paid on his bid; and hence that the sheriff, not being entitled to receive any cash, and not actually receiving or collecting any, was not entitled to charge commissions on the collection upon execution of the amount due on the judgment.

This specious contention of the plaintiff finds no authority to support it in the law relating to execution sales. Sections 681 to 700 of the Code of Civil Procedure govern the issuance and enforcement of writs of execution, and prescribe the powers and duties of the officers executing the same. The plain intentment of these sections is that sales of property under execution shall be conducted for cash, and that successful bidders shall be prepared to pay the amount of their bids in cash at the time of the sale. No distinction is made between purchasers who are also judgment creditors and those who are not. It is true that the judgment creditor who bids in the property for the amount of his judgment may, as a matter of convenience, arrange with the officer making the sale to have the latter accept his receipt for the amount of the judgment in lieu of the cash payment required by his bid; but the officer is not bound to do this, and may in every or any instance require the successful bidder to pay in cash the amount of his bid at the close of the sale. Code Civ. Proc. § 695. The sheriff in this case evidently took this position, and was also evidently led to do so by the claim of the appellant that he had no right to charge and collect his commission because he had not actually collected the money on the execution. We have no doubt of the soundness of the respondent's position. As sheriff he was not bound to make, execute, deliver, or record a certificate of sale to a bidder who had not become a purchaser by paying or tendering in cash the amount of his bid for the property; nor was he bound to accept the proffered receipt of the judgment creditor in lieu of such payment. The case rests there so far as it is disclosed by the material averments of the

complaint. The bidder, not having paid or tendered the cash amount of his bid, did not become a purchaser at the sale, within the contemplation of the statute, and had no right, therefore, to demand a certificate of sale; and, the sheriff not having as yet collected any money on the execution, no question as to his right to charge or collect a commission could properly arise in this case. Pol. Code, § 4300b.

The authorities relied upon by the appellant have no application to the case at bar, for the reason that they relate to the rights of a purchaser at execution sales, to which position, as has been seen, the appellant never attained. We think the demurrer was properly sustained.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

SINSHEIMER BROS. v. KELSHAW et al  
(Civ. 1327.)

(District Court of Appeal, First District, California. March 7, 1914.)

FRAUDULENT CONVEYANCES (§ 298\*)—ASSIGNMENTS—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that an assignment of an interest in a crop of beans was not made to defraud plaintiff and prevent it from satisfying its judgment against the assignor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 892-895; Dec. Dig. § 298.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Sinshelmer Bros. against John Kelshaw and another. From an order denying plaintiffs' motion for a new trial, they appeal. Affirmed.

C. P. Kaetzel, of San Luis Obispo, for appellants. Paul M. Gregg, of San Luis Obispo, and C. U. Armstrong, of Santa Maria, for respondents.

KERRIGAN, J. Judgment in this case went for defendant A. J. Souza against the plaintiff. Thereafter plaintiff's motion for a new trial was denied, and from such order it now prosecutes this appeal.

In May, 1906, Frank G. Lucas, as security for the payment of a promissory note, gave to A. J. Souza a mortgage on his crop of beans, and at the same time his wife, Emilia Lucas, as further security for the same note, executed to Souza a chattel mortgage on certain horses, farming implements, and other personal property, being her separate property acquired from her former husband, then deceased.

In November, 1906, the plaintiff recovered a judgment against Frank G. Lucas, which was regularly entered and docketed. Disputing the validity of the crop mortgage held

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

by Souza, it caused the sheriff to take the crop by virtue of a writ of attachment directed against the property of Lucas, whereupon Souza brought suit to foreclose said mortgage, under which action the beans were placed in the hands of defendant Kelshaw as receiver. In attaching the crop of beans the plaintiff did not pay or tender to the mortgagee the amount of the mortgage and interest, or deposit the amount thereof with the county clerk or treasurer, as provided by section 2969 of the Civil Code, and the trial court therefore found the attachment proceeding to be illegal. It also held that the chattel mortgage was made in good faith. Accordingly a decree was entered, directing that the beans be sold to satisfy the mortgage. This judgment was affirmed, first, by the District Court of Appeal, and subsequently by the Supreme Court. 156 Cal. 460, 105 Pac. 413. Within a month after the District Court of Appeal had decided the cause, and nearly ten months before the judgment therein was affirmed by the Supreme Court, to wit, on January 20, 1909, Lucas executed an assignment to Souza of all his interest in said crop of beans; the consideration being that Souza would release the chattel mortgage on the personal property of Mrs. Lucas, and would look solely to the crop of beans for the satisfaction of Lucas' indebtedness to him, and would also pay all costs and expenses growing out of the litigation concerning the chattel mortgage, whether covered by the judgment of foreclosure or not. Shortly thereafter, and long prior to the time when the garnishment in the present case was levied, Souza gave the receiver notice of the assignment.

In March, 1909, by stipulation of the parties, the beans were sold, and they brought something in excess of \$500 more than was necessary to satisfy the judgment in favor of Souza. Plaintiff claims that this sum should be applied on account of its judgment. Defendant Souza, on the other hand, insists that such excess belongs to him by virtue of the assignment.

As stated by counsel for the plaintiff, the only question involved in the case is the validity of the assignment. It is plaintiff's contention that the assignment was made with intent to defraud it and prevent it from satisfying any part of its judgment against Lucas; also that it was made without any consideration, and is therefore void.

While, as we have seen, the beans brought over \$500 more than the sum necessary to satisfy the judgment of foreclosure, it was by no means certain at the time the assignment was made that, when the beans should be sold, the market value would be as high as it ultimately proved to be, for at several periods during the pendency of the action the market value of this product was so low that, had the beans been sold at any of such

times the amount realized would not have been sufficient to satisfy the Souza judgment. Not only was the profit, if any, which Souza might make on a sale of the beans uncertain, but there was also a doubt as to the result of the litigation concerning the crop, which was at that time pending in the Supreme Court. In addition to those matters Souza, as agreed, released the chattel mortgage on the separate personal property of Mrs. Lucas, and undertook to and did pay all the expenses of the litigation, a very substantial portion of which was not taxable as costs of suit.

We think it is seen, from this brief résumé of the facts, that it cannot correctly be said that there is no evidence to sustain the findings of the court in favor of the validity of the assignment.

The order is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

LEVINDALE LEAD & ZINC MINING CO.  
et al. v. COLEMAN. (No. 2626.)

(Supreme Court of Oklahoma. May 7, 1914.  
Rehearing Denied May 12, 1914.)

(Syllabus by the Court.)

INDIANS (§ 15\*)—ALLOTMENTS—RESTRICTIONS ON ALIENATION.

C., a white man, married Mary C., a full-blood member of the Osage Tribe of Indians, of which marriage one child, a son, was born on the 27th of February, 1906. The son died a few hours after his birth, and the wife died the following day, both intestate. C. inherited from both decedents certain lands, which were allotted to them under the act of Congress of June 28, 1906 (34 Stat. 539, c. 3572), which lands he afterwards conveyed to the L. L. & Z. M. Co., a corporation. Neither C., his wife, nor son had ever procured certificates of competency. *Held*, that the restrictions upon alienation imposed by the above act attach to and run with the land, and the inability to convey disqualifies the white heir as well as the immediate Indian allottees.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.\*]

Appeal from District Court, Osage County; John J. Shea, Judge.

Action by Charles Coleman against the Levindale Lead & Zinc Mining Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Geo. B. Denison, of Vinita, for plaintiffs in error. S. H. King, of Tulsa, and P. A. Shinn, of Pawhuska, for defendant in error.

KANE, C. J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, to cancel and set aside certain deeds, made, executed, and delivered by the plaintiff, purporting to convey to the defendants certain inherited lands in the Osage Nation. After the issues were made up, the court below sustained a motion by the plaintiffs for judgment upon the plead-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ings, and entered judgment accordingly, to reverse which this proceeding in error was commenced.

It seems that the plaintiff, a white man, married one Mary Che-she-walla, a full-blood member of the Osage Tribe of Indians, in January, 1906, of which marriage a son, Joseph, was born. The son lived but a few hours after his birth, and the wife and mother died the following day. The son was enrolled as a member of the tribe, and he and his mother received allotments as such. The plaintiff, who was also an enrolled member of the tribe, inherited the land in controversy from his wife and son. The question is, Were the restrictions upon alienation removed from the lands in controversy at the time the plaintiff executed the deed he now seeks to set aside, neither he, his wife, nor his son having procured certificates of competency? Recently a similar question has been answered in the negative by the United States Circuit Court of Appeals for the Eighth Circuit in the case of *W. H. Aaron and M. L. Levin v. United States of America*, 183 Fed. 347. In that case it was held that:

"(1) Lands of full-blood Osage Indian allottees, selected by and allotted to them before their decease, were inalienable by their full-blood heirs in March, 1909, under the act of June 28, 1906 (34 Stat. 539, 541, 542), where none of them had obtained certificates of competency.

"(2) The homestead lands of such allottees were likewise inalienable by such heirs.

"The fourth paragraph of section 2 of the act provided that the homestead lands of Osage Indian allottees 'shall be inalienable and nontaxable until otherwise provided by act of Congress.' The seventh paragraph of the same section declared that the Secretary might issue to any member of the Osage Tribe a certificate of competency, authorizing him to deed his lands 'except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the allottee.'

"Held: (1) Restrictions upon alienation of this character attach to and run with the land and the inability to convey disqualifies the heir as well as the immediate allottee.

"(2) The exception in paragraph 7 does not affect the restrictions upon the alienation and taxation of homesteads of Osage allottees and their heirs who obtain no certificates of competency, but is limited in its effect to the homesteads of those who procure such certificates."

The only difference between the two cases is that in this case the heir, a white man, inherits Indian lands by virtue of his marriage to a member of the Osage Tribe, whilst in the principal case the heir is a full-blood Osage Indian. We are of the opinion that that fact does not make inapplicable the rule above laid down. If restrictions upon

alienation of this character attach to and run with the land, and the inability to convey disqualifies the heir, as well as the immediate allottee, a white person whose status as an heir is created by intermarriage with a full-blood member of the tribe would inherit the land subject to the same restrictions as a full-blood heir. There is no provision of law with which we are familiar—and none has been called to our attention—which relieves such an one from procuring a certificate of competency if he desires to have the restrictions removed in order legally to alienate the lands inherited by him from an Osage Indian ancestor.

The judgment of the court below is therefore affirmed. All the Justices concur.

BROWN et al. v. STOGSDALE. (No. 3292.)  
(Supreme Court of Oklahoma. Dec. 20, 1913.  
Rehearing Denied May 12, 1914.)

(Syllabus by the Court.)

GARNISHMENT (§ 237\*)—JUDGMENT—OPERATION—PLEADING AS DEFENSE.

An answer to a suit for debt, which pleads in bar that a judgment in attachment in another state has been rendered against defendant as garnishee, is demurrable, unless it shows affirmatively that the demand sued for and that adjudicated in the garnishee proceedings were identical.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 439; Dec. Dig. § 237.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Delaware County; T. L. Brown, Judge.

Action by Mahala Stogsdale against C. B. Brown and another. Judgment for plaintiff, and defendants bring error. Affirmed.

P. S. Davis, of Vinita, and J. G. Austin, of Grove, for plaintiff in error.

BREWER, C. This is a suit begun in 1904 in the United States commissioner's court for the Northern district of the Indian Territory to recover \$100 and interest on a negotiable promissory note. The plaintiff below obtained judgment, and defendants Brown and Whitaker appealed to the United States Court, where the cause was pending at statehood. On October 6, 1911, these defendants, plaintiffs in error here, filed an amended answer setting up a garnishment proceeding in the state of Missouri in a justice of the peace court, in which the present plaintiff was one of the defendants, and the present defendants were garnishees, and that a judgment had been rendered against them as garnishees in the Missouri court in a sum in excess of the sum claimed in the present suit. Copies of the judgment, pleadings, process, and proceedings of the Missouri court are attached, as exhibits to the answer. The court sustained a demurrer to this answer on the ground that it did not aver a defense. This ruling is the only point made in this appeal.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The answer, after admitting the execution of the note, alleges: "Defendants further say: That W. R. Whitaker is the principal debtor on said note, and the other makers are sureties thereon. That defendants were made garnishees in a certain cause before John W. Smith, justice of the peace, Prairie township, McDonald county, state of Missouri, in a certain cause wherein Joe D. Yeargain is plaintiff and Benjamin Stogsdale and Mahala Stogsdale are defendants. A full, true, and correct copy of the proceedings, papers, and record in said cause is hereto attached, duly certified, and made a part hereof, as 'Exhibit A.' That the defendants in said cause were duly served as provided in such cases in the state of Missouri, and within the jurisdiction of said justice of the peace when said action was brought, and when he was served, together with defendant Brown. That he had gone there with money to pay the said note, and that said Whitaker produced the money with which to pay same, and stated that he was there to pay said note, which is set out in plaintiff's bill of particulars, and that after being duly served as such garnishee, and the proceedings had as in said copy of same hereto attached, the said defendant Whitaker by agreement with the plaintiff in said action did not pay the amount of their indebtedness into court, but that he paid same to defendant C. B. Brown, by agreement with the said Joe D. Yeargain and the said Justice Smith and said Whitaker. That said judgment against said garnishees became a final judgment, was never reversed or set aside, and that the same has never been satisfied, and that the said Brown and Whitaker are held liable upon same to the said Joe D. Yeargain, and that the amount of their liability under said judgment is \$166.93 with interest at 6 per cent. from January 11, 1904, which is in excess of the amount due plaintiff on the note which is set out in plaintiff's petition, and the interest thereon. That the laws of Missouri as found in sections 587 to 604, inclusive, of the Revised Statutes of the State of Missouri, 1889, revised and promulgated by the Thirty-Fifth General Assembly, was the law at the time said judgment was rendered, and is the law now, and is herein pleaded as governing the validity of said judgment and that section — of said laws is hereby pleaded as showing the rate of interest on all judgments on accounts or where neither rate of interest is specified. Therefore defendants W. R. Whitaker and C. B. Brown pray that they may be ordered to pay to said Joe D. Yeargain the full amount which may be found due plaintiff from defendants on said note, which is set out as the basis of defendants' indebtedness to plaintiff, and that the same be entered as full satisfaction of the judgment which may be rendered herein."

The judgment exhibited recites: "On the

21st day of December, 1903, the said writ having been returned, duly served, as follows: By summoning as garnishees W. R. Whitaker and C. B. Brown in said county and state on the 8th day of December, 1903—and this cause coming on for trial, come Joe D. Yeargain, plaintiff, and W. R. Whitaker, garnishee, and the said W. R. Whitaker, being duly sworn, under his oath states that the amount he now owes to defendants Benj. Stogsdale and Mahala Stogsdale is \$110. Now, it appearing that the defendants are not residents of this state, it is ordered by the court that said defendants be given twenty days' notice of the said case, by posting up five notices in said township; and thereafter said notices were duly posted. On the 30th day of December, 1903, comes Charley Brown, garnishee, into court, and under his oath states that he is indebted to the defendant Mahala Stogsdale in the sum of \$150. This the 11th day of January, 1904, comes Joe D. Yeargain, plaintiff, by his attorney, S. A. Yeargain, and at one o'clock p. m. on said day, the defendants Benj. Stogsdale and Mahala Stogsdale, being three times audibly called, come not, but make default. The plaintiff having produced evidence in support of his claim, the court doth order and adjudge that the plaintiff recover from the defendants and garnishees the full amount of his claim of \$150.45 and have thereof execution, and that said attachment is fully sustained. This January 11, 1904. Jno. W. Smith, J. P."

It will be observed that the answer in this case does not aver, nor do the exhibits show, that the Missouri judgment was rendered against these defendants on account of their indebtedness to plaintiff on the note in suit; in other words, there is an utter failure of identity between the indebtedness upon which they were charged as garnishees and that upon which they are sued here. It was necessary to show this identity in stating a defense. This question is treated quite fully in Drake on Attachments (7th Ed.) § 715, as follows: "The importance of great care in the framing of a garnishee's answer is strikingly enforced, in connection with the subsequent use of the judgment against him as garnishee, as a defense to an action upon the debt in respect of which the judgment was rendered. For he cannot avail himself of such judgment, or of a payment under it, as a defense, unless it appear that the money paid was on account of the same debt for which he is sued. And as the record of the recovery, including the answer of the garnishee, must be given in evidence in the action by the creditor against him who was garnishee, the latter should not fail to describe particularly in his answer the debt in respect of which he is garnished, and to state every fact within his knowledge having any bearing upon his liability; so that, after-

wards, the record in the attachment suit shall exhibit all that is necessary to a successful defense against an action for the same debt. Thus A. answered as garnishee that he was indebted to the defendant, as executor of B., in a certain sum, but did not state the nature of the debt. Afterwards, on being sued by an assignee of a note given by his testator to the defendant, he pleaded in bar the judgment which had been rendered against him as garnishee, and payment thereof; but the plea was held bad, on demurrer, because it did not aver that the debt in respect of which he was garnished was the same as that sued on. A. and B. were joint makers of a note to C. A. was summoned as garnishee of C., and did not answer, but suffered judgment by default to be given against him, and paid the judgment. Afterwards A. and B. were sued on the note by C., and set up the payment of the judgment as a payment pro tanto; but it was held insufficient, because in itself affording no evidence that A. was charged as garnishee on account of the note."

In the case of *Harmon v. Birchard*, 8 Blackf. (Ind.) 418, a demurrer was sustained to a plea very like the one under consideration. In holding the demurrer well taken, the court say: "In this case the plea does not state, nor do the proceedings offered in evidence show, with certainty, that the debt confessed by the appellant as garnishee, was the same debt sued for in this action." And in *Cornwell et al. v. Hungate*, 1 Ind. 156, it is stated in the syllabus: "A defendant, pleading to an action of debt that a judgment in attachment was obtained against him as garnishee, must aver that the judgment was for the same debt, or a part of it, for which the present suit was brought." And in *Sangster v. Butf*, 17 Ind. 354, the trial court was sustained in holding a demurrer good against an answer similar to the one here. The court say: "The transcript of the proceedings before the justice showed that the garnishee had answered that he had in his hands \$800 of uncurrent money, belonging to the payee of the note sued upon in this case, worth \$620. Held, that the answer was bad, in not showing affirmatively that the demand sued for in this case, and that adjudicated before the justice, were identical." The following cases are strictly in point and to the same effect: *Hutchison v. Eddy*, 29 Me. 91; *Dirlam v. Wenger*, 14 Mo. 384.

The justice judgment, it will be seen, shows that neither of these defendants filed written answers as garnishees in that court, setting out the nature of their indebtedness. One appeared December 21, 1904, and stated he was indebted to both Benj. Stogsdale and Mahala Stogsdale in the sum of \$110. This evidently was not a disclosure of an indebtedness of \$100 to Mahala alone on a promis-

sory note. The other garnishee appeared December 30, 1904, and orally stated he was indebted to Mahala Stogsdale alone in the sum of \$150. This just as evidently could not have referred to his indebtedness on the note for only \$100, upon which, at that time, but a small amount of interest had accrued. There are a number of other things which might be mentioned, such as the fact that nothing is claimed to have ever been paid on this Missouri judgment, which, when it was set up in the answer, was nearly eight years old, and that under the law of Missouri, pleaded with the answer, such a judgment becomes dormant in three years, and cannot be executed without a revivor. Rev. Stat. Mo. 1899, § 6290. However, we think the point made shows that the answer did not state a defense, and that the demurrer was therefore properly sustained.

As further proceedings in this case may be had, we call attention to the recent cases of *M., K. & T. Ry. v. Houseley*, 37 Okl. 328, 132 Pac. 330, *M., K. & T. Ry. v. Bradshaw*, 37 Okl. 317, 132 Pac. 327, and *M., K. & T. Ry. v. Bradshaw*, 37 Okl. 313, 132 Pac. 325.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

#### INDIANA OIL, GAS & DEVELOPMENT CO. v. McCORRY et al. (No. 3301.)

(Supreme Court of Oklahoma. May 12, 1914.  
Rehearing Denied May 12, 1914.)

(Syllabus by the Court.)

#### 1. MINES AND MINERALS (§ 78\*)—OIL AND GAS LEASE—CONSTRUCTION—IMPLIED COVENANT.

A lease which grants "all the oil and gas" under the leased land, together with the right to enter "at all times" for the purpose of "drilling and operating" to erect and maintain structures, pipe lines, and machinery necessary for the "production and transportation" of oil and gas, and to use sufficient water, oil, and gas to run the necessary engines for the "prosecution of said business," which reserves to the lessor substantial royalties in kind and in money on the oil produced and saved and the gas used off the premises, which shows that the promise of these royalties was the controlling inducement to the grant, and which, while expressly requiring that drilling commence within 90 days from the date of said lease, did not expressly define the measure of diligence to be exercised in the work of development and production after the expiration of that period, contains a covenant by the lessee, arising by necessary implication from the nature of the lease and the other stipulations therein contained, that, if during the term of the lease oil and gas, one or both, are found in paying quantities, the work of development and production shall be continued with reasonable diligence; that is, along such lines as will be reasonably calculated to make the extraction of oil and gas from the leased land of mutual advantage and profit to the lessor and lessee.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 205-207; Dec. Dig. § 78.\*]

**2. MINES AND MINERALS (§ 78\*)—OIL AND GAS LEASE—CONSTRUCTION—DILIGENCE IN OPERATION.**

Where the object of the operations contemplated by an oil and gas lease is to obtain a benefit or profit for both lessor and lessee, neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which, or the diligence with which, the operation shall proceed; but both are bound by the standard of what, in the circumstances, would be reasonably expected of an operator of ordinary prudence, having regard to the interest of both.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.\*]

**3. MINES AND MINERALS (§ 78\*)—OIL LEASE—FORFEITURES—ENFORCEMENT IN EQUITY.**

Because forfeitures are usually harsh and oppressive, and because they can ordinarily be enforced at law, courts of equity generally refuse to aid in their enforcement; but the rule is not absolute or inflexible. Its influence and operation do not extend beyond the reason which underlies it, and in cases otherwise cognizable in equity there is no insuperable objection to the enforcement of a forfeiture in a court of equity when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 206-207; Dec. Dig. § 78.\*]

**4. MINES AND MINERALS (§ 78\*)—OIL AND GAS LEASE—FORFEITURE.**

A court of equity will decree a forfeiture of an oil and gas lease on account of a breach of an implied covenant to diligently operate and develop the property when such forfeiture will effectuate justice. The granting of such relief depends upon the facts and circumstances surrounding each particular case.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 206-207; Dec. Dig. § 78.\*]

**5. MINES AND MINERALS (§ 78\*)—OIL AND GAS LEASE—CANCELLATION—CONDITIONS PRECEDENT.**

A lessor invoking the jurisdiction of a court of equity to cancel and rescind a lease for breach of an implied covenant must come into court with "clean hands," and must act with reasonable diligence after the discovery of his right to the forfeiture on account of such breach.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 206-207; Dec. Dig. § 78.\*]

**6. MINES AND MINERALS (§ 78\*)—OIL AND GAS LEASE—DAMAGES.**

In a suit to cancel an oil and gas lease, the court should not decree damages where the measure thereof is uncertain, vague, and indefinite.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 206-207; Dec. Dig. § 78.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by John J. McCrory against the Indiana Oil, Gas & Development Company and others. Judgment for plaintiff, and the defendant named brings error. Reversed.

Chas. W. Grimes, of Tulsa, Harlan Read, of Okmulgee, and Davidson & Williams, of Tulsa, for plaintiff in error. Chas. B. Mc-

Crory and Geo. A. Johns, both of Okmulgee, and Chas. Eichenauer, for defendant in error.

**GALBRAITH, C.** On the 17th day of March, 1906, John J. McCrory, as owner of the land, executed an oil and gas lease to S. P. Elzey, in words and figures following:

"Agreement, made and entered into the 17th day of March, A. D. 1906, by and between J. J. McCrory, of Morris, Indian Territory, party of the first part, and S. P. Elzey, party of the second part.

"Witnesseth, that the said party of the first part, for and in consideration of the sum of five dollars per acre in hand well and truly paid by the said party of the second part, the receipt of which is acknowledged, and of the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept, and performed, hereby grant, demise, lease, and let unto the said party of the second part, their heirs or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, steam, water, gas, and shackle lines to and from adjoining land, and of building tanks, stations, and structures thereon to take care of said products, with the right of going in, upon, over, and across said land for the purpose of operating the same, also with the right to subdivide and release the same or any part thereof, all of the following described tracts of land situate in the Creek Nation, and within the Indian Territory, to wit: The west half of the northeast quarter and the northeast quarter of the northeast quarter of section twenty-eight, township thirteen north, range fourteen east of the Indian meridian, and containing one hundred and twenty acres, more or less.

"It is agreed, that this lease shall remain in force for the term of fifteen years from this date, and as long thereafter as oil and gas, or either of them, is produced therefrom by the party of the second part, their heirs or assigns.

"In consideration of the premises, the said party of the second part covenants and agrees:

"First. To deliver to the credit of the first party, his heirs or assigns, free of cost, in pipe lines to which they may connect their wells, the equal one-eighth part of all oil produced and saved from the leased premises.

"Second. To pay to the first party, his heirs or assigns, one hundred dollars (\$100.00) per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and sold off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used. First party to fully use and enjoy said premises for farming purposes, except such parts as may be used by second

party for the purposes aforesaid; second party agreeing to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. First party to have the right and privilege of using, at his own risk, sufficient gas for one dwelling house on the premises from any gas well found on said described lease, he to make his own connections; and it is agreed that no well shall be drilled within ——— feet of the buildings now on the premises without the consent of the first party.

"It is provided, that this lease shall become null and void if a well is not commenced on the premises within ninety (90) days from date.

"It is further agreed, that the second party it to have the privilege of using sufficient water, oil, and gas from the premises to run all necessary machinery, and at any time to remove all buildings, machinery, and fixtures on said premises by the said lessee.

"All the provisions thereof shall extend to the heirs, successors, and assigns of the respective parties hereto.

"In witness whereof, said parties have hereto set their hands and seal the day and year aforesaid."

On the 9th day of May following S. B. Elzey assigned this lease to one C. S. Vaughn, who entered upon the premises about June 1, 1906, and began drilling, which resulted, on June 25th following, in bringing in a gas well of large volume and pressure. On the 26th day of October, 1906, Vaughn assigned the lease to the Indiana Oil, Gas & Development Company. This company, in January, 1907, drilled a second well on the premises, which came in a gas well, also of large volume and pressure. On June 26, 1907, the Indiana Oil, Gas & Development Company sublet the west 80 acres of the 120-acre tract included in the lease to one T. H. Bass, reserving a one-fourth royalty interest therein. Bass entered upon said premises on July 12, 1907, and commenced the drilling of a well at location No. 1, and completed the same on August 8d thereafter. On August 14, 1907, he commenced drilling at location No. 2, which well was finished on September 7th. On September 28th he commenced drilling at location No. 12, which was well No. 3, and finished this on October 14th thereafter. On November 6, 1907, he commenced drilling at location No. 13 and finished the well on November 27th. Each of these wells were sunk to a depth of something over 1,600 feet at a cost of about \$6,000 each. On November 14, 1907, a receiver was appointed for Bass' interest in this sublease in a suit brought by the Indiana Oil, Gas & Development Company; the receiver taking charge of the property and operating it for 30 days. At the expiration of such time the receiver was discharged, and the property returned to Bass. Bass then executed a trust deed to the property to secure three of his creditors, whose

claims amounted to more than \$24,000. The trustee named in this deed took charge of the Bass lease in January, 1908, and continued to operate it up until September, 1909, when the property was sold at trustee's sale, and purchased by the National Supply Company of Kansas. Immediately after this sale the Kansas company took charge of the property and continued to operate it up until the commencement of this action, and were still operating the wells at the trial in May, 1911. On May 15, 1910, the plaintiff, John J. McCrory, instituted suit in the district court of Okmulgee county to cancel the original lease executed to Elzey in March, 1906, and later assigned to the Indiana Oil, Gas & Development Company, and its sublease of the 80 acres to Bass, on account of the careless and negligent drilling and management of the property.

Issues were joined by the several defendants, and the cause was tried to the court. At the close of the testimony the plaintiff dismissed as to all the defendants except the Indiana Oil, Gas & Development Company and the National Supply Company of Kansas, and disclaimed his right to recover damages against the Kansas company, and asked only the cancellation of the lease against it. The court found the allegations of the bill true, and decreed the cancellation of the lease, and awarded damages in favor of the plaintiff and against the Indiana Oil, Gas & Development Company in the sum of \$4,000 for loss of royalties, and \$4,000 additional for permanent injury to the land as oil-producing property. To review this judgment, the Indiana Oil, Gas & Development Company has perfected an appeal to this court.

It is admitted that all of the expressed covenants in the lease have been fully complied with, and the rescission and cancellation of the lease is sought on the ground of the violation of an implied covenant to skillfully operate and develop said property.

The court found specifically as follows: "The court finds no express provision in the lease expressly providing for the forfeiture; but the court does find and holds that the oil lease was executed in consideration of the prospective royalties provided for therein, and the nominal consideration of \$1, that oil was struck in valuable and paying quantities in summer and fall of 1907, and that the 40 acres upon which five of the six wells were located was very valuable oil property, and in no respect 'spotted,' and was practically surrounded on the west, south, and east by producing offset wells, and the court holds that said lease contains an implied provision or covenant for diligent operation, after oil was struck in paying quantities, for the breach of which the lease may be rescinded, set aside, and forfeited."

The court also found, as to the ground of forfeiture: "That they consisted of a combination of causes, many of which occurred in

the fall of 1907, consisting of negligence, delays, carelessness, nonoperation, and want of diligence occurring at different times, and much of which was of a continuous and persistent nature, contributed to the forfeiture and warrants the rescission of the lease as asked for in these proceedings, and, having so occurred, and being of such a character, the court cannot specify a particular time or date, as asked for by the defendant, excepting that all such occurred before the commencement of suit."

Also the court found: "That the negligent manner in which the wells were drilled and the injurious results therefrom contributed to the cause of the forfeiture and the rescission of the lease as sought by these proceedings."

And, as to fraud, the court found: "The court does not find that there was an actual fraud practiced upon the plaintiff; but the court does find that there was want of proper care, gross and willful negligence in the drilling, developing, and operating said lease. By 'willful' the court refers more especially to the manner in which wells on location 1 and 2 were, against the advice of experienced drillers and protest of the plaintiff, respectively drilled into the salt water stratum."

The two assignments of error necessary to be considered, are: First, that the judgment of the court is contrary to law; second, that the judgment of the court is contrary to the evidence, and not supported thereby.

[1, 2] The decisions of the courts as to whether or not an oil and gas lease will be canceled by a court of equity for breach of an implied covenant to skillfully operate and develop the property are not harmonious. One line of authorities from courts of high standing hold that the remedy for the breach of such covenant is an action at law for damages, and that equity will not take jurisdiction in the absence of actual fraud; but there is another line of decisions from courts of equal standing holding to the contrary doctrine. The reason and weight of the argument in support of this latter line of decisions appeals to us, and we find no fault with the court below in holding that equity has jurisdiction and will decree a forfeiture of the lease for violation of such implied covenant. This line of authorities and the ground for such decision is admirably stated by Mr. Justice Van Devanter, sitting as a member of the Eighth Circuit Court of Appeals, in the case of *Brewster v. Lanyon Zinc Co.*, reported in 140 Fed. 801, 77 C. C. A. 213, and the question is discussed as follows: "With great deference to the able courts which have adopted this view, we think it is not sound. In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which, the exploration and development shall proceed. The operations contemplated, in the event oil and gas are found

in paying quantities, are not to be likened unto a business into which one puts property, money, and labor exclusively his own, the profits and losses in which are of concern only to him, and the conduct of which may be according to his own judgment, however erroneous it may be. By reason of the conditions on which the lease is granted, the lessor retains at least a contingent interest in the oil and gas, to the profitable extraction of which the operations are directed. This interest in the subject of the lease, and the fact that the substantial consideration for the grant lies in the provisions for the payment of royalties in kind and in money on the oil and gas extracted, make the extent to which and the diligence with which the operations are prosecuted of immediate concern to the lessor. If they do not proceed with reasonable diligence, and by reason thereof the oil and gas are diminished or exhausted through the operation of wells on adjoining lands, the lessor loses, not only royalties to which he would otherwise be entitled, but also his contingent interest in the oil and gas which thus passes into the control of others. The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts where the time, mode, or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases. There can therefore be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith. But, while this is so, no breach can occur save where the absence of such diligence is both certain and substantial in view of the actual circumstances at the time, as distinguished from mere expectations on the part of the lessor and conjecture on the part of mining enthusiasts. The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market,

or demand therefor, or the means of transporting them to market, the extent and result of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required. A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence, which, as before shown, is also made a condition of the lease under consideration."

It will appear from this discussion, and from a reading of the other cases following this line of decision, that the application of this doctrine depends largely upon the facts in each particular case. Under the assignments of error, this question is presented to the court in the case at bar: Did the facts in the case warrant the court in applying this rule of decision to this particular case?

[3, 4] It has often been said that equity abhors a forfeiture, and that courts of equity will not lend their aid to declare a forfeiture. The better rule seems to be in such cases that equity jurisdiction cannot be successfully invoked, unless the forfeiture will effectuate justice; that, where the forfeiture would work a hardship or an injustice, aid in equity will be denied.

Mr. Justice Van Devanter says in regard to this rule in the *Brewster Case*, *supra*: "The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that, in cases otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. As stated by Story, *Eq. Juris.* § 439: 'The beautiful character or prevailing excellence, if one may so say, of equity jurisprudence is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes.' In *Brown v. Vandergrift*, 80 Pa. 142, a case involving the forfeiture of an oil lease, it was held by the Supreme Court of Pennsylvania: 'In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity and protects the landowner against the indifference and laches of the lessee, and prevents a great mischief.' Other decisions to the same effect are *Munroe v. Armstrong*, 96 Pa. 307, 310; *Mehaffey's Appeal*, 4 Penny. (Pa.) 502; *J. M. Guffey Petroleum Co. v. Oliver* (Tex. Civ.

App.) 79 S. W. 884, 888; *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 54 Miss. 200; *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630; *Kansas City Elevator Co. v. Union Pacific Ry. Co.* (C. C.) 17 Fed. 200, 204; *Gadbury v. Ohio & Indiana Consolidated, etc., Co.* [162 Ind. 9], 67 N. E. 259, 261, 62 L. R. A. 895. The last case involved the forfeiture of a gas lease, and it was held by the Supreme Court of Indiana: 'Forfeitures are usually against conscience, and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases; but an exception to the rule must exist where it be against equity to permit the defendant to longer assert his title. \* \* \* The lack of any other remedy, and the danger that the gas might be withdrawn through wells on other lands, makes a case of this kind appeal to the conscience of the chancellor, and calls upon him to enforce the incurred forfeiture by removing the cloud from the title.'"

[5] We cannot say upon the record before us that the enforcement of the forfeiture in the instant case would effectuate justice, but are rather constrained to hold that it would work inequity. The testimony does not support the findings of the court below, nor is the judgment justified under the law. There was certainly no negligence in drilling on this lease, since one well was drilled in 1906 and five in 1907. While there may have been some recklessness in the way in which these wells were drilled, and the failure to exercise good judgment in bringing in wells 1 and 2, and in shooting the well at location 12, still the acts of the lessee must be judged in the light of the surroundings existing at the time (1907) when the Morris field was untried and unproven territory, and not in the light of the experience at the time of the trial in 1911, after the field had become proven territory and a developed oil field. Then, again, there are other facts in the plaintiff's case that do not appeal to the conscience of the chancellor. The court below found that the principal cause of forfeiture was the manner in which these wells were drilled in during the year 1907. The plaintiff was there at the time the wells were drilled in and knew then as well as he knew three years later, when suit was filed, that he had a cause of action for rescinding his contract, if he had one at all on this account; but he stood by and was present on every pay day and received his royalties, and received them promptly, while the lease was under the operation of the trustee named in the trust deed in 1908 and 1909, and also after the lease passed to the National Supply Company of Kansas, at the foreclosure sale in September, 1909, and during its operation of the lease from that date up to May 13, 1910, this plaintiff was present and at all times ready and willing and did accept, without protest, the royalties provided for under the lease from these several operators. Then, again, in a few days after commencing this suit to

cancel the lease he entered into a contract with the Kansas company whereby it was agreed that, if the suit was successful, he would execute to the Kansas company, or some person it might designate, another oil and gas lease on a part of the premises, whereby his royalties would be increased. In view of these facts and others appearing in this record, we cannot hold that this plaintiff came into court with "clean hands," as he must do in order to invoke the jurisdiction of a court of equity in his behalf.

Our statute (section 986, Rev. L. 1910) requires one seeking to rescind a contract at law to act with diligence. In equity the diligent, and not the slothful, suitor is rewarded.

The plaintiff testified at the trial that he had made up his mind to bring the suit about a year and a half before it was brought. While the expiration of this length of time after the discovery of his right and the formation of an intention to rescind and commencing the suit is possibly not sufficient to bar the action, yet this, taken in connection with the further fact that he did not commence the suit until after Bass had absconded, and Brady, Bass' manager, had died, until after the two persons best acquainted with drilling the wells and operating the lease were beyond the jurisdiction of the court, is a very strong additional circumstance of the want of "clean hands" in the plaintiff in invoking the aid of a court of equity. To permit a forfeiture of the lease upon this record upon the ground sought would not only work a great hardship upon the lessee, but would give the lessor the fruits of lessee's labor and property most unjustly, and would permit the lessor to "reap where he sowed not." At the time of the execution of the lease in controversy, March, 1906, it does not appear that the plaintiff's land had any particular value, except for agricultural purposes. It was simply a farm. While a consideration of \$5 per acre is recited in the lease, the plaintiff testified that only \$1 was paid, and it appears that this recital was placed in the lease to give to it a fictitious commercial value. At the time of the trial of this cause, some five years later, the plaintiff's property was worth, it appears, any sum between \$15,000 and \$30,000, and he had collected the sum of \$8,000 or \$10,000 in royalties. This large sum in royalties and the increased value added to the plaintiff's farm was by reason of the lessee's efforts, and at his expense, and without the expenditure of a dollar of plaintiff's own money. The record seems to support the contention of the plaintiff in error that this increased value added to the land cost the lessee and the sublessee from \$30,000 to \$40,000.

Can a court of conscience say that, on account of the bad judgment or even negligent and reckless management of the lease by the

subtenant, it would effectuate justice to cancel the lease and kick the lessee out in this summary manner, without notice or warning, and turn over to the lessor the fruits of this great labor and expense? It does not seem so.

[6] Then the judgment for \$8,000 damages cannot be justified by the testimony. The rules by which these damages were estimated were so indefinite and uncertain as to amount at most to a mere guess. The production from the wells on the lease in controversy, as well as that from the wells on the adjoining land, was unequal and variant. Well No. 1 came in with an initial flow of 1,200 barrels, No. 2 with 800 barrels, and No. 3 with 175 barrels, and No. 4 with little or nothing. The wells were all drilled into the same sand, and were located on the same 40 acres, and only a few hundred feet apart, and yet their production was so variant that it seems little less than absurd for a court to solemnly adjudicate that, for careless and negligent drilling and operating these wells, the landowner had been damaged \$4,000 in loss of royalties and an additional \$4,000 in damages to the land itself.

For these reasons, we conclude that the judgment appealed from should be vacated and set aside, and said cause remanded to the district court of Okmulgee county for further proceedings not inconsistent with the views herein expressed.

PER CURIAM. Adopted in whole.

AVEY et al. v. VAN VOORHIS et al.  
(No. 3630.)

(Supreme Court of Oklahoma. April 17, 1914.  
Rehearing Denied May 12, 1914.)

(Syllabus by the Court.)

1. DEEDS (§ 211\*)—FRAUD—SUFFICIENCY OF EVIDENCE.

In an action to cancel a deed on the ground that the same was secured by fraud and deception, the evidence offered to maintain the action, as set out in the opinion, was insufficient, and a demurrer thereto should have been sustained.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

2. ESTOPPEL (§ 92\*)—RECEPTION OF BENEFITS—SALE BY ATTORNEY IN FACT.

The son who, with full knowledge of all the facts, accepts his part of the proceeds of the sale of his father's real estate, sold and conveyed by an attorney in fact after the death of his father, and who retains the proceeds 11 years before commencing action to establish his claim to the property as an heir of his father, is, under section 1150, Rev. Laws 1910, estopped from asserting such claim, and from declaring the invalidity of the deed executed by the attorney in fact.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 260-263; Dec. Dig. § 92.\*]

Commissioners' Opinion. Division 2. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Mary Van Voorhis and others, heirs of William Bushman, deceased, and G. M. Young, deceased, against Newton Avey and others. Judgment for plaintiffs, and defendants bring error. Reversed and rendered.

Wright & Blinn and Burwell, Crockett & Johnson, all of Oklahoma City, for plaintiffs in error. Carlisle & Edwards, of Oklahoma City, and Horace Speed, of Guthrie, for defendants in error.

GALBRAITH, C. On the 19th day of January, 1910, the heirs of Wm. Bushman, deceased, instituted this action in the superior court of Oklahoma county to recover title and the possession of lot 15 in block 36, as shown by the original plat and survey of Oklahoma City. The petition was in the ordinary form of an action in ejectment, alleging title in the plaintiff, and that the defendants were wrongfully withholding the possession from them. The prayer was for possession and damages.

The defendants E. C. Jones, U. S. Grant, Harry Woods, Peter Jacovitch, and Abe Levy answered by general denial, and admitted being in the lawful possession of the premises under Avey. The defendants Newton Avey and associates filed an answer and cross-petition, in which they denied all the allegations of the petition, except they admitted that they were in the possession of the lot, and had had the undisturbed possession thereof for 11 years prior thereto, and averring that they had collected the rents therefrom during that time. By way of cross-petition these defendants averred that they were the legal and equitable owners of the lot, and averred that the plaintiffs had no interest therein, and prayed that the plaintiffs take nothing, and that title to the lot be quieted in them. On March 28, 1910, the plaintiffs, by leave of court, filed a reply to the answer and cross-petition, in which there was a denial of the matters set out in the cross-petition, except it was admitted that Avey and his associates had been in possession of the lot for the time alleged, but charging that such possession was wrongful, and further that possession of the defendants was claimed under a tax deed dated December 30, 1898, issued by the treasurer of Oklahoma county, alleging that said deed was void, as appeared on its face, and set out in details the reason it was void, and alleged that prior to the filing of suit they had tendered to the defendants the amount of the taxes and penalty due against said property, and that such tender had been refused. The prayer was for judgment as prayed in the original petition and for cancellation of the tax deed, and that title to the lot in controversy be quieted in the plaintiff. A general denial was filed by the defendants by way of a reply to this reply and answer of

the plaintiffs. On September 10, 1910, the heirs of G. M. Young, deceased, made application to the court to be made parties plaintiff to the action, setting out the claim that they were the owners in fee of the lot in controversy. On September 17, 1910, the court made an order permitting Chas. L. Young, Edward A. Young, Byron F. Young, and Bertha V. Von Syoc to be made parties plaintiff. The Youngs did not file a formal petition after they were permitted to be made parties plaintiff, but their application to be made parties, in which they claimed to be the owners of the lot in controversy, seems to have been treated as a petition. An answer was filed to it, which consisted: First, of a general denial of the allegation in the application made, except the allegation of the possession of the defendants, which was admitted; and, second, it was alleged that since the commencement of the suit the plaintiffs Chas. L. Young, Byron F. Young, and Bertha V. Von Syoc, had executed deeds to Newton Avey for their respective interests in the lot in suit, and for that reason these parties had no title, right, or claim to the lot, and further pleaded that Edward A. Young had no right, title, or interest in the lot in controversy, and, further, that at the time of the execution of the quitclaim deeds the defendants were in possession, and that the deeds were executed for the purpose of waiving any rights that these parties executing the deeds had in and to the lot in controversy and further alleging that Avey and his associates were the legal and equitable owners of the lot in controversy, and then were and had been for several years in the quiet and peaceable possession thereof; that neither of the plaintiffs had any right, title, or interest of any kind or character in and to the said lot, and prayed that the plaintiffs take nothing by their action, and that the title to the lot be quieted in these plaintiffs.

The Bushman heirs replied to this answer and cross-petition by a general denial. The plaintiff, Chas. L. Young, filed a separate reply, consisting of a general denial, and also alleged that the execution of the quitclaim deed, as set out in the answer and cross-petition, was procured by fraud and deceit, and it was for that reason void, and alleged, further, that as soon as he discovered the fraud that had been perpetrated upon him, he offered to return the money paid for such deed, and prayed for the possession of the lot in controversy, and for damages for withholding the possession, and asked that the quitclaim deed be surrendered up and canceled; that the court order the same released of record, and order the defendants to reconvey the property back to these plaintiffs. Byron F. Young filed a reply in practically the same form, and asked for the same relief. Bertha V. Von Syoc filed a reply in like form, and asked for like



relief. Edward A. Young filed a separate reply, which was a general denial, and admitted that on the — day of —, 1898, he received from W. E. Von Syoc the sum of \$27 as part of the estate of G. M. Young, deceased, and at that time he believed, and still believes, that the funds so received arose from the sale of some chattel property, and that if it should be found by this court that such sum was a part of the proceeds arising from the sale of W. E. Von Syoc to L. Overholser of lot 15, block 36, he tenders the amount into court, with legal interest for the use of the defendants, and he prayed likewise for possession of the lot in dispute and for damages and cancellation of the quitclaim deeds executed by his brothers and sister.

Upon the issues thus formed by these several pleadings the cause was tried to the court and a jury. At the close of the evidence the court, upon the motion of the plaintiffs, took the cause from the jury and directed a verdict for the Young heirs. In the verdict prepared under the direction of the court there was a finding that the title to the lot in dispute was in the Young heirs, and the quitclaim deeds executed by them were ordered canceled, and judgment was given in favor of Newton Avey against the parties executing these deeds for the several sums paid therefor. The defendants presented a motion for new trial, which was overruled, and have appealed to this court.

It is difficult to determine from the pleadings in this case whether the action was of such an equitable character as to warrant the court in taking from the jury the consideration of the controverted questions of fact presented. The testimony was conflicting as to whether or not the quitclaim deeds involved were secured by fraud and misrepresentations. If it was a law action, the defendants had a right to have this question determined by the jury. The action when commenced was an ordinary action in ejectment. About this there can be no serious question. We are inclined to think that it maintained this character throughout the trial, and that the subsequent pleadings filed after the petition and answer, asking for equitable relief in the cancellation of the several instruments, were merely incidental to the main question in the case, namely, the title to lot 15, block 36. However, it is not necessary for us to determine this question, since it is practically immaterial in the view we have taken of other questions raised upon the record.

[1] The lot in question was deeded to G. M. Young by the town-site trustees of Oklahoma City on the 25th day of October, 1890. Some time after that Young built a small house on the lot, and some years later removed from Oklahoma City to Iowa, leaving the lot in charge of a real estate man by the name of Davis. Subsequently L. Overholser & Co., a

real estate and insurance firm at Oklahoma City, composed of L. Overholser and Newton Avey, bought out Davis' interest, and in that manner secured the rental agency of this Young lot. The house on the lot was occupied as a residence. When it was occupied at all, it rented at a rate ranging from \$2 to \$4 per month. It seems that Overholser and Avey collected rents on the lot and remitted to Young during a period extending over some two or three years. On June 28, 1895, G. M. Young executed a general power of attorney to his son-in-law, W. E. Von Syoc, a resident of El Paso county, Colo., giving him full power to sell and dispose of his property, including the lot in controversy. After Overholser & Co. were notified of the giving of this power of attorney, they had considerable correspondence with the attorney in fact, and remitted some rents collected from this property to him. A number of letters passed between L. Overholser & Co. and Von Syoc, the attorney in fact, relative to the purchase of this lot. Finally, in February, 1898, Von Syoc wrote to Overholser & Co. that he would accept from them \$150 for the lot. The evidence proves that this sum was full value for the lot at that time. The deed was prepared, leaving the name of the grantee blank, and forwarded to Von Syoc to execute. This deed was executed on the 26th day of February, 1898, by G. M. Young, by W. E. Von Syoc his attorney in fact. After the deed was returned here Overholser & Co. inserted Wm. Bushman's name in it as grantee, and Bushman subsequently deeded the lot to Overholser, and Overholser conveyed a one-half interest therein to Newton Avey. When this deed from Von Syoc for the lot was received, Overholser deducted the amount of taxes against the property, amounting to sum \$70, and remitted the balance of the \$150 to Von Syoc. Von Syoc divided this remaining part of the consideration for the lot into three parts, retaining one-third for his wife, who was a daughter of G. M. Young, sending one-third of the balance to her brothers, Edward A. Young and Byron F. Young. After this suit was filed by the Bushman heirs, and in September, 1910, notice was served to take depositions at Rocky Ford, Colo. The parties whose depositions were taken in pursuance to this notice were Mrs. Von Syoc, Edward A. Young, and Byron F. Young, three of the heirs of G. M. Young, deceased. At the taking of these depositions it developed that G. M. Young died in Colorado in the year 1896, some two years prior to the making of the deed by Von Syoc to Bushman, as his attorney in fact. It was after the taking of these depositions that the application was made by the Young heirs to be made parties plaintiff to this suit.

One of the assignments of error is that the trial court erred in overruling the defendants' demurrer to the plaintiffs' evidence. At the close of the plaintiffs' testimony the de-

defendants interposed separate demurrers to the evidence to each of the Young heirs. The principal ground of the demurrer urged against the evidence of Bertha Von Syoc, Clarence L. Young, and Byron F. Young was that they had each executed and delivered, for a valuable consideration, a quitclaim deed to Newton Avey, conveying or releasing all their interests in and to the lot in controversy, and that the evidence offered was insufficient to show that these deeds were secured by undue influence or fraud, and the ground of the demurrer as to Edward A. Young was that he was estopped to question the deed from Von Syoc to Bushman, for the reason that he had knowingly accepted and retained his part of the proceeds of the purchase money paid for the execution of that deed.

It is contended on behalf of the defendants in error that Overholser & Co. were agents of G. M. Young for the lot in dispute during his lifetime, and were the agents for his heirs after his death, and that, owing to the relations of trust and confidence that the law throws around this relationship, they could not purchase this property from Young, or from his heirs under the circumstances disclosed by the record. We have no controversy with the numerous authorities cited by counsel in their briefs in support of the doctrine of trust and confidence existing between principal and agent. Those decisions announce sound doctrine, one that has been applied in this court many times and in the courts of all civilized governments, but it is the application of that doctrine to the facts of this case that gives rise to a difference of opinion between the court and counsel. There are different kinds of agencies, and, of course, the extent of the trust relations existing between the principal and the agent depends in a large measure upon the character of the agency. There are different degrees of trust and confidence. There is a wide difference between an agent to merely collect rents and an agent who has authority to dispose of property, between the guardian of a minor or incompetent and a rental agent. There is no evidence to show that Overholser & Co. ever had authority to sell this property, or that it was ever listed with them for sale. Their agency in this matter was of that limited character whereby they were empowered to secure tenants and collect rents; and, since the property was not rented all the time, and when rented did not bring over \$4 a month, this agency did not imply a great degree of trust and confidence between the owners as principal and Overholser & Co. as agent. We do not find anything in the record that would forbid Overholser & Co. from purchasing the lot in controversy, either for themselves or for a client, from Young during his lifetime, or from his heirs after his death. The courts certainly look with favor upon a compromise and adjustment of lawsuits, and upon the

settlement of claim before suit is commenced.

It is alleged that the quitclaim deed secured from Chas. L. Young, Byron F. Young, and Bertha Von Syoc was secured by Avey for the purpose of settling their claim to the lot in controversy, and that they each executed the deed in order to relinquish and settle any claim they might have to this lot. Now the evidence introduced by them in support of their claim that these deeds were secured by fraud and misrepresentation was, in brief, this: That Mrs. Von Syoc and Byron F. and Edward A. Young were residents of Colorado, and Chas. L. Young resided in Pasadena, Cal. When Judge Burwell, one of the attorneys for Avey, discovered that G. M. Young was dead at the time his attorney in fact, Von Syoc, executed the deed to Bushman, he advised his client, Avey, that it was desirable that he should obtain quitclaim deeds from the heirs of Young, and he was authorized to secure these deeds, and he immediately set about to do it. It cannot be said that there was anything improper about this. He met Mrs. Von Syoc, Byron F. and Edward A. Young, at Pueblo, Colo., by appointment, but before he conferred with them about their claim to this lot, he insisted that they should employ independent counsel, which they did. They secured a reputable and distinguished member of the bar at Pueblo, and then, with them and this lawyer, Judge Burwell took up the matter of the adjustment of their claim. The Youngs testified at the trial that Judge Burwell misrepresented their rights and their claims to this lot, and that they relied upon this misrepresentation and believed it, and were induced thereby to execute this deed. In this they are flatly contradicted, and their story is so incredible that it is unworthy of belief. They are all adults and people of intelligence, and they knew that Judge Burwell represented Avey, their adversary. They also had independent counsel to advise, as well as the counsel they had employed to prosecute this suit at Oklahoma City. The negotiations of the first trip to Pueblo did not result in a deal. Some two weeks later Judge Burwell made another visit to Pueblo and conferred with these parties and their attorney, and two of them, Mrs. Von Syoc and Byron F. Young executed a quitclaim deed to their interest in the lot for the consideration of \$400 each. Prior to this date Judge Burwell had gone to Pasadena, Cal., to confer with Chas. L. Young. Young had secured independent counsel, and negotiated with him for a quitclaim deed for his interest in the lot, and received \$1,200 for the same. We are convinced from an examination of the testimony that each of the parties executing these quitclaim deeds were properly advised as to their rights in the premises, and that they each voluntarily executed the deed for a valuable consideration, and after having the benefit of the advice of counsel and ample time for reflection and

consultation, and the transaction on the part of Avey and his counsel was fair and honest and above board, and there is nothing in the evidence to warrant the court in finding that the deeds were secured by fraud, and that they should be canceled. For that reason the demurrer to the evidence of Mrs. Von Syoc, Byron F. Young and Chas. L. Young should have been sustained.

[2] Edward A. Young was a resident of Colorado, and was present at the two conferences held at Pueblo between counsel for Avey and Mrs. Von Syoc and Byron F. Young and their attorney, but he refused to execute a quitclaim deed. It is now contended on his behalf that he owns a one-fourth interest in this lot as the heir of G. M. Young, deceased, since the deed to Bushman, executed by Von Syoc, was executed and delivered after the death of G. M. Young, which death revoked the power of attorney to Von Syoc; that the deed was void and conveyed no title to Bushman.

The demurrer to the evidence introduced on behalf of Edward A. Young raises the question of estoppel, and alleges that he cannot now be heard to assert that the deed from Von Syoc to Bushman was void for the reason that he knowingly received a part of the consideration paid for that deed by L. Overholser & Co. The rule of estoppel in cases of this kind is well established. The principle of estoppel as applied to varying conditions and states of fact is recognized by our own court in the following cases: *Hagar v. Wikoff*, 2 Okl. 580, 39 Pac. 281; *Barnes v. Lynch*, 9 Okl. 158, 59 Pac. 995; *Garrison v. Latham*, 23 Okl. 590, 103 Pac. 609; *Sapulpa v. Sapulpa Oil & Gas Co.*, 22 Okl. 347, 97 Pac. 1007; *Braddon v. McShea*, 26 Okl. 35, 107 Pac. 916; *Brusha v. Board of Education*, 139 Pac. 298, not yet officially reported. See, also, *Corner Stone Bank v. Rhodes*, 5 Ind. T. 206, 82 S. W. 739, 67 L. R. A. 812. The statutes of Oklahoma declare the rule that should be applied in the instant case. Section 1150, Rev. L. 1910, reads as follows: "Estoppel by receiving benefits. Any person or corporation having knowingly received and accepted the benefits or any part thereof of any conveyance, mortgage or contract relating to real estate, shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves."

We are convinced upon a careful consideration of the evidence that Edward A. Young knew when he received the money from Von Syoc that it was a part of the consideration for the sale of the lot in controversy,

and he retained this money for 11 years before this action was filed. It is now too late for him to attempt to repudiate that deed. The rule of estoppel should apply to his claim in this instance, and in this view of the case the demurrer to his evidence should have been sustained also.

The record in this case is very voluminous. It is evident that all the parties introduced all of the available testimony in support of their respective claims, and, in view of the law as we have declared it hereinabove, we think the case should be closed, and that the judgment appealed from should be reversed and vacated, and the court below directed to sustain the respective demurrers to the evidence of the several Young heirs, and to enter judgment in favor of the plaintiffs in error, quieting the title to lot 15, block 36, in Oklahoma City in them, and for costs of this action.

We feel constrained to say, before closing this opinion, that serious charges were made in the pleadings filed on behalf of the Young heirs against one of the counsel for Newton Avey, and that from the record these charges seem to be entirely unfounded and wholly unjustifiable. The conduct of the counsel in question, Judge B. F. Burwell, it seems to us, was most circumspect, honorable, and ethical throughout the entire transaction, and that he should be and is entirely exonerated against all claims of wrongdoing or unprofessional conduct in this case.

PER CURIAM. Adopted in whole.

KITCHENS v. STATE. (No. A-1960.)  
(Criminal Court of Appeals of Oklahoma. May 7, 1914.)

(Syllabus by the Court.)

1. ADULTERY (§ 14\*)—PROOF—REQUISITES.

In a prosecution for adultery, positive evidence of the direct fact is not required. The fact of carnal intercourse may be inferred from circumstances that lead to it by fair inference as a necessary conclusion.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 27, 31, 32; Dec. Dig. § 14.\*]

2. ADULTERY (§ 1\*)—NATURE OF OFFENSE.

Adultery is an offense against the state, as well as against the injured husband or wife, notwithstanding the requirement that the prosecution therefor must be commenced on the complaint of the injured spouse.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

3. WITNESSES (§ 58\*)—COMPETENCY—HUSBAND AND WIFE—ADULTERY.

While adultery is a public offense, it is also a personal offense against the husband or wife, and they become competent witnesses to prove the offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 159½-162, 164; Dec. Dig. § 58.\*]

4. ADULTERY (§ 14\*)—DEFENSE—RELATION OF MASTER AND SERVANT.

In a prosecution for adultery, the relation of master and servant between the parties does

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not necessarily exclude the existence of the relation denounced by the statute, and the relation of servant does not necessarily exclude the woman from becoming the defendant's mistress or concubine.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 27, 31, 32; Dec. Dig. § 14.\*]

**5. LEWDNESS (§ 1\*)—ESSENTIALS OF OFFENSE—“LIVING TOGETHER IN OPEN AND NOTORIOUS ADULTERY.”**

To constitute the offense of adultery, where it is alleged that the defendants were, “living together in open and notorious adultery,” it is not necessary that the parties claim to be husband and wife. It is sufficient if they live together in the same house in the familiar manner of husband and wife, and that their lewd and lascivious cohabitation and conduct was open and notorious.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

Appeal from District Court, Seminole County; Tom D. McKeown, Judge.

John Kitchens was convicted of adultery, and appeals. Affirmed.

The plaintiff in error, herein referred to as defendant, and one Mollie Mitchell were jointly informed against for the crime of adultery. The information, omitting the formal parts, was as follows: “That John Kitchens and Mollie Mitchell did, in Seminole county, and in the state of Oklahoma, on or about the 1st day of April in the year of our Lord one thousand nine hundred and twelve and anterior to the presentment hereof, commit the crime of adultery in the manner and form as follows, that is to say: That on the day and date above mentioned and in said county and state, did unlawfully, willfully, voluntarily, and feloniously associate and cohabit together, living in open and notorious adultery, they, the said defendants, not being then and there married to each other, and him, the said John Kitchens, then and there having a living wife, and the said Mollie Mitchell having a living husband, and they, the said defendants, did unlawfully, voluntarily, and feloniously have carnal knowledge together, each of the body of the other, contrary to,” etc. Upon arraignment the defendants interposed a demurrer to the information on the ground “that it did not state facts sufficient to constitute a public offense against the laws of Oklahoma.” The demurrer was overruled, whereupon defendant entered a plea of not guilty, and asked for and was granted a separate trial. His trial resulted in a verdict of guilty as charged in the information, leaving the punishment to be fixed by the court. On the 11th day of October, 1912, motion for new trial having been duly filed, the same was overruled, and he was sentenced to be confined in the penitentiary for the term of two years. From the judgment and sentence he appeals.

The evidence shows without contradiction that defendant was married in Seminole county, in 1900, and had lived in said county

with his family until the middle of November, 1910, at which time his wife and their seven children left him, and went to live in Hughes county; that his codefendant, Mollie Mitchell, was the wife of Cal Mitchell, and the mother of three children; that she lived apart from her husband, he having the care and custody of the three children born of their marriage, and all of tender years; that defendant resided upon his farm in a house consisting of one room, a kitchen, and an attic above; that in September, 1911, defendant brought to his house his codefendant, Mitchell, for the avowed and ostensible purpose of making her his housekeeper, and to care for his aged invalid mother, who made her home there a part of the time, but who also lived much of the time with her other married children. For several weeks, Joe Brooks, the 16 year old brother of Mrs. Mitchell, stayed on the place, and for a short time two men who worked, picking cotton, for the defendant stayed on the place. There was evidence tending to show that while Mrs. Mitchell was staying at his place, defendant took her with him back and forth on his trips to town, and they were often seen driving together.

E. S. King testified: That he lived a mile and a half from defendant, and saw Mollie Mitchell at defendant's and said to him: “Mr. Kitchens, under these circumstances they will get you, won't they?” Defendant answered: “No, they will have to prove that I had sexual intercourse with the woman before they can get me.” That he had heard other neighbors complain of the conduct of defendant and Mrs. Mitchell. That defendant brought Mrs. Mitchell to writing school one evening, and the ladies present rebuked her, and the defendant did not come any more.

A. J. Morgan testified that he lived about 250 yards from defendant; that Mollie Mitchell stayed there about a year; defendant's mother was not there all the time; had seen defendant and the Mitchell woman there alone at night; saw defendant at different times with his arms around her; saw her sitting in his lap; called there one evening, and saw Mrs. Mitchell with her arms over defendant's shoulders, and he was holding her clothes up so that her person was exposed from her waist down. Heard defendant say that he had the clap; that he caught it from Mollie Mitchell; saw defendant and Mrs. Mitchell in bed together.

Ed. Morgan testified that he lived with his father, A. J. Morgan; saw defendant at different times with his arms around Mollie Mitchell; saw him take indecent liberties with her person and hold her dress up; heard defendant say he had the clap, and that he caught it from Mollie Mitchell.

Neely Ross testified that he worked for defendant; often saw defendant and Mrs. Mitchell sitting in each other's lap, hugging,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

kissing, and playing with each other. After Mollie Mitchell had been there about two weeks heard defendant say that he had caught the clap from her.

John Crotzer testified that he stopped over night at defendant's house, and no one else was there except defendant and Mollie Mitchell; that they all slept in the same room; Mrs. Mitchell in one bed, and defendant and witness in another.

The evidence further shows that defendant's neighbors went to his place and objected to his keeping the Mitchell woman there, and he said to them: "That he had been advised by lawyers that he had a right to keep a cook there, and they would have to catch him doing business with her, and would have to prove it before they could convict him, and that he had been advised that no one had a right inside the inclosure without his permission, and that he was going to shoot the first damn man he caught in there like he would a dog."

On behalf of defendant several witnesses testified that they were often at his home and had never noticed any improper conduct on the part of defendant and Mrs. Mitchell.

Oscar Hull testified that he picked cotton for defendant three or four weeks in the fall of 1911, and stayed at his place; that Mrs. Mitchell done the housework; never saw anything indecent between them, and heard no vulgar talk. Defendant's mother was there a part of the time; that the boys working for defendant went away a night or two fishing and left him and Mrs. Mitchell there alone.

Dr. J. C. Dovell testified that he had been defendant's physician and had treated him during the last two years for malaria and hemorrhoids; did not treat him for gonorrhea; that he had full opportunity to know whether or not defendant had such disease, and did not think that he had ever had it; that about the 1st of October, 1911, he commenced treating Mollie Mitchell for chronic gonorrhea, and treated her for several months; that she was brought to his office by defendant, and he continued to accompany her when coming for treatment while he had the case in charge; that without using preventatives and disinfecting, he did not think it would have been possible for one to have had intercourse with Mrs. Mitchell while he was treating her without catching the disease.

Mollie Mitchell testified that she was a married woman, separated from her husband; that she had worked for defendant for more than a year as a servant, and he paid her three dollars a week for her services; that she never stayed alone with defendant. She denied all acts of immoral conduct.

Defendant as a witness in his own behalf testified that he had hired Mollie Mitchell to care for his mother and cook for him and his farm hands; that he had never stayed in the house overnight alone with Mollie Mitchell.

He denied all acts of immoral conduct or adulterous intercourse.

Defendant introduced testimony tending to impeach the character of certain of the state's witnesses as to truth and veracity. On rebuttal, evidence was given as to the good character of these witnesses.

Willmott & Dean, of Wewoka, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

DOYLE, J. (after stating the facts as above). [1] The provision of the Penal Code upon which the prosecution was founded defines the crime of adultery as follows: "Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery." Section 2431, Rev. Laws.

The main question to be reviewed is the sufficiency of the evidence. It is claimed that the trial court erred in denying defendant's motion for a directed verdict of acquittal, and in overruling the motion for a new trial, on the ground that the evidence was insufficient to support the verdict; the contention being that, as the prosecution was not commenced upon the complaint of the wife of defendant, or the husband of his codefendant, the proof must show that the defendants were "living together in open and notorious adultery," and that the proof only shows the relation of master and servant, and as such they might properly live together without invoking public scandal. In a prosecution for adultery, positive evidence of the direct fact is not required. To require positive evidence alone would be to give immunity to practically all offenders. Usually presumptive evidence alone is attainable, and the fact of carnal intercourse is inferred from circumstances that lead to it by fair inference as a necessary conclusion; without this rule, no protection whatever could be given to marital rights.

[2] Under the provision of the Penal Code quoted, adultery is an offense against the state, as well as against the injured husband or wife, notwithstanding the requirement that the prosecution therefor must be commenced on the complaint of the injured spouse. The requirement that "prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime," pertains to the procedure only. That such complaint has not been

made may operate to withhold authority to prosecute or punish, but this does not affect the question of the actual guilt of the offending parties. The requirement is founded partly on principles of public policy which lie at the basis of civil society. If the parties injured choose to condone the wrong done, then no one else ought to be allowed to move in the matter.

[3] While adultery is a "public offense," it is also a personal offense against the injured husband or wife, and they become competent witnesses to prove the offense. *Heacock v. State*, 4 Okl. Cr. 806, 112 Pac. 949.

However, under the proviso of the section quoted, any person may make complaint when it is alleged that the defendants "are living together in open and notorious adultery," as such adulterous cohabitation and its notoriety necessarily tends to debase and lower the standard of public morals by dishonoring the marital relation.

It appears from the record that in addition to the undisputed facts in evidence, the defendant, a married man, and his codefendant, a married woman, lived together; that there was competent evidence showing, or tending to show, the fact of illicit cohabitation, and that adulterous intercourse had habitually taken place between the parties while they were living together. If the parties for a single day lived together in open and notorious adultery, the offense was complete.

[4] The evidence showing the existence of the relation of master and servant between the parties was properly admitted, but that relationship did not necessarily exclude the existence of the relationship denounced by the statute. Defendant was not living or abiding with his wife at the time charged, and the relation of servant did not necessarily preclude his codefendant from becoming his mistress or concubine.

[5] The only question to be considered is whether the right to prosecute is sustained by evidence showing, or tending to show, that defendant was living with his codefendant in a state of open and notorious adultery. The courts, when called upon to determine what constitutes the state of living together within the purview of statutes defining adultery, have defined it as the state of cohabiting.

In *Copeland v. State*, 10 Okl. Cr. —, 133 Pac. 258, it is said: "Simply having occasional illicit intercourse, without a public or notorious living together, is not sufficient to constitute the offense of living in a state of open and notorious adultery. The parties must reside together publicly, in the face of society as if the conjugal relation existed between them; their illicit intercourse must be habitual."

We do not think it necessary that the parties should claim to be husband and wife. It is sufficient if they lived together and behav-

ed themselves in each other's presence in the familiar manner of husband and wife, and that their lewd and lascivious conduct was witnessed by other persons. The law seeks not alone to prevent illicit cohabitation, and to prohibit the public scandal and disgrace incident thereto, but also to preserve and promote the institution of marriage, upon which the best interests and indeed the existence of society depend.

Without extending this opinion, already too long, by an analysis of the evidence, it is sufficient to say, that there was competent evidence given tending to support every material allegation of the information. The jury were of opinion that such evidence was true beyond a reasonable doubt. The instructions given by the court fully and fairly presented the law of the case.

The judgment of the lower court is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J.,  
concur.

MITCHELL v. STATE. (No. A—1961.)  
(Criminal Court of Appeals of Oklahoma. May 7, 1914.)

Appeal from District Court, Seminole County; Tom. D. McKeown, Judge.

Mollie Mitchell was convicted of adultery, and appeals. Affirmed.

Willmott & Dean, of Wewoka, for plaintiff in error. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Mollie Mitchell, was tried for the correlative offense just considered, in the case of *Kitchens v. State*, 140 Pac. 619. She also was found guilty, and her punishment assessed at confinement in the penitentiary for a period of one year. The judgment and sentence was rendered and entered on the 11th day of October, 1912. The facts in the case are substantially the same, and the questions presented are the same as those just decided in the companion case.

For the reasons stated in the opinion in the case of *Kitchens v. State*, supra, the judgment of conviction herein is affirmed.

JOHNSON et al. v. STATE. (No. A—1747.)  
(Criminal Court of Appeals of Oklahoma. May 7, 1914.)

(Syllabus by the Court.)

1. GAMING (§§ 79, 88\*)—INFORMATION—SUFFICIENCY—ELEMENTS OF OFFENSE.

(a) It is not essential to the validity of an information based on section 2498, Rev. Laws, which was section 2422, Comp. Laws, that it contain an allegation or averment that the person charged with conducting a gambling game did so for money, checks, or other representatives of value. The contrary doctrine announced in *Proctor v. Territory*, 18 Okl. 378, 92 Pac. 389, is overruled for the reasons set forth in opinion.

(b) Any person, whether he be owner, employé, or a bystander acting as a matter of accommodation, who conducts any such prohibited game or assists in conducting the same is sub-

ject to indictment and conviction for so doing, whether he acts for compensation or not.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 206-217, 241-243; Dec. Dig. §§ 79, 88.\*]

## 2. GAMING (§ 85\*)—INFORMATION—SUFFICIENCY.

(a) It is not essential to the validity of an indictment or information that it set out the capacity in which the person acted who conducted the prohibited game, nor that he received compensation for his acts. It is sufficient that the information charge that a prohibited game was conducted, which game was played at by other persons for money or other representatives of value.

(b) For an information properly drawn under the statute, and which is proof against demurrer and objection, and which is in proper form under the statute, see opinion.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 220-223, 228, 261, 266; Dec. Dig. § 85.\*]

## 3. GAMING (§ 98\*)—SUFFICIENCY OF EVIDENCE.

Uncontradicted evidence which clearly establishes a violation of the law, and connects the accused directly with such violation, is sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 291-297; Dec. Dig. § 98.\*]

Appeal from County Court, Oklahoma County; John W. Haysen, Judge.

Elmer Johnson and John Garrett were convicted of gaming, and appeal. Affirmed.

Beardon & Hereford, of Oklahoma City, for plaintiffs in error. Smith C. Matson, Asst. Atty. Gen. (Herbert M. Peck, of Oklahoma City, of counsel), for the State.

**ARMSTRONG, P. J.** The plaintiffs in error, Elmer Johnson and John Garrett, were convicted at the March, 1912, term of the county court of Oklahoma county on a charge of conducting a roulette game, and their punishment fixed at a fine of \$500 and confinement in the county jail for a period of 60 days.

The information upon which the conviction is based is as follows: "In the name and by the authority of the state of Oklahoma comes now Sam Hooker, the duly qualified and acting county attorney in and for Oklahoma county, and state of Oklahoma, and on his official oath gives the county court in and for said Oklahoma county and state of Oklahoma to know and be informed that the above-named Elmer Johnson and John Garrett did, in Oklahoma county, and in the state of Oklahoma, on the 8th day of March, in the year of A. D. 1912, commit the crime of conducting a game of roulette in manner and form as follows: For that they did then and there unlawfully and wrongfully conduct a game commonly called roulette, the same being played for money and other representatives of value, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

The proof on behalf of the state conclusively establishes the fact that the plaintiffs

in error conducted a gambling game, to wit, roulette, on the date alleged, at 109½ North Broadway, in Oklahoma City, and that plaintiff in error Garrett was owner of said place. State's witness Seward testified that he was in the place on that day; that plaintiff in error Johnson was also there, and was looking after the game; that he saw Johnson pay off the dealer and the doorkeeper, and also saw him get money from one part of the building and give it to one of the dealers conducting a game in another part of the building.

No testimony was offered on behalf of either plaintiff in error.

Counsel for the plaintiffs in error contend that the information does not state facts sufficient to constitute a public offense, for the reason that it contains no allegation that the persons conducting the game did so for money or some other representative of value, and for the further reason that the information does not state in what capacity the persons conducting the game acted—that is, whether as owner or employé—and insist that for these reasons the court should have sustained their objection to the introduction of testimony; no demurrer having been interposed.

[1, 2] The prosecution was based on section 2422, Comp. Laws, which is as follows: "That every person who deals, plays or carries on, or opens or causes to be opened, or who conducts, either as owner or employé, whether for hire or not, any game of faro, monte, poker, roulette, craps, or any banking or percentage game played with dice, cards, or any device, for money, checks, credit, or any representative of value, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not less than 30 days nor more than 6 months."

It will be noted that plaintiffs in error are charged by the information with conducting a game of roulette, which game was played for money, checks, etc., but does not contain an allegation that the game was conducted for money, checks, etc. Counsel contend that the failure upon the part of the pleader to allege and prove this latter element is fatal to the information and conviction, and cite *Proctor v. Territory*, 18 Okl. 378, 92 Pac. 389, as sustaining their contention; also *People v. Carroll*, 80 Cal. 153, 22 Pac. 129; *Brown v. State*, 5 Okl. Cr. 41, 113 Pac. 219.

If the doctrine in the *Proctor Case* is to be followed, then the contention of counsel would not be without merit. Upon a thorough investigation of the authorities on which the *Proctor Case* was apparently based, however, we are of opinion that the rule there declared is not supported by the authorities cited, and is not a sound and correct interpretation of the statute. Neither is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the obiter dicta in the Brown Case, supra, supported thereby.

In *People v. Carroll*, supra, the Supreme Court of California had under consideration the question decided by this court in *Brown v. State*, supra, but did not have under consideration the question decided by the Supreme Court of Oklahoma Territory in *Proctor v. State*, supra. The California court in the Carroll Case said: "To constitute it an offense to conduct a game, it must be 'played for money, checks, credit, or any representative of value.' The information does not charge that the game was played for money, but that the defendant conducted it for money. It may be that those who were engaged in the game were playing for amusement, and paid the defendant a fixed sum, in no way dependent upon the result of the game, for conducting it. This would be within the allegations of the information, but it would not be a public offense or within the statute." From this quotation it is clearly to be seen that the California court was not considering, and did not refer to, the question here raised. They simply held, as we held in the Brown Case, supra, that the information must charge that the persons playing in the game played for money, etc. The Carroll Case is sound in principle and convincing in argument. The court simply held that the information did not allege that the games were played for money, and for that reason it was defective, but made no reference to the proposition that the conductor of the game must carry on or conduct it for money.

In *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673, also cited by the Supreme Court of Oklahoma Territory as supporting the rule in the Proctor Case, does not in our judgment support it. The court there had under consideration the proposition of whether or not it was necessary for the information to charge that the person who conducted or carried on the game did so as owner or as employé, and held that it was not necessary to either allege or prove that he acted in either capacity, but clearly established the doctrine that it is sufficient to allege and prove that the person who conducted or carried on the game, without reference to ownership or employment, conducted or carried on a game which was played for money, etc. It appears to us that the territorial court confused the terms "playing" and "conducting" in announcing the doctrine in the Proctor Case, supra. This court fell into the same error in the dicta in the Brown Case, supra. This being the first time our attention has been called directly to the proposition, upon a careful and thorough investigation, we feel that the doctrine in the Proctor Case and the dicta in the Brown Case should be specifically overruled.

The information in the case at bar is not only not subject to defeat by objection to

the introduction of testimony, but is sound against attack by proper demurrer. As said by the Supreme Court of California in *People v. Sam Lung*, supra: "It is not necessary to state that the person accused was the employé or owner of the game; nor is proof as to that fact an essential prerequisite to conviction," under the Penal Code.

The California Court had under consideration a statute identical in principle with ours. Discussing the proposition further, the court said: "As we understand section 330 of the Penal Code, it means that every person whatsoever who deals, plays, or carries on, or opens or causes to be opened, or who conducts, certain games therein mentioned, 'for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid—such imprisonment not to exceed one year'; and that 'every person who plays or bets at or against any of said prohibited game or games is guilty of a misdemeanor.' That being so, it was not material that the information (which charged that the defendant 'did willfully and unlawfully carry on and conduct a certain game of tan, then and there played for money,' etc.) should have stated that he did so as an employé or owner of such game. The offense defined in the first clause of the section supra, is not limited to those who, as owners or employés, conduct or carry on any of the prohibited games for money. It embraces all persons who carry on or conduct such games, whether as owners, employés, or in any other capacity, but it does not include any one who plays or bets at or against such games; they being included in the second clause of said section. The Legislature did not intend to declare, by the first clause, that no one except owners or employés connected with such games should be punishable thereunder. It meant to include all persons who might thereafter commit the acts there prohibited."

The Supreme Court of Washington, in *State v. Preston*, 49 Wash. 298, 95 Pac. 82, construing a misdemeanor statute such as ours, quoting a portion of the statute, says: "Each and every person who shall deal or carry on, or open or cause to be opened, or who shall conduct, either as owner, proprietor, or employé, whether for hire or not, any game of faro, monte, roulette, or any game played with cards, dice, or any other device, whether the same be played for money, checks, credit or any other representative of value, should be guilty of a misdemeanor." The statute not only prohibits the conducting of such a game as proprietor, but prohibits the game by each and every person conducting the same, whether as owner or proprietor or employé, whether for hire or not, so it was not essential that an information thereunder should charge that accused conducted



the game either as owner, proprietor, or employé."

These authorities amply support the contention of the state in this case that the information upon which this conviction is based fully complies with the law. We are of opinion that it not only complies with the law, but is the proper form for all such informations. See *State v. Wakeley*, 43 Mont. 427, 117 Pac. 95.

For the benefit of the prosecuting attorneys and the people of the state as well, we may say that any person interested directly or indirectly in conducting a gambling game in Oklahoma, whether as owner, or whether as employé, or whether as a matter of accommodation, either for hire or without hire, is subject to indictment and conviction under the statute supra. An information charging such offense or offenses might well be drawn in the language of the information here under consideration, and proof that such game was conducted as alleged will be sufficient to sustain a conviction.

We have not overlooked the fact that there are authorities which sustain a more strict construction, but in Oklahoma the statute law requires a liberal construction as against a strict construction, and then, too, the cases relied upon and cited by counsel for plaintiffs in error are based upon felony indictments, and not misdemeanor indictments, as a rule. All courts are more careful in extending the doctrine of liberal construction in felony than in misdemeanor cases.

[3] The only other assignment necessary to refer to is based on the contention that the verdict of guilty is not sustained by sufficient evidence as to the plaintiff in error Johnson. The proof on behalf of the state was contradicted, and established the fact that Johnson was in the place on the date alleged; that he paid off one of the dealers and a watchman; that he procured money from one portion of the room and delivered it to a dealer who was conducting a game in another portion of the room; and otherwise interested himself in the conducting of the game. He did not deny these facts, and no one in his defense denied them.

We are of opinion that in the absence of any contradiction whatever of these facts, that the verdict of the jury was properly sustained by the trial court, and we cannot disturb it on appeal.

DOYLE and FURMAN, JJ., concur.

O'CONNOR v. TOWEY et al. (FOX,  
Intervener).

(Supreme Court of Oregon. April 14, 1914.)

1. APPEAL AND ERROR (§ 635\*)—DISMISSAL—  
GROUNDS.

That the record on appeal does not contain all the evidence introduced upon the trial, nor sufficient to enable the court to review the cause,

is not a ground for dismissal of the appeal, but only for refusal to consider any matter other than the sufficiency of the pleadings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.\*]

2. APPEAL AND ERROR (§ 581\*)—RECORD—ABSTRACT—REQUISITES.

Under L. O. L. § 554, as amended by Laws 1913, p. 618, requiring the appellant to file a transcript or such an abstract as the law or the rules of the appellate court may require, together with a copy of the judgment or decree, the notice of appeal, and proof of service thereof, and of the undertaking on appeal, it is not necessary that the abstract contain the findings of fact, conclusions of law, and notice of and undertaking on appeal; it being sufficient that the transcript contains these records.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2575-2581, 2599, 2801; Dec. Dig. § 581.\*]

3. APPEAL AND ERROR (§ 385\*)—UNDERTAKING—SIGNATURE OF APPELLANT.

Under L. O. L. § 551, requiring the undertaking of the appellant with one or more sureties, it is not necessary that the undertaking be signed by the appellant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2020, 2021, 2057; Dec. Dig. § 385.\*]

En Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by Carlotta A. O'Connor against Mark Towey, and Patrick Towey, by J. H. Fox, his guardian, intervenes. From the decree, plaintiff appeals. Motion to dismiss appeal denied.

P. J. Bannon and J. N. Hart, both of Portland, for appellant. Arthur I. Moulton, of Portland, for respondent.

McNARY, J. [1] This is a motion to dismiss an appeal. The first reason assigned goes to the insufficiency of the evidentiary record, in this: That the record filed "does not contain all the evidence introduced upon the trial of the above-entitled cause, nor sufficient thereof to enable the court to review the entitled cause." This is not a ground for the dismissal of an appeal from a decree. The only penalty visited upon appellant who is responsible for such a situation is the refusal of the court to consider any matter other than the sufficiency of the pleadings. *Wyatt v. Wyatt*, 31 Or. 534, 49 Pac. 855; *Morrison's Estate*, 48 Or. 614, 87 Pac. 1043.

[2] Another ground assigned in support of the motion is that the abstract of record does not contain the findings of fact, conclusions of law, notice of and an undertaking on appeal. This is not necessary. The transcript contains these various records and documents, which is conformable to the practice prescribed by the Code in section 554, L. O. L., as amended by the laws of 1913, page 618.

[3] Still another ground of assignment questions the sufficiency of the undertaking on appeal, in this: That it is not signed by the appellant, but is signed by two sureties

who guarantee the fulfillment of those obligations prescribed by section 551, L. O. L. The statute does not require the appellant to sign an undertaking. He is bound by the judgment, and the purpose of the undertaking is simply to assure respondent that appellant will pay all damages, costs, and disbursements which may be awarded against him on the appeal, and which guaranty comes not from the plaintiff, but through the medium of the sureties who sign his bond. *Joan Drouilhat v. John Rottner, Surety*, 13 Or. 493, 11 Pac. 221; *Elliott v. Bozorth*, 52 Or. 391, 97 Pac. 632.

One other reason is given why the appeal should be dismissed, but we deem it unimportant.

The motion to dismiss this appeal must be disallowed.

**THURMAN et ux. v. MULTNOMAH COUNTY et al. (KELLOGG et al., Interveners).†**

(Supreme Court of Oregon. April 14, 1914.)

**1. DEDICATION (§ 50\*)—OPERATION AND EFFECT—PROPERTY INCLUDED.**

The ground on the south side of a street attempted to be included in a boulevard formed by the widening of the street 20 feet on each side is not affected by a deed of dedication of property on the north side of the street bounded on the south by the north line of the boulevard, though at the time of the dedication the grantors owned the land on both sides of the street.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 91-94; Dec. Dig. § 50.\*]

**2. DEDICATION (§ 50\*)—STREETS—VACATION OF PLAT.**

Whatever effect the vacation of a plat on the north side of a street may have on the portion of lots on that side of the street which is included in an attempted widening of the street, it has no effect on lots south of the street.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 91-94; Dec. Dig. § 50.\*]

**3. EMINENT DOMAIN (§ 180\*) — PROCEEDINGS TO TAKE PROPERTY—NOTICE TO OWNERS.**

Under a city charter provision requiring notice to owners of proceedings to condemn land for a street extension, an owner who is given no notice is not bound, and a conveyance according to the old plat takes to the original line of the street.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 489; Dec. Dig. § 180.\*]

**4. EMINENT DOMAIN (§ 167\*)—PROCEEDINGS TO TAKE PROPERTY—STATUTORY PROVISIONS.**

A city in eminent domain proceedings is an inferior tribunal, and must strictly comply with the statute, or its acts are void.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 451-456; Dec. Dig. § 167.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by R. E. Thurman and another against Multnomah County and another, and W. S. Kellogg and others intervene. From a decree for plaintiffs, defendants and interveners appeal. Affirmed.

The defendant city of St. Johns claiming that what was shown on Miner's addition as "6th St." has been enlarged, 20 feet taken from adjoining property on both the north side of the street and on the south side, and the name changed to "Willamette boulevard," the plaintiffs, being the owners of lot 1, block 22, of Miner's addition, bring this suit to quiet their title thereto. The lot in question as platted was 25 by 100 feet. When that addition was laid out and platted, what is now known as Willamette boulevard, being claimed as 100 feet wide, was dedicated by Miner in said plat as Sixth street, which was only 60 feet wide. It is now contended by plaintiffs that Sixth street is the only public easement. A. L. Miner platted and dedicated the A. L. Miner's addition December 10, 1889, which included the land over which Willamette boulevard was afterward attempted to be located, and the lots on either side of Sixth street attempted to be condemned therefor. Thereafter, although it does not appear when or how, the portion of A. L. Miner's addition north of the north line of Sixth street was vacated and thrown into acreage, and prior to February 17, 1902, Hartman, Thompson & Powers became the owners of both that portion of Miner's addition so vacated and the portion of that addition south of the north line of Sixth street. On that day they platted into tracts and streets as St. Johns Heights the part of Miner's addition which had been vacated, and which was described by metes and bounds, including only the ground north of the north line of Willamette boulevard, and leaving out of the plat the south 20 feet of the lots bordering on the north of Sixth street, and supposed to be in the boulevard. Thus it remained when plaintiff acquired title to lot 1 of block 22 of Miner's addition, unless it was affected by adverse user, or by the effort of the city of Albina to condemn, on the south of Sixth street, the north 20 feet of the lots mentioned. The defendant the city of St. Johns answered the complaint, alleging the widening of Sixth street to 100 feet, taking 20 feet off of lot 1, block 22, by the city of Albina, as well as 20 feet off the south side of the lots north of Sixth street; also alleging title in the city to the boulevard by adverse user, and a dedication by Hartman, Thompson & Powers by their platting of St. Johns Heights. Defendants Kellogg and Ross appeared as interveners, claiming that they owned lots on the north side of the boulevard, and would be injured if the street should be confined to Sixth street; it being only 60 feet wide. From a decree for plaintiffs, defendants appeal.

O. J. Gatzmyer, of St. Johns, for appellants Multnomah County and another. George J. Perkins, of Portland, for appellants interveners. H. E. Collier and W. E. Thomas, both of Portland (Collier & Collier and Cham-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 26, 1914.

berlain, Thomas & Kraemer, all of Portland, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). [1] The ground attempted to be included in the boulevard is not affected by the dedication of St. Johns Heights by Hartman, Thompson & Powers on the 17th day of February, 1902, for the reason that the ground platted extended south only to the north line of Willamette boulevard, and does not dedicate the boulevard or any ground included in it. The only question that might be considered open for discussion in regard thereto is whether Hartman, Thompson & Powers, having marked upon its plat some of the lines of blocks 21, 22, 23, and 24, and the intervening streets, and the Willamette boulevard as bounding or adjoining the ground platted, and at the time of filing the plat owning, also, the ground south of the St. Johns Heights, are bound to a dedication of such boulevard or street. The deed of dedication of St. Johns Heights has no relation to said boulevard, nor does it affect any land except that bounded by its terms. There was no purpose to affect the original dedication or plat of A. L. Miner's addition south of the north line of Sixth street, and the court cannot now give it such effect. Plaintiffs' deed from Hartman, Thompson & Powers describes the property in question in this case by the original plat, upon which plaintiffs have a right to rest their title.

[2, 3] What effect the vacation of the ground now covered by the St. Johns Heights and the dedication thereof by Hartman, Thompson & Powers has on the portion of the lots extending south of the north line of the boulevard, namely, to the north line of Sixth street, is immaterial here, and we do not decide; but it has no effect upon the lots in block 22 of A. L. Miner's addition. Therefore no part of lot 1, block 22, was dedicated to the public as a street, and the record shows that the whole of lot 1, block 22, has at all times remained in the exclusive possession of plaintiffs and their grantors. It has not been acquired by the city by adverse user, and the question to be determined is whether the lot has been acquired by the public by the exercise of eminent domain, which was attempted by the city of Albina under section 82 of its charter, of date February 20, 1889, p. 258, and section 83 thereof, as amended February 20, 1891, p. 945. Said section 82, in relation to widening streets and condemning private property therefor, provides that within 60 days from the adoption of the surveyor's report the council shall appoint viewers to assess damages accruing to the owners of the ground taken and benefits resulting to the owners, and "shall assign a day and place for them to meet, and shall cause a notice to be given \* \* \* and the police judge shall send by mail postpaid a copy of

such notice to each owner of property affected by such proceeding." There is no provision in the charter as to what notice must be given to the owner, that is, for what length of time before the meeting of the viewers; but the record is entirely silent as to the giving of any notice by the police judge to owners, and therefore Miner was not bound by the attempted condemnation of a portion of lot 1, block 22. When Hartman, Thompson & Powers conveyed to plaintiffs, they simply conveyed the lot as platted in Miner's addition. Therefore plaintiffs took the whole lot, and are entitled to have it quieted as prayed.

[4] The city in eminent domain proceedings is an inferior tribunal, and must strictly comply with every prerequisite of the statute. If it does not, its acts are void. *N. P. T. Co. v. Portland*, 14 Or. 24, 18 Pac. 705, 708. The decree of the trial court is affirmed.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

#### KUCKENBERG v. DURKEE et al.†

(Supreme Court of Oregon. April 14, 1914.)

BROKERS (§ 31\*)—RELATIONS TO PRINCIPAL—VALIDITY OF CONTRACT.

Where a real estate agent was authorized to sell a house and lot at a certain price, the purchaser to assume the street improvement assessments, and drew a contract of sale, omitting reference to the assessments, which the owner signed without having noticed the omission, which contract was made by the agent for his own benefit with a third person, it was not binding on the owner, and will be canceled at his suit.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 24; Dec. Dig. § 31.\*]

Department 2. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Suit by William Kuckenberg against Wilma W. Durkee and another. From a decree for plaintiff, defendants appeal. Affirmed.

This is a suit to cancel a contract of sale as a cloud upon the plaintiff's title to lot 7, block 1, East Irvington addition, Portland, Or. The circuit court rendered a decree in favor of plaintiff, and defendants appeal therefrom.

The controversy arises out of the following facts: On September 6, 1911, plaintiff executed the following instrument: "To John P. Weston: For a consideration of one (\$1.00) dollar, the receipt of which is hereby acknowledged, I hereby appoint you my exclusive agent, to make sale of the real property described as house and lot at 437 E. 25th Street North, lot 50x100, for the price of \$1,900.00, upon the following terms: \$1,000.00 cash, \$900.00 secured by mortgage thereon for 4 months at 6 per cent, and you are hereby authorized to accept a deposit to be applied on the purchase price and to execute a binding contract of sale on my be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 2, 1914.

half. I agree to pay you, my said agent, the regular commission fixed by the Portland Realty Board, or \$75.00, if a sale is made during the life of this contract, and to convey said property to the purchaser by good and sufficient deed. I also agree to furnish satisfactory abstract of title. This contract to continue and including October 6th, 1911." Plaintiff alleges in effect: That the agreement with Weston was that, in addition to the sale price named, the purchaser should assume and pay assessments on the property for street improvements amounting to \$328.50. That Weston pretended to reduce the agreement to writing, and wrongfully and intentionally left the street assessment provision out of the agency contract which he represented to plaintiff contained all the terms of the agreement, and that plaintiff believing the same and relying thereon signed the writing as prepared. That on October 6, 1911, defendant Weston fraudulently, and with intent to cheat and defraud plaintiff and secure his property for a less sum than had been agreed upon (as plaintiff's agent and in his name), pretended to make and execute in writing a contract of sale of the real estate in question to defendant Wilma W. Durkee at the price of \$1,900, less \$75 commission, payments to be made as follows: \$100 upon the execution of the contract; \$825 on October 11, 1911; and for the balance Wilma W. Durkee agreed to assume \$900 of a certain mortgage of plaintiff. That this contract was acknowledged by her and recorded in the deed records of the county and is a cloud upon the title of plaintiff. That defendant Wilma W. Durkee is a mere figurehead in the deal, and holds whatever interest she has under the pretended agreement for Weston. That said recorded contract is not in accordance with the terms of the sale Weston was authorized to make nor in accordance with the agency contract set out above. Defendants answered and denied the fraud, admitted the contract with Durkee, and alleged in substance that plaintiff had agreed to accept Weston, his agent, as a purchaser of the property, and is estopped to say that Weston is not a satisfactory purchaser; that Wilma W. Durkee is not bound to pay or assume the street assessment. They pleaded a tender made on October 11, 1911, of \$1,000, as per the sale agreement, an offer to assume the mortgage to the extent of \$900 or execute a new one for that amount, and asked that the contract of sale be enforced.

William Kuckenberg, plaintiff, testified in substance that Weston came to his house and asked if the property was for sale; that the latter agreed that he could sell it for \$1,900 above the street improvements, out of which his commission of \$75 was to be taken; that Weston asked how much the street improvements were, and that he told the boy to look it up; that he said that he knew it was \$328

and some cents; that Weston said he would come down to the store and draw the contract to that effect; that he drew the contract, and that he (Kuckenberg) read it; that they were busy at the time; that, after Weston was gone, he looked it over again and noticed that the former did not put the street assessment matter in the contract; that three days before the contract expired Weston came and wanted an abstract of title; that "he didn't wrote down the street improvements which is supposed to be in there; therefore I was afraid to let him have it;" that Weston wanted to make a sale and he went to his lawyer then.

William Kuckenberg, Jr., son of plaintiff, testified to the effect: That at the time the matter of sale was talked about at the store, by plaintiff and Weston, when they came down to the street improvements Weston said: "How much are the improvements?" That he told him it was \$328, and some cents. That Weston wrote the contract, and that he started to read one, but was interrupted several times by customers. That they finally signed them, and that when Weston was gone it was noticed that he had omitted the street improvements. It appears that the contract of sale was first written with Weston's name inserted therein, which name was afterwards changed to Mrs. Durkee. The evidence tends to show that, when the matter first came up, Weston said that he knew about the street assessment. The contract for the sale was first written and submitted to plaintiff with a provision that the purchaser should pay a street assessment of \$300. Plaintiff would not consent to a reduction of the amount, and defendant Weston declared that he would stand on the agency contract. The \$300 claim was afterwards stricken out. John P. Weston, one of the defendants, testified to the purport that he tendered plaintiff \$1,000 pursuant to the sale contract, and that the same was refused; that they objected because the street improvements were not provided for. He did not touch upon the matter relating to the agency contract. It further appears from the evidence that the abstract of title was obtained October 5, 1911; that Weston's money was tendered; that Mrs. Durkee signed the contract at the request of Weston.

George Rossman, of Portland (Wilson & Neal, of Portland, on the brief), for appellants. Otto J. Kraemer, of Portland (Chamberlain, Thomas & Kraemer, and Lester W. Humphreys, all of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It is contended by counsel for defendants that there was error in overruling the demurrer to plaintiff's complaint and in rendering a decree in favor of plaintiff. The same questions are involved in each proposition, and they may be considered together. It is clear

that Weston was the real party in interest in the contract of sale. When the plaintiff appointed Weston as his agent to sell the real estate and signed the agency contract, a fiduciary relation was created between them. Good faith and loyalty to his principal required Weston to act solely in the interest of Kuckenberg, and he could not, without the full knowledge and free consent of the latter, become the purchaser of the property either directly or through the medium of a third person. Weston was bound to disclose to his principal the exact nature of his interest in the purchase and all material facts connected. The mere fact of purchase by such agent makes the contract *prima facie* voidable. In order to sustain the sale, the burden was upon Weston to show that Kuckenberg, with a full knowledge of all the facts, consented to such a sale, and that the same was fair. This he has wholly failed to do. Instead of consenting, plaintiff objected, unless the street lien was paid by the purchaser. *Tilleney v. Wolverton*, 46 Minn. 256, 48 N. W. 908; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; 31 Cyc. 1437 et seq.; *Mechem on Agency*, § 643; *Franck v. Blazler*, 133 Pac. 800, 802; *Savage v. Savage*, 12 Or. 459, 470, 8 Pac. 754. The plaintiff desired to sell the real estate in question for the price of \$1,900, besides the street assessment thereon of \$326.50. Weston drew the agency contract authorizing the sale. The provisions in regard to the purchaser assuming or paying the street lien was omitted from the contract through the fault of Weston. As the evidence shows, Kuckenberg never consented that Weston or any one else should become the purchaser of the property for \$1,900, or the amount for which the contract of sale was made, without such purchaser assuming or paying for the street improvement. The contract executed by Weston, as agent, in the name of plaintiff, was unauthorized. It was made for Weston's benefit. Mrs. Durkee has no interest in the same except for Weston. It would be inequitable to allow Weston to take an advantage to the amount of \$326.50 by virtue of the agency contract. Plaintiff had a right to rely upon Weston, as his agent, to properly prepare the agreement according to the undisputed terms of sale which Kuckenberg stated to him when he came to the latter's house and inquired if the property was for sale. In his testimony Weston does not contradict the statements of plaintiff and his son in regard to the terms of sale; that is, that the street lien should be paid by the purchaser in addition to the \$1,900. Defendant Weston now seeks to take advantage of his own wrong in not properly drawing the contract, and asks that such an unfair proceeding be sanctioned in a court of conscience by enforcing a contract of sale made in his own interest against the protest of his principal made when the matter of the contract of sale was first broached. Plaintiff has never rati-

fied the contract in any way. This case is not like that of *Hawkins v. Hawkins*, 50 Cal. 558, and other cases relied upon by defendants' counsel, where no relation of especial trust or confidence exists between parties entering into a contract written by one of them. Weston had Mrs. Durkee sign the contract of sale for him in order to conceal from Kuckenberg the true nature of the same; that he was the real purchaser. A court of equity should not enforce the contract. Our view upon this phase of the case renders it unnecessary to consider the other questions raised and argued. The contract should be canceled.

The decree of the lower court was right, and it is affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

### SCIBOR v. OREGON-WASHINGTON R. & NAVIGATION CO.

(Supreme Court of Oregon. April 7, 1914.)

#### 1. CORPORATIONS (§ 513\*)—ACTIONS—PLEADING—ACTS OF AGENTS.

In an action against a corporation for an act committed by its agent, the acts are to be alleged as the acts of the corporation, and it is not necessary to allege that they were committed by an agent, or who was the agent, or the facts showing that the acts were within the scope of the agent's employment.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2017-2027, 2031-2084, 2036-2045; Dec. Dig. § 513.\*]

#### 2. APPEAL AND ERROR (§ 1061\*)—REVIEW — REFUSAL OF NONSUIT.

Though the plaintiff did not prove a cause sufficient to be submitted to the jury, the denial of a nonsuit will not be disturbed if the testimony afterward supplies the omission.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.\*]

#### 3. JUDGMENT (§ 199\*) — TRIAL OF ISSUES — JUDGMENT NOTWITHSTANDING VERDICT.

The motion for judgment notwithstanding the verdict, authorized by L. O. L. § 202, is only to permit a party to take advantage of error which has not before been assigned, and cannot be used to raise a question which has been included in a motion for nonsuit.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

#### 4. PLEADING (§ 364\*)—MOTIONS — STRIKING OUT PORTION.

There was no error in striking out of the answer an allegation in detail which was also included in a statement in general language under which proof of all facts suggested by the matter stricken out was admitted, except an item as to which there was no suggestion in the evidence.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.\*]

#### 5. EVIDENCE (§ 333\*)—DISCHARGE OF SHERIFF'S DEPUTY—RECORD.

In an action against a corporation for injuries inflicted by a watchman who had been appointed a special deputy sheriff in making an arrest, the admission in evidence of the record of the sheriff's office to show the discharge of the watchman as a deputy before the acts complained of, by a notation in red ink, "Canceled

9-22-11 by order E. W.,” over the brief entry showing the appointment, was not error; the appointment of deputies authorized by L. O. L. §§ 1036, 1037, continuing in force at the pleasure of the sheriff, and being terminable even by oral notice, and without regard to any request for the discharge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247-1257, 1259-1265; Dec. Dig. § 333.\*]

**6. FALSE IMPRISONMENT (§ 15\*)—PERSONS LIABLE—SCOPE OF EMPLOYMENT.**

A watchman employed by a railroad company to prevent property from being stolen from its yards was within the scope of his authority in following the thief to his home, where other property of the railroad of the same kind was found stored, and in arresting a person found there guarding the property, and the railroad was liable if he did this in an unlawful manner.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. § 15.\*]

**7. ARREST (§ 68\*)—INSTRUCTIONS—ACTS IN MAKING ARREST.**

An instruction as to the amount of force an officer may use in making an arrest, that he need not have acted according to the high standard of a cool, collected man, nor would it be enough that his conduct was that of a man that was excitable, indiscreet, and unnatural, but that the standard is the conduct of ordinarily prudent men under the existing circumstances, was not error.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 166-169; Dec. Dig. § 68.\*]

**8. MASTER AND SERVANT (§ 332\*)—INJURY TO THIRD PERSON—PUNITIVE DAMAGES—QUESTION FOR JURY.**

In an action against a railroad for injuries caused by a watchman in making an arrest, allegations in the answer justifying the acts of the watchman were sufficient to go to the jury on the question whether the railroad company ratified the watchman's acts so as to authorize the recovery of punitive damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Walter Scibor against the Oregon-Washington Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for personal injuries received during an arrest of the plaintiff. In connection with its transportation business the defendant owns terminal yards at Albina, Portland, consisting of 200 or 300 acres covered with tracks and side tracks, used in breaking up freight trains received from outside points, and for making up trains to be moved out of Portland. While in the yard loaded cars had frequently been broken open, and goods stolen therefrom. During February, 1912, defendant kept watchmen in the yard day and night to prevent such depredations. Some of the watchmen were appointed special deputy sheriffs on the request and at the expense of the defendant in order that they might have authority to arrest the despoilers. About February 23d, and prior thereto, many cars loaded with wheat had

been broken open, and many sacks of wheat stolen. W. A. Mack was such a watchman in the employ of defendant, and had been appointed special deputy sheriff for the purposes mentioned. On the night of February 23, 1912, he discovered one Thomas Scibor carrying wheat away from the yards to a point where were deposited two other sacks of wheat, marked with the brand of the sacks in defendant's cars, and later found at Thomas Scibor's dwelling about 25 or 30 sacks of wheat similarly marked, hidden away in the basement. At that time he also found this plaintiff, Walter Scibor, in the basement with said wheat, and arrested him as implicated in the larceny. Plaintiff resisted the arrest, receiving injuries and wounds at the hands of Mack, and this action was brought to recover damages for assault and for injuries received. The case was tried by a jury and resulted in a verdict for plaintiff in the sum of \$2,000. From a judgment therefor, the defendant appeals.

Charles E. Cochran, of Portland (W. W. Cotton and Arthur C. Spencer, both of Portland, on the brief), for appellant. O'Day & Haddock, of Portland, for respondent.

EAKIN, J. (after stating the facts as above). [1] At the close of plaintiff's testimony the defendant moved for a judgment of nonsuit, the denial of which defendant assigns as the first error. Two grounds for the motion are urged: (1) That the complaint does not state facts sufficient to constitute a cause of action, in that it does not allege who was defendant's agent in the assault, and does not state facts showing that such agent was acting within the scope of his employment when the arrest was made; (2) that the testimony was not sufficient to support the judgment, in that the acts of Mack, who made the arrest, were not shown to be within the scope of his employment, and therefore cannot bind defendant. The allegation of the complaint stating the facts of the assault is: "That heretofore, to wit, February 23, 1912, the defendant herein willfully and maliciously made and caused to be made an assault upon the plaintiff herein, and did willfully and maliciously strike, beat, maul, and bruise the plaintiff, and caused this plaintiff to be struck with a club or billy and revolver, and otherwise did assault and cause to be assaulted this plaintiff; whereupon," etc. Defendant insists that this is a conclusion of fact; and that it is insufficient, for the reason that it does not state by whom the defendant corporation acted, or allege facts showing Mack's relation to the corporation, or that his acts were within the scope of his employment. The allegation of the complaint is sufficient, unless it is necessary to state who was the agent acting for the defendant, and the facts showing that the wrongful acts were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

within the scope of his employment. We understand the rule to be that, in a cause of action against a corporation for an act committed by its agent, the acts are to be alleged as the acts of the corporation, and it is not necessary to allege that they were committed by an agent, or to state who was the agent, or the facts that show the acts were within the scope of the agent's employment. This is expressly stated in 5 Pl. & Pr. 92. See, also, *Cederson v. Navigation Co.*, 38 Or. 343, 62 Pac. 637, 63 Pac. 763; *Sullivan v. O. Ry. & N. Co.*, 12 Or. 392, 7 Pac. 508, 53 Am. Rep. 364. The complaint is not subject to the objection made.

[2] As to the second objection, that the evidence is not sufficient to support the judgment, defendant now insists that the motion for the judgment of nonsuit should be determined from the evidence introduced prior to the motion; but it has been held in many Oregon cases that, if the plaintiff did not prove a cause sufficient to be submitted to a jury, a denial of the motion for nonsuit will not be disturbed if the testimony afterward supplies the omission. *Dryden v. Pelton-Armstrong Co.*, 53 Or. 418, 101 Pac. 90. In this case the subsequent testimony has cured many of the omissions in plaintiff's testimony.

[3,4] The motion for judgment notwithstanding the verdict, as provided by section 202, L. O. L., is only to permit the party to take advantage of error which has not before been assigned. The question raised by the motion was included in the motion for nonsuit, and cannot again be raised by this motion. The matter stricken out of the answer on motion was an allegation in greater detail, but was included in the statement of the answer in general language, namely: "Among other kinds of freight received at said terminal yards are hundreds of cars of wheat, and, after said cars have arrived at the Albina terminal yard, the same have been broken up and a large amount of sacks of said wheat have been taken." In the trial this was recognized as a sufficient allegation to admit proof of all the facts suggested by the matter stricken out, except as to the organization of the thieves, as to which there is no suggestion in the evidence. It was not error to strike out the portion mentioned.

[5] Again, it is alleged to have been error to admit in evidence the record of the sheriff's office of the cancellation of the appointment of Mack as deputy sheriff. He was appointed August 15, 1911, at the request of E. B. Wood, special agent, Oregon-Washington Railroad & Navigation Company. The sheriff's office keeps a book, alphabetically arranged, in which are entered, very briefly, the name, address, and character or purpose of the appointment of all deputy sheriffs. Mack's appointment was noted therein as follows: "8—15—11. Mack, Wm. A., watchman, O. W. R. & N. yards. Ex. 20a." Upon

which is written in red ink, "Canceled 9—22—11, by order Ed Wood," which was testified by W. B. Hollingsworth, chief deputy. Section 1036, L. O. L., provides for the appointment of a general deputy, and section 1037 provides for special deputies or special agents to do any particular act for him. The appointment continues in force during the pleasure of the sheriff. There is no provision of law as to how the authority of a deputy shall be terminated, so that a discharge even orally is sufficient to terminate it. *Murfree on Sheriffs*, §§ 16, 17. It may be a matter of necessity that the office keep some note of appointments and cancellations; but so far as this case is concerned Mack's authority ceased on September 22, 1911. Whether Wood had authority to request the cancellation is not material, as the sheriff had power and authority to make the cancellation without request. However, the court's instructions practically informed the jury that a private citizen's right to make an arrest for a felony without a warrant is the same as that of an officer, so that it was immaterial whether Mack's appointment had been canceled.

[6] Error is also assigned in the giving of the following instruction: "A corporation is responsible for the acts of its agents, not because it authorized its acts to be done, nor, in the doing of those acts that the agent represented the corporation, but the corporation is liable because the agent was at the time doing its business, and it is a rule of law that one must so conduct his business as not to bring injury to another, and the principal is liable for the acts of his agent, when the agent is doing the business of his principal." Mack's employment related to watching defendant's property, and to prevent its being stolen. He was employed and paid by the defendant, who had him appointed deputy sheriff that he might make arrests if any one criminally interfered with defendant's property, for which services he was to be paid by the defendant. Defendant was aware that some property had been stolen and contemplated that other property would be carried off, and in such case it is not to be presumed that the watchman was not to follow the thieves and recapture the property, especially when he was given power to make arrests in such cases. In this case, when Mack followed some of this property being carried away, he was still defendant's agent in going to Thomas Scibor's home, finding the property, and arresting the thief. His work was not at any particular location, nor did it confine him to one place, being to watch all the property in the yard, which would necessarily include recapturing any of it that was being taken away. It was defendant's business that Mack was put there to perform. The defendant may not have directed his actions nor approved thereof, yet, even though he violated instructions, the defend-

ant was liable for the wrong if it was committed while acting within the scope of his employment. The only question is: Was Mack acting for the defendant in performing its business? If he was and did it in an unlawful manner, the principal is liable. This is made plain in *French v. Cresswell*, 13 Or. 418, 11 Pac. 62. There is no suggestion in the evidence that Mack did not have authority to leave the right of way or yards of defendant, nor that he stepped aside from his employment as a watchman, and was acting for the sheriff or the county. On the contrary, his employment was not simply that of a watchman, but included, also, the duties of deputy sheriff as to anything necessary to be done in his employment as watchman, even though they took him away from the cars in his charge. The appointment by the sheriff expressly limited his powers to the particular purpose named in the appointment, and expressly exempted the sheriff from liability for his compensation.

[7] Defendant also objects to the instructions so far as they limit the amount of force that may be used by an officer in making an arrest to the amount necessary to so do, and no more. On this question the court said: "The law makes reasonable allowances for the infirmities of human judgment under the influence of human passion, and it does not require him to measure with methodical precision the degree of force necessary to arrest a person or repel an apparent attack, or to compel submission to an officer; it simply requires all men, whether under the heat of sudden passion or extraordinary circumstances, to exercise such reasonable discretion in the use of force as under those peculiar circumstances may seem to be necessary." At the close of the instructions, when defendant excepted as above, the court said: "Oh, yes, there is a reasonable latitude allowed. Of course the law makes an allowance for the imperfections of humanity, and it says we give you a man, a reasonable man, by which to determine whether a man acts hastily in a given case or not. We do not ask you to say that he would have acted according to the high standard of a cool, collected man, nor would it be enough that his conduct were that of a man that was excitable, indiscreet, and unnatural; but it says the standard which you shall adopt to determine this question whether he acted reasonably, in the light of all the surrounding circumstances, is the conduct of the ordinarily prudent man under all the existing circumstances, and, if his conduct was that of the ordinarily prudent man under the existing circumstances, then the law says he has done all that can be exacted of him." We think the court fairly presented to the jury the measure by which they were to judge whether Mack used excessive force in arresting plaintiff.

[8] Defendant also excepted to the action of the court in giving to the jury the right

to find punitive damages. The court assumed there was some evidence from which the jury might infer that the defendant ratified Mack's acts complained of here, and the existence of such evidence was necessary to justify the instruction. The defendant, by his answer, says: "That said W. A. Mack, as such deputy sheriff, of Multnomah county, Or., for the purpose of apprehending the thieves and criminals engaged in the enterprise of abstracting said wheat and stealing the same, did keep a surveillance on the wheat cars which came into the Albina yard terminal, and did thereupon apprehend and arrest one Thomas Scibor, a brother of the plaintiff, who had then and there in his possession certain of the defendant's wheat which the said Thomas Scibor had taken, stolen, and carried away from one of defendant's cars, located in said yard terminal; that said Thomas Scibor resided at 150 Fargo street in the city of Portland, Or., and said W. A. Mack obtained said stolen wheat so found in the possession of said Thomas Scibor; \* \* \* the said W. A. Mack did go to the said house at 150 Fargo street for the purpose of keeping surveillance upon the said stolen wheat, and for the purpose of arresting the said Thomas Scibor, and found the plaintiff herein in possession and charge of said wheat, who declared to the said W. A. Mack that he was the owner of the same. \* \* \* Whereupon the plaintiff resisted the said W. A. Mack, and did then and there assault and beat and violently attack the said W. A. Mack with a mop, and did strike him upon the arms and body, and immediately thereafter did seize a teakettle from the stove in said house, which teakettle contained boiling water, and did strike said W. A. Mack upon and about the head and body of him, the said W. A. Mack, and did scald and burn the said W. A. Mack until the skin of his face, head, shoulders, and arms dropped away, whereupon the said W. A. Mack, for the sole and only purpose of defending himself from great bodily harm, and for the purpose of restraining and subduing the plaintiff in making said arrest, and using no more force than was necessary in the premises, did then and there forcibly restrain said plaintiff and arrest him, \* \* \* and that the foregoing facts constitute the same transaction of which the plaintiff complains in his complaint, and not otherwise." And defendant thereby seeks to defend and justify the said acts of Mack. These allegations were sufficient to go to the jury upon the question as to whether defendant had knowledge of the particulars of the transaction and ratified them; and there was no error in the instruction complained of as to punitive damages.

Finding no reversible error, the judgment is affirmed.

McBRIDE, C. J., and BEAN and McNA-  
RY, JJ., concur.



**WILLIAMSON et al. v. ROBERTS.**

(Supreme Court of Oregon. April 14, 1914.)

**1. TRUSTS (§ 72\*)—EXPRESS TRUSTS—TAKING TITLE TO LAND PAID FOR WITH ANOTHER'S MONEY.**

Where a purchaser of land, on securing a loan, has the title transferred directly to the creditor, the latter becomes the trustee of the title for the purchaser.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. § 72.\*]

**2. APPEAL AND ERROR (§ 894\*)—REVIEW—RETRIAL IN APPELLATE COURT.**

On appeal in a suit for an accounting, where the abstract brings up the record relating to the interlocutory decree, but not the itemized account filed by the defendant pursuant thereto, nor plaintiffs' answer, the case upon the accounting is not in the Supreme Court for retrial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8637-3644; Dec. Dig. § 894.\*]

On petition for rehearing. Former decree modified, and decree of lower court affirmed. For former opinion, see 138 Pac. 840.

**EAKIN, J.** [1] The petition by defendant for rehearing is based upon the theory that he purchased the ground with his own money for himself, and therefore no trust resulted; but the evidence quoted in the petition shows that the money advanced by defendant was a loan to plaintiffs. Therefore the payment was by plaintiffs, and the title was taken in defendant's name as security for the repayment thereof. The case is clearly within the rule announced in *Hall v. O'Connell*, 52 Or. 164, 95 Pac. 717, 96 Pac. 1070.

[2] In plaintiffs' motion for rehearing attention is called to the fact that, while the abstract brings up the record relating to the interlocutory decree entered July 10, 1912, it does not bring up the itemized account filed by defendant in pursuance of the interlocutory decree, and plaintiffs' answer thereto making the issues upon the accounting, presenting only alleged errors by the court in rendering the interlocutory decree.

Therefore the case upon the accounting is not here for retrial, and the former decree of this court will be modified by affirming the decree of the lower court.

It is so ordered.

**McBRIDE, C. J., and BEAN, J., concur.**  
**McNARY, J., not sitting.**

**GARETSON-HILTON LUMBER CO. v. HINSON.**

(Supreme Court of Oregon. March 31, 1914.)

**1. CORPORATIONS (§ 216\*)—LIABILITY OF STOCKHOLDER—WHAT LAW GOVERNS.**

In the absence of statute in the state in which a person resides, imposing upon him a particular liability as a stockholder in a foreign corporation, the statute of the state incorporat-

ing it or the articles which it adopts afford the rule regulating his liability to its creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. § 216.\*]

**2. CORPORATIONS (§ 269\*)—PRESUMPTIONS—LAWS OF OTHER STATE.**

Where the complaint, in an action by a foreign corporation to enforce the liability of a stockholder in this state, did not set forth the provisions of the foreign statute under which plaintiff was organized or state any charter provision respecting the liability of its stockholders, it would be assumed that the charter was silent on that subject, and that the foreign law governing the case was the same as the common law or the statute declaratory thereof prevailing in this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 980, 1149-1159, 2277; Dec. Dig. § 269.\*]

**3. CORPORATIONS (§ 254\*)—INDEBTEDNESS—LIABILITY OF STOCKHOLDER—TRUST FUND.**

The trust fund doctrine, as applicable to the assets of a corporation which is a going concern, does not obtain in this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 870, 892; Dec. Dig. § 254.\*]

**4. CORPORATIONS (§ 544\*)—INSOLVENCY—LIABILITY OF STOCKHOLDER—TRUST FUND.**

When a corporation either suspends its business or becomes insolvent and its assets are in possession of a court of equity for final settlement and distribution, its capital stock constitutes a trust fund upon which general creditors have a lien for the payment of their demands, but mere insolvency does not of itself convert corporate property into a trust fund.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. § 544.\*]

**5. CORPORATIONS (§ 252\*)—STOCKHOLDER'S LIABILITY TO CREDITOR—CONDITIONS PRECEDENT.**

It is not essential that a creditor should secure a judgment against an insolvent corporation and have an execution issued and returned nulla bona, as a condition precedent to a suit in equity for relief against a stockholder, since the performance of vain things is unnecessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.\*]

**6. CORPORATIONS (§ 259\*)—STOCKHOLDER'S LIABILITY TO CREDITOR—FORM OF ACTION.**

The proper remedy of a creditor of an insolvent corporation to reach a fund alleged to have been paid to a stockholder as a dividend in liquidation is by a suit in equity, and not by an action at law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052-1067, 2272; Dec. Dig. § 259.\*]

**7. CORPORATIONS (§ 153\*)—ENFORCEMENT OF STOCKHOLDER'S LIABILITY TO CREDITOR—PARTY PLAINTIFF.**

A corporation which has disposed of its property and ceased to transact any business, thereby necessitating the employment of another corporation in clerical work necessary to the management of its affairs and resulting in an approved claim for such service, without some restoration of its corporate life cannot institute or maintain a suit for the recovery of a dividend paid out to a stockholder in liquidation, but the suit should be instituted by such creditor corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 579, 580; Dec. Dig. § 153.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Garetson-Hilton Lumber Company against W. B. Hinson. Judgment for defendant, and plaintiff appeals. Affirmed, and action dismissed without prejudice.

This is an action to recover money. The material averments of the complaint are to the effect that on March 9, 1903, the plaintiff, the Garetson-Hilton Lumber Company, became, ever since has been, and now is, a corporation organized and existing under the laws of the state of Missouri, having at its creation a fully paid-up capital of \$30,000, divided into 300 shares of the par value of \$100 each; that on April 20, 1904, its stock was increased to \$50,000, fully paid-up capital, and divided into 500 shares, of which the defendant, W. B. Hinson, then held and now is the owner of 55 shares; that on May 18, 1910, by authority of the plaintiff's board of directors, all the real and personal property of the corporation, other than bills receivable, were sold and the proceeds arising therefrom were, pursuant to a dividend duly declared, distributed ratably to all its stockholders including the defendant; that thereafter all sums of money due the corporation that could be collected were accumulated, and other dividends thereof were declared whereby the defendant received his proportional part; that by oversight and neglect of the board of directors no provision was made for the payment of any debt that might be incurred subsequent to such distribution of the corporate assets; that thereafter a claim for \$2,000 against the plaintiff was presented to it by the Garetson-Grason Lumber Co., another Missouri corporation, for clerical services rendered by its agents in accounting for and managing the affairs of the plaintiff; that the officers and directors of the latter corporation recognized the validity of such claim, but, having no assets with which to liquidate the demand, it was resolved January 25, 1912, by the stockholders by a vote of more than two-thirds of all of the stock of the plaintiff that its board of directors be authorized to call upon the stockholders to refund \$4 per share of their stock; that the sum so due from the defendant is \$220, but upon a demand therefor he refused to pay any part thereof. A demurrer to the complaint on the grounds, *inter alia*, that it did not state facts sufficient to constitute a cause of action and that the plaintiff did not have legal capacity to sue, was sustained. The plaintiff declining further to plead, the action was dismissed, and it appeals.

Q. L. Matthews, of Portland (Christopherson & Matthews, of Portland, on the brief), for appellant. Robert Tucker, of Portland (Tucker & Bowe, of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1, 2] Is an action at law the proper remedy herein, and is the Garetson-Hilton

Lumber Company the proper party plaintiff, are the questions to be considered. As a preliminary matter, it may be stated that in the absence of an enactment by the state in which a person resides, imposing upon him a particular liability as a stockholder in a foreign corporation, the statute of another state giving life to such artificial being, or the articles which it adopts, afford the rule regulating the liability to its creditors when suits are brought to establish a legal responsibility against a resident stockholder. *Smith v. Huckabee*, 53 Ala. 181; *Shaw v. Boylan*, 18 Ind. 384; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Seymour v. Sturgess*, 28 N. Y. 134; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Ex Parte Van Riper*, 20 Wend. (N. Y.) 614. The complaint herein does not set forth the provisions of the statute of Missouri under which enactment the plaintiff was organized, nor does the initiatory pleading state any of the clauses of the charter adopted by the corporation respecting the liability of its stockholders, and in default thereof it will be assumed that the articles of incorporation are silent upon this subject, and also presumed that the law of Missouri governing the case is the same as the principles of the common law prevailing in or the statute in recognition thereof enacted by Oregon. *Goodwin v. Morris*, 9 Or. 322; *Cressey v. Tatom*, 9 Or. 541; *Scott v. Ford*, 52 Or. 288, 97 Pac. 99; *Young v. Young*, 53 Or. 365, 100 Pac. 656; *De Vall v. De Vall*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705; *Long v. Dufer*, 58 Or. 162, 113 Pac. 59. No reference will therefore be made to the laws of the state under which the plaintiff was organized, except so far as the allusions to the statute of Missouri are made in decisions of the courts of that state upon the questions herein involved.

[3, 4] Whatever opinions may have been originally announced by the federal and state courts of this country, respecting the trust doctrine as applied to a corporation, the legal principle is now established that, until a corporation has either suspended its business or has become insolvent and its assets have been placed in the possession of a court of equity for administration and are in the course of final settlement and distribution, the capital stock of a corporation does not constitute a trust fund upon which general creditors have a lien for the payment of their demands. *Thom. Corp.* (2d Ed.) § 3421.

The existence of the trust doctrine as applicable to the assets of a corporation which is a "going concern" has been denied by this court. *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 34 Pac. 692, 35 Pac. 854, 42 Am. St. Rep. 756. The rule has been settled by our adjudications that mere insolvency does not of itself convert corporate property into a trust fund; but, when a corporation ceases to transact business and is insolvent, its assets then constitute a trust fund for the payment

of the corporate debts without the intervention of a court of equity to administer upon the property for the purpose of a final settlement. *Macbeth v. Banfield*, 45 Or. 553, 78 Pac. 693, 106 Am. St. Rep. 670; *Williams v. Commercial Natl. Bank*, 49 Or. 492, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857. In order to subject such assets to the payment of a creditor's demand, a resort to a court of equity is essential. *Ladd & Bush v. Cartwright*, 7 Or. 329; *Hodges & Wilson v. Silver Hill Mining Co.*, 9 Or. 200; *Aldrich v. Anchor Coal Co.*, 24 Or. 32, 32 Pac. 756, 41 Am. St. Rep. 831; *Hawkins v. Donnerberg*, 40 Or. 97, 66 Pac. 691, 908; *Macbeth v. Banfield*, supra.

[6] The performance of vain things are unnecessary, and hence it is not essential that a creditor should secure a judgment against an insolvent corporation establishing his demand, and have an execution issued and returned nulla bona as a condition precedent to invoking equitable intervention to obtain relief against a stockholder. *Shipman v. Portland Const. Co.*, 64 Or. 1, 128 Pac. 989.

[8] From the principle thus established in this state the proper remedy of a creditor of an insolvent corporation to reach the fund alleged to have been paid to a stockholder as a dividend in liquidation is by a suit in equity and not by an action at law as commenced in the case at bar.

[7] The remaining question is whether or not the Garetson-Hilton Lumber Company is the proper party plaintiff. "Where dividends," says an author, "were paid to a stockholder at a time when the bank was insolvent, and in disobedience of the banking statute, it was held that the liability to repay was to the corporation and was enforceable by it." 5 *Thomp. Corp.* (2d Ed.) § 5360. In support of the language thus quoted, the case of *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875, is cited. The text-writer, mentioned, further observes: "It has been held that either the corporation or its assignee might recover a dividend paid by mistake." *Id.* § 5363. As upholding the latter excerpt, the case of *Skrainka v. Allen*, 7 Mo. App. 434, is relied upon *inter alia*. The decision in *Gager v. Paul*, supra, was evidently predicated upon a statute, construing which the court says: "Section 1765, which prohibits payment of dividends by insolvent corporations generally, seems to recognize that," such "liability is to the corporation, by providing that such liability is to restore the full amount, except in certain cases. Restoration can only be made to the source from which the dividends came." In *Skrainka v. Allen*, 7 Mo. App. 434, 441, the conclusion reached was based upon a clause of the statute of Missouri which is set forth in the opinion. In that case, the plaintiff, having obtained a judgment against a corporation, caused an execution to be issued and returned nulla bona and thereupon moved

for leave to issue execution against a stockholder. It would seem that under the statute of Missouri a judgment creditor of a corporation, upon a motion therefor, might obtain the issuance of an execution against a stockholder for an unpaid subscription of stock. *Ersine v. Loewenstein*, 82 Mo. 301, 305. In referring in that case to such procedure the court remarks: "This motion takes the place, under the statutory provision, of the suit in equity, at common law, to reach the assets in the hands of the stockholder." The rule announced in Missouri and in Wisconsin in construing statutes of the respective states is not controlling in Oregon, where no enactment regulating the procedure exists.

It may be conceded that, when a corporation is a "going concern," it is a proper party plaintiff to sue for or to prevent a misappropriation of its property; but, if it fails or refuses to perform that duty, the person interested in recovering or protecting the corporate assets may institute and maintain the suit. *North v. Union S. & L. Ass'n*, 59 Or. 483, 117 Pac. 822. When, however, a corporation has disposed of all its property and ceased to transact any business, thereby necessitating the employment of another corporation to perform the essential clerical work required in the management of its affairs, it is believed that, upon principle, it is in such a comatose state, preceding final dissolution, that without some act of revivification whereby its animation is restored, it has not sufficient vitality to institute or maintain a suit for the recovery of any part of a dividend paid out in liquidation.

Such being the case, the plaintiff is not a proper party plaintiff, and the suit should have been instituted by the Garetson-Grason Lumber Company, the corporation which it is alleged rendered such service. The judgment is affirmed, except that the action should be dismissed without prejudice, and it is so ordered.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

#### BISBY v. QUINBY et al.

(Supreme Court of Kansas. April 11, 1914.  
Rehearing Denied May 18, 1914.)

(Syllabus by the Court.)

#### JUDGMENT (§ 785\*)—LIENS—PRIORITIES.

A surety was induced to sign a note by an agreement that the land to be purchased with the proceeds should be sold and the note paid. Failing to secure performance of the agreement, he obtained from the principal, who had disposed of the land in exchange for other land, an order upon the holder of the legal title to the latter to pay such surety all money received from the sale thereof above a certain amount, which order was assented to by such holder. In this situation a judgment creditor brought suit to subject the land to her judgment against the

principal, the real owner, in which action the surety intervened, and, paying off the note in full, sought a lien on the land to secure himself. The trial court found that the legal title was held for the use and benefit of the principal who owned the land; that the surety was entitled to a lien thereon, and the judgment holder to the next lien, and ordered the land sold to satisfy the claims against it. *Held*, that such surety was entitled to the relief granted him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1353-1362; Dec. Dig. § 785.\*]

Appeal from District Court, Morris County. Action by Mrs. J. E. Bisby against Frank J. Quinby, and W. H. Dodderidge interpleaded. From an adverse judgment, plaintiff appeals. Affirmed.

Clarence A. Crowley, of Council Grove, for appellant. Nicholson & Pirtle and D. H. Brown, all of Council Grove, and Monroe & Roark, of Topeka, for appellees.

WEST, J. In December, 1909, the plaintiff recovered a judgment against the defendant Quinby for \$2,300 and interest for money he had previously borrowed of her. He was engaged in the milling business at Council Grove, and in September, 1906, he borrowed \$7,000 of the Farmers' & Drovers' Bank in order to meet certain indebtedness at the bank and enable him to procure some Nebraska land in exchange for his mill property, giving two notes of \$3,500 each, one signed by the defendant Dodderidge and the other by Quinby's father-in-law, S. C. Houck. The court found that to induce Dodderidge to become surety Quinby agreed that the Nebraska property was to be sold and the proceeds applied to the payment of the note signed by Dodderidge. Quinby, however, traded the Nebraska land for Colorado land and so disposed of that as to become the owner of 320 acres in Morris county, Kan., subject to a mortgage, placing the latter property in the hands of W. D. Houck, who mortgaged it for \$5,000 to pay off the incumbrance. Before the plaintiff recovered her judgment Quinby gave Dodderidge a written order, directing W. D. Houck, upon sale and settlement of the farm, to pay Dodderidge all money received above the mortgage of \$5,000 and \$3,500 paid to S. C. Houck, "the total amount to be retained by you \$3,500 above the mortgage." This order was presented to Houck by Dodderidge and assented to by the former. In September, 1910, Dodderidge paid his note in full. The note signed by S. C. Houck has been paid. The plaintiff brought this action to subject the land to the lien of her judgment, in which action Dodderidge intervened. The court awarded Dodderidge an equitable lien on the Morris county land to secure the amount of the debt paid by him, and gave the plaintiff a lien thereon secondary and inferior to that of Dodderidge, both subject to the mortgage of \$5,000, and ordered the

land sold and the proceeds applied accordingly. The plaintiff appeals, and insists that she should be given a lien prior to that of Dodderidge.

As the Houck note has been paid the plaintiff's lien appears to be subordinate only to the mortgage of \$5,000 and the amount of the Dodderidge note, but what the value of the 320 acres of land is and what security this leaves the plaintiff the record does not show. The plaintiff contends that, as she discovered and unearthed the fraud by which Quinby was covering up the title to the land and secured an express finding that it was held by Houck for the use and benefit of Quinby, her lien should not be postponed for the claim of Dodderidge, who had nothing but a written order to pay him out of the proceeds when the land should be sold, and that at any rate a lien on the proceeds is not a lien on the land. Dodderidge, failing to be reimbursed out of the Nebraska land, secured the written order on Houck to pay upon the sale and settlement of the Kansas land, so that whatever equitable right this agreement and this order gave was vested in him before the plaintiff had recovered her judgment against Quinby. It is argued that Dodderidge must have known that Houck was holding the title for Quinby, and, resting upon his secret and unrecorded agreement and order, he permitted the plaintiff to expose the fraud already known to himself, and should not now be allowed to profit by the advantage he had thus secretly gained. But it might be said that Dodderidge in reality furnished a part of the consideration for the land which in the first instance was to be sold and his note paid from the proceeds. Tracing the deals and their proceeds into the Kansas land, he obtained the order in question, which, being given by Quinby, the real owner, and accepted by Houck, the holder of the paper title, was good as between himself and them, and the property was thus burdened when the plaintiff became a judgment creditor of Quinby. Hence when she procured the application of her lien to the land in question it was only to such interest therein as Quinby actually had. It is asserted and denied that Dodderidge after his intervention did much to get at the real facts, and thus assisted the plaintiff in making the truth known. At all events it is clear that if we treat the situation as one giving him an equitable lien, it was prior to the judgment lien of the plaintiff. True he did not liquidate the note, and thus actually pay any part of the purchase price, until after this action was brought to subject the land to the plaintiff's judgment, but he was entitled to security for his liability on the note and by such payment he made certain the fact and amount of Quinby's liability to him, and the plaintiff was in no wise harmed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereby. It is stated that Quinby agreed to place the title to the Nebraska land in Dodderidge, but we find no such evidence or finding in the record, and must therefore consider the matter in the light merely of the agreement to sell and pay out of the proceeds. Authorities are cited for and against the theory of an equitable mortgage. While the name is not important, probably the right of Dodderidge to look to the land or its proceeds might well be called an equitable lien to secure his reimbursement to the extent that he had in effect furnished the money to pay for the land.

"In courts of equity the term 'lien' is used as synonymous with a charge or incumbrance upon a thing, where there is neither *jus in re*, nor *ad rem*, nor possession of the thing. The term is applied as well to charges arising by express engagement of the owner of property, and to a duty or intantion implied on his part to make the property answerable for a specific debt or engagement." 1 Jones on Liens, 2d Ed. § 28.

"It follows, therefore, that in a large class of executory contracts, express or implied, which the law regards as creating no property right nor interest analogous to property, but only a mere personal right and obligation, equity recognized, *in addition to the obligation*, a peculiar right over the thing with which the contract deals, which it calls a 'lien,' and which, though not property, is analogous to property, and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing." *Pomero's Equity Jurisprudence* (2d Ed.) § 166. In one case the maker of a deed of trust to secure certain promissory notes agreed with the holder that, in consideration of his forbearance in foreclosing, the land should be cultivated in cotton for one year, one-half to go to the holder to be credited on the notes, giving lien on the whole crop for the payment of one-half. During the year the maker died insolvent, and it was held that the holder of the mortgage had an equitable lien on the cotton superior to that of the creditors of the maker. *Kirksey, Adm'r, v. Means*, 42 Ala. 426. In another case a Society of Shakers, an unincorporated community holding its property in common, had given a promissory note, executed by its trustees, in return for money which went to increase the funds of the society. It was held by the United States Court of Appeals of the Sixth Circuit that the holder was entitled to an equitable lien on the property of the Shakers. *Society of Shakers v. Watson*, 68 Fed. 730, 15 C. C. A. 632; *Id.*, 163 U. S. 704, 16 S. Ct. 1206, 41 L. Ed. 313. In the opinion *Severens, J.*, speaking for Judges *Taft, Lurton*, and himself, said: "It is to such a case that the jurisdiction of a court of equity is peculiarly applicable. By the

flexibility of its procedure to fix the liability and the scope of the remedies it is authorized to employ for its satisfaction, it can furnish complete relief where the remedy of the common law is neither plain nor adequate. \* \* \* The note was not effectual against anything but this changing body, and that only by supposing it to be intended to be a charge against the property which all the members of the society had concurred in putting in a common mass in the hands of the trustees of the society. \* \* \* And the consideration of the note went to augment the fund upon which it is sought to charge it. At page 738 of 68 Fed., at page 640 of 15 C. C. A.

It is said of an equitable lien: "It is not a right of the property in the subject-matter of the lien, nor a right of action therefor, nor does it depend upon possession, but is merely a right to have the property subjected to the payment of a debt or claim, and it applies as well to charges arising by express engagement of the owner of property as to a duty or intention implied on his part to make the property answerable for a specific debt or engagement." 25 Cyc. 662. See note to *Bell v. Pelt*, 4 L. R. A. 247; *Foster v. Bank*, 71 Kan. 158, 80 Pac. 49, 114 Am. St. Rep. 470, 6 Ann. Cas. 44; *Charpie v. Stout et al.*, 88 Kan. 318, 128 Pac. 396; *Mason v. Saunders et al.*, 89 Kan. 300, 131 Pac. 562; 3 Words and Phrases, Jud. Det., 2440, 2441.

While the case is not free from doubt, we conclude and hold that under the broad principles of equity the trial court was justified in holding as it did.

The judgment is therefore affirmed. All the Justices concurring.

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STATE ex rel. DAWSON, Atty. Gen., v.  
AKERS, State Treasurer, et al.  
(Supreme Court of Kansas. April 11, 1914.  
Rehearing Denied May 18, 1914.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS (§ 1\*)—DEFINITION—"NAVIGABLE"—"PUBLIC WATERS."

The main test of navigability in this country is ascertained by use or by public acts or declarations. The foundation for navigability in law is navigability in fact following the appropriation to public use and its publicity. The ebb and flow of the tide has nothing to do with making waters navigable. To say that waters are public is equivalent in a legal sense to saying they are "navigable."

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4675-4684; vol. 8, p. 7728; vol. 6, pp. 5837, 5838; vol. 8, p. 7774.]

2. NAVIGABLE WATERS (§ 1\*)—RIVERS OF THE STATE—PUBLIC HIGHWAYS.

By the declarations of the United States in the several acts of Congress relating to the survey and disposal of the public lands, and by other legislation relating to the western coun-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

try out of which Kansas territory was carved, the Mississippi river and its navigable tributaries, which include the Kansas and Arkansas rivers in Kansas, were constituted public highways, and recognized as navigable streams in the fullest and broadest sense.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*]

**3. COMMON LAW (§ 12\*)—NAVIGABLE WATERS (§ 36\*)—COMMON-LAW DEFINITION—BED OF STREAM—TITLE.**

The Supreme Court of the United States having in 1851 repudiated the common-law definition of navigable waters, and the same test of navigability having been repudiated by many of the states in the Union before the act of the territorial Legislature of 1855 adopting the common law was enacted, the strict rule of the common law defining navigable waters was never a part of the common law of Kansas; Kansas entered the Union upon an equal footing with the other states, and upon her admission absolute property in and dominion and sovereignty over the soils under the navigable and public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the federal government with respect to navigation.

[Ed. Note.—For other cases, see *Common Law*, Cent. Dig. § 10; Dec. Dig. § 12.\* *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. Dig. § 36.\*]

**4. ADVERSE POSSESSION (§ 7\*) — BED OF STREAM—TITLE—ADVERSE POSSESSION.**

As against the state, no title to the waters or bed of a public stream could be acquired through private use or occupancy, whether adverse or by permission, however long continued, or by prescription.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 24-42; Dec. Dig. § 7.\*]

**5. NAVIGABLE WATERS (§ 36\*) — BED OF STREAM—TITLE—IMPOSITION OF ROYALTY.**

In Kansas all the legislative power that the people possess is vested in the Legislature, and it is within the power of the Legislature to conserve the use of the products of the public streams for the benefit of all the people by imposing a royalty upon the taking therefrom of sand for commercial purposes, so long as it does nothing either to violate its duty to hold the title as trustee for the benefit of the people, or to interfere with the superior rights of Congress to control navigation.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

**6. STATUTES (§§ 23, 283\*) — ENACTMENT — VALIDITY—PRESUMPTION.**

Chapter 259 of the Session Laws of 1913 originated in the House of Representatives as House Bill No. 219. It regularly passed the House on three separate readings and went to the Senate, where it was read twice separately and referred to the judiciary committee. The committee reported another bill as a substitute, the body of which differed essentially from the original, but the title remained the same, and thereafter the bill was known as substitute for House Bill No. 219, and in that form was passed by the Senate and the House. As the title of the bill remained the same, and the substitute is germane to the title, and the result accomplished was the same as if the original bill had been amended in respect of the new matters contained in the substitute bill, *held*, that the two separate readings of the original in the Senate and the previous readings of the original in the House should be treated as sufficient to make the final passage of the sub-

stitute bill in both houses a passage upon third reading.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 26, 27, 382; Dec. Dig. §§ 23, 283.\*]

**7. CONSTITUTIONAL LAW (§ 80\*)—NAVIGABLE WATERS (§ 36\*)—BED OF STREAM—REMOVAL OF SAND—ROYALTY—VALIDITY OF STATUTE—JUDICIAL POWERS.**

Other objections to the act considered, and *held*, that it is valid and constitutional.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 140, 143-147; Dec. Dig. § 80.\* *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

(Additional Syllabus by Editorial Staff.)

**8. MANDAMUS (§ 73\*)—GROUNDS—PUBLIC DUTIES.**

Mandamus will lie on the relation of the Attorney General to compel the State Treasurer and State Auditor to perform duties imposed on them by statute with respect to a fund derived from royalties, pursuant to *Sess. Laws 1913, c. 259*, on sand removed from navigable streams.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 115, 135, 144-149; Dec. Dig. § 73.\*]

**9. MANDAMUS (§ 152\*)—PARTIES.**

In mandamus it is proper to make persons defendants from whom performance of no duty is sought, but who might be affected by the judgment.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 293; Dec. Dig. § 152.\*]

Original action in mandamus by the state, on the relation of John S. Dawson, Attorney General, against Earl Akers, as State Treasurer, and others. Judgment of dismissal as to defendant F. J. Schwartz, and judgment for plaintiff as to all the other defendants.

John S. Dawson, Atty. Gen., and F. S. Jackson, of Eureka, for plaintiff. H. S. Sluss, of Wichita, H. C. Root, of Topeka, Johnson & Lucas, of Kansas City, Mo., McAneny & Alden, of Kansas City, Kan., and Francis C. Downey, of Kansas City, Mo., for defendants.

PORTER, J. This is an original action in mandamus, the purpose of which is to test the constitutionality of chapter 259 of the Session Laws of 1913. The statute attempts to regulate the sale and taking of sand and other natural products from navigable rivers and streams which are the property of the state, and to provide for payment to the state of royalties for sand and other products taken from the rivers for commercial purposes. The defendants other than the State Treasurer and the State Auditor are persons and firms engaged in the business of taking sand from the rivers and offering the same for sale. If the statute is constitutional, it is the duty of the sand companies to pay into the state treasury the royalties fixed by the executive council, and such moneys immediately become a part of the general revenue fund, or of the state school fund, according to whether the sand was taken from islands belonging to the school fund, or from

the rivers; and it would likewise become the duty of the State Auditor to keep a record of such payments accordingly. The immediate question involves the duties of the State Treasurer and the State Auditor in the manner in which the fund derived from the sale of the sand shall be accounted for. The state, on the relation of the Attorney General, therefore brings the action to compel compliance by these officers with the duties imposed by the statute with respect to the fund. Since the act took effect, payments of royalties have been made by some of the defendants under protest, and they have been joined as persons interested in the result of the litigation.

[8, 9] The objection that the state has other adequate remedies and that mandamus should not issue cannot be sustained. The duty sought to be compelled is one of a purely public nature, and the writ of mandamus affords the appropriate remedy. *Bobbett v. State*, 10 Kan. 9, 14; *State v. McLaughlin*, 15 Kan. 228, 22 Am. Rep. 264. The defendants other than the state officers are proper defendants if they have any material interest, however slight, in the result of the litigation. *State v. Dolley*, 82 Kan. 533, 108 Pac. 846.

Chapter 259 of the Session Laws of 1913 is an act "relating to the removal of natural products from rivers and islands belonging to the state." The first section of the act makes it unlawful for any person to take from "the bed of any navigable river or any other river which is the property of the state of Kansas any sand, oil, gas, gravel or mineral, or any natural product whatsoever from any lands lying in the bed of any such river," except in accordance with the act. Section 2 provides for obtaining the consent of the executive council of the state upon such terms as to compensation and upon such conditions as the council may determine to be just and proper, and that such compensation to the state shall be paid at such times and under such terms of supervision as the council may direct; and provides that no contract shall be entered into giving any person, company, or corporation any exclusive privilege of making purchases under the act. It also contains a provision that nothing in the act "shall prevent the taking without payment therefor of any sand or gravel to be used exclusively for the improvement of public highways or to be used exclusively in the construction of public buildings or for other public use or to be used exclusively by the person taking same for his own domestic use." The same section provides that, where any navigable stream extends into or through any drainage district, one-third of the proceeds of such natural products which the state may sell from within or beneath a portion of the channel of such streams lying within such district shall be paid to the treasurer of such drain-

age district to be expended only by the district for the purposes for which it was created; the other two-thirds of such proceeds to be paid into the state treasury. In section 3, the executive council is authorized to make and publish all needful rules, terms, and conditions for taking, purchasing, or selling sand or other products taken from the streams of the state. Section 6 reads as follows: "For the purposes of this act the bed and channel of any river in this state or bordering on this state to the middle of the main channel thereof and all islands and sand bars lying therein shall be considered to be the property of the state of Kansas unless this state or the United States has granted or conveyed an adverse legal or equitable interest therein since January 29, 1861, A. D., or unless there still exists a legal adverse interest therein founded upon a valid grant prior thereto; provided, that nothing in this act shall affect or impair the rights of any riparian land owner or lawful settler upon any island which is state school land."

These are the only portions of the act which are material for the present consideration. The streams from which sand is and has been taken by the defendants are the Arkansas and Kansas rivers, both meandered streams. The Kansas river is meandered from its mouth to a point above the city of Topeka. It lies wholly within the state and empties into the Missouri river, which is likewise a meandered stream. The defendant Stewart-Peck Sand Company is the owner of several tracts of land bordering on the Kansas river. The title to some of these riparian lands was vested in Wyandotte Indian allottees by patents from the United States under the treaty of 1855. Other tracts are portions of land originally patented to Silas Armstrong, a Wyandotte Indian, under the Sandusky treaty with the Wyandottes ratified in 1842 and the treaty of January 1855. The Stewart-Peck Sand Company derives title to its riparian lands through mesne conveyances from Indian allottees under these treaties. The Stewart-Peck Southwestern Sand Company claims the title to riparian lands along the south bank of the Kansas river in the city of Topeka, which is part of a tract patented by the United States to Thomas G. Thornton, December 5, 1861. Defendant Wear Sand Company is the riparian owner and operates upon a tract of land on the south bank of the Kansas river in the city of Topeka, and derives its title through mesne conveyances from George Gardner, to whom patent was issued by the United States on October 5, 1860. These defendants have been engaged for some years in taking sand from the Kansas river by means of dredges and pumps, and in selling the sand for commercial purposes.

The state has interposed its motion to quash the several returns of the defendant

sand companies to the alternative writ, and the case is thus presented to us upon its merits.

Briefly summarized, the main contentions of these defendants are:

1. The common law of England, as it existed prior to 1607, having been in force in Kansas Territory when the treaties with the Shawnee and Wyandotte Indians were approved, and when the patents were issued to the allottees thereunder, by the United States, and when the patents were issued to Thornton and Gardner, these defendants, degrading their several titles from such allottees and patentees, are the owners of the bed of the Kansas river adjoining their riparian holdings, between their boundary lines to the thread of the stream.

2. The title of the state to the bed of a meandered stream is not an absolute fee, which the state can dispose of as it wishes; but such title is vested in it in trust for the benefit and common right of all the people, for the purposes for which such property has been used from time immemorial, viz., the common right of passage, of fishing, of the use of the waters for domestic, agricultural, and commercial purposes, and therefore the state has no proprietary right in the bed of the stream or in the water which it can sell.

3. The sands in the Kansas river form no part of its bed. They are foreign to the stratification of its bed and banks and flow into it from the upper reaches of its tributaries, beyond meander lines and beyond state lines; that these sands are in constant motion, unstable and unfixed in place and are *fœre naturæ* in character and become the property of the one first reducing them to possession; that the common right to reduce and subject them to personal dominion is a property right of value of which the defendants cannot lawfully be deprived without compensation.

4. That the right to take sand from the river is a right which under the common law may be obtained by prescription, even as against the sovereign, and that the long-continued usage by the Stewart-Peck Sand Company under claim of right to take sand and gravel from the Kansas river has ripened into a vested estate from which it cannot be deprived without compensation.

5. That chapter 259 of the Session Laws of Kansas was not legally adopted by the Legislature.

[1] The first question which we will notice is the authority of the state over the beds of navigable streams and its interest as owner therein. It may be assumed that the Legislature in adopting the act in question relied to a large extent upon the recent decision of this court in *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041, where it was ruled in the syllabus as follows: "The title to the bed of the Arkansas river within the boundaries of

Kansas is in the state." Mr. Justice West, speaking for the court, said: "It is not pretended that the river is now navigated or navigable in fact in Kansas, and the court, as well as everybody else, knows that it is not. But does this conclude the matter?" 86 Kan. page 948, 122 Pac. page 1042. The opinion refers to a number of facts of which the court takes judicial notice, including the size and extent of the Arkansas river; that through its long course in Kansas both of its banks were meandered by the government surveyors; the act of Congress of February 20, 1911, passed for the purpose of enabling the people of the territory of Orleans to form a Constitution and state government, which provided that the Mississippi river and the navigable rivers and waters leading into the state should be common highways and forever free to the inhabitants of the state as to other citizens of the United States; also, to similar provisions found in the act admitting Louisiana and the act creating the Missouri Territory, and to similar declarations in the ordinance for the admission of the Northwest Territory. The opinion then proceeds: " \* \* \* The question as to when a stream once navigable ceases to be so by nonuse or by the accumulation of sand or soil is one on which we have been afforded no light. But considering the character, width, and length of the river, the various acts and declarations by Congress in reference thereto, and the policy shown thereby with reference to waters which more than 100 years ago were navigable according to the needs and uses of that time, and which led into the Mississippi, we deem it justifiable to hold, and do hold, that while the stream is not now navigated in fact anywhere in Kansas it has, nevertheless, not ceased to be a highway set apart by national act and declaration for public use in the manner and at the time to be determined upon by the federal government. This being true, the title to the bed is in the state, and islands therein not surveyed or claimed by the government belong also to the state, and under the act of 1907 may be sold as school land." 86 Kan. page 964, 122 Pac. page 1047.

If there be any one proposition upon which the courts have agreed "with no variability neither shadow of turning," it is that the extent of the title of the owner of lands bordering upon navigable waters depends upon the local law. Whether under a patent from the United States the title extends to the center of the stream or lake or is limited to the margin thereof is everywhere held to be dependent on the law of the state. *Martin et al. v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Pollard's Lessee v. Hagan et al.*, 3 How. 212, 11 L. Ed. 565; *Weber v. Harbor Commissioners*, 18 Wall. 57, 21 L. Ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. 210, 84 L. Ed. 819; *Hardin v. Jordan*, 140 U.



S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Philadelphia Co. v. Stimson*, 223 U. S. 606, 32 Sup. Ct. 340, 56 L. Ed. 570; *Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107. In *Barney v. Keokuk*, supra, it was said: "If they (the states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." 94 U. S. page 338, 24 L. Ed. 224. In *United States v. Chandler-Dunbar Company*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063, it is said in the opinion: "The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law"—cases cited. 229 U. S. page 60, 33 Sup. Ct. page 671, 57 L. Ed. 1063. In the recent case of *Kansas v. Colorado*, 206 U. S. 46, page 98, 27 Sup. Ct. 655, page 665 (51 L. Ed. 956), the United States itself was a party and resisted a claim asserted by Kansas to the ownership of the bed of the Arkansas river. In the opinion Mr. Justice Brewer said: "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." A multitude of cases to the same effect might be cited from the courts of the various states. In fact, whether a patent of upland from the United States conveyed the title to the bed of navigable streams is not a federal question within the Removal Acts. *Gould on Waters* (3d Ed.) § 40; *Kenyon v. Knipe* (C. C.) 46 Fed. 309. Although in a former edition the exact contrary was said to be the law. *Gould on Waters* (2d Ed.) § 40.

Our first inquiry, therefore, must be: What is the law of Kansas? In his dissenting opinion in *Hardin v. Jordan*, supra, Mr. Justice Brewer, after stating that "beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law," used this language: "For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and the final authority." 140 U. S. page 402, 11 Sup. Ct. page 838, 35 L. Ed. 428.

We have no hesitation in declaring that the law of Kansas upon this question has been settled not only by statutory authority but by previous decisions of this court, notably *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330, and *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041. In *Wood v. Fowler*, supra, the action was to restrain defendants from cutting and removing ice formed on the surface of the Kansas river within certain described boundaries. It involved the title of the riparian owner

who claimed to own to the center of the stream. It was decided in that case that a riparian owner owns only to the bank and not to the center of the navigable stream. In the opinion Mr. Justice Brewer, after reciting historical facts showing that the Kansas river is a navigable stream, used this language: "The stream having been meandered, the lines of the surveys are bounded by the bank. The patents from the United States passed title only to the bank. Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the state." 26 Kan. pages 688, 689, 40 Am. Rep. 330. We shall have occasion to refer again to this decision upon another branch of the present case.

In *Kreger v. Fogarty*, 78 Kan. 541, page 545, 96 Pac. 845, page 847, it was said: "In disposing of public land bordering upon rivers, it is not the policy of the government to reserve title to the lands under water, whether the stream be navigable or not. The government parts with its whole title, leaving the question of boundary, whether the shore line or the thread of the stream, to be determined by the local law. In case of navigable waters in this state the boundary is at the bank, and the title to the bed of the stream is in the state"—citing *Wood v. Fowler*, supra, and *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

In the briefs, counsel for defendants say: "It is true that the government has not, directly, at any time, made a practice of disposing of the beds of nontidal rivers, where the banks thereof have been meandered in the course of the making of the public surveys; but this fact does not by any means imply lack of power to do so."

It must be conceded that the precise question is one upon which the courts were for a long time undecided. Expressions were found in opinions rendered by the United States Supreme Court which left the matter in doubt. However, as early as 1856, in the case of *Haight v. City of Keokuk*, 4 Iowa, 199, the Supreme Court of Iowa announced the doctrine that the government cannot convey the land between high and low-water mark on the public or navigable rivers, citing *Pollard's Lessee v. Hagan*, 8 How. 213, 11 L. Ed. 565, and other authorities. In the opinion it was said: "Although no state may exist at the time of such a grant, as in this case, yet grants and sales made under such circumstances are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its rights when arisen." 4 Iowa, page 213.

One of the first decisions by a state court holding squarely that the United States have no authority to convey the title to the bed of navigable streams within a territory before its admission to the Union was by the Supreme Court of Oregon in *Hinman v. Warren* (1877) 6 Or. 408. Oregon was ad-

mitted into the Union, February 14, 1859. Long prior thereto in 1850 Congress passed an act known as the "Oregon Donation Act" (Act Sept. 27, 1850, c. 76, 9 Stat. 496), requiring the lands to be surveyed as in the Northwest Territory; and it made grants or donations of land according to government surveys to actual settlers and occupants. The Supreme Court of the state, in the *Hinman Case*, held that a patent from the United States conveyed no land below high-water mark, and that the tidelands belong to the state of Oregon by virtue of its sovereignty. In the syllabus it was ruled that: "The United States government has no authority to so dispose of lands within a territory as to make it impossible to admit such territory into the Union upon an equal footing with the other states. In all matters that touch the sovereignty of the future state, the general government is simply a protector thereof, until such time as the territory becomes a state." In the first and second editions of *Gould on Waters*, published in 1883 and 1891, respectively, the author used this language: "In *Hinman v. Warren*, in Oregon, it was held that the United States, while holding the title to the soil of tidewaters, cannot make a valid conveyance of such soil. There are also dicta to this effect in the case of *Haight v. Keokuk*, in Iowa; but *Hinman v. Warren* was the first adjudication upon the subject. According to this view, the United States holds purely as trustee for the future state, and is without statutory or constitutional authority to do any act making it impossible to admit the new state upon a footing equal, in all respects, with that of the other states. The decisions of the Supreme Court of the United States were thought to lead to the conclusion reached in *Hinman v. Warren*; but it would seem that there is no very direct expression of such a view, in the opinions of that court." Section 40.

It is significant that in the third edition of *Gould on Waters*, published in 1900, the author omitted the foregoing language from the text; and section 40 was rewritten to conform to the then recent decision of the Supreme Court of the United States in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 831. That case, decided in 1893, cites with approval *Hinman v. Warren* as stating the Oregon law. Since the case of *Shively v. Bowlby*, supra, the question can no longer be considered doubtful. In that opinion Mr. Justice Gray reviewed the decisions in this country, and referred to the origin of the law in England from the time of Lord Hale, where it was settled that the title to tidelands or of arms of the sea below ordinary high-water mark is in the king, except where rights have been acquired by express grant or by prescription or usage. The doctrine was declared to be well settled here as in England that a grant from the sovereign

of land bounded by navigable tidewater passes no title below high-water mark, unless either the language of the grant or long usage under it clearly indicates that such was the intention (citing Lord Hale in *Hargrave's Law Tracts* 17, 18, 27; *United States v. Pacheco*, 2 Wall. 587, 17 L. Ed. 865). *Martin v. Waddell* (1842) 16 Pet. 367, 10 L. Ed. 997, is cited as the leading case in this country, and, after stating the different rules which obtain in the original states with respect to the title to lands covered by navigable streams or by tidewaters, the opinion proceeds: "The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject: but that each state has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution therefore is necessary in applying precedents in one state to cases arising in another. IV. The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters, and in the lands below the high-water mark, within their respective jurisdictions." 152 U. S. page 26, 14 Sup. Ct. page 557, 38 L. Ed. 331. "VIII. Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evidence that this is not strictly true." 152 U. S. page 47, 14 Sup. Ct. page 565, 38 L. Ed. 331. "We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory. IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek." 152 U. S. page 48, 14 Sup. Ct. page 566, 38 L. Ed. 331. (The italics ours.) The reasons are stated in another part of the opinion in the following language: "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of

the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state after it shall have become a completely organized community." 152 U. S. pages 49, 50, 14 Sup. Ct. page 566, 38 L. Ed. 331. The court decides that a donation claim under the act did not of its own force have the effect of passing any title in lands below high-water mark.

It will be observed that the court limits the power of Congress to make grants of lands below high-water mark of navigable rivers in a territory to instances where it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the purposes of commerce, or to carry out other public purposes appropriate to the objects for which the United States hold the territory. The contention of defendants that Congress has the power to grant to settlers the title to the bed of nontidal navigable streams within a territory is not sustained by any express declaration of the United States Supreme Court to which our attention has been called; and certainly no such inference can be drawn from anything that is said in the exhaustive opinion in *Shively v. Bowlby*, *supra*.

Moreover, many of the decisions to which we have already referred, and numerous others which might be cited, hold that in the case of all meandered streams no part of the soil under them is included within the original survey or passes by virtue of the patent. *Dana v. Hurst*, 86 Kan. 947, 122 Pac. 1041; *Kregar v. Fogarty*, 78 Kan. 541, 96 Pac. 845. In *Mayor, etc., of Mobile v. Eslava*, 9 Port. (Ala.) 577, page 604 (33 Am. Dec. 325), it was said: "By the acts of Congress regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters, and the soil covered by them."

In *Hardin v. Jordan*, *supra*, the court said: "We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be con-

strued as to their effect according to the law of the state in which the lands lie. The next question for consideration therefore is: What is the law of Illinois with regard to such grants?" 140 U. S. page 384, 11 Sup. Ct. page 813, 35 L. Ed. 428.

The same court, in the case of *Hardin v. Shedd*, 190 U. S. 508, page 519, 23 Sup. Ct. 685 (47 L. Ed. 1156), used this language: "When land is conveyed by the United States bounded on a nonnavigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union."

"The rule that a grant is to be construed most strongly against the grantor does not apply to public grants. The government being but a trustee for the public, its grants are to be considered strictly. Grants of land by the United States, by patent, have relation to the survey, plats, and field notes." *McManus v. Carmichael*, 3 Iowa, 1, Syl.

"The United States, upon acquiring a territory, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, take the title and the dominion of lands below high-water mark of tide waters for the benefit of the whole people, and in trust for the future states to be created out of the territory." *Shively v. Bowlby*, 152 U. S. 1, Syl. 6, 14 Sup. Ct. 548, 38 L. Ed. 331.

By the policy of the state of Wisconsin declared in numerous judicial decisions there is a qualified title to submerged lands of rivers navigable in fact conceded to shore owners; but this qualified title is not permitted to displace or materially affect public rights or the title to lands under the streams which are held to be in the state. In *Illinois Steel Co. v. Bilot et ux.*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905, decided in 1901, it was held that the title to lands under lakes, ponds, and navigable rivers of the state was never in the United States, except in trust for public purposes; that a patent from the United States, covering such lands, whether made before the state was admitted into the Union or thereafter, conveys no title. In the opinion it was said: "The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors." 109 Wis. page 426, 84 N. W. page 856, 83 Am. St. Rep.

905. Among the cases cited are: *Pewaukee v. Savoy*, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859; *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224; *Railroad Co. v. Schurmeier*, 7 Wall. 272, 19 L. Ed. 74.

Some of the same questions were passed upon in the recent case of the United States for the Eastern district of Oklahoma. *United States v. Mackey*, 218 Fed. —. The question involved was the validity of oil and gas leases in the bed of the Arkansas river. There were three rival claimants. The United States sought to maintain the right of the Creek Indians to the oil underlying the bed of the river. The Creek Indians are one of the Five Civilized Tribes holding permanent titles to their lands by treaty, and after the tribal relations were dissolved the lands were allotted in severalty to the members of the tribe. Avery and the Gipsy Oil Company claimed under leases from the owner of the riparian lands; Avery's title being founded upon a lease to the lands in the bed of the stream, and that of the oil company on the claim that its lease covered all the riparian lands and therefore the bed of the stream on the theory that the title of the riparian owners extended to the middle thread of the stream. The Pollard Hagan Oil Company claimed under a lease from the state of Oklahoma on the theory that the state acceded to the ownership of the bed of the river upon her admission to the Union subsequent to the making of the lease. The court upheld the Oklahoma title on the ground that the Arkansas is navigable and that the title of the United States to the river beds was in trust for the state of Oklahoma; that the Indians were mere occupants of the lands and that the state alone could dispose of the title to the bed of the streams. In the opinion the court approves and follows the Kansas case of *Dana v. Hurst*, supra, and starts with the proposition that the Arkansas river is a navigable stream; that the grant to the Creek Nation by the patent of August 11, 1852, did not convey to that nation the same title and interest in the bed of the river as it acquired by the patent to the uplands. The opinion contains an exhaustive review of the decisions, many of which we have already cited. Since the argument we have been furnished with a copy of a decision by the Supreme Court of Oklahoma which was handed down March 10, 1914. The case is *State of Oklahoma v. Larry Nolegs, the Jim Crow Oil Co., et al.*, 139 Pac. 943. Portions of the syllabus read as follows: "(1) The ownership of the navigable waters and the soil under them in all the territory embraced in the Louisiana Purchase was held in trust by the federal government, and, as each of the states were created the same, within the boundaries of such state, passed to it, and the absolute right to such navigable waters and the soil thereunder is in the state, subject to the pub-

lic rights and the paramount power of Congress over navigation. (2) If a river is in fact navigable and in fact used for purposes of commerce, the title to the waters thereof and the bed thereunder is held by the federal government, and, when a territory containing such navigable river becomes a state, the title thereto vests in the state, regardless of subsequent navigation or navigability, and the fact that a riparian owner obtains title to the land adjoining such stream prior to statehood does not divest the state of such title." "(6) Where a government patent to land describes the same by lots and refers to the official plat of the survey thereof and such plat shows that the land conveyed is bounded by a navigable river, the title extends no further than the edge of the stream and does not include an island, though the channel between that and the main land may not be navigable."

The foregoing principles of law are supported in a well-considered opinion by the Oklahoma court which follows and approves the Kansas case of *Dana v. Hurst*, supra, and *United States v. Mackey*, supra, and refers to numerous acts of Congress, public records, and documents of the several departments at Washington recognizing the navigability of the Arkansas river. As will be observed, many of the questions passed upon are directly in point here.

But defendants assert a prior claim to the bed of the Kansas river adjoining their riparian lands by virtue of a patent issued to Silas Armstrong, a Wyandotte Indian. Again they are met and foreclosed by the decision in *Wood v. Fowler*, supra. In that case plaintiff claimed under a patent to Matthias Splitlog, a Wyandotte Indian, whose title was in all respects the same as that of Silas Armstrong to the lands in this case. But the court said: "The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank; Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the state." 26 Kan. pages 688, 689, 40 Am. Rep. 330. In the briefs defendants say that this language was not necessary to the decision; but the court at the time deemed the question necessary and controlling and saw fit to rest its decision on that ground, so that the language cannot be regarded as dictum. The contention of defendants that the common law in all its strictness was in force in the territory of Kansas when the Indian patentees acquired title, and that by force of that law the original riparian owners took to the center thread of the stream, is also disposed of by what was said in *Wood v. Fowler*, as follows: "It is true a distinction was recognized in England, and that streams were considered navigable only in so far as they partook of the sea, and to the extent that their waters were affected by the

ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank; above such point, even although the stream was large enough to be used, and in fact was used, for purposes of navigation, the riparian owner owned the soil *ad medium filum aquæ*. \* \* \* The same doctrine of riparian ownership to the center of the stream in all rivers unaffected by the ebb and flow of the tide is recognized in some states of the Union; but the better and more generally accepted rule in this country is, to apply the term 'navigable' to all the streams which are in fact navigable; and in such case to limit the title of the riparian owner to the bank of the stream. Especially is this true in the states where the lands have been surveyed and patented under the federal law. See the following authorities: *Railroad Co. v. Schurmeier*, 7 Wall. 272 [19 L. Ed. 74]; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Rld. Co.*, 32 Iowa, 106 [7 Am. Rep. 176]; *Flanagan v. City of Philadelphia*, 42 Pa. 219; *Bridge Co. v. Kirke*, 46 Pa. 112 [84 Am. Dec. 527]; *People v. Tibbetts*, 19 N. Y. 523; *People v. Canal Appraisers*, 33 N. Y. 461." 26 Kan. page 689, 40 Am. Rep. 330.

The defendants, however, say that the extent to which the common law became a rule of property in Kansas is to be determined, not from language used by way of argument in *Wood v. Fowler*, but by reference to the act of the territorial Legislature of 1855 (Stat. 1855, p. 469), which declared that the common law of England and all statutes prior to 4 James I. not local to that kingdom, and of a general nature, should be the rule of action and decision in the territory. *Sattig v. Small*, 1 Kan. 170, 175. Substantially the same provision was re-enacted in 1859. In 1868 the language was changed to read: "The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of this state." Chapter 119, Gen. Stat. 1868, § 3.

It is worth while to inquire by what process of reasoning it can be asserted that Kansas was deprived of her right to enter the Union upon an equality with the other states. Time and again the Supreme Court of the United States has declared that each of the new states is entitled to be admitted into the Union on an equal footing with the original states. "By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. \* \* \* To maintain any other doctrine is to deny that Alabama has been admitted in-

to the Union on an equal footing with the original states, the Constitution, laws, and compact, to the contrary notwithstanding." *Pollard's Lessee v. Hagan et al.*, 3 How. 212, 11 L. Ed. 565, 573; *Martin et al. v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Weber v. Harbor Com'rs*, 18 Wall. 57, 71, 21 L. Ed. 798; *Knight v. U. S. Land Ass'n*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *Shively v. Bowlby*, supra; *Withers v. Buckley et al.*, 20 How. 84, 15 L. Ed. 816.

The Kansas and the Arkansas rivers when the territorial act of 1855 was passed were navigable in fact and were so recognized by Congress in its surveys of the public lands. Ordinarily the first lands to be taken up by settlers are those on the banks of the streams. The great struggle for the admission of Kansas might have been prolonged until all but a few tracts of riparian lands along the Kansas river from its mouth to Junction City had been settled upon. Had such been the situation, and if defendants' contention is sound, Kansas would have entered the Union stripped of the valuable right of ownership in and control over the bed of the Kansas river, or, what is just as inconceivable, would have held the title only to those fragmentary portions of the bed of the stream that adjoined the lands not settled upon. Moreover, this situation would have resulted, not because the Kansas river was not a navigable and public stream in fact, but because the common law of England as declared by Lord Hale and collected by him from decisions in the Year Books made the ebb and flow of the tide the test of navigability.

The defendants rely with much confidence upon the following language from the decision of Judge Campbell of the federal court of Oklahoma in *United States v. Mackey*, supra: "If therefore we are to apply the strict rule of the common law as it existed in England at the time this country was colonized, the rights of the owners of the upland bordering upon this stream, so far as ownership of the soil is concerned, must be considered as extending to the middle thread of the stream, to the exclusion of the state, subject only to the public right of navigation."

No one will dispute the legal proposition stated. It merely asserts that, under the strict rules of the common law as it existed in England, no river or arm of the sea was in law navigable above the point where it was affected by the tide, although it may have been navigable in fact above such point, and the title of the riparian owner above the ebb and flow of the tide extended to the middle thread of the stream, while the title to the bed of that portion of the stream affected by the tide was in the crown. Of course, if that rule of the common law were applied to Kansas streams, the defendants would be correct in their contention. Oklahoma's adopting statute is worded as our amended stat-

ute of 1868, and Judge Campbell may have been of the opinion that, if the Oklahoma statute contained language as broad as our statute of 1855, the riparian proprietor of lands bordering on the Arkansas river would have acquired title to the middle thread of the stream. But we do not so construe the effect of the territorial acts by which Kansas adopted the rules of the common law.

We have always supposed that the first settlers in Kansas, those who came even before the Kansas-Nebraska act, brought with them the common law of England, that is, so much of it as was not local to England and was applicable to the circumstances and conditions of the territory, and that the common law to that extent was already a part of the law of the territory when the adoption act of 1855 was passed.

How the common law came to Kansas is told in a comprehensive sketch of the subject in *Clark v. Allaman*, 71 Kan. 206, page 224, 80 Pac. 571, page 577 (70 L. R. A. 971). In the opinion Mr. Justice Burch reviews the history of the formation of the Louisiana Territory, and refers to the acts of Congress, the legislation of the several states and territories to which Kansas has at different times in her history belonged, and cites the public documents and decided cases bearing upon the question. Speaking of the principles of the common law to which the immigrants who came from the Southern states "were inured," the opinion says: "It was likewise notoriously the heritage of the men who came from the North to Kansas to aid in establishing its law." The opinion also quotes from the message of Gov. Reeder of July 3, 1855, to the first territorial Legislature, as follows: "It appears that the laws of the United States not inapplicable to our locality—the laws of the territory of Indiana made between the 26th of March, 1804, and the 3d of March, 1805, enacted for the district of Louisiana, the laws of the territory of Louisiana, the laws of the territory of Missouri—the common law, and the law of the province of Louisiana at the time of the cession, except so far as the latter have superseded the former, still remain in force in the territory of Kansas. As the common law to a considerable extent was adopted for the territory by Congress as late as 1812, and by the Missouri Legislature as late as 1816, \* \* \* it has without doubt superseded and supplied a great amount of the law previously existing." 71 Kan. pages 220, 221, 80 Pac. page 576 (70 L. R. A. 971).

Statutes solemnly enacted are often said to be merely declaratory of the common law; that is to say, the law declared by the statute was already in existence, and the courts without the sanction of the statute, would, in a proper case, have enforced it. Moreover, the act of 1855 expressly excepts from its operation those rules of the common law of England which were local to that

kingdom and not of a general nature. What rule could be more local to Great Britain and less general in nature than one which could only apply to the peculiar natural conditions existing there—the absence of navigable streams that were unaffected by the ebb and flow of the tide? What rule could be imagined more unsuited to the great Mississippi and its navigable tributaries, not only rendered navigable by the laws of nature but the free navigation thereof consecrated and guaranteed by public treaties and acts of Congress? See *Dana v. Hurst*, supra.

Speaking of the rights of Alabama, the Supreme Court said in the opinion in the case of *Pollard's Lessee v. Hagan et al.*, supra: "But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions." 8 How. page 229, 11 L. Ed. 565.

In *Chisholm v. Georgia*, 2 Dall. 419, page 435, 1 L. Ed. 440, 447, Justice Iredell used this language with respect to the common law, which is so often quoted: "I know of none such, which can affect this case, but those that are derived from what is properly termed the 'common law,' a law which I presume is the groundwork of the laws in every state in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England (unaltered by any statute) at the time of the first settlement of the country." The italics are ours and emphasize the qualifying language to which we wish especially to direct attention.

There has always been, it is true, a contrariety of opinion in the courts of the different states upon this question. Those of the original states with rivers and waters affected by the ebb and flow of the tide adopted the common-law test of navigability. But this was repudiated by some of the original states as wholly inapplicable to great rivers and streams actually navigable and wholly unaffected by the tide. The Supreme Court of Pennsylvania as early as 1810 decided that the doctrine of Lord Hale as to navigable rivers is not applicable to the larger rivers of Pennsylvania, such as the Ohio, Delaware, Susquehanna, and Allegheny. Chief Justice Tilghman, who tried the case on the circuit, said in his opinion: "But the common-law principle concerning rivers, even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small." *Carson v. Blazer*, 2 Bin. (Pa.) 475, 477 (4

Am. Dec. 463). His ruling was affirmed in the Supreme Court in an opinion which, after referring to the act of the assembly of 1777, declaring that the common law of England shall be binding on the inhabitants of the state, used this language: "But the uniform idea has ever been that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident. The adoption of a different rule would, in the language of Sir Dudley Ryder, resemble the unskillful physician, who prescribes the same remedy to every species of disease. The qualities of fresh or salt water cannot, amongst us, determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character." 2 Bl. (Pa.) page 484, 4 Am. Dec. 463. To the same effect is *Shrunk v. Schuyt. Nav. Co.*, 14 Serg. & R. (Pa.) 71.

One of the first to adopt the common sense rule was the Supreme Court of North Carolina in the case of *Wilson v. Forbes*, 2 Dev. (13 N. C.) 30, decided in 1828. In the opinion, Henderson, Judge, said: "It is clear that, by the rule adopted in England, navigable waters are distinguished from others, by the ebbing and flowing of the tides; but this rule is entirely inapplicable to our situation, arising both from the great length of our rivers, extending far into the interior, and the sand bars and other obstructions at their mouths. By that rule, Albemarle and Pamptico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property." 13 N. C. pages 34, 35.

The great case of *McManus v. Carmichael*, 3 Iowa, 1, is cited with approval in our own case of *Wood v. Fowler*, supra. It is a storehouse of reason and authority to which we are much indebted. Judge Dillon was one of the counsel who contended that the absurd rules of the common law could not be made the test of the navigability of a great river like the Mississippi. In the briefs he said: "If \* \* \* this river is navigable, then it is so in spite of the common law; or, more correctly speaking, it is navigable, because the common law, not having any applicability to this river, has nothing to do—I repeat it, the common law has nothing to do—with the question as to whether it is navigable or not navigable." 3 Iowa, page 25. And he was speaking of navigability in law as affecting riparian rights. In the opinion Mr. Justice Woodward used this language: "And if we, like the people of these states, generally, have brought the common law with us; then, too, we, like them, have brought such parts of it as are adapted to our institutions and circumstances; and we ask with confidence whether the rules and tests which are applicable enough to the rivulets of England shall be taken to measure those waters, whose flow is through the climates and zones of the earth?" 3 Iowa, page 31. Reviewing

the decided cases he said: "In the most of those from the northeastern states, the subject is discussed very little; but they simply assume the common-law rule as the one to decide by, and look no farther." 3 Iowa, page 33. He quotes from the opinion of the judges in the case of *Canal Commissioners v. People*, 5 Wend. (N. Y.) 423, pages 447, 448, where Chancellor Walworth said: "The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes, or inland seas, which are wholly unprovided for by the common law of England. \* \* \* It is not necessary to express an opinion whether this principle can be properly applied to some part of those streams which are navigable from the sea by large ships and vessels, far above the influence of the tides, as that question can never arise in this state. We have no such rivers." Commenting upon this language, Justice Woodward said: "Surely, such an expression leaves us, who have such rivers, free to discuss the question anew, and without feeling constrained by those decisions." 3 Iowa, page 41. We quote the following extracts from the syllabus of the Iowa case: "Although the ebb and flow of the tide was, at common law, the most usual test of navigability, it was not necessarily the only one. But however this may be, that test is not applicable to the Mississippi river. \* \* \* The term 'navigable' embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public is equivalent, in legal sense, to saying that they are navigable." \* \* \* It is navigability in fact, which forms the foundation for navigability in law, and from the fact follows the appropriation to public use, and hence its publicity and legal navigability. The real test of navigability in this country is ascertained by use, or by public act or declaration. The acts and declarations of the United States declare and constitute the Mississippi river a public highway, in the highest and broadest intendment possible."

The leading western cases to the contrary are *Morgan & Harrison v. Reading*, 3 Smedes & M. (Miss.) 366, decided in 1844, and *Middleton v. Pritchard et al.*, 3 Scam. (Ill.) 510, 38 Am. Dec. 112. So far as we have examined, they are the only cases which have applied the strict rule of the common law to the Mississippi river, and which hold that it is not in law a navigable stream. The conflict of opinion in the various states upon this vexed question has created some anomalous conditions. Because of the adherence of the Illinois courts to the strict rules of the common law as to property rights, the owner of lands in Northern Illinois bordering on the east bank of the Mississippi owns the bed of the river to the middle thread, where his title is met by that of the sovereign state of Iowa.

In *Barney v. Keokuk*, supra, Justice Brad-

ley said: "In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject. The exhaustive examination of this question by the Supreme Court of Iowa in 1856, in the case of *McManus v. Carmichael*, 3 Iowa, 1, really leaves nothing to be said." 94 U. S. pages 338, 339, 24 L. Ed. 224.

The fact must not be lost sight of that the Supreme Court of the United States repudiated the absurd definition of the common law as long ago as 1851 in the case of *The Genesee Chief*, 12 How. 443, 13 L. Ed. 1058. The opinion, which was delivered by Chief Justice Taney, has long been recognized as one of the monuments of the law. The court was confronted by a condition. In its earlier cases, notably, *The Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 358, the court had decided that the admiralty jurisdiction of Congress was limited to tidewaters. In 1845 Congress passed an act the validity of which was regarded as doubtful, and by which it was sought to extend the admiralty jurisdiction to the great navigable streams and inland lakes. The court freely recognized its embarrassment because of its former rulings and in the opinion regretted that the proposition had not been presented at an earlier time in the history of the country. The court, however, expressed itself as convinced that it would not do to follow an erroneous decision into which it fell, "when the great importance of the question as it now presents itself could not be foreseen." 12 How. page 456, 13 L. Ed. 1058. In the opinion was said: "It is evident that a definition that would at this day limit public rivers in this country to tidewater rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. \* \* \* The lakes and the waters connecting them are undoubtedly public waters, and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." 12 How. page 457, 13 L. Ed. 1058. The act of Congress was held constitutional.

We must once more refer to the language of Mr. Justice Bradley in *Barney v. Keokuk*, supra: "And since this court, in the case of *The Genesee Chief*, 12 How. 443 [13 L. Ed. 1058], has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters." 94 U. S. page 338, 24 L. Ed. 224.

We have already quoted from opinions of the Supreme Court of Pennsylvania. The same court in a later case has held that the *Monongahela* is a navigable stream, and that its soil up to low-water mark, and the river itself, are the property of the commonwealth.

In *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112, 120 (84 Am. Dec. 527) the absurdity of the common-law test of navigability is aptly stated in the following language: "We are aware that by the common law of England such streams as the Mississippi, the Missouri, the rivers Amazon and Platte, the Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges, and the Indus were not navigable rivers, but were the subject of private property, whilst an insignificant creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbled and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this commonsense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."

The doctrine of the Iowa courts repudiating the tidal test of navigability and declaring that a stream is navigable in law which is navigable in fact, and which has been declared to be a public stream by the acts of Congress and recognized as such by government surveys of the public lands, has been expressly approved by the Supreme Court of the United States in the case of *Packer v. Bird*, 137 U. S. 661, page 672, 11 Sup. Ct. 210, page 212 (34 L. Ed. 819), which involved the title to the bed of the Sacramento river in California. In the opinion Mr. Justice Field, after referring to the states which have adopted the common-law rule to its fullest extent and to those which like Pennsylvania and Iowa have repudiated it, used this language: "The legislation of Congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them." In the opinion it was said: "A different test must therefore be sought to determine the navigability of our rivers, *with the consequent rights both to the public and the riparian owner*, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. \* \* \* The same reasons therefore exist in this country for the *exclusion of the right of private ownership over the soil under navigable waters* when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, *and consequently to the exclusion of private ownership, either of the waters or the soils under them.*" (Italics ours.) 137 U. S. page 667, 11 Sup. Ct. page 211, 34 L. Ed. 819.



In those states where the common-law test as to navigability has been followed, the courts recognize the right of the state to keep the stream open for the public use of navigation, and they argue that the public right is in no way impaired by the fact that the bed of the stream is owned absolutely by the riparian owners. Thus, in *Lorman v. Benson*, 8 Mich. 18, page 32 (77 Am. Dec. 435), it was said: "The public authorities can regulate water highways as well as land highways, although the soil of neither belongs to the state." The same argument is employed by Mr. Farnum in his vigorous opposition to any relaxation to the strict rule of the common law. 1 *Farnum on Waters*, p. 253.

It is worthy of note that some of the courts which have felt themselves bound by the common-law test of navigability have refused to apply this doctrine in its entirety, but, on the contrary, have reserved to themselves the right to modify that ancient rule wherever in their judgment it has been found inapplicable to the situation and conditions of the people. Thus, in the recent case of *Fulton L. H. & P. Co. v. State of N. Y.* (1911) 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307, the New York Court of Appeals, while declaring that in adopting the common law of England the people of that state took over such of its rules as were applicable to, and consistent with, their condition and circumstances, laid down the doctrine that the title to a navigable stream above tidewater is in the riparian owners, *except where it constitutes a territorial boundary*. Now the common law of England was a system of rules and precedents designed for the government of the people of an island. It knew nothing of streams as boundaries between states. The decisions in New York and Iowa are not so inconsistent after all, since it appears that the courts in each state differ merely in determining what rule is best suited to the wants and conditions of the people. Illinois, as we have seen, has applied the doctrine even to the Mississippi river, which is a state boundary.

In addition to Pennsylvania, North Carolina, and Iowa, the following states have refused to be bound by the common-law test of navigable waters: Missouri (*Benson v. Morrow et al.*, 61 Mo. 347; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300); South Carolina (*Cates v. Wadlington*, 1 McCord, 580, 10 Am. Dec. 699); Tennessee (*Elder v. Burrus*, 6 Humph. 358); Alabama (*The Mayor, etc., of Mobile v. Eslava*, 9 Port. 577, 33 Am. Dec. 325, affirmed in 16 Pet. 234, 10 L. Ed. 948); Michigan (*La Plaisance Bay Harbor Co. v. City of Monroe*, Walker's Ch. 155).

After all, in every case the substantial question is this: Is the stream navigable or not? Under the common law of England the mode of ascertaining the fact may have been uniform, and the fact that the tide ebbcd and flowed in the stream may always have been

taken there as evidence of the fact. Nevertheless, it is the fact of navigability and not the mode of proof upon which the rights of riparian owners should be made to depend.

[2, 3] We have considered the question at length because of its importance and the different view which prevails in some of the states, and for the further reason that it involves what we regard as the most meritorious of the claims urged by the defendants. We adopt the Iowa doctrine and hold that by the declarations of the United States in the several acts of Congress relating to the survey and disposal of the public lands, and by other legislation relating to the western country out of which Kansas Territory was carved (and which are referred to elsewhere in this opinion and in *Wood v. Fowler*, supra, and in *Dana v. Hurst*, supra), the Mississippi river and its navigable tributaries were constituted public highways, and recognized as navigable streams in the fullest and broadest sense. The Supreme Court of the United States having repudiated the common-law definition of navigable waters in 1851, and the same test of navigability having been repudiated by many of the states in the Union before the act of the territorial Legislature of 1855 adopting the common law was enacted, we hold that the ancient rule of the common law defining navigable waters was never a part of the common law of Kansas; that Kansas entered the Union upon an equal footing with the other states; that upon her admission into the Union absolute property in and dominion and sovereignty over the soils under the navigable and public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the federal government with respect to navigation.

[4] Nor do we think that anything said in *Clark v. Allaman*, 71 Kan. 206, page 229, 80 Pac. 571, page 579 (70 L. R. A. 971), holds to the contrary. The question there involved the rights of a riparian owner to the use of water for irrigation purposes from Rose Creek, a stream five miles long. It is true, as stated in the opinion, that "the common-law rules relating to riparian rights became the law of Kansas for every stream within its border." But the common-law test of navigability never became the law of Kansas. The court in *Clark v. Allaman* was not attempting to define navigable streams, nor was it the intention to declare the law as to the ownership of the bed of meandered navigable streams to be different from what had already been held in *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330. The defendants possess all the rights of riparian owners under the common law as that law is applicable to Kansas. What we decide is that they never acquired any property interest in the bed of the Kansas river adjoining their lands. It is unnecessary to define their riparian rights under the common law, but one of them is the right of flowage, and as was held in *City*

of *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453, the state could not, if it would, deprive them of such rights without compensation. See, also, *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190.

We are unable to discover any reason why the fact that the sand is mingled with the flowing water of the stream and comes originally from the upper reaches of the Kansas river affects the matter, or how that fact could deprive the state, which is the exclusive owner of the bed, of the right to dispose of any surplus water flowing over it or any natural product found therein, so long as the state does nothing either to violate its duty to hold the title as trustee for the benefit of the people, nor to interfere with the superior rights of Congress to control navigation. Because the title to the soil is in the state, it was said in *Wood v. Fowler*, 28 Kan. 682, page 690 (40 Am. Rep. 330): "The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this: That his land joins the land of the state. The fact that it so joins gives him no title to that land, or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land of any individual neighbor."

Moreover, that sands accumulate upon the bed of the river we know to be a fact. At times of low water the bed is made up largely of bars of sand which are started in motion when the stream rises; and, although it is customary in removing the sand to operate the dredges and shovels in running water, the sand taken forms a part of the bed of the stream.

In *United States v. Chandler Dunbar Co.*, 229 U. S. 53, page 69, 33 Sup. Ct. 667, page 674 (57 L. Ed. 1063), it was said: "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." In that case also it was said that there was nothing objectionable in permitting the state to let out the use of the water to private parties and thus reimburse itself for the expenses incurred in the erection of a public dam.

The argument that because the sand is in constant motion it falls within the principle of *ferre nature*, and that the defendants cannot be deprived of the valuable right of an individual to reduce to his possession wild animals or things of that nature, does not impress us as sound. We have examined the seaweed cases cited, and do not think they support the claim of the defendants. They merely hold that seaweed cast by the tide and waves upon the land of a riparian proprietor becomes his property just as wreckage cast upon his lands belongs to him. *Church v. Meeker*, 34 Conn. 421. Many of the cases are controlled by statutes confer-

ring certain rights upon the owners of riparian lands adjoining tidewater such as the case cited in *Anthony v. Gifford*, 2 Allen, 549. The opinion expressly declares that these marine products do not become the property of the riparian proprietor until they are cast upon or attached to the land or shore. There is nothing in chapter 250 which seeks to deprive the defendants of the right to any sand cast upon their lands.

The defendants' claim by prescription cannot be sustained. There is some conflict in the authorities as to whether a right may be obtained by prescription against the public, especially in regard to rights in property dedicated to public use such as streets and highways. Some hold that rights of this character may be acquired, and others that they cannot. 26 A. & E. Encycl. of L. 90. In *Pennsylvania* "it is settled law that public rights are not destroyed by long continued encroachments or permissive trespasses." *Kittaning Academy v. Brown*, 41 Pa. 269. See, also, *Commonwealth v. Moorehead*, 118 Pa. 344, 12 Atl. 424, 4 Am. St. Rep. 599. In *Town of Clinton v. Bacon*, 56 Conn. 508, 16 Atl. 548, it was held that the uninterrupted and undisputed possession by defendant of a natural oyster bed for 30 years had not given him a title by adverse possession; the title being in the state against which there could be no title gained by such possession. Moreover, title by prescription arises by a presumption from long-continued use of a incorporeal hereditament of a previous grant which has been lost. 3 Cruise, 467. Therefore nothing can be prescribed for that cannot be the subject of a grant. *Luttrell's Case*, 4 Coke's R. 86. To the same effect, see 22 A. & E. Encycl. of L. 1187, where it is stated that the doctrine of prescription is applicable only to rights which may be granted, and that a grant will not be presumed where it could not lawfully have been made. *Hill v. Lord*, 48 Me. 83, 98. In *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188, 20 L. R. A. 94, 39 Am. St. Rep. 404, it is held that title to oyster beds belonging to the state cannot be acquired by prescription.

"Property so held belongs to the people in virtue of their sovereign rights, and of it they cannot be deprived save by their own appointment as expressed in the Constitution. Legislatures cannot imperil such property. Statutes may prescribe for its regulation, but not for its loss by the public and its acquisition by individuals by prescription or otherwise." Note, 76 Am. St. Rep. 488; and to the same effect, see *Burbank v. Fay*, 65 N. Y. 57, and *Fulton L. H. & P. Co. v. State of N. Y.*, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307.

We hold therefore that no title to the river could be obtained by prescription. The defendants' use of the waters of the stream, however long continued, and whether adverse or by permission, could not impair the rights of the state.

[5] One of the principal contentions of the defendants is that the state has no proprietary interest in the bed of the streams or the natural products of the waters which it can sell and dispose of. In other words, that if it has the title at all as against these defendants, it holds the title in trust for the benefit of the whole people; and they ask the question: "Can the state sell the bed of a meandered stream, such sale not being for any other purpose than the enrichment of its general treasury?" Now the state has not undertaken to sell any portion of the bed of the streams, and we have not even before us the question as to the power of the state to grant an exclusive right to an individual or corporation to take these sands from the streams. The statute itself (section 2) expressly provides that no contract shall be entered into granting any exclusive privilege under the act. The defendants rely very much upon the decision of the Supreme Court of Wisconsin in *Rossmiller v. State*, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910. The state of Wisconsin enacted a statute making it unlawful to cut ice from any meandered lake in the state for shipment out of the state unless upon a license obtained from the Secretary of State and the payment of a royalty to the state of 10 cents per ton. The Supreme Court held the law unconstitutional on the ground that the right to take ice and to the use of any waters of the public streams and lakes was for the individual enjoyment of all without restraint other than by reasonable police regulations designed to preserve their use to the whole people, and that the state while holding the title in trust has no such proprietary interest in the bed of the streams or the waters over them as it would have a right to sell or dispose of. The state is regarded as a mere trustee for the whole people. We have examined the case with interest but cannot regard it as persuasive upon the question.

It is a well-known fact, of which the court requires no proof, that for commercial purposes the sand of the Kansas river, known everywhere as Kaw river sand, has long been considered by builders and architects to be unsurpassed on account of its sharpness and by reason of other natural properties. It is probably true that no other building sand in the country is shipped to places so distant as the sand from the Kansas river. Only a limited portion of the people of the state can gain access to the stream and exercise the natural right of taking this valuable natural product from the stream itself. In Kansas all the legislative power that the people possess is vested in the Legislature; and the Legislature in its wisdom may have believed that the benefit of the whole people and their rights to enjoy this natural product could best be conserved by imposing a royalty upon the taking of sand from the river for commercial purposes, rather than to permit sand companies like the defendants to have unlim-

ited rights therein. The court is well aware of the fact that the state of Oklahoma is leasing for royalties the oil beds beneath the Arkansas river (*United States v. Mackey*, supra), and that in many of the states the right to prospect and obtain the oil and other mineral products beneath the bed of the public rivers is a valuable one. It is stated in the brief of the Attorney General that the states of Wisconsin, Minnesota, and Michigan receive enormous revenues from the sale of iron and copper ore taken from the beds of the navigable lakes of those states. We have not examined the statutes or decisions for the purpose of inquiring into the matter, but can see no reason why such rights might not be exercised by the states. The state is the absolute owner of the beds of the streams. It holds the title in trust for all the people and subject to the right of the federal government with respect to navigation. It is not our province to consider the wisdom or expediency of the law passed by the Legislature, but we think it is within the power of the state to conserve the use of the products of these streams for the benefit of all the people by exacting a royalty for the benefit of the state. The state owns the sand and recognizes the right of every person to take freely what he needs for his own use, but requires those who engage in the business for profit to pay a royalty for the benefit of all the people. In *Sanborn v. People's Ice Co.*, 82 Minn. 43, 44, 84 N. W. 641, 51 L. R. A. 829, 83 Am. St. Rep. 401, it was held that, while the taking of ice from public waters was one of common right, it was a right only for personal use and did not extend to an ice company which was cutting and removing ice for shipment and sale in distant markets for commercial purposes.

In the case of *State v. Pacific Guano Co.*, 22 S. C. 51, the Supreme Court of South Carolina upheld the power of the state holding the title to the beds of tidal waters in trust for all the people, to dispose of phosphate beds as the Legislature might deem best for her citizens, and a statute by which the state granted rights to different companies to mine in these beds, imposing penalties on those who undertake to do so without such license, was held valid. A similar case was that of *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537. The case involved the validity of an act of the Legislature granting exclusive rights in a corporation to mine in the beds of the Coosaw river, and to remove phosphate rock and deposits. The power of the state to exact royalties for the exercise of such privileges was not disputed.

The defendants, not having shown any title or right to the bed of the streams, are not in a position to object to the manner in which the state seeks to use and dispose of its rights therein. In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 33 Sup.

Ct. 667, 57 L. Ed. 1063, it was held that, inasmuch as the defendant had no property right in the river which has been "taken," it was not interested in the question of the power of the government to sell the surplus water.

It is suggested in the briefs of the Attorney General that we might sustain the law as an exercise by the Legislature of its power of regulation, but we do not care to rest the decision upon grounds which would require the court to disregard facts of which it takes notice (*State v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298) concerning the circumstances and conditions existing at the time the act was passed. All persons well informed with the history of the discussion at the time know that the principal object sought to be accomplished was to add to the revenue of the state; and there is nothing in the act itself indicating that the question of regulation is not merely incidental to the main purpose of revenue.

The defendants claim that the state law is ineffective as against a permit which they hold from the United States authorizing them to dredge sand from the Kansas river. The permit amounts to nothing more than consent that, so far as the right of the government to control the stream for the purposes of navigation is concerned, the defendants may continue dredging. In this respect it is not unlike the permits or licenses issued by the internal revenue department authorizing persons to engage in the sale of intoxicating liquors in Kansas. It has never been supposed that such a permit furnishes immunity to the holder from prosecution for a violation of our prohibitory laws.

[6] The legislative history of chapter 259 shows that it was legally adopted by the Legislature. The original bill was known as House Bill No. 219. It was read three times in each branch of the Legislature and, on separate days. The main objection to the manner of its passage is that in the Senate the judiciary committee simply reported a substitute for House Bill No. 219. It appears, however, that the substitute was germane to the title and that exactly the same result could have been accomplished by returning the original bill and recommending its passage with the amendments. The precise question was before the Supreme Court of Tennessee in a recent case. *Southern R. Co. v. Memphis*, 126 Tenn. 267, page 293, 148 S. W. 662, page 668 (41 L. R. A. [N. S.] 828, Ann. Cas. 1913E, 153). The language of the court in disposing of the contention is so pertinent that we adopt and approve it. In the opinion it was said: "It is said the committee on municipal affairs simply reported a substitute for House Bill No. 175. The distinction sought to be made between reporting a substitute bill and an amendment by substitution is more fanciful than real. As stated, the title of the bill remained the same,

and the substitute offered for the original is germane to the title, and is otherwise unobjectionable. The bill cannot be destroyed upon a mere matter of terminology. If it were competent, as is conceded, for the original bill to have been amended by substitution, so as to ingraft upon it the same matter that was contained in the substitute bill, we can see no substantial reason why it is not just as permissible to offer the same subject-matter under the original title as a substitute for the original bill."

Whatever rule may obtain in other states, in Kansas "an enrolled statute imports absolute verity and is conclusive evidence of the passage of the act and of its validity, unless the journals of the Legislature show affirmatively, clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally, and this rule applies to the title as well as to the body of the act." *State v. Andrews*, 64 Kan. 474, syl. 1, 67 Pac. 870.

The title to the act is as follows: "An act relating to the sale and taking of sand, oil, gas, gravel, mineral and any natural product whatsoever from the bed of any river which is the property of the state or any island therein, and relating to the taking and sale of hay, timber and other products of lands lying in the bends of such rivers; prescribing certain powers and duties of public officers in relation thereto; and prescribing penalties, and repealing inconsistent legislation."

Under the authority of *State v. Barrett*, 27 Kan. 213; *State v. Brooks*, 74 Kan. 175, 85 Pac. 1013; *Bank v. Pearce*, 76 Kan. 408, 92 Pac. 53; and decisions cited in the opinions in those cases—it must be held that the title contains but one subject and is broad enough to cover every provision contained in the act. It would be sufficient if the title had read, "An act relating to the sale and taking of sand from public streams within the state." Whether the Legislature may provide, as section 8 of the act purports to do, that certain evidence shall be prima facie proof of a fact material to be established in order to warrant a conviction in a criminal case, need not be determined. No such question is involved here. Were it conceded that the Legislature has no such power, it could avail the defendants nothing. It is expressly provided in section 9 of the act that, if any provision be held unconstitutional, the judgment shall not affect the other provisions, and without this provision it would be our duty so to declare. The certificates of the officers of the House and Senate with the presumptions which will be indulged in favor of the regularity of the act are sufficient to show that it was presented to the Governor within proper time and duly signed. *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149.

[7] The contention that the act attempts

to confer judicial power upon executive officers is answered by numerous decisions which need not be reviewed. The executive council is an administrative body, and it is well settled that the Legislature may create agencies to carry laws into effect, and that, where judgment or discretion is exercised as a mere incident to a ministerial power, there is no commingling of judicial and executive powers. *State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606, and cases cited in the opinion.

We have considered all of defendants' numerous objections to the act of 1913, and find no ground upon which we would be justified in declaring it repugnant to the Constitution of the state; and since the defendants never acquired either by grant or prescription any right or title to the bed of the Kansas river, nor any right to the sand in the bed and channel of the stream, the act does not deprive them of any property rights and cannot be considered as in conflict with any of the provisions of the Constitution of the United States.

The defendant F. J. Schwartz is in no way interested in this litigation, since it appears that he has voluntarily paid the royalties without protest. His motion is sustained, and the action will be dismissed as to him and judgment given in his favor for costs. As to all the other defendants, judgment will be entered for the plaintiff, and the peremptory writ will be allowed. All the Justices concurring.

# ORPHEUS VAUDEVILLE CO. v. CLAYTON INV. CO. (No. 2520.)

(Supreme Court of Utah. April 13, 1914. Rehearing Denied May 9, 1914.)

## 1. EVIDENCE (§ 417\*)—PAROL EVIDENCE—AGREEMENT FOR LEASE—CONSTRUCTION—PROVISIONS AS TO FURNISHING.

Under a contract for the construction and lease of a theater building, providing that defendant should completely equip it in accordance with the architect's specifications to be approved by plaintiff, where neither the contract nor the architect specified what should constitute the equipment, evidence of qualified witnesses that an asbestos curtain, a ticket office, a brass rail for such office, a gridiron, and rigging loft, chairs, and decorations for ceiling and walls were usual and necessary parts of the equipment was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.\*]

## 2. CONTRACTS (§ 303\*)—BUILDINGS—PERFORMANCE—ACT OF ARCHITECT—AGREEMENT FOR LEASE—BUILDING PLANS.

Under a contract whereby defendant was to build and equip and lease a theater building to plaintiff, providing that it should be equipped in accordance with specifications which, in fact, were prepared as the work progressed, the architect's failure to prepare complete specifications of equipment such as fixtures and decorations, which were the last things done in com-

pleting the building, did not relieve defendant from his obligation to furnish such items of equipment as were shown to be usual and necessary.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.\*]

Straup, J., dissenting.

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by the Orpheus Vaudeville Company against the Clayton Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 128 Pac. 575.

This is an action for damages for breach of contract. The cause was tried to a jury who returned a verdict for plaintiff, hereafter referred to as Vaudeville Company, in the sum of \$4,664.48. From the judgment rendered on the verdict, defendant, hereafter referred to as Clayton Company, appeals. The case was before this court on a former appeal. *Orpheus Vaudeville Co. v. Clayton Inv. Co.*, 128 Pac. 575.

The parties to the action, on April 7, 1905, entered into a contract in writing, which, so far as material here, is as follows: "The party of the first part [Clayton Company] hereby agrees to completely build, erect, and equip, at the cost of the party of the first part, in accordance with plans and specifications to be prepared by Architect C. M. Neuhausen, at the expense of the party of the first part, which plans and specifications shall first be approved by the party of the second part, a theater building, which shall be erected on that certain piece of land situated in Salt Lake, Utah, and described as follows [describing a piece of land on State street between First and Second South streets].

\* \* \* The party of the second part shall not have the right to require the expenditure by the party of the first part of more than thirty thousand (\$30,000) dollars for the erecting and equipping of said building and entrance; but, in case the said party of the first part shall expend more than thirty thousand (\$30,000) dollars in erecting and equipping said building and entrance, the party of the second part shall not, because of said greater expenditure, be required to pay any more rent for the said premises than is above provided, nor shall the party of the second part be required to pay any portion of said additional expenditure. \* \* \*

The party of the first part further agrees that said building and entrance shall be completed and equipped in all particulars in accordance with said plans and specifications on or before the 1st of October, A. D. 1905."

The Clayton Company, at the time the contract was entered into, executed a lease of the premises to the Vaudeville Company. The lease, which is in the usual and customary form of such instruments, provided, among other things, that the Vaudeville Com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pany "shall have and hold" the premises from October 1, 1905, until October 1, 1915. The contract and lease, each of which was in duplicate, were placed, together with an escrow agreement, in a local bank. The Clayton Company deposited its certified check for \$10,000 with the contract and lease in escrow. The escrow agreement provided, among other things, that "the said certified check, together with one copy of the said lease, shall be delivered to the party of the first part upon compliance by it, on or before October 10, 1905, with all the terms of the said inclosed contract and plans and specifications, \* \* \* and one copy of said lease shall thereupon be delivered to the party of the second part. If the party of the first part shall fail to comply with all the terms and conditions of said contract on or before the 10th day of October, 1905, the contents of this envelope are to be delivered to the party of the second part on the 1st day of November, 1905."

While the building, according to the contract, was to have been erected and equipped on or before October 1, 1905, owing to the contemplated structure being enlarged, there were several extensions of time granted, and hence it was not turned over to the Vaudeville Company until December 25th. It is alleged in the complaint: "That, in erecting, building, and equipping said theater building in accordance with said contract, it was necessary and essential, in order that the same could be used for theatrical performances, that the same should be equipped with an asbestos curtain, a ticket office, and brass rail for same, a gridiron and rigging loft, a manager's office, 48 chairs for theater boxes and stalls, and ceiling and wall decorations, all of which defendant at all times knew, \* \* \* but that defendant failed, neglected, and refused to perform said contract on its part to be performed as hereinabove set out." It is further alleged "that, in order to complete the erection and equipment of the said building, and in order to put the building in such condition that it would be a theater building where theatrical performances might be given, and which it became necessary for the plaintiff so to do, and because of the failure of defendant to perform its duties under said contract, \* \* \* the plaintiff, between the 25th day of December, 1905, and the 1st day of February, 1906, was compelled to and did equip the same with an asbestos curtain, ticket office," etc., "at an expense and cost to it of \$2,013.85, and that on or about the 1st day of July, 1906, it expended in wall decorations the further sum of \$2,000." It is also alleged in the complaint that: "Because of the delay in erecting said building, the said lease, by interlineation, was changed so as to provide that the term should begin January 1, 1906, and continue for a period of ten years from that date; that said lease so changed was

by defendant herein offered to the plaintiff herein; that \* \* \* the plaintiff protested and objected to the defendant, and did accept said lease under protest, \* \* \* not waiving any of its rights under said agreement; \* \* \* that on and prior to the 25th day of December, 1905, this plaintiff was under a large forfeit amounting to \$2,500 to third parties in the event that it failed to open the theater for a theatrical performance on the night of December 25, 1905; \* \* \* that on or about said 25th day of December, 1905, and upon being notified by defendant that said building was fully completed and ready for occupancy, plaintiff, because and on account of said forfeiture to third parties, and in order to avoid the same, took possession of the same from defendant under protest, and after objecting to the same as aforesaid."

Defendant, in its answer, among other things, alleged: "That on or about the 25th day of December, 1905, plaintiff and the said defendant, by mutual consent, abrogated and rescinded any and all contracts theretofore existing between them respecting the erection, equipment, or adornment of the theater building mentioned; \* \* \* that said action was taken by and between the parties hereto for and in consideration of the execution and delivery of the defendant to the plaintiff of a lease of the said building in the condition in which the same at that date was, and the said lease was then and there accepted by the plaintiff from the defendant, and the said plaintiff did then and there, in consideration of the rescission and abrogation of all contracts theretofore existing, and in consideration of the execution of said lease, enter into the possession and enjoyment of said building under the lease thereby granted; \* \* \* that thereby all negotiations, contracts, agreements, and obligations theretofore pending between the parties were terminated and by express agreement held for naught, and all expenditures, outlays, and expenses incurred by the plaintiff in connection with said building since the said date have been and are at the sole cost of said plaintiff."

Plaintiff introduced evidence tending to show that, soon after it took possession of the building, it, at its own expense, made the decorations, furnished and installed the equipment mentioned in the complaint. The case was tried to a jury, who returned and rendered the following special verdict:

"(1) Was an asbestos curtain an essential part of the equipment of the theater? If so, what was its value at the time it was placed in the theater? Answer: Yes; \$365.

"(2) Was a ticket office an essential part of the equipment of the theater? If so, what was its value at the time it was placed in the theater? Answer: Yes; \$177.

"(3) Was a brass rail for the ticket office an essential part of the equipment of the

theater? If so, what was its value at the time it was placed in the theater? Answer: Yes; \$10.

"(4) Were a gridiron and rigging loft essential parts of the equipment of the theater? If so, what was their value at the time they were placed in the theater? Answer: Yes; \$788.

"(5) Were forty-eight chairs for theater boxes and stalls an essential part of the equipment of the theater? If so, what was their value at the time they were placed in the theater? Answer: Yes; no claim allowed.

"(6) Were decorations for the ceiling and wall an essential part of the equipment of the theater? If so, what was their value at the time they were placed in the theater? Answer: Yes; \$2,000."

From the judgment rendered on the verdict, the Clayton Company appeals.

Pierce, Critchlow & Barrette, of Salt Lake City, for appellant. Gustin, Gillette & Brayton, of Salt Lake City, for respondent.

MCCARTY, C. J. (after stating the facts as above). The first question presented by the appeal relates to the admission of evidence offered by the Vaudeville Company showing that the company was under contract and bond with a third party, which contract and bond provided for a forfeit to such party in case the company failed to open the theater in question on December 25, 1905. Counsel for appellant contend that this evidence was immaterial, as it in no way related to the contract, or to the alleged breach thereof, upon which this action is predicated, and was therefore prejudicial. It is evident that respondent pleaded the contract, bond, and forfeit it was under to a third party as matter of inducement only. Appellant, in its answer among other things, alleged that respondent, by entering into the possession of the building, thereby terminated "all prior negotiations, contracts, agreements, and obligations theretofore pending between" it and appellant. The evidence complained of tended to explain and elucidate the circumstances under which respondent accepted and went into possession of the building before it was, as it contends, decorated and equipped as provided in the contract. We think the evidence was, under the circumstances, properly admitted.

The contract provided that respondent could not compel appellant to expend in erecting, completing, and equipping the building and entrance thereto more than \$30,000. Appellant could, however, under the contract, expend more than \$30,000 in erecting and equipping the building for use as a theater, but could not compel respondent to pay any portion of any expenditure it might make in excess of \$30,000. Nor could it increase the rent of the building to respondent because

of any additional expenditure. The evidence shows that it cost appellant from \$50,000 to \$70,000 to erect and put the building in the condition it was when respondent went into possession. It is contended that, since appellant expended more than \$30,000 in erecting and equipping the building for use as a theater, and since "respondent received a building worth nearly twice as much as it had expected, or that appellant was obliged to build," respondent cannot, as matter of law, recover for any expenditure made by it in decorating or equipping the building for the uses for which it was intended. We think the provision of the contract limiting the amount that appellant was required to expend in erecting, completing, and equipping the building for use as a theater is plain and unambiguous. Under this provision of the contract, appellant, in order to limit the cost of the building and the equipment to \$30,000, could have erected a much less elaborate structure than the one it did erect, and, as stated by counsel for respondent, it "could, to bring the cost of the theater down to the figures named, place in material and workmanship inferior to that which respondent might desire. It could \* \* \* have decorated the theater in water colors rather than oil. It could (and did) furnish imitation rather than real leather chairs," etc. Appellant was, however, under the contract, bound to erect, complete, and equip a building suitable for the use for which it was intended. This assignment is without merit, and is therefore overruled.

[1] The contract, in general terms, provided that appellant should "completely build and equip" a theater building "in accordance with plans and specifications to be prepared by Architect C. M. Neuhausen, \* \* \* which plans and specifications" were to be approved by respondent. Neither the contract nor the plans and specifications specified what should constitute the equipment of the theater building. It seems that the plans and specifications were prepared by the architect as the work in erecting the building progressed, and that a complete set of plans and specifications were never prepared by the architect. Witnesses who were shown to be skilled in reading plans testified that the plans prepared by the architect for the construction of this building indicated that decorations were intended. Respondent called several witnesses, all of whom were shown to be qualified to testify as to what constituted equipment for a theater building. These witnesses testified that the following items are an essential, in fact a necessary, part of the equipment of a building used as a theater: Asbestos curtain; ticket office; brass rail for ticket office; gridiron and rigging loft; chairs; and decorations for ceiling and walls. It is contended on behalf of appellant that the court erred in admitting this evidence. We do not think so. As the par-

ticular items constituting equipment for the theater building are not set forth in detail in the contract, nor indicated in the plans and specifications, it was proper for respondent to introduce evidence tending to show what items are usually and necessarily included in the equipment of a theater building.

[2] It is also contended on behalf of appellant that, as the contract provided that the building should be completed and equipped "in accordance with the plans and specifications," and that since the plans and specifications do not provide for any of the items above mentioned, appellant was not legally bound to supply them. There would be much force to this contention if a complete set of plans and specifications had been prepared and submitted to and approved by respondent, and as approved had been followed by appellant in constructing and equipping the building. But that is not this case. As hereinbefore stated, the plans and specifications were prepared by the architect as the work on the building progressed. It appears that the decorating and painting of the walls and ceiling, and putting in the fixtures and appliances mentioned, were the last things done and necessary to be done in preparing the building for the uses for which it was erected and for which it was intended. The failure of the architect to prepare complete plans and specifications of the building and the equipment cannot relieve appellant from its obligations as fixed by the contract.

The judgment is affirmed. Respondent to recover costs.

FRICK, J. I concur with the CHIEF JUSTICE. I feel constrained, however, to briefly state the principal reasons upon which I base my concurrence in the affirmance of the judgment. They are these:

The particular provision of the contract existing between the parties which is involved, and which, in my judgment, must control this decision, is as follows: "The party of the first part [appellant] hereby agrees to completely build, erect, and equip, at the cost of the party of the first part, in accordance with plans and specifications to be prepared by Architect C. M. Neuhausen, at the expense of the party of the first part, which plans and specifications shall first be approved by the party of the second part, a theater building," etc. The theater building was erected by appellant; but it is contended by respondent that it was not completely equipped as provided in the contract. Appellant's answer to this contention is that it was required to build and equip a theater building only according to certain plans and specifications, and not otherwise. Further, that the plans and specifications as provided do not designate the things sued for by respondent as constituting a part of the equipment of the building. If the provision of the contract had been complied with by ap-

pellant in furnishing plans and specifications, its answer to respondent as indicated above might be decisive of the whole controversy. It conclusively appears, however, from the evidence that appellant failed to comply with the contract, in that it did not furnish complete plans and specifications for the equipment of the theater building. While perhaps there is nothing said to that effect, yet, to my mind, it is quite clear that respondent waived or did not insist on that part of the contract; but it did not waive and has always insisted upon the part which required appellant to "completely build, erect, and equip" the theater building. This latter provision contemplated a building complete in itself, and one that was complete for use as a theater—a complete "show house," if you please. Appellant, in my judgment, cannot now shield itself, as it is attempting to do, behind its own negligence in not providing a complete set of plans and specifications from which it could be precisely determined by any one just what the character of the equipment spoken of in the contract should be. Appellant had agreed to completely equip; but it had failed to specify the character of the equipment, although I think it was its duty to furnish plans in which such was contained. Had it done so respondent then could have either approved or disapproved the equipment proposed in such plans. As the matter was left, respondent had no voice in the matter. The mere fact, therefore, that appellant failed to furnish such plans, in my judgment, cannot be availed of by it as an excuse for not completely equipping the building. Appellant having failed both in providing plans and equipping the building for use as a theater, respondent's only recourse was to establish, if it could, what constituted equipment of a theater building such as was erected by appellant. The fact that the character of the equipment may have been left in doubt is of no consequence since, if that was so, it was so because of appellant's fault in not furnishing the necessary plans and specifications in which the character of the equipment was specified. I think, therefore, that it cannot now invoke the rules which would govern in ordinary cases. If appellant agreed to equip the building, and decorations constituted a part of such equipment, and that it did so was found to be the case by the jury, it cannot now complain if it is required to pay for reasonable and fitting decorations for a theater building of the kind which it erected as shown in this case. The evidence is conclusive, I think, that the decorations placed in the building by respondent were shown to be proper and reasonable in every respect, including cost. I can see no reason, therefore, why appellant should not be compelled to comply with all the terms of its contract, whether expressed or necessarily implied. The objections now urged by appellant, by



reason of its conduct as above stated, have been stripped of their legal force and effect, and for that reason it now, by the verdict and judgment, is merely required to comply with the provisions of its own contract.

STRAUP, J. I dissent. A chief point of difference relates to decorations. By the respondent it is contended that under the contract the appellant was required to decorate the walls and ceiling of the building. Appellant disputed that, and further claimed that the contract in such particular was ambiguous. It made no decorations. The respondent, when it took possession of the building, at its own expense of \$2,000, decorated the walls and ceiling. The jury allowed it that sum for that purpose. The only provision of the contract which in any respect can be said to relate to or include decorations is: The appellant "agrees to completely build, erect, and equip, \* \* \* in accordance with plans and specifications to be prepared by" a designated architect, and to be approved by respondent, "a theater building." To properly ascertain the terms of the contract requires a consideration of both the contract and the plans and specifications. They must be read and considered together. There is nothing in the contract itself concerning the subject of decorations, nor is there anything in the specifications; but on the plans are certain marks, mostly pen point dots, some short curved, and some horizontal, lines of different shading, all made by the architect when the plans were drawn by him. These, the respondent contends, indicate decorations and the places where they were to be made on the walls and ceiling. The appellant contends they were only put on the drawings to give them a finished appearance. That is all there is to indicate that anything was agreed upon or stipulated concerning decorations. The marks or scrolls do not, in or by themselves, indicate or resemble anything. They can be said to indicate a finished appearance of the drawings, or, treating them as symbolical, to represent anything, decorations, trimmings, equipments, structures, or anything else one might imagine could be put up at the places indicated by the marks, or the character of the walls, or the material out of which they were to be constructed, one thing at one place and a wholly different thing at another. If treated as symbols of decorations, there is nothing to indicate the description, character, or quality of them, whether to be in metal work, plaster work, leather, tapestry, water colors, oil, or what not. We thus have here a double ambiguity; one as to what was meant and intended by the marks, and, if decorations, then as to their character and quality. The respondent was permitted, over appellant's objections, to resort to parol evidence. I think it doubtful as to whether the contract, though considered in connection

with the plans, shows that the parties agreed upon anything with respect to decorations, or in any particular stipulated concerning such a subject. Though it be conceded it was competent by parol to show what was meant and intended by the marks on the plans, still the further questions are as to whether the proffered and admitted evidence over the appellant's objections was competent for that purpose, and, most of all, whether the testimony when so adduced sufficiently aided the ambiguity to ascertain with reasonable certainty what was meant and intended by the parties respecting decorations as expressed by their contract. These can best be considered by reference to the questions propounded to the witnesses by the respondent and the answers made by them, all of which were received over the appellant's specific and timely objections. A witness was called by the respondent, and, after showing that he was "a practical architect of four years' experience," a graduate of a correspondence school, and that he had drawn plans for and constructed as many as two theaters, one at Salt Lake City, the other at Calgary, was shown the plans upon which the marks appeared. He had nothing whatever to do with preparing or drawing them, and was asked nothing respecting the architect who had prepared or drawn them, and nothing as to his acquaintance or association with him, nor as to his knowledge of the architect's method of indicating decorations on drawings, nor as to the method or manner decorations by architects are usually or generally indicated. Looking at the plans, the witness was asked: "Q. Referring to the upper portion of the proscenium arch or sounding board as you have described it, I will ask what the scroll-work upon that indicates. A. It indicates decorations. \* \* \* I can't tell what kind of decorations from this plat. The scroll work upon the proscenium arch indicates decorations, I can't say what kind. The plans show decorations on the side of the proscenium arch, the sounding board, the arches above the boxes, the panels on the side of the auditorium, the ceiling in the balcony, and the front face of the balcony. I cannot determine from the plans what kind of decorations was intended. Q. From your experience as an architect, what kind of decorations might be placed upon the proscenium arch, the auditorium, the sounding board, and the boxes of the theater such as the Orpheum Theater in Salt Lake City? A. Decorations might consist of stucco work, plaster of paris cast, and relief work, could be in stamped model work, embossed paper, water colors, or oil relief work. Water color relief work done in stencil would be cheapest. Q. I will ask you whether or not, in your opinion as an architect, from the experience which you have had in building theaters, examination of theaters throughout the United States, if \$2,000 would be a reasonable price for dec-

orating the interior of the Orpheum Theater in Salt Lake City in water colors? A. Yes; I do." This, as is seen, was not even based on any knowledge of the witness, nor upon any assumed hypothesis, as to the description, character, or quality of the decorations made by the respondent. Then, too, the whole question without such a basis was tried, not to the court and jury, but to the witness.

A contractor of experience was also called and, being shown the plans, testified: "I don't know what those marks about the proscenium arch indicate; they look like decorations. Q. I will ask you if those plans, or plans similar to those, were submitted to you as a building contractor in the regular course of your business, and you found upon the proscenium arch figures and lines and indications such as you find upon these, what, in your opinion, would they indicate? A. They would indicate some kind of decoration, I would not be able to tell what kind. Q. Where would you go to find out what kind of decorations were meant? A. I would go to the architect in charge of the work. \* \* \* The decorations might be paint, water colors, plaster, or leather. \* \* \* Q. In your opinion as a builder and architect, what kind of decorations would be indicated by these plans here? A. To decorate and to comply with this drawing, it might be done with water color, or oil paint, or plaster. Water color would be the cheapest. It would be impossible to tell from that [the plans] what it did mean. It could be stucco work, pressed paper, plaster of paris, or various other kinds." He further testified that the walls were not decorated by the appellant, and that the decorations were made by respondent. He was further asked: "Q. In the manner in which the theater was decorated, I will ask you whether or not you know that the way it was decorated was the cheapest or the most expensive, or what was the relative cost? A. It was decorated in about as cheap a way as it could be done. It was done in water color. Q. I will ask you whether or not, in your experience as a builder and contractor, and also from your experience and examination of other theaters throughout the United States, and your experience in regard to decorating buildings generally, whether or not the sum of \$2,000 was a reasonable sum for the decoration of the Orpheum Theater in Salt Lake City, Utah, in water colors? A. I think that was a reasonable sum."

Still another witness was called, who testified: "I think I am competent to determine what are necessary equipments of a theater. Q. I will ask you whether or not, in your experience as a builder and contractor, and also from your experience in building the Orpheum Theater in Los Angeles and the one now being erected in Salt Lake, you are able to state whether or not decorations are a necessary part of the equipment of a the-

ater which is to be built and to fully erect and equip? A. Yes." Upon being shown the plans, he testified that they "show decorations around the proscenium arch and sounding board, over the boxes on either side and over the door"; but he, as the other witnesses, was unable to tell what kind of decorations was intended or meant.

These rulings are all complained of. And the further complaint is made that the testimony so received did not help or cure the ambiguity. Though it be conceded that parol evidence was admissible to explain the ambiguity, still I am clearly of the opinion that this testimony was improperly received. I think it would have been competent to show by parol that the marks were used by the architect preparing and drawing the plans to indicate decorations, or that it was his habit or custom in preparing plans to so indicate decorations, or that in the trade or profession it was usual or customary for architects to so indicate decorations, or that the marks in the trade or profession had such a defined or understood meaning. Had such evidence been adduced, then it might be inferred that the architect in preparing and drawing the plans had so regarded and used the marks, and hence that the parties so regarded and understood them. But nothing of that kind was shown. Here the witnesses were but called and shown the plans and asked what the marks indicate. They replied, decorations of some sort. As well could they have been permitted to say that the dots, the pen points, indicated "September Morn" in water color, the curved lines "Psyche at the Well" in tempera, and the scrolls "Cleopatra-Meeting Antony" in oil.

And then I think it also clear that, by many of the questions propounded to them, the witnesses were required and permitted to usurp the province of the court and jury by drawing conclusions of law and fact upon which the decision of the case with respect to the issue relating to decorations depended, and in most instances were allowed to give their opinion as to the cost of the decorations, without a showing that they had knowledge of, or without stating to them, the character and quality of the decorations made by the respondent. They but answered that the decorations as indicated on the plans, the description, character, or quality of which was intended neither of them could tell, would cost \$2,000. And for these reasons were the questions also objectionable.

But, after all this testimony was adduced, in what way did it help or cure the ambiguity? All the witnesses, testifying on the subject, but testified that the marks indicated some sort of decorations, but were unable to tell the description, character, or quality of them, or what decorations were intended or meant. With the aid of the testimony what more information had the court and jury as to the intent of the parties with respect to decorations as expressed by their

contract? Being but informed that some sort of decorations was intended, but nothing to show the description, character, or quality of them, how can the contract in such particular be enforced, or how can it be told when it was performed in such respect and when not? I think, therefore, that the parol evidence in no way aided the ambiguity, and that the contract was as uncertain and indefinite after the evidence was received as before.

But the respondent further argues that it was entitled to an allowance for decorations under the clause of the contract "to completely build, erect, and equip" the theater, irrespective of plans or specifications, that decorations of some sort were a necessary part of its equipment, and that it was not "completely equipped" without them. The parties made no such contract. Its plain provisions are "to completely build, erect, and equip" the theater "in accordance with plans and specifications to be prepared by" a designated architect, and to be approved by the respondent. So the parties did not, by their contract, merely stipulate that the appellant should "completely build, erect, and equip" a theater, but should so build one "in accordance with plans and specifications," etc. Hence must we, as the parties themselves stipulated, look to the plans and specifications to ascertain how the theater was required to be equipped. When we look to them we find nothing concerning decorations, unless the marks on the plans indicate decorations, which leads to the ambiguity. If they do not indicate decorations, then none are provided for; if they do, then is the stipulation in such respect, though considered with the testimony adduced by the respondent, so uncertain and ambiguous as to be incapable of performance or enforcement.

It further is argued that complete plans and specifications were not furnished by the appellant, and for that reason should the contract be considered independently of the clause that the theater was to be equipped in accordance with the plans and specifications. All I find to support the contention that complete plans and specifications were not furnished is this: The president of the respondent company upon the stand was asked: "Were any full, complete plans ever submitted to you, or how did you get them?" This was objected to as calling for a conclusion. The question was withdrawn, and the witness asked how many times he "saw different plans and specifications, that is, a piece here and there." He answered: "Well, the plans were gotten out just as the work proceeded. There never was a full set of plans. The plans were gotten out as the work proceeded for special work." Another witness for the respondent, the contractor, testified in response to questions asked by counsel for respondent: "Did he [the architect] as architect ever furnish you a complete set of plans and specifications?" He an-

swered: "Well, he furnished a complete set before we got through, but not until we about got through;" that a complete set of plans and specifications were not furnished before the work commenced; "they came along as they were required \* \* \* as a contractor there was a set of plans furnished us, a blue print of them." But no claim was made that the plans and specifications as and when they were furnished were not approved by the respondent, or that it with respect to them made any objections, nor is it claimed by any one that the contract in such particular was in any manner modified or changed by any kind of an agreement, either express or implied. It was competent for the parties to modify or change their contract and build the theater without plans or specifications. But they did not do that. Further, the only claim made with respect to incompleteness of the plans and specifications relates to the subjects of an asbestos curtain, a gridiron, and a rigging loft, a brass rail, a ticket office, and a manager's office, and chairs. These, the respondent contends, should have been, but were not, indicated on the plans or specifications, because, as it asserts, they are necessary equipments of a completed theater. But on the record I do not find anything to show that the respondent objected to the plans or specifications because any of these things were not indicated on the plans or specifications. It did not try its case on any such theory. It tried it on the theory that those things are necessary equipments of a theater independently of the plans and specifications. That is, because, as it contends, they are such necessary equipments, it is entitled to recover for them, regardless of whether they were or were not indicated or provided for on the plans or specifications, or regardless of whether the plans or specifications furnished were approved or objected to by the respondent.

But no claim was or is made that the plans or specifications were incomplete with respect to decorations. Those, the respondent contends, are indicated on the plans by the marks and scrolls referred to. Of course it makes the further claim that it, under the clause of the contract referred to, was entitled to show that decorations were a necessary equipment of a completed theater, irrespective of the plans or specifications; but it made no claim that the plans in such respect were incomplete, or that it had not approved them, or that the contract requiring the theater to be equipped in accordance with plans and specifications to be furnished by the architect and approved by the respondent was in any particular changed or modified. Both parties concede that the contract between them was and is to "completely build," etc., a theater "in accordance with plans and specifications" to be furnished by the architect and approved by the respondent. Complete plans were furnished, not before the

work commenced, but as they were required. Under the plans and specifications which were furnished was the theater constructed. There is no dispute as to that. As to decorations the respondent contended that the plans as furnished provided for decorations; that the marks and scrolls indicated that, to show which it was permitted to resort to parol evidence. But now see how this matter was submitted to the jury for its special finding. The direction in such particular is: "Were the decorations for the ceiling and wall an essential part of the equipment of the theater? If so, what was their value at the time they were placed in the theater?" The jury found: "Yes; \$2,000." The pertinent question in such respect was not: Were decorations "an essential part of the equipment of the theater"? for that was not the contract of the parties. Nor was the direction in such particular within the construction of the contract put upon it by the court in its instructions to the jury. The court, as to that, charged: "The court charges you that, if you find that the plans were not drawn for the purpose of showing or calling for any specific or ascertainable decoration and in this particular were drawn and constructed only for the purpose of showing where the decoration might be put if it were called for and specified, then the defendant was not under obligation to decorate the walls of the theater to any other or greater extent than they were decorated in accordance with the directions shown upon said plans."

The pertinent question was: Were decorations, as an equipment or otherwise, indicated or provided for on the plans and specifications, and, if so, what were the character and quality of them and the reasonable cost of making them? Notwithstanding the respondent, to support its contention, adduced much evidence to show that the plans did indicate and did provide for decorations, the appellant to the contrary, yet the matter of decorations was submitted to the jury for a special finding, independently of all this testimony, and not on the theory of whether the marks did indicate decorations, or whether the plans and specifications otherwise called for or provided for decorations, and, if so, the character and quality of them and the reasonable cost to make them, but on the theory of whether decorations were an essential part of the equipment of a theater irrespective of the plans and specifications, and independently of the evidence adduced in respect thereof, and directly contrary to the charge referred to. So we have a contract which, if it at all pertains to the subject of decorations, is, as to that, to say the least, ambiguous, to explain which the parties adduced much evidence. But, after the evidence was adduced, the matter was submitted and determined in utter disregard and independently of such evidence. I think that

wrong, and that the allowance made for decorations cannot, on this record, be upheld, and that a new trial should be granted, unless the respondent remits the amount awarded for decorations.

# UTAH COMMERCIAL & SAVINGS BANK v. FOX et al. (No. 2550.)

(Supreme Court of Utah. April 10, 1914.)

## 1. APPEAL AND ERROR (§ 1008\*)—FINDINGS—OPINION OF TRIAL COURT.

The opinion of the trial court may be looked to on appeal to ascertain the reasons for the decision, but it is not a finding of any fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

## 2. EVIDENCE (§ 383\*)—BOOK ENTRIES—WEIGHT OF EVIDENCE.

Entries in books of a party not made by any person who knew the facts, nor made at the time the transactions occurred, but long thereafter, and not so made as to explain themselves, have but little, if any, probative force as evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\*]

## 3. APPEAL AND ERROR (§ 1009\*)—FINDINGS—REVIEW.

Under the Constitution, appellant may, in a suit in equity, invoke the judgment of the Supreme Court on the facts and the law; and where the findings are clearly against the evidence, or when the Supreme Court is satisfied that the presumption of correctness of the findings have been overcome by the record, the Supreme Court must make or direct findings according to the evidence and the law applicable thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

## 4. EVIDENCE (§ 588\*)—CREDIBILITY OF WITNESSES.

The testimony of an unimpeached witness, not contrary to the usual course of nature or for some other reason unworthy of belief, must be considered by the court in determining the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

## 5. JUDGMENT (§ 276\*)—ENTRY—CANCELLATION OF DEBT MERGED IN JUDGMENT.

The trial court should not enter judgment without requiring plaintiff obtaining the judgment to produce for cancellation the evidence of the debt merged in the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 542-545; Dec. Dig. § 276.\*]

## 6. BILLS AND NOTES (§ 491\*)—PRESUMPTION FROM POSSESSION.

A holder of notes, who obtains a judgment thereon, has no legal right to retain possession of the notes, and any presumption arising from possession is without any force as to him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1643-1648; Dec. Dig. § 491.\*]

## 7. PLEDGES (§ 44\*)—PAYMENT OF DEBT—RIGHTS OF PLEDGEE.

Where a note secured by collaterals is paid, the collaterals are not enforceable in the hands of the holder of the note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 103-107; Dec. Dig. § 44.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
 † Campbell v. Gowans, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 608.

**8. BILLS AND NOTES (§ 527\*)—ACTIONS—PAYMENT—EVIDENCE.**

Evidence held to show that a note sued on had been paid before the commencement of the action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.\*]

**9. LIMITATION OF ACTIONS (§ 41\*)—COUNTERCLAIM—LIMITATIONS.**

Where money paid in excess of what should have been paid on a debt could not be recovered because of the bar of limitations, a counterclaim for the overpayment was barred, so that a judgment therefor could not be sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 214, 216; Dec. Dig. § 41.\*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by the Utah Commercial & Savings Bank against Jesse W. Fox and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Benjamin F. Johnson, of Salt Lake City, for appellants. Moyle & Van Cott and A. E. Moreton, both of Salt Lake City, for respondent.

FRICK, J. This action in equity was commenced to foreclose a mortgage. The case is here on a second appeal. For first appeal see 40 Utah, 205, 120 Pac. 840. On the first appeal we stated the issues fully and shall do no more in that regard than to refer to that opinion. We reversed the judgment in favor of the plaintiff on the first appeal, and upon the second trial the court again made findings and entered judgment against the defendants, and they again appeal. It was contended on the last hearing that in the former opinion the facts with regard to the note in question are not correctly stated. In view that the promissory notes involved here were not produced in evidence, and for the reason that the facts were not clearly presented in the record, we did the best we could in that regard, and, so as to be sure not to mislead any one, we quoted the precise words of one of plaintiff's witnesses with respect to what the particular note in question was given for. See 120 Pac. 842, right-hand column. The effect of the testimony of the witnesses on the last trial is substantially the same as on the former, except that on many of the points the evidence is much more explicit than it was on the first trial. On the former appeal we suggested that the trial court make findings: "(1) What was the actual consideration for the note sued on; that is, was it or was it not given for the purpose claimed by appellants? (2) Were the two Beck notes received by the respondent bank for the purpose claimed by the appellants, or as claimed by the bookkeeper? (3) When and how did the claims arise which appellants averred in their counterclaim against respondent?" The court made findings on the last two questions but

made none on the first one, except that there was a consideration for the note. We shall state the facts so far as it may be necessary to illustrate the points decided.

The evidence shows that on March 1, 1892, the appellant Jesse W. Fox and L. G. and O. H. Hardy made and delivered to one A. D. Young five promissory notes for \$4,000 each, thereby evidencing an indebtedness of \$20,000. Three of the foregoing notes were made payable in 18 months from date, one in 15 months, and when the other was made payable, whether in a shorter or longer time, is not shown. We shall assume, however, that it was made payable in 15 months. One of said notes was not accounted for at the trial, and no one seemed to know what became of it. On August, 11, 1892, A. D. Young, the payee of the foregoing five notes, made and delivered to the respondent bank his one promissory note for \$20,000, payable in 90 days from date. In said note it is recited that the maker thereof has "deposited as collateral security five notes of L. G. Hardy, Jesse W. Fox, Jr., and O. H. Hardy of four thousand each and note of John Beck of seven thousand five hundred of the nominal value of twenty-seven thousand five hundred dollars." The evidence also shows that the payment of the \$20,000 note was further secured by a mortgage on two parcels of real estate lying in the block immediately north of Brigham street and west of State street in Salt Lake City, and also by 1,000 shares of Bullion-Beck mining stock, which at the time was paying considerable dividends. The value is not shown of either the real estate or mining stock, but it was conceded at the trial that respondent had collected a considerable sum as dividends on the stock, and that at least some of the proceeds derived from such dividends should have been credited either on the \$20,000 note or on the five \$4,000 notes; and the testimony indicates that such was done, although no indorsements to that effect are shown on the notes themselves. In making the computations herein, we have, however, excluded the dividends. What the proceeds of the real estate were is not shown. Apparently matters ran along until at least one of the \$4,000 notes was about to mature or had matured, when, according to appellant's testimony, some time in the early part of July, 1893, Fox was notified by the respondent bank to call at the bank for the purpose of making some arrangements with respect to the payment of the notes which he had signed with the two Hardys as aforesaid. He says that at least one, and he thought two, of the \$4,000 notes had been paid by the Hardys or by one of them at that time. He went to the bank, however, and says that while there he made the following proposition to the bank respecting his future liability on the Hardy-Fox notes, namely: That he would give the bank a note in an amount equal to one of the

\$4,000 notes, with accrued interest, and secure the same by a mortgage on some real estate he owned in the western part of Salt Lake City, if the bank would discharge him from all liability on the other \$4,000 notes. He says that, while respondent did not accept his proposition on that day, he nevertheless was notified in a few days thereafter that it had accepted his proposition, whereupon, on the 13th day of July, 1893, he and his wife went to the office of respondent's attorney, Mr. C. O. Whittemore, and then made and delivered the note and mortgage sued on in this action. The note was payable to M. E. Cummings, the cashier of the respondent bank, and was payable on or before December 1, 1893, with 10 per cent. interest from date. The note was given for \$4,147.77, which represented the principal and accrued interest up to the 13th day of July, 1893, of one of the \$4,000 notes. Fox also testified that the note was by him given and by the respondent received in full satisfaction of his liability on all of the \$4,000 notes. He further testified that, some time after he had made and delivered the note and mortgage in suit, he entered into an arrangement with the president of the respondent bank whereby it was agreed that he should obtain two certain promissory notes which he then owned, and which were deposited in another bank for collection, one of which was dated April 5, 1892, given by John Beck for \$1,575, payable in one year to the order of Fox, and the other given by the same payor for \$5,250, payable in two years to the order of Fox, and which was dated August 24, 1892; that the respondent should collect those two notes, on the smaller one of which it seems some interest had been paid, and should apply the proceeds as collected on the note sued on until the same was fully paid. Fox further testified that, pursuant to this agreement, he deposited the two Beck notes in the respondent bank, and the indorsements made by some of respondent's employes show that during the year 1894 and subsequent thereto payments were made on those notes. The payments on the notes amounted to the sum of \$5,357.35, as near as we are able to ascertain the amount from the indorsements thereon.

In January, 1895, respondent commenced an action in Salt Lake county on three of the \$4,000 notes. While Mr. Fox was made a nominal party to that action, yet no service of summons was made upon him, although he was always in Salt Lake City. On the 21st day of February, 1895, respondent obtained judgment by default on said three notes against L. G. and O. H. Hardy, two of the makers, for the sum of \$14,366.65; the same being principal and accrued interest up to the date of the judgment. We remark that although all of the Hardy-Fox notes, as well as the note in suit, were all long past due at the time the foregoing action was commenced and judgment obtained as afore-

said, yet Mr. Fox was not sued. No explanation is made why he was not sued in 1895 with the other makers of the \$4,000 notes, nor why no action was brought against him on the note in suit which was then past due, nor why no action was ever commenced on the fourth one of the \$4,000 notes. These facts are important only as tending to sustain appellants' contention that the note in suit was by Fox given and received by the respondent bank in full satisfaction of Fox's liability on all of the \$4,000 notes. In view of the payments made to respondent on the two Beck notes, appellants also contend that the note in suit was paid long before this action was brought. The only attempt made to meet appellants' evidence by respondent is by having recourse to certain entries in its bank books, from which it is contended it is made to appear that the note in suit was given as additional security on the five \$4,000 notes, and that the Beck notes were not received by the bank for the purpose testified to by Mr. Fox, but that they were owned by the bank. Respondent, however, did not introduce a single witness who knew anything about the transactions, and the witnesses frankly admitted that all that they were able to do in the matter was to make deductions from the entries in the books favorable to respondent's contention. The deductions were also based, to some extent at least, on the usual presumptions that arise from the fact that the note in suit, as well as four of the other \$4,000 notes, were still in the possession of respondent. Further that the note in suit was given at a time when only one of the \$4,000 notes had matured. The trial court adopted the theory of respondent's witnesses, and, while no judicial findings respecting the purpose for which the note in suit was given were made by the court, it did judicially find that the Beck notes were not deposited with respondent for the purpose testified to by Mr. Fox, but found that said notes belonged to the respondent bank.

[1] The judge, in giving his reasons in an oral opinion, however, also held that the note sued on was not given in satisfaction of Mr. Fox's liability on the \$4,000 notes, but was given either as additional security for all of those notes or in payment of the one then past due. But the judge, as we read his opinion, rather inclined to the view that it was given as collateral for all of the \$4,000 notes. While we may look to that opinion to ascertain the judge's reasons for his decision, yet it amounts to no judicial finding of any fact, and hence has no judicial effect whatever. It is also strenuously argued by respondent's counsel that the district judge saw and heard the witnesses, and that he had the right to believe any one, or all, or none, of them, and hence his findings and conclusions should not be disturbed by us. While, under ordinary circumstances, where there is a conflict in the testimony of the witnesses who testify in a case, or where the

testimony of the witnesses is more or less strongly contradicted by established facts, etc., the contention of counsel has much force, yet in the case at bar no such conditions prevail.

[2] Even the entries in the books that were produced have little, if any, probative force, since in most instances they were made neither by the person who knew the actual facts recorded, nor were the entries made at the time the transactions occurred, but were made a long time after the transactions had taken place. Nor are the book entries such as clearly explain themselves, so that one may say they can be implicitly relied on as tending to establish a particular fact or facts. Indeed, under the ordinary rules of evidence, those entries would practically be of no probative force or effect whatever.

[3] Again, counsel overlook the fact that under our Constitution the right of appeal is absolute, and that in equity cases the appellant has a right to invoke our judgment on the facts as well as upon the law. We therefore cannot take refuge behind the findings or conclusions of the trial court and approve them, whatever they may be, upon the ground that that court had the right to believe or to disbelieve the testimony of a witness or any number of witnesses. Where it appears to us that the findings are clearly against the evidence, or when we are satisfied that the presumptions respecting the correctness of the findings and judgment have been dissipated by what is made to appear in the record, it is our duty to determine what the findings and judgment should be, and we must then make or direct such findings and judgment which, according to the evidence and the law applicable thereto, in our judgment are right and just. Upon this question the rule applicable to equity cases in this jurisdiction is correctly stated in *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660.

[4] Appellants' testimony certainly stands without contradiction by any of the witnesses; and as we construe the record evidence, what little there is, it corroborates rather than contradicts the statements of Mr. Fox. We have no hesitancy in saying that under the circumstances of this case, so long as Mr. Fox's testimony stood unimpeached, it was the duty of the trial court to give it due and proper consideration in arriving at what the findings and judgment should be. The rule invoked by respondent's counsel does not go to the extent that the court may capriciously and without adequate reason refuse to consider the testimony of any of the witnesses. Unless the witness is impeached or his testimony is against the ordinary and usual course of nature, or for some other adequate reason is clearly not worthy of belief, the courts are bound to consider it in arriving at their conclusions. No such reasons appear in this record, and hence the testi-

mony of Mr. Fox should have been considered by the court. The court did not do so, but followed some theory of its own which is reflected in the oral opinion we have referred to. While the oral opinion of the district judge in no way is binding on us, yet we have carefully considered it, and, because of the judge's conclusions, have given the record a most careful scrutiny.

[5] We cannot agree with the judge in the deductions he makes from the evidence. For example, he arrived at the conclusion, but nevertheless failed to judicially so find, that the note sued on was either given in place of one of the \$4,000 notes which was not found, and which was past due at the time the one in suit was given, or else that it was given as additional collateral security for the whole series of said notes. We think otherwise. Fox testified that at least one, and probably two, of the \$4,000 notes were paid by one or the other of the Hardys before appellant made the arrangement with respondent, testified to by him, and before he gave the note in question. We think his testimony that at least one of those notes was paid should prevail. That note we have assumed became due in 15 months, and, assuming that it was paid when due, the amount, principal and interest, was \$4,500. The judge was also of the opinion that Fox's testimony could not be believed because, if it were true, then he would have paid a debt before it matured. In this connection it is insisted that the presumption is that creditors do not pay before their debts mature. Grant this, and yet the arrangement testified to by Fox is certainly a matter entirely within the range of probabilities. Again, some stress was laid on the fact that at least four of the \$4,000 notes were left in the possession of the respondent. If the judge's theory is the correct one, namely, that the note in suit was only given as additional collateral security, then respondent, as a matter of course, would retain all of the \$4,000 notes. But, under the circumstances of this case, possession of notes by respondent has no significance whatever. The evidence is without dispute that respondent had obtained judgment on three of the five \$4,000 notes on February 21, 1895, and yet it had possession of all of them even at the time of the trial in the district court. Here we thus find three notes amounting, with interest, to the sum of \$14,366.65, although merged in judgment, still in the possession of the holder thereof. In many jurisdictions this would be an impossibility, since the courts of original jurisdiction would not enter judgment without having the party produce and have canceled the evidence of the debt which was merged into the judgment. This case illustrates that the rule is a wholesome one and should prevail everywhere.

[6] Respondent had no legal right, therefore, to retain those notes after judgment,

and hence the presumption arising from their possession is without any force in this case. The possession of those notes, therefore, in no way affects appellants' contentions. Again, the fact that the note in suit was made payable to the cashier of the bank instead of the bank itself indicates, to our minds, that the arrangement was intended to segregate the claim against appellants from the claim against the Hardys on the other notes. This theory is supported by the fact that Fox was not served with summons, nor was any judgment asked against him on any of the other notes, although judgment was taken against all of the other payors. In this connection there are a number of other facts and circumstances which to our minds support appellants' contentions, but which we cannot enlarge upon further.

[7, 8] There is, however, another phase of the controversy which we want to discuss for a moment. The actual payments made on the \$20,000 A. D. Young note, according to the indorsements thereon made between November 11, 1892, when said note became due, and March 4, 1895, amounted to \$11,260. If we now add to that sum the amount of the one \$4,000 note which we have found was paid to respondent with interest, it will swell the payment to the sum of \$15,760. Then there was actually paid on the two Beck notes as principal and interest, from the indorsements made thereon, all of which was credited on the Young note, the further sum of \$5,357.35. To this sum must be added the sum of \$1,200, which, by indorsement, it is shown was received from the Bullion-Beck mining stock, and which was credited on the \$7,500 Beck note which was originally deposited with the \$20,000 note as collateral security. How much more, if anything, was received from either said note or said stock is not disclosed. Then the district court found that Fox had paid an additional \$1,000 which was applied on the Young note. If we now add all of those payments together, we have a total of cash payments to be applied on said note amounting to \$23,317.35. This would pay the principal sum of the Young note with nearly two years' accrued interest. Whenever that note was paid, of course the collateral notes no longer were of any force while in the hands of respondent and could not have been enforced by it. But, in addition to all this, it should not be overlooked that the \$20,000 note was further secured by a mortgage upon two parcels of real estate which, if not directly in the heart of Salt Lake City, were nevertheless near the center thereof. It was conceded at the trial that this real estate had been disposed of for the use and benefit of the respondent bank, and that whatever the proceeds thereof were, which no one seemed to know, were applied in discharge of the \$20,000 note, and hence also of the note in suit. Assuming those two pieces of real estate were of the

moderate value of \$7,500, it swells the payments on the A. D. Young note to the grand total of \$30,817.35, with the results, if any, derived from the \$7,500 Beck note still to be heard from. But to all this the district court added judgment for \$11,092.11. When this is finally added to the payments respondent already had, it would make the munificent sum of \$41,909.46. While it is true that some of the foregoing amounts are left to inferences merely, the inferences are, however, well supported by the facts. One of these inferences is based on the fact that all of the \$4,000 notes which remained in the possession of respondent are marked paid across their face. The \$20,000 note is marked paid on a slip attached thereto as of July 1, 1896. The only note not marked paid is the \$5,250 Beck note, which was left with the respondent bank by the appellant Fox, but this note respondent, in its reply, admitted was paid, as well as the \$1,575 note, and the trial court so found. In the computation we have made, however, we have not charged respondent with the full amount of the two Beck notes, but only with the amount actually paid thereon, as shown by the indorsements on the notes themselves. If we should allow what the district court allowed on those two notes, it would swell the amount paid approximately another \$4,000. To allow this would, however, in our judgment, be neither just nor equitable, although, as matter of law, in view of the admissions in the pleadings, it could be allowed. In view of the foregoing, it is of no consequence that the judgment against the Hardys has not been paid.

Now a few words with regard to the note in suit and why we think it, too, was paid in full, regardless of the payments on the \$20,000 note. The actual payments, as shown by the indorsements made on the two Beck notes, amount to \$5,357.35, which amount, of course, we have credited, and was to be credited also on the \$20,000 note. The actual amount due on the note in suit, with accrued interest from its date to July 13, 1898, or three years after its date, amounted to \$5,392.10, or \$34.65 in excess of the payments made on the Beck notes. Inasmuch, however, as nearly all the payments that were made on the two Beck notes were made during 1894 and 1895, the principal and accrued interest on the note sued on could not have amounted to the sum we have indicated, and hence it is safe to conclude that the note in suit was actually paid in full before this action was commenced in December, 1899. In view of all the circumstances, we have been forced to the conclusion that Mr. Fox entered into the arrangement with the respondent bank as testified to by him; that the two Beck notes were his; and that the amount actually paid on them satisfied the note in suit.

[9] This brings us to appellants' counter-claims. With respect to the claim of \$250



for real estate sold by respondent, the finding in favor of respondent on that question is clearly right, and hence appellants should not recover. While we very much doubt the right of respondent to have applied the \$1,000 obtained by it in September, 1901, as found by the trial court, under the arrangement entered into with Mr. Fox, yet there is no doubt that no fraud or other sufficient cause to take the item out of the effect of the statute of limitations was shown, and hence appellants cannot recover on that item because of the bar of the statute. In view of the admissions in respondent's reply, the court found that much more was paid on the Beck notes than we have allowed, and for that reason counsel for appellants contends that his clients are entitled to recover the surplus on their counterclaim. This contention cannot prevail. The money was paid so many years before the counterclaim was filed, and, no cause being apparent why the statute of limitations should not apply, therefore that counterclaim must also fail. But we think that that claim cannot prevail on general principles. We do not think that under all the facts Mr. Fox paid any considerable amount in excess of what he should have paid, but we do think he paid all that respondent had a right to ask him to pay. Therefore, for this reason also, the counterclaim with regard to excessive payments should fail.

From what has been said, it follows that the judgment must be, and it accordingly is, reversed; and the cause is remanded to the district court of Salt Lake county, with directions to make findings that the note in suit was fully paid when this action was commenced by the payments made on the two Beck notes, that the statute of limitations has run on all of appellants' counterclaims, and to enter judgment dismissing the complaint, and also dismissing the counterclaims, and to make such disposition with respect to costs in that court as to the court shall seem just between the parties. Appellants to recover costs on appeal.

McCARTY, C. J., and STRAUP, J., concur.

**SOUTHERN PAC. CO. v. I. X. L. FURNITURE & CARPET INSTALLMENT HOUSE et al. (No. 2569.)**

(Supreme Court of Utah. May 9, 1914.)

**BANKRUPTCY (§ 398\*)—LIENS ON EXEMPT PROPERTY—EFFECT.**

Under Bankruptcy Act July, 1898, c. 541, 80 Stat. 564, § 67f (U. S. Comp. St. 1901, p. 3449), declaring all liens obtained through legal proceedings against an insolvent within four months of bankruptcy proceedings void, in case he is adjudged a bankrupt, and that the property affected by the lien shall be discharged therefrom, a district court in this state was without power to condemn the wages of an insolvent in the hands of a garnishee, over his

claim of exemption, within four months preceding the filing of his petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 676, 677; Dec. Dig. § 398.\*]

Original petition for prohibition by the Southern Pacific Company against the I. X. L. Furniture & Carpet Installment House and another. Writ allowed.

P. L. Williams, Geo. H. Smith, and H. B. Thompson, all of Salt Lake City, for plaintiff. C. Mathison, of Salt Lake City, for defendant I. X. L. Furniture & Carpet Installment House.

FRICK, J. This is an original application to this court for a writ of prohibition to prohibit the enforcement of a certain judgment entered against the plaintiff as garnishee. The facts are not in dispute. Briefly stated they are as follows: On May 28, 1913, an execution with a writ of garnishment was duly issued out of the district court of Salt Lake county upon a judgment entered against the defendant Sears, which was in full force and effect. The writ of garnishment was served upon the Southern Pacific Company, the petitioner here, on the same day. On May 29, 1913, pursuant to our statute, the garnishee filed its answer to said writ in which it admitted that it was indebted to Sears, who was then a resident of California, the judgment debtor aforesaid, in the sum of \$104.34. On June 13, 1913, said Sears filed his petition in bankruptcy in the District Court of the United States for the Northern District of California, and on said day was by said court duly adjudged a bankrupt. Said bankrupt, in said bankruptcy proceedings, duly filed a schedule of his property, in which was included said sum of \$104.34 due and owing him from the garnishee herein, and which money he claimed as exempt under the laws of the state of California, and said court duly adjudged the same to be exempt as money earned for personal services rendered in said state of California for the garnishee. It is also conceded that Sears fully complied with all the provisions of the laws of the United States relative to the bankruptcy proceedings. On June 14, 1913, one day after said Sears had been adjudged a bankrupt, a judgment was duly entered in the district court of Salt Lake county against said garnishee for the said \$104.34, based upon its answer as garnishee, and an execution was thereafter issued. On September 23, 1913, the garnishee made application to the district court of Salt Lake county in which the facts relating to the bankruptcy proceedings were set forth, and in which the money in question was claimed as exempt, and the applicant asked said court to issue an order directing the judgment creditor and the officers who were seeking to enforce the judgment against it to show cause why said judgment should not be annulled and set

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

aside, and said sum of \$104.54 be released from said writ. Such an order was duly issued, and on a hearing the district court aforesaid refused to set aside or to interfere with the enforcement of said judgment whereupon the petitioner filed its application to this court as aforesaid, and an alternative writ was duly issued, to which the interested parties have appeared and answered.

The application is based on section 67f of the bankruptcy act, which, so far as material here, is as follows: "That all levies, judgments, attachments, or other liens obtained \* \* \* at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same."

Upon the foregoing facts, and in conformity with what we considered the great weight of authority, and more particularly on what is said in the case of *Lockwood v. Exchange Bank*, 190 U. S. 297, 23 Sup. Ct. 751, 47 L. Ed. 1061, we held that the defendant Sears could not claim the wages earned by him in California as exempt under the laws of this state, since exemption laws have no extraterritorial effect. The opinion was handed down on the 14th day of this month. A few days thereafter the attorney for the petitioner discovered a very recent case decided by the Supreme Court of the United States entitled *Chicago, B. & Q. R. R. v. Hall*, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, in which that court, upon facts and circumstances precisely like those in the case at bar, held that the judgment entered in the garnishment proceedings herein referred to, and by which the exempt wages were attempted to be applied in satisfaction of the judgment in which the writ of garnishment was issued, was of no force or effect, for the reason that the said court did not and could not acquire jurisdiction over the exempt wages. An application for a rehearing was therefore promptly applied for and as promptly granted, and the case was resubmitted at the present term.

Counsel for the defendant *I. X. L. Furniture, etc., Co.* concedes that under the foregoing decision the writ should be allowed. The gist of the decision in that case, as contained in the headnote, is as follows: "The decisions of the state and lower federal courts in regard to annulment of liens on exempt property have been conflicting, and this court now holds that section 67f annuls all such liens obtained within four months of the filing of the petition, both as against the property which the trustee takes for benefit of creditors and that which may be set aside to the bankrupt as exempt."

The court of last resort, upon the question involved, having settled it, we most cheer-

fully comply with the decision of that court. In the opinion the court distinguishes the case of *Lockwood v. Exchange Bank*, supra, upon which we based our former decision. This opinion is therefore substituted for the former one, and will be the only one published in the case.

In view, therefore, that the district court was powerless to condemn the wages of the defendant Sears while in the hands of the petitioner, as garnishee, without his consent, and over his claim of exemption at any time within a period of four months preceding the filing of his petition in bankruptcy, the writ of prohibition as prayed for should be allowed. It is so ordered. The petitioner to recover costs.

McCARTY, C. J., and STRAUP, J., concur.

**SALT LAKE COFFEE & SPICE CO. v. DISTRICT COURT OF SALT LAKE COUNTY et al. (No. 2619.)**

(Supreme Court of Utah. April 30, 1914.)

**1. JUSTICES OF THE PEACE (§ 70\*)—COMMENCEMENT OF ACTION.**

Though nothing was done in an action in justice's court from April 25, 1907, when defendant's default was entered, until April 22, 1913, when judgment was entered, the action was pending from the time the complaint was filed upon February 21, 1907.<sup>1</sup>

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 231; Dec. Dig. § 70.\*]

**2. STATUTES (§ 267\*)—RETROACTIVE OPERATION—STATUTES AFFECTING PROCEDURE.**

While statutes affecting procedure or remedies prima facie apply to all acts or steps still to be taken in a pending action when the statute is enacted, they do not apply to acts already done therein, at least, unless the statute so provides; so that Comp. Laws 1907, § 3685x, making every judgment void made on a complaint containing an untrue allegation of the jurisdictional facts required by the section, would not avoid a judgment on a complaint already filed when the statute was enacted.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 350-359; Dec. Dig. § 267.\*]

**3. JUSTICES OF THE PEACE (§ 101\*)—WAIVER OF DEFECTS—FAILURE TO VERIFY COMPLAINT.**

The failure to verify a complaint, in a justice's action, as required by Comp. Laws 1907, § 3685, was not a jurisdictional defect, in absence of statute making it such, so that such defect was waived by failure to interpose a timely objection on that ground.<sup>2</sup>

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 342; Dec. Dig. § 101.\*]

**4. JUSTICES OF THE PEACE (§ 187\*)—APPEAL—DECISION.**

The judge of the district court stated, on appeal from a justice's judgment in disposing of the case, that the only two pleas that need be discussed were the question of payment and the question of jurisdiction, and then proceeded to show that the plea of payment must fail for want of evidence to sustain it, and then continued: "There is only one question. I am disposed to give the plaintiff just as clean-cut a record as it can get on that, if it wants to test that question." And then the judge referred to the statute making every judgment void which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

<sup>1</sup> *Luke v. Bennion*, 36 Utah, 61, 106 Pac. 712.

<sup>2</sup> *State v. District Court*, 36 Utah, 223, 103 Pac. 868.

is given on a complaint not legally verified, or containing untrue allegations of a jurisdictional fact, and stated that the complaint in question falsely alleged that the indebtedness arose within the justice's jurisdiction, and was not verified, and that the statute was enacted to meet just such a case, and ended: "Therefore it follows that the court must, in accordance with this statute, hold that the judgment is void. You may draw findings in accordance with the views of the court as expressed." *Held*, that the district judge did not dispose of the case upon its merits, but solely on the ground of want of jurisdiction because of noncompliance with the statute.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 726; Dec. Dig. § 187.\*]

**5. MANDAMUS (§ 31\*)—APPEAL FROM JUSTICE COURT—REQUIRING DISTRICT COURT TO ACT.**

While the decision of the district court upon the merits, on appeal from a justice's judgment for \$33.50, cannot be reviewed by the Supreme Court, however erroneous, if the district court, without legal reason, refuses to dispose of the appeal to it upon the merits, the Supreme Court will require that court to do so, and enter judgment.<sup>3</sup>

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.\*]

Original application by the Salt Lake Coffee & Spice Company against the District Court of Salt Lake County and another for an alternative writ of mandate. Peremptory writ issued.

Chris Mathison, of Salt Lake City, for plaintiff. C. M. Leatherbury and Brigham Clegg, both of Salt Lake City, for defendants.

FRICK, J. This is an original application for an alternative writ of mandate directed to the Hon. M. L. Ritchie, judge of the district court of Salt Lake county, to require him to show cause why he should not "proceed with the trial" of a certain action pending in said court on appeal from a justice court and "render judgment therein upon the merits."

The petitioner contends that said district court has refused to dispose of the case upon its merits, and has thus deprived it from having a trial on the merits. On the other hand, it is contended both by the district court and by the defendant in said action, who is a party to this proceeding, that said court has disposed of the case upon merits. In view that the plaintiff has no remedy by appeal, nor any other adequate remedy at law, the question we must determine is whether the court, without a sufficient legal reason, has refused to dispose of an appeal upon its merits, and whether the application comes within the rule laid down by this court in *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167, and *State v. District Court*, 36 Utah, 223, 102 Pac. 868.

The facts, briefly stated, are: That on the 21st day of February, 1907, the Salt Lake Coffee & Spice company, a corporation, the plaintiff here, commenced an action against one George Sturm, one of the defendants in

this proceeding, in the justice court of Murray City, Salt Lake county, Utah; that a summons was duly issued by said court in said action, which was served on said Sturm on the 21st day of March, 1907, and was duly returned and filed; that on the 25th day of April, 1907, default was duly entered against said Sturm. Nothing further was done in the action until the 22d day of April, 1913, when a judgment in due form was entered against said Sturm in said justice court for the sum of \$33.50, and costs. On September 6, 1913, said Sturm duly served and filed his notice of appeal in said action, and executed and filed an undertaking on appeal, as required by law, and thereafter, on the — day of October, 1913, within proper time, said appeal was duly docketed in the district court of Salt Lake county, Utah. On September 6th, when the notice of appeal was served and filed, said Sturm also filed, or pretended to file, a demurrer and answer to said action in the justice court.

[1] Although nothing was done in said action commenced in said justice court during the time stated, it nevertheless was pending from the time the complaint was filed, to wit, February 21, 1907. *Lake v. Bennion*, 36 Utah, 61, 106 Pac. 712. Said demurrer and answer were also subsequently filed in the district court. The demurrer was based upon the ground that the complaint filed did not state facts sufficient to constitute a cause of action, and that "said justice court had no jurisdiction of the person of the defendant or the subject-matter of the action." In the answer it was averred: (1) That the debt sued on was barred by the provisions of our statute; (2) that the same had been fully paid; and (3) the facts were set forth why the justice court had no jurisdiction. The averments in that respect were all based on a failure of the plaintiff to comply with the provisions of Comp. Laws 1907, § 3685x, to which we shall refer later. The case came on for hearing in the district court, and was heard by the court without a jury. Inasmuch as no findings of fact whatever were made or waived as provided by Comp. Laws 1907, §§ 3169, 3170, we must have recourse to the judge's return, wherein he sets forth the proceedings that occurred at the so-called trial. When the case was submitted, the district court, in addressing counsel, said: "You need not argue this question counsel has been arguing. The *Nelson Case* (*State v. District Court*, supra) does not touch this case. The only two pleas that need to be discussed here are, the question of the plea of payment and the question of jurisdiction." The judge then proceeds to show that the plea of payment must fail for want of evidence to sustain it. After doing so, he proceeds thus: "There is only one question. \* \* \* I am disposed to give the plaintiff just as clean-cut a record as it can get on that, if he [it]

<sup>3</sup>For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

<sup>1</sup>*Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167. *State v. District Court*, 36 Utah, 223, 102 Pac. 868.

wants to test that question." The court then states the facts regarding the time the action was commenced in the justice court by stating the facts we have hereinbefore stated in that regard. He then refers to Comp. Laws 1907, § 3685x, pursuant to which he ultimately disposes of the case. The statute referred to by the judge, so far as material, reads as follows: "Every judgment made or given on a complaint not legally verified, or that contains no allegation or an allegation that was untrue of the jurisdictional fact required by this section, \* \* \* shall be void; and shall be so declared, on review, at the instance of the party aggrieved, either on appeal or by means of a writ of prohibition, or certiorari." See Laws Utah 1907, p. 123.

The judge then continues: "There could not be any provision of the law more explicit than that is. I take it, as a matter of common knowledge to those who were living in this county engaged in the practice of law at the time this act went into effect, that it was intended to meet just such cases as this. It is not for the court to undertake to set aside the legislative intention. It seems to have been devised to meet precisely this state of affairs. Here is a complaint which alleges falsely that this indebtedness arose in Murray City. It is admitted that neither of the parties ever lived there. It is admitted that the debt was not contracted there, and could not have been payable there, and there is no other inference that can be drawn than that the allegation is untrue. It is the sort of an allegation that this statute is intended to meet; not only untrue, but the complaint is not verified. It is true the complaint was filed and the summons issued before the act went into effect a few days, but the summons was served and filed a few days after it went into effect, and the judgment was rendered more than six years after it went into effect. The act provides: 'Every judgment made or given on a complaint not legally verified.' The judgment was rendered six years after the act went into effect. There cannot be any question as to the act being in force then, and I think it was just as competent for the Legislature to prescribe upon what sort of showing a judgment could be rendered, even though that might change a rule of practice as to some complaint already on file, as it would be to change the statute of limitations. It is a familiar rule of law, I take it, that will not be questioned, that if, when an instrument is given, the statute of limitations happens to be five years, and the Legislature, either before or after an action on it is commenced, cuts down the time to three, that that pertains to the remedy, and not to the right, and therefore the new statute governs. This statute doesn't change the cause of action, doesn't change the construction of any phrase or clause in a contract, it doesn't change anything concerning the status of the parties or

their rights under the contract, or in any manner affect any clause in the contract itself, implied though it is by being based on certain facts. It simply prescribes upon what terms a judgment shall be rendered. I am very clear the act does apply to just such a case as this."

Further remarks are then made on the case of State v. District Court, *supra*, and the judge gives his reasons why he thinks the decision in that case does not apply. After doing so, he continues: "So that the facts appear clear enough in the record that the allegation in the complaint that the debt was contracted in Murray City was untrue, and therefore it follows that the court must, in accordance with this statute, hold that the judgment is void. \* \* \* You may draw findings in accordance with the views of the court as expressed. Judgment in favor of the defendant."

The law with respect to pleadings in justice courts is contained in Comp. Laws 1907, § 3685, which is as follows: "(1) Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. (2) Pleadings, except the complaint, may be oral or in writing; if in writing, must be filed with the justice; and, if oral, an entry of the substance must be made in the docket. (3) The complaint must be in writing, and must be verified, and must fully allege and set forth at least one of the grounds mentioned in section 3668, showing that the action is commenced in the city or precinct as required by said section."

Section 3685x is merely an addenda to the section just quoted, and became effective in March, 1907, less than a month after the action in question was commenced. It is evident that, by the provisions of section 3685x, certain facts were required to be alleged and proved by the plaintiff in an action commenced in a justice court which were not required of him under section 3685. Two questions therefore arise: (1) Did the provisions of section 3685x, which became effective after the action in question was commenced, have any effect on the pleadings filed in said action? and (2) Did the provisions of that section afford the district court of Salt Lake county any legal ground or excuse for refusing to determine the action on its merits? For the purposes of this decision, and not otherwise, we shall assume that the provisions of section 3685x are valid and enforceable with respect to all actions commenced after the section became effective, and also as to all acts or steps in a pending action which were still required to be taken therein by either party after said section went into effect.

[2] Under all the authorities, so far as we are aware, a legislative act which changes the state of the law in respect to procedure, and which requires matters to be al-

leged in a complaint and proved at the trial which were not required when the complaint was filed and the action begun, as a general rule, are given no application to a pending action at all, and in no event unless the statute, in specific terms, so provides. While the rule is now well recognized by all the courts that statutes relating to or affecting procedure or remedies merely, *prima facie* at least, apply to all acts or steps still to be done or taken in a pending action, yet it is equally well established that such statutes do not apply to the acts or steps already done or taken in a pending action, and in no event do they apply to the latter acts or steps, unless it is expressly so provided in the statute.

In 2 Lewis' *Suth. Stat. Const.* § 674, the author, after discussing the effect of statutes relating to procedure in all pending actions, states the rule thus: "If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, and the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened."

The rule in the headnote to the case of *Bedford v. Shilling*, 4 Serg. & R. (Pa.) 401, 8 Am. Dec. 718, is stated thus: "A statute requiring, as a basis of recovery in an action, evidence of facts not previously necessary to be proved will not be construed to apply to actions commenced before its passage, unless expressly so declared."

In *Hanover Nat'l Bank v. Johnson*, 90 Ala. 552, 8 South. 43, the Supreme Court of Alabama, in passing upon the sufficiency of an unverified plea, says: "The plea was held to be sufficient on the former appeal in this case, and it could not be vitiated by the subsequent enactment of the statute requiring such pleas to be verified. The statute should not be given a retroactive effect, so as to destroy the efficacy of steps already taken in a pending suit, though, as it relates only to the remedy, it would operate upon proceedings taken after its passage in a cause then pending." To the same effect are the following cases: *Barret v. Browning*, 8 Mo., marg. p. 689; *Spooner v. Russell*, 30 Me. 454; *Wood v. Ostram*, 29 Ind. 177; *Newsom v. Greenwood*, 4 Or. 119; *Trist v. Cabenas*, 18 Abb. Prac. (N. Y.) 143.

[3] While it is true that, under the provisions of section 3685, *supra*, which was in force when the action in question was commenced, the plaintiff was required to verify its complaint, yet the failure to do so, in the absence of a statute to that effect, could not affect the court's jurisdiction, nor vitiate the judgment rendered therein. No objection

was interposed by the defendant at any time before judgment, and therefore, according to familiar rules of practice, the defect was waived. The contention, therefore, that the justice of Murray City was without jurisdiction, and that the judgment rendered by him was void, is without any foundation whatever. That very question was decided in the case of *State v. District Court*, *supra*. We are forced to the conclusion that, in disposing of the case in question, the district court, without any legal cause therefor, refused to give the plaintiff in that action its constitutional right to a trial upon the merits in that court.

[4] We are not unmindful of the contention made that the court did try the case upon its merits. While it is true that the court heard the evidence in support of and against the plea of payment and held, but without judicially finding, that the plea must fail, yet he disposed of the case entirely upon the plea of the jurisdiction, and held that the justice court was without jurisdiction, and therefore the district court had none. He turned the plaintiff out of court, not because it had no valid or legal claim or cause of action against the defendant Sturm, but because its complaint did not measure up to the requirements of section 3685x which became a law after the complaint was filed and the action was pending. The district court, therefore, disposed of the case upon the ground that all that had been done in the justice court was void, and, further, in legal effect, held that, because the provisions of section 3685x were not followed, therefore the plaintiff never had obtained a valid judgment in the justice court, and for the same reason it could obtain none in the district court. Nor can the clerk's minute entry, which is sent up, alter the case. The facts are that the plaintiff had no adjudication upon the merits.

[5] If the district court had passed upon the merits and had found against the plaintiff, and, in doing so, had committed most palpable errors, yet those errors, however gross, could not be reviewed in this court in this or in any other proceeding, since that court is the court of last resort on appeals from justice courts. When the district court, however, without sufficient or any legal reason, refused to dispose of the appeal upon the merits, it is the duty of this court to require that court to hear and determine the same upon its merits, and make findings and conclusions of law in accordance with the evidence as it finds it to be, and enter judgment accordingly. The case, therefore, falls within the principle laid down in *Hoffman v. Lewis* and *State v. District Court*, *supra*.

For the reasons stated, a peremptory writ of mandate should issue as prayed for in the petition. In this case, the defendant

Sturm having resisted the writ, he should pay the costs of this proceeding.

Let such an order be entered.

McCARTY, C. J., concurs.

STRAUP, J. I fully concur. The court, by its ruling, indicated that the petitioner on the merits was entitled to prevail but held that no adjudication could be made on the merits for want of jurisdiction. As shown by Mr. Justice FRICK, the undisputed facts alleged in the petition and the return made on the alternative writ show that the judgment rendered "in favor of the defendant" was based alone on the ground that the plaintiff in the action before the justice by an insufficient and false complaint had not conferred jurisdiction on the justice to render a judgment in the action, and hence no jurisdiction was conferred by the appeal on the district court to render a judgment on merits. So the district court merely declared void the judgment rendered by the justice, and made no adjudication on merits.

For the reasons stated by Mr. Justice FRICK, I think the district court had jurisdiction to make an adjudication on the merits, and that it ought to do so.

#### STATE v. CARMAN. (No. 2588.)

(Supreme Court of Utah. April 18, 1914.)

##### 1. INDIANS (§ 34\*)—INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—APPLICABILITY OF STATUTES.

Laws 1911, c. 106, regulating traffic in intoxicating liquors, was intended to supersede all laws upon the subject, except those clearly not repugnant thereto, and section 30, making the sale, etc., of liquor to an Indian a misdemeanor, is so repugnant to Comp. Laws 1907, § 4298, making such sale, etc., to an Indian "or person living \* \* \* with an Indian woman" a felony as to repeal it, at least as to an offense not within the words quoted.<sup>1</sup>

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. § 34.\*]

##### 2. INDIANS (§ 34\*)—INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—APPLICABILITY OF STATUTES.

Comp. Laws 1907, § 4488, providing that an act or omission punishable in different ways by different proceedings may be punishable under either provision, but not under more than one, cannot be considered as intended to authorize the enforcement of both Comp. Laws 1907, § 4298, making the sale of liquors to an Indian a felony, and also Laws 1911, c. 106, § 30, making it a misdemeanor, as that would enable the county attorney to discriminate between offenders by charging the violation of either statute according to his whim.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. § 34.\*]

##### 3. CONSTITUTIONAL LAW (§ 70\*)—VALIDITY OF STATUTE—REASON FOR ENACTMENT.

The reason for the enactment of a statute is wholly immaterial, except as it may throw light on the intention of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

##### 4. STATUTES (§ 159\*)—REPEAL—IMPLIED REPEAL BY REPUGNANT ACT.

While repeals by implication are not favored, where later provisions are clearly repugnant to existing provisions, the later ones control, and the earlier provisions must be deemed repealed by implication to the extent of the repugnancy.<sup>2</sup>

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.\*]

##### 5. CRIMINAL LAW (§ 1187\*)—APPEAL—DISPOSITION OF CAUSE—SETTING ASIDE SENTENCE AND REMANDING FOR RESENTENCE.

Under Comp. Laws 1907, § 4977, providing that "the court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm, or modify any or all proceedings, subsequent to or dependent upon such judgment or order, \* \* \* where a defendant was convicted and sentenced as for a felony, whereas, the offense was only a misdemeanor, which was the only objection raised, the court could set aside the sentence; but, not having power to pronounce sentence, it was necessary to remand for resentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3220, 3221; Dec. Dig. § 1187.\*]

Appeal from District Court, Uinta County; A. B. Morgan, Judge.

Luther Carman was convicted of selling intoxicating liquor to an Indian, and, from the sentence imposed, he appeals. Sentence set aside, and case remanded, with directions.

J. W. N. Whitecotton, of Provo, and T. W. O'Donnell, of Vernal, for appellant. A. R. Barnes, Atty. Gen., E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

FRICK, J. [1] The appellant was charged with and convicted of a felony, and sentenced to imprisonment in the Utah State Prison, from which sentence he appeals.

It was charged in the information that appellant "unlawfully, willfully, and feloniously did sell, give, barter, and dispose of intoxicating drink, to wit, four pints of whisky, to one Walter Daniels; the said Walter Daniels then and there being an Indian of the half blood," contrary, etc. The charge and conviction were based on Comp. Laws 1907, § 4298, which, so far as material here, reads as follows: "Every person who sells, exchanges, gives, barter, or disposes of any intoxicating drink to any Indian of the half or whole blood, *or to any person living or cohabiting with an Indian woman*, shall be guilty of a felony," etc. (Italics ours.)

It will be noticed that appellant is not charged with having offended against that part of the statute which is italicized.

In 1911 the Legislature of this state repealed title 39, which consisted of sections 1242 to 1260x1 inclusive, of the Compiled Laws of 1907, and which title constituted all the laws in force in this state relative to the regulation of the traffic in intoxicating liquors except section 4298, which we have quoted. In lieu of title 39 aforesaid the Legislature, at the time of its repeal, enacted

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

<sup>1</sup> Pleasant Grove City v. Lindsay, 125 Pac. 339.

<sup>2</sup> Marleneaux v. Cutler, 23 Utah, 475, 21 Pac. 355.

chapter 106, Laws of Utah 1911, p. 152. In adopting that chapter, the Legislature inserted therein a certain provision which was omitted from title 39 aforesaid, and which constitutes section 30 of said chapter, and which provides for the punishment of any person who sells or gives any intoxicating liquor to any Indian except as in that section provided. That section, so far as material here, reads as follows: "No intoxicating liquor shall be sold to, procured for, or delivered to an Indian, \* \* \* either for his own use or for the use of any person, except for medicinal purposes upon the prescription of a physician."

It will thus be seen that, in adopting section 30 of chapter 106, the Legislature covered the subject of selling or bartering intoxicating liquor to Indians, which was not the case under title 39 aforesaid, all of which was repealed by chapter 106. The penalty provided for in section 30 of the act of 1911 is, however, less drastic than the one provided for in section 4298, since a violation of the latter act merely constitutes a misdemeanor, and not a felony. Another matter to which attention should be directed is that the clause we have italicized is entirely omitted from section 30 aforesaid. In view of the state of the law as we have outlined it, appellant insists that his conviction for a felony under the charge preferred against him is erroneous, for the reason that section 4298, so far as it covers the offense charged against him, has been repealed, and hence he can be held guilty of a misdemeanor only, and not for a felony. The Attorney General, on the other hand, contends that the provisions of section 30 are not necessarily repugnant to those contained in section 4298, and hence both sections may stand. It seems to us, however, that the provisions of section 30 in punishing the offense of giving or disposing of intoxicating liquor to an Indian cover precisely the same matter that is covered by section 4298, except perhaps that which we have italicized. The two sections are therefore in direct conflict, in that by the one the act is punishable by a fine or imprisonment in the county jail as a misdemeanor merely, while under the other the same act is punishable in the state prison as a felony. To say that these provisions are not repugnant is to trifle with both words and substance.

[2-4] We have a statute, however (Comp. Laws 1907, § 4488), which provides: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one."

At first blush the writer had some doubt as to whether the foregoing section did not cover the case in hand. My associates are, however, of the opinion that the section just quoted has no application here. Upon reflection

I am persuaded that my associates are right. The provision just quoted, if applied to the statute now under consideration, might be so applied as to produce incongruous as well as most inequitable results to say the least. For example, A., who has disposed of intoxicating liquor to an Indian, might be charged with and convicted of a felony, and sentenced to a term in the state prison, while B., who might be equally guilty, but favored by some county attorney as the initial prosecutor, would be charged and convicted of a misdemeanor only, and thus be fined or at most sent to the county jail for 30 days. We do not think that section 4488 was intended to cover cases of this character, and, if it were intended to have such an effect, we should very much doubt its validity. If we adopt the view of the Attorney General, namely, that both sections may stand and be enforced, the same incongruous results are possible. We therefore should not lightly assume that the lawmaking power intended that two laws upon the same subject should be enforced, under which a vendor could be sent to the state prison for a felony, while under the other he could be convicted of a misdemeanor merely, and whether he was to receive the greater or the lesser punishment be made dependent upon the whim of a prosecuting officer. It may well be doubted whether such method of punishment would not be vulnerable to other objections. The question, then, recurs whether the provisions of section 30 and those of section 4298 are so repugnant as to require us to hold that, inasmuch as section 30 reflects the last expression of the Legislature upon the subject, the provisions of section 4298 have been repealed by implication because they are repugnant to each other. It is contended by the state that the provision of section 4298 which we have italicized is not covered, at least not in terms, by section 30, supra, and therefore there is nothing in the latter section repugnant to the provision referred to in the former one. While it is true that the language of section 30 is unlike the italicized part of section 4298, yet from that alone it does not necessarily follow that the provisions of the two sections are not repugnant within the rule of repeal by implication. Whether such is the case, however, is not necessarily involved here, and therefore it is not necessary to determine whether the italicized part of section 4298 is also repealed by implication, and therefore upon that question we express no opinion. The appellant was not charged with the offense denounced in the italicized portion of section 4298, but was charged with and convicted of the offense denounced in that part of said section which is clearly covered by section 30 aforesaid. Under the law as it stood in 1888 (2 C. L. U. § 4586), the offense here in question constituted a misdemeanor, and was punishable as such. It is possible, therefore,

that the Legislature entertained the view that to punish the act as a misdemeanor has again become adequate punishment, and has returned to the old method; but what view the Legislature may have entertained is wholly immaterial to us, except as it may throw light on the legislative intent. The question we must solve is: What is the law? And, when we have solved that question, the reason why it was made the law, while perhaps interesting, is without any force. We have already held (*Pleasant Grove City v. Lindsay*, 125 Pac. 389) that, in adopting chapter 106, supra, the Legislature intended to supersede all laws upon the subject of regulating traffic in intoxicating liquors, except such as were not clearly repugnant to the provisions of said chapter. We are of that opinion still. We are forced to the conclusion, therefore, that, in adopting section 30 of chapter 106, all acts and provisions repugnant to that section must be deemed repealed by implication. We have also repeatedly held that, while repeals by implication are not favored by the courts, yet, where the later provisions upon a given subject are clearly and manifestly repugnant to existing provisions, the later ones control, and, so far as they are repugnant to the earlier provisions, the earlier ones must be deemed to be repealed by implication. This is elementary doctrine. See *Marloneaux v. Outler*, 32 Utah, 475, 91 Pac. 355, and cases there cited. We think the case at bar clearly falls within the doctrine there announced.

[5] The question now arises: What disposition should be made of the case? As pointed out, appellant has assailed nothing, except that he was sentenced for a felony when, under the law, the offense he was charged with constituted a misdemeanor only. The sufficiency of the information is not assailed. The correctness of the verdict of the jury is not questioned. Nor is it contended that the evidence is insufficient to sustain the finding of the jury that he was guilty of the act charged in the information. The only error committed, therefore, consisted in imposing an excessive sentence or penalty for the offense. Under such circumstances we think the provisions of Compiled Laws 1907, § 4977, which define the powers of this court on criminal appeals are applicable. That section reads as follows: "The court may reverse, affirm, or modify the

judgment or order appealed from, and may set aside, affirm, or modify any or all the proceedings, subsequent to or dependent upon such judgment or order, and may, if proper, order a new trial."

The powers exercised by appellate courts under such or similar provisions are clearly stated in 12 Cyc. 937, 938, in the following words:

"In the absence of a statute permitting this to be done, the appellate court has no power to amend or correct the judgment. According to the modern practice, however, and under recent statutes, the appellate court may reform and correct defects in the judgment appealed from and affirm it as thus corrected.

"The appellate court in affirming a conviction may modify the punishment imposed by the trial court by mitigating, reducing, or otherwise changing it so far as it exceeds the limits prescribed by the statute. This rule applies to a fine or a sentence to a term of imprisonment in excess of that permitted by statute; to a fine rendered against defendants jointly; to a sentence on a general verdict of guilty, where one of several counts is unsustained by any evidence; and to a premature sentence."

In the case at bar a sentence should therefore be imposed to conform to the provisions of section 65 of chapter 106, Laws Utah 1911, which section specifies the penalty a court may impose for the violation of section 30 of that chapter. Under the provisions of section 4977, supra, we cannot pronounce sentence; but that must be done by the district court in which the conviction was had. *Hussey v. People*, 47 Barb. (N. Y.) 503; *People v. Griffin*, 27 Hun (N. Y.) 595.

For the reasons hereinbefore stated, the verdict of the jury must therefore be, and the same is, in all respects held legal and just. The sentence, however, which was imposed by the district court of Wasatch county is set aside and annulled, and the case is remanded to that court, with directions to require the appellant to appear before it and to impose a sentence upon him as provided by section 65 of chapter 106, Laws Utah 1911, and to enforce such sentence. No costs are to be taxed against the appellant either in this or in the district court.

McCARTY, C. J., and STRAUP, J., concur.



## BALDWIN v. FIRST METHODIST EPISCOPAL CHURCH OF OPPORTUNITY.

(No. 11,520.)

(Supreme Court of Washington. May 12, 1914.)

## RELIGIOUS SOCIETIES (§ 27\*)—MINISTERS—SALARY—CONTRACTS—CONSTRUCTION.

Where plaintiff, when engaged as minister, knew that his salary was contingent upon voluntary contributions, and that the church board merely estimated them, there was no binding contract under which he could subject the church property to payment of his salary, particularly as the rules of that denomination, with which he was probably familiar, forbade such procedure.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 180-198; Dec. Dig. § 27.\*]

Department 2. Appeal from Superior Court, Spokane County; Thos. E. Grady, Judge.

Action by A. J. Baldwin against the First Methodist Episcopal Church of Opportunity. From a judgment for plaintiff, defendant appeals. Reversed, and order dismissed.

Nuzum, Clark & Nuzum and Geo. H. Armistage, all of Spokane, for appellant. Belden & Losey, of Spokane, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover a balance alleged to be due upon a contract for services as pastor of the defendant church.

The complaint alleges, in substance, that on or about September 1, 1910, the defendant entered into a contract with the plaintiff to pay the plaintiff the sum of \$500 for his services as pastor of the defendant church during the years 1910 and 1911; that the defendant has paid thereon \$410, leaving an unpaid balance of \$90. For a second cause of action the complaint alleges that on or about September 1, 1911, another contract to the same effect was entered into, by which the defendant agreed to pay to the plaintiff the sum of \$600 for his services as pastor of the defendant church during the years 1911 and 1912; that the defendant has paid thereon the sum of \$300, leaving an unpaid balance of \$300. The plaintiff prays for judgment for the sum of \$390. The defendant answered the complaint, and denied that any contract had been entered into, admitted the payments as alleged in the complaint, and pleaded three affirmative defenses. A demurrer was sustained to the first two separate defenses. The third was to the effect that the defendant church was a denomination known as the Methodist Episcopal Church, and was controlled by the laws, rules and regulations of such churches; that such churches and its boards and ministers are controlled by what is known as the "Discipline of the Methodist Episcopal Church," which "Discipline" provides that the property of the church shall not be held for the current expenses of the church. Sec-

tion 316 of the "Discipline" provides as follows: "Should the people among whom a member of an annual conference has labored fail to pay him his allowance, he may present a claim for the same to the conference, and the conference may authorize the conference stewards to pay a part or all of said claim out of funds at its disposal for such purpose, and shall include in its report the name of the pastoral charge with the amount paid. In no case, however, shall the church or the conference be held accountable for a final deficiency."

It is alleged that this "Discipline" was binding upon the plaintiff, who had notice and knowledge of it, and accepted his pastorate after such knowledge. This affirmative defense was denied by a reply. Upon these issues the cause was tried to the court without a jury. Findings were made in favor of the plaintiff, and judgment entered for \$390 against the defendant. This appeal followed.

The plaintiff testified, in substance, that he had a contract with the officers of the church at Opportunity, Wash., as alleged in his complaint; that he had been paid the amounts therein stated, and that there was still due him \$390.

It appears from the record that the defendant is a corporation, incorporated under the laws of this state. The articles of incorporation recite that the object of the corporation is: "For the establishment and maintenance of religious worship of God, at or near Opportunity, Washington, according to the usages of the Methodist Episcopal Churches of the United States of America. \* \* \*" It also appears that the Methodist Episcopal denomination is a sect which carries on its religious work through what are called conferences, the chief authority of which is lodged in bishops. The conferences are comprised in territorial limits, and are subdivided into districts, one of which is known as the Cœur d'Alene district of the Columbia River Conference of the Methodist Episcopal Church of the United States of America, under the jurisdiction of which is the Opportunity Methodist Episcopal Church, the defendant herein. This church is governed by a system of laws which is known as the "Discipline." According to this "Discipline," the pastors are appointed and assigned to churches by the bishop of the conference, or, in his absence, by the district superintendent. Neither the trustees of the churches nor their congregations, acting separately or together, have any authority or voice in choosing the pastor, or making any contract with reference thereto, binding upon the church. Under the conference organization, there is in each local church a body called the "official board," composed of the pastor and other church members, whose duty it is to hold congregational conference meetings, and to devise means for the sup-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—43

port of the religious work and to report concerning the work to the conference authorities. This board solicits voluntary subscriptions for the support of the minister and the expense of the church. The members of the board estimate what they can raise for the pastor. And it is from this source, and also from a sum allotted, in some instances, by the Home Missionary Society connected with the church, that the pastor is supported.

In the year 1910 the regular pastor of the church at Opportunity requested the plaintiff to supply his place for the balance of his term, which was about three months. The plaintiff did so, and was paid therefor. He testified that he did not remember how or in what amount he was paid. In September, 1910, the plaintiff was requested by the congregation and by the district superintendent to continue his pastorate for another year. The official board reported they could raise for his salary the sum of \$500. He continued his pastorate for that year, and was paid the sum of \$410, leaving a balance of \$90. He was again appointed for the next year, and the official board reported that they could raise for his salary the sum of \$600, including the sum of \$130 from the Home Missionary Society. During the latter year he was paid but \$300. Some contention arose among the members of the church, which resulted in the plaintiff withdrawing from the church and taking nearly all of the members with him into a church of his own, thereby making it impossible for the defendant church to collect the subscriptions necessary to pay the balance of his salary.

The principal question in the case, as we view it, is whether or not there was an agreement to pay at all events a specific salary. It is apparent that there was not. It is claimed by the respondent that at the time he first took charge of the church as its pastor that he was a Congregational minister, and was unacquainted with the "Discipline" of the Methodist Episcopal Church; that he was never under the control of the church organization, and was not governed by its "Discipline." The record, we think, plainly shows, that he withdrew from his Congregational connection, and became a member of the Methodist Church at Opportunity during his first year, or at any rate, before the beginning of his last year. He testified that he did not know and was not acquainted with the "Discipline." He admitted, however, that he had possession of a copy of the "Discipline" for a period of about two weeks, but stated that he did not read it with reference to his duties. Whether he did or did not, we think, is of no special importance. He was fully acquainted with the method by which the pastor's remuneration was acquired, without having actually read the "Discipline." He knew, of course, that the pas-

tor's salary was raised by voluntary subscriptions among the members and friends of the church, aside from \$130 from the Home Missionary Society. He knew that the church had not sources from which to acquire funds, except from these two sources, namely, by voluntary contributions of its members and friends, and by a stipulated amount from the Home Missionary Society. He knew that the official board merely estimated the receipts from such contributions. And, when he was called as pastor of the church at both the first and second meetings of this board, when his alleged contracts were made, he knew all these facts and necessarily contracted, if a contract were made, with reference to them. In answer to a question as to the substance of the contract, he said: "This contract? The authorities met, held a conference, decided what they could raise, offered me that amount if I would supply the church for a year on that basis." This is as near as he states the terms of the contract. We think it is apparent that he understood that no definite amount was to be paid to him in any event, but it was understood by him, and by the congregation, that his salary was contingent upon these voluntary subscriptions; that, if the voluntary subscriptions were paid, he would be paid also; that, if these subscriptions were not paid, there would be no money with which to pay his salary. We are satisfied from the whole record that this does not constitute a contract for a definite amount to be paid in any event, and made a lien against the property of the church, but is a contract only for \$500, or \$600, as the case was, provided that amount of money were collected. It is not shown that the money was collected. On the other hand, it is definitely shown that the money was not collected; and one of the reasons therefor, no doubt, was that the church was divided against itself, and the plaintiff organized from the old members another church, and therefore made it impossible for the defendant church to collect the voluntary subscriptions. We are satisfied that there was no such contract as would authorize the plaintiff to maintain an action for a specified amount, unless it may be for the amount actually collected and not paid to him.

The respondent relied in the court below, and in this court relies upon the case of *Jones v. Trustees of the Corporation of Mt. Zion*, 30 La. Ann. 711. That was a case in many respects like this. But in that case the evidence showed, or at any rate the court assumed, that a contract was made for a definite amount, and judgment therefor was entered in favor of the pastor. But in this case, as we have seen, if there were a contract for a definite amount, it was contingent upon voluntary subscriptions which were never paid.

We are satisfied, therefore, that the court

erred in entering judgment in favor of the plaintiff.

The cause is reversed, and ordered dismissed.

CROW, C. J., and FULLERTON, PARKER, and MORRIS, JJ., concur.

#### In re ENOS' ESTATE.

ENOS v. HAMBLÉN et al. (No. 11,738.)

(Supreme Court of Washington. May 12, 1914.)

#### 1. JURY (§ 14\*)—ADMINISTRATION OF ESTATES—RIGHT TO POSSESSION.

Under Rem. & Bal. Code, §§ 1366, 1376, 1534, respectively providing that, when any person dies seized of land, his title shall vest immediately in his heirs and devisees subject to debts, expenses of administration, etc., that this rule shall apply to community real property, and that the executor or administrator shall take into his possession all of the estate of the deceased, a wife of a deceased person is entitled to her community interests after the payment of debts and cost of administration, but she is not entitled to possession until after administration is closed; and hence a proceeding by a woman to be declared the wife of decedent and thus entitled to share in his community estate is not an action for the recovery of money only or specific real property, triable by jury under section 314, but is an equitable action, triable by the court under section 315.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.\*]

#### 2. TRIAL (§ 374\*)—JURY IN TRIAL BY COURT—EFFECT OF VERDICT.

In an equitable action, where the issues of fact are submitted to the jury, its verdict is merely advisory, and can be disregarded by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 884; Dec. Dig. § 374.\*]

#### 3. MARRIAGE (§ 50\*)—EVIDENCE.

In a proceeding to establish that petitioner was the wife of decedent, evidence held insufficient to show that the parties had ever been married.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79-89; Dec. Dig. § 50.\*]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster.

In the matter of the estate of John Enos, deceased. Petition by Susan Enos against Lawrence R. Hamblen, as executor, etc., and others to be declared the wife of the deceased. From a judgment dismissing the petition, petitioner appeals. Affirmed.

Cannon, Ferris & Swan, of Spokane, O. J. Bandella, of Sandpoint, Idaho, and W. E. Southard, of Wilson Creek, for appellant. W. S. Gilbert, of Spokane, for respondents.

MOUNT, J. The appellant in this action claims to be the lawful wife of John Enos, deceased, and, as such wife, has a community interest in the property left by the deceased. It appears that John Enos, commonly known as "Portuguese Joe," died on or about the 30th day of May, 1911. He left an estate consisting of real and personal property in

Spokane county of considerable value. Prior to his death he made a will, by the terms of which he left the bulk of his property to his wife, Mary Enos. Thereafter, on the 12th day of July, 1911, the will was admitted to probate in the superior court for Spokane county, and Lawrence R. Hamblen was duly appointed as executor of the will.

Thereafter on January 30, 1913, the appellant filed a petition in the superior court for Spokane county, in the matter of the estate of John Enos, deceased, alleging that she was the lawful wife of the testator during his lifetime; that there were born to her and the said John Enos three sons, two of whom died while young, and that the third son was supposed to be living, but his whereabouts was unknown to the appellant; that at the time of his death John Enos left certain property, describing it, in Spokane county, of the appraised value of \$137,000. She prayed for a citation and a hearing upon her petition, and that, upon such hearing, she be adjudged to be the lawful wife of John Enos, deceased.

The executor of the estate, and others who were interested therein, appeared in answer to the petition. They denied that the appellant was the wife of John Enos, deceased. When the cause came on for trial, a jury was demanded by the petitioner. This demand was resisted by the executor. Upon that application it was conceded by counsel for the petitioner that it was discretionary with the trial court whether a jury should be called, and that the verdict of a jury would be advisory only. The court thereupon called a jury, and the cause was tried. The only question submitted to the jury was whether the appellant was ever legally married to the deceased, or was his wife. At the conclusion of the trial, the jury found that the appellant and the deceased were lawfully married. Upon motion of the respondents, the court declined to adopt the verdict of the jury, concluded upon the evidence that there was no lawful marriage, and dismissed the proceedings. This appeal is prosecuted from that order.

[1, 2] The appellant assigns that the court erred in disregarding the verdict of the jury, in refusing to enter a judgment thereon, and in dismissing the petition. Voluminous briefs have been filed in the case. The appellant argues strenuously that she was entitled to a jury as a matter of right, and that the verdict of the jury is binding upon the court, and not advisory merely. The statute (Rem. & Bal. Code, § 314) provides: "An issue of fact, in an action for the recovery of money only, or of specific real or personal property shall be tried by a jury, unless a jury is waived, as provided by law. \* \* \*"

Section 315 provides: "Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or

any specific question of fact involved therein, be tried by a jury. \* \* \*

These statutes seem to us plain and unequivocal. Where there is an issue of fact in an action for the recovery of money or of specific real or personal property, that issue must be tried to a jury, unless a jury is waived. It is plain, we think, that this is not an action of the kind there mentioned. The question in this case is simply whether the appellant was the lawful wife of John Enos during his lifetime. If that question is determined in the affirmative, then she is undoubtedly entitled to her community interest in his estate, after the debts and costs of administration are paid. Rem. & Bal. Code, §§ 1366, 1370, 1534; *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910; *In re Guye's Estate*, 54 Wash. 264, 103 Pac. 25, 132 Am. St. Rep. 1111.

But this action cannot be said to be an action for the recovery of specific property, either real or personal. It is simply to determine the question whether the appellant is the widow of the deceased. The case of *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 101, extensively quoted from and apparently relied upon by the appellant, is not an authority upon the question that this is an action for the recovery of specific real or personal property. That clearly was such an action. There the administrator sought to recover from an executor who had been deposed certain personal property belonging to the estate. We held in that case that it was an action for the recovery of specific property, and that the issues were triable to a jury. But this is not such an action.

The appellant argues at length that she is not claiming the property in question by inheritance or as an heir, but is asserting title to property which she owns to the same extent and in the same manner as the deceased owned it. We think it makes little difference in this case whether she claims a community interest as one of the community, or whether she claims as an heir. She is, in either event, not entitled to possession until after the administration is closed upon the estate. As we have seen above, the statute requires the whole estate to be administered upon, and, while the title vests in the heirs, or those entitled thereto, immediately upon the death of the testator, neither the heirs nor those interested in the community are entitled to the possession until after administration. Not being an action to recover money or specific real or personal property, the case falls within the provisions of section 315, supra, and is triable by the court without a jury. In other words, it is an equitable action, and the court was authorized to try it without a jury, or to select a jury whose verdict would be advisory merely. In *Collins v. Fidelity Trust Co.*, 33 Wash. 136, at page 143, 73 Pac. 1121, at page 1122, referring to the trial of a case by jury in an equitable

action, we said: "The jury in a case of this kind is only an advisory adjunct to the court, its verdict not binding the trial court or this court, which decides the case upon the testimony. *Peck v. Stanfield*, 12 Wash. 101, 40 Pac. 635. This seems to be the prevailing and reasonable rule."

In *Dalton v. Union Gap Irrigation Co.*, 69 Wash. 303, 124 Pac. 1128, we said: "Even in purely equitable actions, the method of determining questions of fact is discretionary with the court. It may try all the issues, or may submit all or part of any issuable question of fact to a jury, using the verdict as advisory merely, and in no manner bound thereby, should it not meet with approval." Several authorities are there cited to that effect.

We think there can be no question, under the rule adopted in this state, that an equitable action, as this one is, is triable to the court without a jury or with a jury, as the court sees fit, and that such a verdict is not binding upon the court, but is merely advisory; and the trial court and this court will review the evidence de novo, and find according to the facts as they may appear. It is, no doubt, true that the finding of the jury will have weight with the trial court in determining the questions submitted to the jury, but the trial court is not, and neither is this court, bound by the verdict of the jury. We deem it unnecessary to review the authorities from other states upon the question presented here. We think our own cases are decisive when once the character of the action or proceeding has been determined.

The estate in this case is in the possession of the executor. The property in his possession is a trust fund: First, for the payment of the costs and expenses of administration; and, second, to be distributed to the persons lawfully entitled thereto. A person claiming to be an heir or a community owner of the estate must establish his claim at some place in the proceedings, and, when established, they are entitled to the distribution which the law authorizes. In order to establish a right to the estate as distributee, the proceeding must necessarily, we think, be an equitable one, and falls within the provisions of Rem. & Bal. Code, § 315, above quoted.

[3] It is next strenuously argued that the finding of the jury was right to the effect that the appellant was the lawful wife of John Enos during his lifetime. Upon this question we have carefully read the abstract of evidence in the case. This abstract is voluminous, because many witnesses testified upon the question. But we are satisfied from the record in the case that the evidence fails to establish the fact that the appellant was ever married to the deceased, John Enos. She claims to have been married to him some time during the years 1870, 1871, or 1872, when she was about the age of 14 years. She is an Indian woman, unable to speak

the English language, and unable to fix the date exactly. But the date was fixed by other witnesses at about the time stated. She testified that the marriage took place according to Indian custom, north of the Columbia river, on the Colville Indian reservation; that she lived with her husband upon his ranch in Lincoln county for about 9 years. But the evidence, we think, conclusively shows that the deceased at that time, and for several years after that, was not in that country, but was more than 100 miles away from that country. We think this fact is conclusively shown. And, furthermore, we think it is conclusively shown that if the appellant was married to a man by the name of John Enos, or "Portuguese Joe," as he was commonly known, that the deceased was not the man. And it is further conclusively shown that the appellant did not live with the deceased at his home in Lincoln county for 9 years, or for any other length of time. And it is further conclusively shown that whatever children the appellant had were the children of Indians who claimed to be her husband, and were not the children of the deceased; that the only child living was not a boy, as alleged in the petition, but was shown to be a girl, who had lived, and at the time of the trial was living, in the same vicinity with her mother. It is further shown almost beyond question that the appellant had another husband during these times, and that, as his widow she claimed his estate upon his death. These, and other facts not necessary to be mentioned, convince us beyond a doubt that the appellant was simply an adventuress who never was married to the deceased by Indian custom, or at all, who never lived with him as his wife, and who is not entitled to share in his estate. We think the trial court properly rejected the verdict of the jury upon this question, and rightly concluded that the appellant was not the widow of John Enos, deceased.

The judgment is therefore affirmed.

CROW, C. J., and FULLERTON, MORRIS, and PARKER, JJ., concur.

#### In re ENOS' ESTATE.

JASINTO et al. v. HAMBLIN et al.  
(No. 11,740.)

(Supreme Court of Washington. May 12, 1914.)

#### 1. WILLS (§ 55\*)—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

In a will contest, evidence *held* to show that testator, at the time of the execution of a will, possessed testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-158, 161; Dec. Dig. § 55.\*]

#### 2. WILLS (§ 166\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

In a will contest, evidence *held* not to show that the wife of testator procured the will to be executed by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

#### 3. WILLS (§ 405\*)—WILL CONTESTS—COSTS.

Under Rem. & Bal. Code, § 1313, relating to the taxation of costs in probate proceedings, etc., the costs and expenses of an unsuccessful will contest should not be paid out of the estate; since such would place a reward upon the contest of wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 879-884; Dec. Dig. § 405.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Keenan, Judge.

Proceedings by Domingos Jasinto and others against Lawrence R. Hamblen, executor, and others to contest the will of one John Enos. From a judgment for defendants sustaining the will, contestants appeal. Affirmed.

See, also, 140 Pac. 675.

Robertson & Miller and Graves, Klizer & Graves, all of Spokane, for appellants. W. S. Gilbert, of Spokane, for respondents.

MOUNT, J. This is a proceeding to contest the will of one John Enos, commonly known as "Portuguese Joe," who died in the Azores Islands on May 30, 1911. He left an estate in Spokane county of the value of about \$200,000. The will is dated February 8, 1911. By the terms of the will John Enos bequeathed to his two brothers \$5 each; to his two sisters \$500 each; to a Catholic church in the Azores Islands \$10,000; to an asylum for the homeless in the Azores Islands \$10,000; to the Young Men's Christian Association in Spokane \$5,000; and the remainder of the estate was devised and bequeathed to the testator's wife, Mary Enos.

After the will was admitted to probate, the brothers and sisters of the testator instituted this proceeding. For cause of contest they alleged, in substance, that at the time of the execution of the will Mr. Enos was 73 years of age, ill and in failing health, weak in mind and body, and mentally incapable of making a will; that his wife, Mary Enos, procured the will to be made by the exercise of undue influence, ill treatment, and by plying him with liquor; that the will was not the free and voluntary act of the testator, but was procured by fraud, duress, and artifice, operating upon a body and mind weakened by age, failing health, and the use of alcohol. Issues were joined, and the judge to whom such issues were submitted for decision called a jury to pass upon the facts. In answer to interrogatories submitted by the trial judge, the jury found that Enos died of alcoholism; that at the time of the execution of the will Enos' mind was weakened by age and the use of intoxicating liquors so as to be more susceptible to undue influence; and that the residuary devise to Mary Enos was procured by undue influence. The trial judge disregarded the findings of the jury, and entered a judgment dismissing the contest, denying, at the same time, the contestants' application for an allowance for

costs and counsel fees. From that judgment the contestants have appealed.

[1, 2] It appears from the record in the case that John Enos was born in the Azores Islands of Portuguese parents. When a young man he came to the United States, and settled in Lincoln county in this state, and engaged in the business of raising cattle. After many years in this business, he sold his cattle ranch and cattle, and invested in property in the city of Spokane, where he thereafter lived and looked after his property. In about the year 1908, having accumulated property which was then worth considerable money, he visited his brothers and sisters, who were then living in the Azores Islands. These brothers and sisters were at that time very old. They were not possessed of fortunes, though they were not destitute. At that time his relatives consisted of two brothers and two sisters. One of the sisters was unmarried. At that time he purchased a home for his sisters, and employed a servant girl to care for them. He took title to this home in his own name, and placed the servant girl in charge, with instructions to care for his sisters. He thereupon returned to the United States. After about a year he returned to the Azores Islands, accompanied by a brother who was in this country. He paid the expenses of his brother from this country to the Islands, but did not pay his return expenses. When he arrived there he found that his sisters had left the home which he had provided in charge of the servant girl. After remaining there for a while, he returned to the United States, bringing the servant girl with him. This servant girl, it appears, had never been married, but had two illegitimate children. After arriving in Boston, and on November 10, 1909, Joe and the servant girl were married. They came to Spokane and lived together thereafter until his death.

The testimony of the contestants tends to show that after the marriage, and while the deceased and his wife were living in Spokane, Joe became addicted to the frequent use of alcoholic drinks; that his wife encouraged him in this, and made statements to her friends that she married Joe for his money. The evidence also tends to show that she importuned him upon all occasions to make a will in her favor. Finally, on February 8, 1911, the deceased executed his will, devising and bequeathing the greater portion of the estate to his wife. She also at the same time made a will in which she willed all her estate to her husband. Shortly after making the wills, Joe and his wife returned to the Azores Islands. While there he died.

The contestants in their brief say: "The contestants' case, as we have heretofore pointed out, is not rested upon any supposed testamentary incapacity of Joe Enos. It is not claimed that he was mentally incapable of transacting business of importance. What is insisted upon is that during the last

months of his life his judgment was so impaired, and his will power so weakened by age and the excessive use of liquor, as to be incapable of resisting the constant pressure of the stronger will and mind of Mary Enos to make a will which should leave everything to her and disinherit his brothers and sisters. This pressure, we insist, is proven to have been brought to bear upon him and to have accomplished the purpose for which it was designed. If this is so, that part of the will which, after the payment of the considerable bequests provided for, gave everything to her and left nothing to his brothers and sisters, was the product of undue influence."

While there was evidence introduced on behalf of the contestants, as we have stated, which tended to show that the testator consumed considerable intoxicating liquor after his marriage, and upon two or three occasions was intoxicated, we are satisfied from a careful reading of all the evidence that it does not show that the mind of Enos at the time the will was made was incapable of making an intelligent will, or that his mind was so weakened by the use of alcoholic liquors that the constant pressure of Mary Enos upon him to make a will in her favor resulted in a will other than he would otherwise have made. If the evidence offered by the contestants upon this point was sufficient to show that his mind was not normal when the will was made, we think it was entirely overcome by evidence offered in support of the will by substantial citizens, who had known him for many years in all his conditions of life, and who testified that his mind, at the time and after making the will, was as clear as it ever had been; that he was always a shrewd and well-balanced man; that they were not aware of the fact of his use of intoxicating liquors at that time; and that they saw him almost daily, transacted business with him, and would have known if he had been under the influence of liquor, as the contestants would have us believe. It is true that there was some evidence which tended to show that he died of alcoholism, but this was entirely expert, conjectural evidence; and even this evidence tended as well to show that he might have died from some other cause. In other words, it was not conclusively shown by any means that alcoholism was the cause of his death. It is true there is substantial evidence on the part of the contestants which tended to show that his wife continuously after the marriage requested him to make a will in her favor leaving her everything, and that he did not accede to these requests, but stated to her that he was going to provide for his brothers and sisters. On the other hand, the evidence on the part of the proponents of the will shows almost conclusively that he had considered the making of a will for about a year before it was finally made. It shows that Joe was unable to read or write in his native tongue; he was

likewise unable to read or write the English language; and, until a few months before his death, he was unable even to write his own name. In his more important business transactions, he relied upon trusted friends. He left his money with his banker. He consulted his banker almost daily about his business transactions. His banker drew checks for him, and had absolute control of his funds. He likewise made a confidential adviser of his attorney and counselor, Mr. Hamblen, and from 1903 until the time of his death was constantly advising, frequently daily, upon matters of business, with Mr. Hamblen. It was Mr. Hamblen who, after Joe's marriage in 1909, without solicitation from any person, suggested to Joe that, now he was married, he should make a will and dispose of his property as he desired it to go. Joe thereupon asked Mr. Hamblen what the result would be if he left no will. He was advised by Mr. Hamblen of the result. He thereupon stated that he desired practically all of his estate to go to Mrs. Enos, and said he would consider the making of a will. This was in the spring of 1910. The next talk about a will was had with Mr. Hamblen by the testator in September, 1910, when he, in substance, told Mr. Hamblen that he had concluded that he would make his will. These conversations were not had in the presence of Mrs. Enos, but were held in the privacy of Mr. Hamblen's office. A day or two before the will was made Mr. Enos came to Mr. Hamblen and requested him to prepare his will. Mr. Hamblen then asked Mr. Enos to whom he desired to leave his property. He stated that he desired to leave the bulk of it to his wife, but that he desired to make some bequests to Catholic institutions in the Azores Islands. Mr. Hamblen then told him to get the names of the persons to whom he desired to make bequests. Joe then, with his wife, upon the next day came to Mr. Hamblen's office, bringing a paper containing the names of legatees to be named in the will. Mr. Hamblen had theretofore stated to Joe that inasmuch as he had made his fortune in this country, that he ought to leave a substantial sum to some local institution, and suggested the Young Men's Christian Association of Spokane. Joe made some inquiry as to this institution and agreed that he would leave \$10,000 thereto. Mr. Hamblen then dictated a will as Joe directed, and, when asked if he desired to leave anything to his brothers, said he did not. Mr. Hamblen then suggested that some nominal sum be left to them, and \$5 was inserted in the will for each of the brothers. Afterwards, when Joe and his wife came to sign the wills, they were read over to them. Joe concluded that he would change the amount to be given to the Y. M. C. A. of Spokane from \$10,000 to \$5,000. The will was then redrafted and signed. Mr. Hamblen testified that, at that time, and at the conversations upon previous occasions, the tes-

tator's mind was clear, that he knew what he was doing, and that he made his will without any other influence than as stated. Mr. Hamblen also testified that during the years he had known the testator they had been intimately associated in business affairs; that he had been the testator's confidential and legal adviser; that the mind of the testator was as clear as it had ever been; and that, if Joe was addicted to the use of intoxicating liquors, he (Hamblen) did not know it. There was much other testimony to the same effect, but this, we think, is conclusive upon the question.

The rule is, as stated in *Schouler on Wills* (3d Ed.) § 236: "The wife has been treated with a marked indulgence in testamentary cases which involve issues of this kind; out of consideration, as it would appear, to her sex and marital position, which incline her to persuasive, tender, and persistent, rather than overruling methods of influence, and to the impression which popularly obtains, moreover, that a true and faithful spouse is not likely to gain more under her husband's will than she really deserves. Hence a wife's pleading, and even her importunity with her husband, seldom avoids a will made under its influence, so long as it may be supposed that the husband weighed what she proposed and deliberated for himself, and that she practiced no deception upon him; and, generally speaking, a wife may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent." See, also, *Underhill on Wills*, § 147.

This court in *Re Estate of Patterson*, 68 Wash. 377, 123 Pac. 515, said: "To vitiate the will, an influence must be shown which, at the time of the testamentary act, controlled the volition of the testator, deprived him of free will agency, and prevented an exercise of his judgment and choice. He may have been subjected to counsel, suggestion, persuasion, or even importunity, yet, if it be shown, as in this case, that he had testamentary capacity, and at the time of making the will was free and unrestrained in exercising his volition, it cannot be held that undue influence has been shown."

And in *Re Estate of Tresidder*, 70 Wash. 15, 125 Pac. 1034, it was said: "Nor will a showing of mere persuasion on the part of a beneficiary overcome the will of a party, if from the whole record it is made to appear that it is his will. It is not influence alone, but an undue influence, which has been defined to be such an influence as deprives the party of the free exercise of his intellectual powers, an influence which is exercised by coercion, imposition, or fraud, an influence which impels the testator to act in fear, a desire for peace, or some feeling which he is unable to restrain."

It is apparent from the record in this case

that no undue influence was exerted by Mrs. Enos upon her husband in the making of his will. He considered it for nearly a year. The record shows that he was slow to act in business transactions; that, while he sought the advice of his confidential advisers and friends, he acted at last upon his own judgment, and usually uninfluenced by solicitations or recommendations. We are convinced that, even though it be true, which we doubt, that he was addicted to the excessive use of intoxicating liquors before and at the time the will was made, and subsequently, the evidence clearly and persuasively shows that he was mentally capable of transacting any important business, such as the making of his last will, and that at the time his will was made he acted solely upon his own judgment, and placed his property where he desired it to go.

In the case of *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970, we said: "A great deal is said in the elaborate briefs of counsel for appellants upon the duty of courts to construe wills with reference to the rights of heirs at law conferred by the law of descent and distribution. But the rights conferred by the law of descent and distribution are not more potent than the right conferred by the law to make a voluntary distribution of one's estate. It is doubtless true that the law of descent and distribution disposes of the estate, in the absence of testamentary disposition, in accordance with the dictates of common affection, but the right of independent disposition is just as absolute, and no presumption can be indulged in against the exercise of this legal right."

So here, while the law of descent and distribution without a will would have placed a larger portion of the property of the testator into the hands of his brothers and sisters than does the will, yet the testator had a right to make a will, and, if he made it in his right mind in his own good judgment, and desired to leave but a pittance to his brothers and sisters, that was his privilege and his right. The record suggests a reason therefor which no doubt seemed sufficient to him. It was also a privilege of his wife to solicit him to make a will in which he should leave to her the larger portion or all of his estate. She was his lawful wife, and it was his duty to protect her by his will, and he evidently desired to do as he did in that respect. We are satisfied from the whole record that at the time the will was made the testator was fully competent to make it, and made it without any undue influence, and that it was his will.

[3] Counsel for the appellants insist that the court erred in not making an allowance for counsel fees and costs to the contestants. The statute (Rem. & Bal. Code, § 1313) with reference to proceedings of this kind says: "The fees and expenses shall be paid by the losing party. If the probate be revoked or

the will annulled, the party who shall have resisted such revocation shall pay the cost and expenses of proceedings out of the property of the deceased."

There is no provision of the Code which provides that the costs and expenses of an unsuccessful contest shall be paid out of the estate. And this court has held that costs should not be allowed in such cases. In re Estate of Rathjens, 45 Wash. 55, 87 Pac. 1070; *Hunt v. Phillips*, supra.

Neither in law nor in good conscience do we think the unsuccessful contest of a will should result in costs and counsel fees against the estate. Such a ruling would, in effect, place a reward upon the contest of every will disposing of large estates. The trial court properly refused to make such an allowance.

The judgment of the trial court is affirmed.

CROW, C. J., and FULLERTON, MORRIS, and PARKER, JJ., concur.

#### STATE v. TILDEN. (No. 11,720.)

(Supreme Court of Washington. May 5, 1914.)

##### 1. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

On a trial for seduction, evidence of prior acts of intercourse between the parties is admissible, though the prior acts are crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

##### 2. CRIMINAL LAW (§ 447\*)—EVIDENCE—ADMISSIBILITY.

On a trial for seduction, it was not error to permit prosecutrix to explain to the jury expressions contained in letters written to her by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1029-1031; Dec. Dig. § 447.\*]

Department 2. Appeal from Superior Court, Stevens County.

Marshall G. Tilden was convicted of seduction, and he appeals. Affirmed.

W. C. Stayt, of Colville, and Osee W. Noble, of Kettle Falls, for appellant. J. B. Slater and J. A. Rochford, both of Colville, for the State.

MORRIS, J. The appellant was charged with the crime of seduction, committed on the 22d day of July, 1912, and appeals from a conviction. The prosecuting witness testified that the first act of sexual intercourse took place on the 15th day of June, the second act three or four days later, the third some days still later, and the fourth on the day alleged in the information. At the close of the state's case, the state, on motion of appellant, was required to elect upon which one of the acts it relied for a conviction, and elected to stand on the act of July 22d, as alleged in the information.

[1] The error urged most strongly by appellant is that, the state having selected the



act of July 22d, it was error for the court to permit evidence of the previous acts, as testified to by the prosecutrix, and that the same should have been withdrawn from the jury. Offenses involving carnal intercourse of the sexes furnish a well-recognized exception to the general rule excluding evidence of other like crimes. For a reason peculiar to those crimes, the rule has been most liberally extended, until it may be safely asserted that, where the charge is made of the commission of any of the crimes known as sexual offenses, evidence of prior acts of the same character is admissible, even though such prior act is itself a crime. *State v. Wood*, 33 Wash. 290, 74 Pac. 380; *State v. Fetterly*, 33 Wash. 600, 74 Pac. 810; *State v. Osborne*, 39 Wash. 548, 81 Pac. 1006; *State v. Sargent*, 62 Wash. 692, 114 Pac. 868, 35 L. R. A. (N. S.) 173; *Elliott, Evidence*, § 3149; *Underhill, Crim. Ev.* § 326; *People v. Molineaux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, note on page 331, where the subject is exhaustively treated.

Appellant cites *State v. Dacke*, 59 Wash. 238, 109 Pac. 1050, 30 L. R. A. (N. S.) 173, in support of a contention that, since the prosecuting witness surrendered her virtue to appellant on June 15th, she was not a "female of previous chaste character," within the meaning of the statute, on July 22d, the day charged in the information. The *Dacke* Case has no application here. The defendant there was charged with an offense committed on June 30, 1909, under a statute which went into effect on June 8, 1909. The evidence showed numerous acts of sexual intercourse between the prosecuting witness and the defendant, beginning in November, 1908, and it was held that, since the defendant was charged with an offense committed on June 30th under a statute requiring that the female against whom the offense was committed should be of previous chaste character, because of prior acts of sexual intercourse, the prosecutrix was not of previous chaste character on June 8th when the law went into effect. In other words, the defendant being charged with an offense under the new statute, it must be shown that the female named in the information was within the description of the statute, and was of previous chaste character on June 8th, the day when the new statute became effective. No such question is involved in this case, and defendant here cannot shield himself under the plea that, having had sexual intercourse with the prosecutrix on June 15th, he could not be charged with a violation of her chastity on July 22d."

[2] The appellant complains of certain rulings of the court in permitting the prosecutrix to explain to the jury the meaning of certain expressions used by the appellant in letters written by him to her. The given name of the prosecutrix was Leona, and in certain of his letters to her appellant used

these expressions: "So sorry to hear of poor Jane. Take good care of her;" "Poor Jane. I feel so sorry for her;" "What if Jane don't get sick"—and other like expressions. The prosecutrix testified, over objection, that "Jane" was a nickname given to her by appellant, and that in writing of Jane he referred to herself. Other expressions were: "I am sending you ten stamps so you can correspond oftener;" "I don't have the stamps, but will probably raise them some way;" "Will send you some stamps for Spokane;" "I wrote you a note yesterday expecting to send the stamps, but have had a deuce of a time trying to raise it and have not yet, but probably will some time today;" "Will send you twenty stamps today and enough for home in a few days." The prosecutrix was permitted to testify, over objection, that "stamps" meant money. In another of his letters appellant said: "I think you was very foolish to wait so long, but of course you know best." Prosecutrix was permitted to explain her understanding of the meaning of this statement. She was also permitted to explain the meaning of the following statement in one of appellant's letters to her: "You don't want to worry too much because you have quite a little time, girl. See how long it was the last time; over two months, was it not?" We find no error in any of these rulings.

Appellant next excepts to six of the instructions given to the jury. We shall not set out these instructions, but content ourselves with saying that we have read them in the light of the appellant's exceptions, and find no error. Other exceptions made by appellant have been reviewed, and, without setting them out in detail, for the sake of brevity, we are of the opinion that they are not well taken.

Finding no prejudicial error in the case, the judgment is affirmed.

CROW, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

REYNOLDS v. DAY et al. (No. 11,743.)  
(Supreme Court of Washington. May 6, 1914.)

1. COURTS (§ 7\*)—JURISDICTION—TRANSITORY ACTIONS—PERSONAL INJURY ACTIONS.

In the absence of statute making a personal injury action local, it is deemed a transitory action and may be brought wherever service can be had upon defendant.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 14, 16, 22-31; Dec. Dig. § 7.\*]

2. COURTS (§ 8\*)—JURISDICTION—TRANSITORY ACTIONS—COMITY.

Under the doctrine of comity, rights accruing under the law of another state or nation are treated as valid everywhere, so that where an action accruing in another state is transitory, and jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the state of the forum or to good morals, and is not injurious to the state

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the forum or its citizens, will be recognized and enforced in actions ex delicto as well as ex contractu.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.\*]

### 3. COURTS (§ 8\*)—JURISDICTION—TRANSITORY ACTION—COMITY.

Under the rule of comity, a transitory action, such as one for personal injuries, which accrued and was actionable in another state, may be maintained, though plaintiff could not have recovered had the injury occurred in the state of the forum.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.\*]

### 4. MASTER AND SERVANT (§ 250½, New, vol. 15 Key-No. Series)—COMMON-LAW ACTION—RIGHT TO MAINTAIN.

A common-law action for personal injuries to an employé which occurred in another state and could have been enforced therein may be maintained in this state notwithstanding the Industrial Insurance Law (Laws 1911, c. 74), abolishing the common-law remedies of workmen against employers on the ground that it is unwise and inadequate, section 8 of which, however, authorizing a common-law action when the employer defaults in paying dues to the accident fund, since to construe the act as declaring a public policy against such actions would violate Const. U. S. art. 4, § 2, relating to the privileges of the citizens of each state.

### 5. COURTS (§ 8\*)—COMITY BETWEEN STATES.

To make an employé's common-law remedy for personal injuries contrary to the public policy of this state, so that it will not be enforced as a matter of comity, where the cause of action accrues in a state where it is enforceable, it must appear that the common-law remedy would never be enforced under any circumstances, if the cause of action arose in this state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.\*]

En Banc. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Michael J. Reynolds against Harry L. Day and others, copartners doing business as the Hercules Mining Company. From a judgment for defendants, plaintiff appeals. Reversed and remanded for further proceedings.

Robertson & Miller, of Spokane, and Corkery & Corkery, of Toledo, Ohio, for appellant. John H. Wourms, of Wallace, Idaho, and Graves, Kizer & Graves, of Spokane, for respondents.

ELLIS, J. The plaintiff brought this action in the superior court of Spokane county to recover for personal injuries suffered by him, which injuries he alleges were caused by the negligence of the defendants while he was in their employ as a laborer in their mine in the state of Idaho. The amended complaint sets up an ordinary cause of action as at common law against a master for negligent injury to his servant. This is followed by the allegation: "That there is not any statute or law in the state of Idaho providing for compulsory or industrial insurance, and the plaintiff does not receive, under the laws of the state of Idaho, any benefits, insurance, or compensation on account of said injuries as

provided for employés under the laws of the state of Washington." There is no allegation as to what is the law of the state of Idaho relating to the maintenance of such actions, save the inference arising from the allegation quoted that there is no statute covering the case. A demurrer was interposed upon the grounds that the court had no jurisdiction of the subject-matter, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the action dismissed upon the sole ground, as expressed in the court's order, that "the court has no jurisdiction of the subject-matter of the action." The plaintiff appealed.

There was apparently no opportunity given for further amendment of the complaint so as to set out more specifically the law of the state of Idaho, and it is manifest that, if the decision of the trial court is correct, an amendment in that particular would have been unavailing in any event. Moreover, it seems to be conceded in the respondents' brief that, for the purposes of this review, it will be assumed that the common law, as applied to actions of this character, prevails in the state of Idaho. Any other course would be obviously unfair, since if the court had overruled the demurrer on the jurisdictional ground, but sustained it on the ground of insufficiency of facts, the appellant doubtless would have secured leave to amend.

The respondents contend, and the trial court apparently held, that it is contrary to the public policy of this state to permit the maintenance of an action of this character, and that this policy will not be controlled by the rule of comity so as to permit our courts to entertain such an action upon a cause arising outside of this state.

It is asserted that a policy hostile to such an action as this is specifically declared in the first section of the Industrial Insurance Act (Laws of 1911, p. 345). That section reads as follows: "The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wageworker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

[1] In the absence of a statute declaring it local, an action for personal injury is a transitory action, and may be brought wherever service can be had upon the person responsible for the injury.

"Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. \* \* \* It would be a very dangerous doctrine to establish that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred." *Dennick v. Railroad Co.*, 103 U. S. 11, 18 (26 L. Ed. 439); 40 Cyc. 105; 22 Am. & Eng. Encyc. of Law (2d Ed.) pp. 1379, 1380.

[2] Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the state where the action is brought, nor contrary to abstract justice nor pure morals nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions *ex contractu* and actions *ex delicto*. In all such cases, the right to recover is governed by the *lex loci* and not by the *lex fori*. In an action where the injury occurred in Montana and the suit was brought in Minnesota, the laws of the two jurisdictions being different as to the measure and amount of recovery, the Supreme Court of the United States, in an opinion delivered by the present chief justice, quotes with approval from *Herrick v. Minneapolis & St. Louis R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, as follows: "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To

justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens"—adding: "The contract of employment was made in Montana, and the accident occurred in that state, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*." *Northern Pacific Railroad v. Babcock*, 154 U. S. 190, 198, 199, 14 Sup. Ct. 978, 981 (38 L. Ed. 958).

The Supreme Court of Illinois has clearly stated the same rule. "Actions not penal, but for pecuniary damages for torts or civil injuries to the person or property, are transitory, and, if actionable where committed, in general may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought." *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 135, 52 N. E. 951, 952 (44 L. R. A. 410); *Stewart v. Baltimore & Ohio R. Co.*, 168 U. S. 445, 449, 18 Sup. Ct. 105, 42 L. Ed. 537; *Herrick v. Minneapolis & St. Louis R. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; *Morris v. Chicago, R. I. & P. Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; *Railway Co. v. Lewis*, 89 Tenn. 235, 14 S. W. 603; *Storey*, *Conflict of Laws* (8th Ed.) p. 845, note A; *Dicey*, *Conflict of Laws* (Am. Notes) pp. 667, 668.

[3] This rule applies even though the plaintiff could not have recovered had the injury occurred in the state of the forum. *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514.

[4] Measured by these principles, is the spirit of the Industrial Insurance Law so antagonistic to the common-law action as to warrant a denial of jurisdiction in our courts of a case such as this? There is nothing penal in the common-law action, nor anything contrary to good morals or natural justice, nor is it, for any cognate reason, prejudicial to the general interests of our citizens. That the Legislature did not so regard it is evidenced by its preservation in all cases save those for injury in "extra hazardous work" and the permission of its application under certain conditions even in such cases.

The respondents' position is clearly and

forcibly stated in their brief as follows: "The amended complaint leaves us somewhat in the dark as to what is the law of Idaho on the subject of compensation to injured workmen. It merely pleads that there is no statute in Idaho providing for compulsory or industrial insurance. No statute of Idaho governing the subject being pleaded, and the state of the law there being not more specifically alleged, we presume that the courts will assume that the common law prevails in Idaho. Now the common-law system of compensating injured workmen is particularly and eo nomine condemned by the Industrial Insurance Act. It is declared 'to be economically unwise and unfair.' It is said that 'its administration has produced the result that little of the cost of the employer has reached the workmen, and that little only at large expense to the public.' Because of the unwisdom of the common-law system in that behalf, the state of Washington, it is declared, has withdrawn the compensation of injured workmen 'from private controversy' and has abolished 'all civil actions and civil causes of action for such personal injury and all jurisdiction of the courts of the state' thereafter. If this be not the declaration of a policy utterly antagonistic and opposed in its every notion and theory to the common law, it is impossible to frame such a declaration."

Conceding the premises with the exceptions made by the statute itself, the conclusion does not follow. The hostility of our law is not directed against the remedial purpose of the common law. It extends that purpose to cases not reached by the common-law action. The rule of the common law is condemned, not because it furnishes a remedy, but because the remedy is deemed inadequate. This is far from a declaration of policy which would refuse that remedy where that remedy is the only alternative. There is nothing in the Employers' Liability Act so hostile to the common-law remedy as to deny any remedy where the circumstances will permit the application of no remedy save that of the common law. The assertion that our law declares a policy "utterly antagonistic and opposed in its every notion and theory to the common law" is more rhetorical than exact. It is true only in a qualified sense. Our law is not opposed to the common-law theory of recompense for injury. It is only opposed to the common-law assumption that a suit at law furnishes adequate recompense. Such a policy is certainly not contrary to the giving of any remedy merely because the only remedy possible is deemed inadequate. Our statute was never intended to declare that, because workmen injured in this state receive compensation without suit, it is against the public policy of this state that workmen injured outside of the state, and where the common law prevails, should receive any compensation.

The expense to our taxpayers and the in-

convenience to our courts which would result from entertaining suits upon causes of action arising in other jurisdictions is advanced as another reason why the rule of comity should not prevail in such cases. It is pointed out that one of the motives for the passage of the Industrial Insurance Act was to avoid the expense imposed by the operation of the common-law system of compensation. It is claimed that this policy is shown in the preamble of the act, where it is said that the administration of that system has been "at large expense to the public." To our minds this hardly justifies the respondents' conclusion. Such actions are still maintained in this state, where the cause of action arises in this state, even in cases falling within the purview of the Industrial Insurance Act, when the employer is in default in any payment due from him to the accident fund. Industrial Insurance Act, § 8; Laws of 1911, p. 362. In *State ex rel. Baker, etc., R. Co. v. Nichols*, 51 Wash. 619, 621, 99 Pac. 876 (though, as there indicated, the question of comity was not really involved, but only a question of statutory construction), it was pointed out that public policy is dependent upon our own laws, while comity is based upon the laws of other states or countries. In that case it is well stated that: "Comity depends not alone upon a disposition to favor the citizen of another state or country, but rests upon well-settled principles of practice, expediency, and convenience. It is a rule recognized by courts and applied within bounds of discretion. It is based upon the statute law or decisions of courts of general jurisdiction of other states or countries, rather than our own. These will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state."

Unquestionably, before the Industrial Insurance Act was passed, our courts would have entertained this action under the rule of comity so defined. Can it be said with any show of reason that, because our courts have been relieved of much of this character of litigation when arising between our own citizens and on causes originating in our own state, there is now such an overpowering inconvenience as to make it inexpedient to entertain jurisdiction of a cause of action arising in another state which would have been entertained but for that relief? Every trial of a case of which jurisdiction is taken by comity adds just that much to the burden of taxation. That fact, however, is only valid as an argument against the indulgence of the principle of comity in any case. It has no peculiar application to cases of this kind.

[5] There is another consideration which presents an insuperable obstacle to the respondents' position. In order to make the common-law remedy so contrary to the public policy of this state that it will not be en-

forced as a matter of comity, it must appear that the common-law remedy will never be enforced under any circumstances where the cause of action arises in this state between our own citizens. We again impress the fact that the common-law action may still be maintained and its remedy enforced as against an employer in this state in all cases not specifically covered by the Industrial Insurance Act. Moreover, the Industrial Insurance Act, upon which the respondents rely as the sole manifestation of a public policy of this state inimical to the common-law action, expressly excepts cases where the employer is in default in his contribution to the statutory insurance fund. We have held that such payment is a matter of affirmative defense which must be pleaded and proved in order to defeat an action at law against the employer for injury to his employé. *Acres v. Frederick & Nelson, Inc.*, 140 Pac. 370. This negatives any such hostility of our public policy to the common-law action, even in cases arising in this state and within the purview of the act, as to override the rule of comity in favor of a cause of action arising in a jurisdiction where there is no statute creating such a fund or providing any other remedy than that of the common law. To construe our statute as declaring such a public policy as that claimed would, aside from any rule of comity, render it subject to the ban of section 2, art. 4, of the federal Constitution. It would deny to the citizens of other states the same privileges which it accords to our own citizens in like circumstances.

"In the decision of the merits of the case, there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal Constitution." *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 35 (52 L. Ed. 143); *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; *Corfield v. Coryell*, 4 Wash. C. 371, 381, Fed. Cas. No. 3,230.

The Legislature never intended the act in question to infringe the broad rule of comity as heretofore recognized by the highest courts both state and federal. To give the act that effect would wantonly endanger its constitutionality.

The judgment is reversed, and the cause is remanded, with direction to permit an amendment of the complaint so as to plead

the law of Idaho applicable in such a case, and for further proceedings.

CROW, C. J., and MAIN, GOSE, PARKER, and FULLERTON, JJ., concur.

SMITH v. NORTHERN PAC. RY. CO.  
(No. 11,523.)

(Supreme Court of Washington. May 5, 1914.)

1. MASTER AND SERVANT (§ 256\*)—PLEADING  
—FEDERAL EMPLOYERS' LIABILITY ACT.

A complaint, in an action for injuries to a railroad employé, which alleged that the railroad company owned and operated an interstate system of railways, with several branches, engaged in commerce between the several states from Minnesota to Puget Sound and Oregon, and that one of its branches extended out of the city of Tacoma southeasterly, on which the accident to the employé happened, sufficiently alleged that the branch line on which the accident happened was used in carrying on interstate commerce, within the federal Employers' Liability Act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.\*]

2. APPEAL AND ERROR (§ 171\*)—QUESTIONS  
REVIEWABLE—THEORY OF CASE.

Where a trial proceeded on the theory that a recovery was sought by plaintiff under the federal Employers' Liability Act, and the court charged, without exception, that it was conceded by both parties that defendant was engaged in interstate commerce, and the question of the sufficiency of the complaint to state a cause of action under that act was not raised in the trial court, the question could not be raised in the Supreme Court on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

3. MASTER AND SERVANT (§ 286\*)—INJURY TO  
SERVANT—EVIDENCE—QUESTION FOR JURY.

Where, in an action for injuries to a member of a railroad bridge crew, struck by a pile, there was evidence that, when the pile swung from one side of the track to the other, it was sufficiently high to swing clear of plaintiff had the engineer operating the pile driver engine held onto the line, as it was his duty to do, unless he received a signal from the signalman to let go, that he let go of the line without a signal, and that because thereof the pile fell on plaintiff, there was evidence justifying an inference that the engineer dropped the pile, so as to justify a submission to the jury of the issue of the employer's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

4. DAMAGES (§ 34\*)—PERSONAL INJURIES—  
MEASURE OF DAMAGES.

Where a person receives an injury through the negligence of another, and the injury is subsequently aggravated, and a recovery retarded, through some accident not the result of want of ordinary care of the person injured, he may recover for the entire injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 43; Dec. Dig. § 34.\*]

5. TRIAL (§ 115\*)—CONDUCT OF TRIAL—DIS-  
CRETION OF TRIAL COURT.

The trial court may, in its discretion, deny the right of counsel for either party to read extracts from the testimony of a witness when arguing the case to the jury, or deny a request

to have the stenographer read the extracts from his shorthand notes.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 279-283, 295, 298; Dec. Dig. § 115.\*]

**6. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

Where one sustaining a fracture of the femur of the left leg was confined in a hospital for several weeks, and the leg was shortened and deformed, but plaintiff's physical health remained otherwise good, a verdict for \$15,000 was excessive, and must be reduced to \$10,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Department 2. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by Joe Smith against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Conditional-ly affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for appellant. Govnor Teats, Leo Teats, and Ralph Teats, all of Tacoma, for respondent.

**FULLERTON, J.** The respondent, plaintiff below, brought this action against the appellant railway company, under the federal Employers' Liability Act, to recover for personal injuries suffered by him while in the appellant's service as a member of its bridge crew. At the trial the superior court refused to direct a verdict in the appellant's favor, and the jury returned a verdict for the respondent in the sum of \$15,000. Judgment was afterwards entered on the verdict, and this appeal taken therefrom.

At the time of the accident giving rise to the injury the appellant was engaged in repairing a bridge extending across a stream on one of its branch lines. The repair work necessitated the driving of piles. Timbers suitable for piling were hauled by the appellant and unloaded alongside of the railway track a short distance back from the margin of the stream. The respondent's duty was to cut the timbers into proper lengths for use as piles, and prepare the points and heads for driving. The work of driving the piles was carried on as the respondent prepared them for use. To drive the piles, the appellant used a pile driver fastened upon a flat car, which car was moved forward and back along the railway track by means of a locomotive engine. The uprights or leads of the pile driver were 35 feet in height, while the piles then being driven were 55 feet long. To pick up a pile for driving, the car containing the pile driver was moved along the railway track to a point opposite the pile and stopped, or, in technical parlance, spotted. The cable of the pile driver which passed over the top of the leads was then fastened to the pile, and, by means of the engine which operated the pile driver, the pile was hauled up between the leads into an upright position. As the piles in this instance were some 20 feet longer than the leads of the pile driver,

it was necessary, in order that the piles might be clear of the track when placed between the leads, to fasten the cable some 20 feet back from the top or heavy end of the pile. A pile was being picked up in the manner described at the time the respondent was injured. He assisted in fastening the cable to a pile and moved across to the opposite side of the track from the pile when a signal to hoist was given the engineer operating the pile driver engine. After the end of the pile had been hoisted to a height of some 10 or 12 feet, it suddenly swung over to the side of the track on which the respondent was standing, where it struck the respondent and caused the injuries for which he sues.

[1, 2] Noticing the errors assigned in the order in which the appellant presents them, it is first contended that there is no allegation in the complaint, or proof in the record, that the branch line of the appellant's railway, on which the accident happened, was used by it in its business of carrying on interstate commerce. But, while the allegation of the complaint was not as full in this respect as it could have been made, we think it sufficient as against an objection raised for the first time by motion for an instructed verdict. In the complaint it is alleged that the appellant "is at this time, and was at all the times herein mentioned, a corporation organized and existing under the laws of the state of Wisconsin, owning and operating an interstate system of railways, with several branches in the western part of the state of Washington, engaged in commerce between the several states from Minnesota to Puget Sound and Oregon," and that one of its branch lines extended "out of the city of Tacoma southeasterly, herein called the Wilkeson branch," on which the accident to the respondent happened. It is true, as the appellant argues, there is no direct allegation in the complaint that the so-called Wilkeson branch was, at the time of the injury, used by the appellant in interstate commerce; but we think it is clearly so inferable from the other facts alleged. While the language might have been better chosen, it is plain that the pleader meant to allege, and would be commonly understood as alleging, that the interstate system, as well as the several branches mentioned, were used by the appellant in its business of interstate commerce. Moreover, the record discloses that the trial proceeded throughout on this theory. The motion for a directed verdict, which is now thought to have raised the question, was couched in language so general as not to call attention to the particular question, and was, furthermore, submitted without argument; and indeed the court charged the jury, without exception from the appellant, that the fact that the appellant was engaged in interstate commerce on this branch of its road

was conceded by both parties. This being true, it is too late to urge the question in this court.

The allegations of the complaint in the respect mentioned were admitted in the answer, and, since we hold them sufficient, it was, of course, not necessary that proof thereof be tendered or made.

[3] It is next contended that the evidence failed to show negligence on the part of the appellant. But we think the most that the appellant can claim on this branch of the case is that the evidence was in dispute. The evidence on the part of the respondent tended to show that, when the pile swung from the one side of the track to the other, it was sufficiently high to have swung clear of the respondent had the engineer operating the pile driver engine held on to the line; that it was his duty to hold the line, unless he received a signal from the signalman, directing the operations, to let go; that he let go of the line without such a signal; and it was because of his neglect of his duty in this respect that the pile fell upon the respondent. Stress is laid on the fact that no one was able to testify directly that they saw the pile dropped by the engineer. But the conclusion was inferable from other facts shown, and this justified the trial court in submitting the question to the jury.

[4] The respondent, among other injuries, sustained a fracture of the femur of the left leg. When still in the hospital, although going about on crutches, he fell while attempting to descend a stairway and refractured the bone at the place of the original fracture. This accident confined him to his bed for an additional 11 weeks, and correspondingly increased his sufferings and delayed his recovery. The appellant introduced evidence tending to show that the respondent was in an intoxicated condition at the time of the second fracture, and that such fracture was the direct and proximate result of his intoxicated condition. In its charge to the jury upon this question the court instructed them that, if they found that the respondent was in an intoxicated condition at the time he received his second injury, and that such condition was the direct and proximate cause of such second injury, then the appellant would not be liable in damages for the additional suffering and delay in recovery caused thereby, but would be liable only for such damages as were the direct and proximate result of the original injury, adding thereto that, if they found that the respondent was intoxicated at the time he fell and fractured his leg the second time, but that his fall was not the result of his intoxicated condition, then they should disregard such fact in making up their verdict.

Error is assigned on the last part of the instruction; but manifestly it is a correct statement of the law. If a person receives an injury through the negligent act of another, and the injury is afterwards aggravat-

ed, and a recovery retarded, through some accident not the result of want of ordinary care on the part of the injured person, he may recover for the entire injury sustained, as the law regards the probability of such aggravation as a sequence and natural result likely to flow from the original injury.

[5] In the course of the argument to the jury, one of the attorneys for the respondent made statements to the effect that there was no evidence before them concerning a particular fact. The attorney for the appellant had the stenographer in attendance upon the court transcribe extracts from the testimony of a certain witness, and, when arguing the appellant's case to the jury, sought to read these extracts as controverting the attorney's statements. An objection was made to the reading of the extracts, unless the whole of the evidence of the witness should be read. The court sustained the objection, whereupon the attorney requested that the stenographer read the parts transcribed from his shorthand notes, which request was also denied by the court. These rulings are assigned as error; but we do not think them so. How many times a witness may be recalled on a particular matter, or how many times his evidence may be repeated to the jury, rests in the sound discretion of the court, to be reviewed only for abuse. Here we find no abuse of discretion. The attorney was not denied the right to refresh his memory from the stenographic notes, or from any memorandum he may have made of the evidence otherwise, nor was he denied the right of stating to the jury his remembrance of the testimony of any witness, nor from drawing any deduction or conclusion he chose to draw therefrom. He was denied only the right to doing what amounted virtually to a recall of the witness and have him repeat to the jury what he had testified on a particular matter. Doubtless in the interests of truth and justice the trial judge may permit such a practice; but it does not belong to either litigant to demand it as an absolute right.

[6] Lastly, it is contended that the verdict is excessive, and with this contention we are constrained to agree. Unquestionably the respondent's injuries were severe, and he has suffered much because thereof. But nevertheless we think the verdict ought not to be allowed to stand for the amount returned by the jury. The resultant effect of the injury is a shortened and otherwise deformed leg, which will probably not permit the respondent to engage in the avocations followed by him prior to his injury. But his physical health is otherwise good, and, as we said in passing upon a similar injury, there are avocations open to him which he may still pursue. In finding the amount of the recovery this is a proper consideration and seemingly the jury, which gave but 30 minutes to a consideration of the case, did not sufficiently consider it.

The judgment appealed from will there-

fore be reversed, and the cause remanded, with instructions to grant a new trial, unless the respondent will in writing, within 30 days after the remittitur from this court reaches the trial court, consent to a judgment of \$10,000. If he so consents, judgment shall be entered in his favor for that sum. If he fails to consent within the time named, a new trial will be granted.

CROW, C. J., and MOUNT, MORRIS, and PARKER, JJ., concur.

**BRADLEY v. SPOKANE & I. E. R. CO.**  
(No. 11,525.)

(Supreme Court of Washington. May 5, 1914.)

**1. DEDICATION (§ 53\*)—PLATTED STREETS — RESERVATION OF FEE.**

A dedication to the public of platted streets and alleys gives the public only an easement of use, and does not vest in it the fee, which remains in the dedicators as owners of the lots, so that words in terms reserving the fee to the dedicators are mere surplusage.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.\*]

**2. BOUNDARIES (§ 20\*)—PLATTED STREETS — RESERVATION—SERVING TITLES TO STREETS AND LOTS.**

Where the dedicators of platted streets and alleys expressly reserve the fee, a warranty deed of the lots according to the plat, without reservation or exception, will still pass the fee to the streets.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. § 20.\*]

**3. DEDICATION (§ 55\*)—PLATTED STREETS — VOID RESERVATION.**

Reservation in a dedication of platted streets, of right to lay "water and gas pipes and electric wires, and to erect poles for such purpose, and to construct and operate \* \* \* cable and motor railways," being repugnant to proper control of the streets of the city, is void as against public policy.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 98, 99, 101, 102; Dec. Dig. § 55.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Cyrus Bradley against the Spokane & Inland Empire Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Smiley, of Spokane, for appellant. Graves, Kizer & Graves, of Spokane, for respondent.

MORRIS, J. In April, 1888, the appellant and G. B. Dennis, the then owners of the property, platted an addition known as Dennis & Bradley's addition to Spokane Falls. At the time of the filing of the plat, the lands embraced within this addition were without the city limits of Spokane, but for over 20 years they have been within the corporate limits of the city. The dedication plat was in the form of a deed containing this language: "The streets and alleys as on

said map named and indicated we do dedicate to the public, to be used as highways, reserving and excepting always from said dedication, to ourselves, our heirs and assigns, the rights in said streets and alleys to lay down and make use of for all lawful purposes, water and gas pipes, and electric wires, and to erect poles for said purpose, and to construct, and operate in said street and alleys, cable and motor railways, excepting also from said dedication of streets and alleys the fee of the lands therein contained to such extent as that should the same or any part thereof be vacated by proper authority, the part or parts vacated shall revert to ourselves, our heirs and assigns. Nothing in this map or these presents is to be construed as a conveyance of or in any manner affecting the title of such parts of said land first described herein as are shown to be the Spokane river and the strips of land between said river and the platted lots and streets, we reserving said land and river as our private property as though these presents were not made, but we hereby dedicate to the public the right to build and maintain a bridge across said river from the east end of Front street to Superior avenue, as the same is marked upon said map, and to use the bed of said river between said points to erect and maintain piers for such bridge." Subsequently the lots in this addition passed into the ownership of the respondent, all of the deeds in the chain of title from appellant to respondent being full warranty deeds without reservation or exception. In January, 1906, the city passed two ordinances vacating the streets and alleys in this addition, and respondent, as owner of the abutting lots, took possession of the vacated streets and alleys and has since so remained in possession. In August, 1912, the appellant brought this action in ejectment to recover possession of an undivided one-half interest in the portions of the streets and alleys so vacated, contending that he had never conveyed or assigned his right or title to the portions of the streets and alleys so vacated, and had never conveyed or assigned his right to possession of the same on their vacation, and that this right and title still remained in him under the reservation in the deed of dedication. Judgment went against him in the lower court, and he has appealed.

[1-3] The theory upon which appellant seeks a reversal is that, at the time of this dedication, it was the rule in this state that the ordinary statutory dedication passed the fee in the streets to the municipality, to be held in trust for public purposes and the abutting property owners on vacation; that the dedicators in this plat, having such rule in mind, desired to eliminate this plat from the operation of such rule, and with that purpose in view employed language expressing an intention that this dedication should

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



pass the fee in the streets and alleys to the municipality for public purposes only until such time as there should be a vacation of the streets and alleys, and that upon such vacation the fee should remain in themselves. It is probable that language may be found in one of the earlier cases that lends support to such a theory. In *State ex rel. Grinsfelder v. Spokane Street Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739, the court used this language: "In platted additions to a town when streets are laid out thereon the fee belongs to the public."

In a subsequent case (*Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362), this expression in the *Grinsfelder* case was used as authority for the contention then being made that the ownership of the fee in public streets was in the city. In disposing of this contention it was said: "But it is not accurate to designate the public control of streets and highways in this state as a fee. The statutes declare the effect and purpose of the dedication, to the public, by a city plat such as the one in controversy here. Section 1264, Bal. Code, declares them public highways, and section 1266 puts them under control of the corporate authorities. Sections 1269 and 1270 provide that, upon vacation of a street, it shall vest in equal proportions in the abutting lot owners, and section 1276 declares the effect of dedication. But the case of *State ex rel. Grinsfelder v. Spokane Street Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739, is cited by counsel for respondent as sustaining ownership of the fee in the city. In that case it was urged by the defendant, an electric railway company, in answer to mandamus to compel its operation, that it had no city franchise through a platted addition, but only a license from the owner of the property platted. The point the court had in view was the effect of a dedication by plat to the public, and it was held that the plat, when executed, was to the public; that is, if conditions were attached to the dedication, the conditions, if inconsistent, fell, and the dedication was valid for the purposes intended. Section 1276, *supra*, was mentioned, and the case of *City of Des Moines v. Hall*, 24 Iowa, 234, cited as to the effect of the statutory dedication; and from the Iowa case was inadvertently drawn the remark which is cited, 'In platted additions to a town, when streets are laid out thereon, the fee belongs to the public.'" It is evident from this last decision that it was not intended to lay down the rule that the fee vested in the public. At all events, it has been made clear by our later decisions that it is now the settled rule of this state that the public has only an easement of use in a public street or highway, and that the fee rests in the owners of the abutting property. *Holm v. Montgomery*, 62 Wash. 398, 113 Pac.

1115, 34 L. R. A. (N. S.) 506, Ann. Cas. 1912C, 965.

It follows that, when Dennis and Bradley by the language of their dedication sought to reserve the fee in the streets and alleys to themselves while conveying only an easement or right of use to the public, they reserved no other or different right than would have followed without such words of exception, for the act of dedication no more divested them of their title to that portion of the land included in the streets and alleys than it did to that portion included within the various lot and block boundaries. The title to the land included within the streets and alleys would only pass by grant as title to the various lots would only pass by grant. So far as we are here concerned, it might be admitted that, as the original owners of the land possessing the fee both in the streets and abutting lots, Dennis and Bradley could have separated these two estates and treated them as separate and distinct parcels of land (*Hagen v. Bolcom Mills*, 74 Wash. 462, 133 Pac. 1000, 134 Pac. 1051), and maintained these two separate and distinct estates through all their conveyances of the abutting lots. But such a severance of title will not be presumed. It would follow only from apt words in the chain of title, and we do not think that the words of reservation employed in this dedication should be held to express other than what was evidently in the minds of the dedicators at the time the plat was dedicated—that such words were necessary in order to prevent the public from taking the fee in the streets because of the dedication.

What, then, became of this title? When these dedicators conveyed the various lots in this addition, they did so by warranty deeds without reservation or exception of any kind. In August, 1905, the appellant owned two lots and the undivided one-half interest in the river bed around the so-called peninsula formed by the bend of the Spokane river. He conveyed these lands to respondent by a deed of like character to those used in the prior conveyances to others. All of these conveyances were according to the plat, and it is our opinion that, when these conveyances were made without words of exception or reservation, or any language expressing a contrary intention, they fell within the general rule that a conveyance of land abutting upon a public highway carries with it the fee to the center of the highway as part and parcel of the grant. No language is required to express such an intent on the part of a grantor in whom the title to the lot and highway vests. It follows as an inference or presumption of law that, in selling the land abutting upon the highway, he intended to sell to the center line of the adjoining highway. *Rowe v. James*, 71 Wash. 287, 128 Pac. 539. While the intention to pass such a title is always presumed, and re-

quires no special words to create it, the contrary intention will never be presumed, and, before it will be held that it was the intention of the grantor to withhold his interest in the highway after parting with his title to the adjoining land, such declaration of intent must clearly appear. *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988. Deeds may expressly exclude the streets, but, unless they do, the implication is that the street is included. *Cox v. Freedley*, 33 Pa. 124, 75 Am. Dec. 584. The only place where we can find any expression of the intent of these dedicators in passing title to the streets is in the deeds themselves, and these deeds are a unit in establishing the fact that it was never intended to separate the title to the land in the streets from the title to the land embraced within the abutting lots. If it should be said that the dedicators of this plat expressed their intention to sever the title to the streets by the words of exception or reservation used in the dedication, we think it is clear from the testimony and subsequent conduct of appellant (without referring to the conduct of Dennis) that, so far as one's acts indicate one's intent, he had abandoned such intent long prior to the bringing of this action. We find this, not only in the giving of warranty deeds to the different lots with covenants of full warranty which upon their face conveyed all that a deed to a lot bounded by a street would convey, but in 1905, when he sold all he then owned in this addition to respondent, knowing the land was being acquired for the purpose for which it is now used, knowing also that the railroad company was seeking to acquire his entire interest, and describing in his deed what was then apparently in the minds of all as representing his entire interest. Referring in his testimony to this last deed, he says that at the time he overlooked the rights reserved in the dedication, that for 25 years it had "absolutely slipped" his mind, and that it did not occur to him until a short time before bringing this action, when he came across and read an old tracing of the plat of the addition. It seems to us his forgetfulness is more attributable to an intent to convey all his title to the purchasers of the lots, and that he thought he had done so until the language of this reservation suggested the possibility of a contrary holding. The reservation in the dedication to general municipal purposes such as the laying of "water and gas pipes and electric wires, and to erect poles for such purpose, and to construct and operate in such streets and alleys cable and motor railways," would be so repugnant to the character of these streets and alleys as public ways, by seeking to take away from the city the power to exercise control over these streets, as to contravene a sound public policy, and for this reason we think it must be held absolutely void. *State ex rel.*

*Grinsfelder v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; *Jones v. Carter*, 101 S. W. 514, 45 Tex. Civ. App. 450; *Noblesville v. L. E. & W. Ry. Co.*, 130 Ind. 1, 29 N. E. 484; *Richards v. Cincinnati*, 81 Ohio St. 506; *Des Moines v. Hall*, 24 Iowa, 234; 1 *Elliott, Roads & Streets*, § 163. When, therefore, the streets and alleys in this plat were vacated by the proper authority, the effect of such vacation was to vest the title to the land embraced within such streets and alleys in the owners of the abutting property in legal proportions. *Rem. & Bal. Code*, § 7846.

For these reasons we hold with the lower court that appellant has no cause of action. The judgment is affirmed.

CROW, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

FRIEZE v. POWELL et ux. (MERLE & HEANEY MFG. CO., Garnishee).  
(No. 11,271.)

(Supreme Court of Washington. May 6, 1914.)

1. JUDGMENT (§ 139\*)—BY DEFAULT—OPENING OR VACATING—DISCRETION OF COURT.

The vacation of a default judgment rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.\*]

2. JUDGMENT (§ 158\*)—OPENING OR VACATING—AFFIDAVITS ON APPLICATION.

The vacation of a default judgment on the ground of insufficient service falls within *Rem. & Bal. Code*, § 464, subd. 3, permitting the vacation of judgments for irregularity in obtaining them, and a petition therefor was sufficient, though verified by the attorney and not accompanied by an affidavit of merits, as section 467 only requires that an application under section 464, subd. 3, shall be by verified petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.\*]

3. JUDGMENT (§ 158\*)—OPENING OR VACATING—AFFIDAVITS ON APPLICATION.

The vacation of a default judgment because of the failure of the agent served to take proper legal steps falls within *Rem. & Bal. Code*, § 303, authorizing relief from a judgment taken against a party through his excusable neglect, upon affidavit showing good cause, and a petition therefor was sufficient, though verified by the attorney, no other agent being within the county, and though not accompanied by an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.\*]

4. CORPORATIONS (§ 670\*)—FOREIGN CORPORATIONS — ACTIONS—GARNISHMENT—SERVICE OF WRIT.

Under *Rem. & Bal. Code*, § 687, providing that writs of garnishment shall be served the same as a summons, and section 226, subd. 9, providing that a summons may be served on a foreign corporation by delivery to "any agent, cashier, or secretary thereof," service of a writ of garnishment against an Illinois corporation on its local manager was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2628-2639; Dec. Dig. § 670.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

**5. GARNISHMENT (§ 104\*)—WRIT—APPEARANCE OF GARNISHEE.**

A garnishee who appeared and requested permission to defend, without preserving a special appearance, thereby waived objection to the sufficiency of the service of the writ.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 209-213; Dec. Dig. § 104.\*]

**6. GARNISHMENT (§ 187\*)—JUDGMENT BY DEFAULT—OPENING OR VACATING—EXCUSES.**

Where a writ of garnishment against a foreign corporation was served on its local manager, who, through ignorance, failed to take the necessary steps to protect the garnishee's interests until default had been taken, after which prompt steps were taken to have it vacated, there was a sufficient showing of excusable neglect, within Rem. & Bal. Code, § 303, authorizing the vacation of judgments on that ground, and the court did not abuse its discretion in setting it aside.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 350-364; Dec. Dig. § 187.\*]

**7. JUDGMENT (§ 143\*)—DEFAULT JUDGMENT—SETTING ASIDE—FOREIGN CORPORATIONS.**

In view of the liberal statutory rule permitting service on foreign corporations through agents unfamiliar with legal proceedings, an equally liberal discretion in vacating defaults founded on such service should be permitted, to the end that justice may be done.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-281; Dec. Dig. § 143.\*]

**8. GARNISHMENT (§ 187\*)—JUDGMENT BY DEFAULT—OPENING OR VACATING—MERITORIOUS DEFENSE.**

A petition to vacate a default judgment against a garnishee, which alleged that the garnishee owed nothing to the principal defendant and had none of his goods in its possession, presented a meritorious defense, if proven, and not a mere conclusion that such a defense existed.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 350-364; Dec. Dig. § 187.\*]

**9. TRIAL (§ 388\*)—BY COURT—FINDINGS OF FACT—DUTY TO MAKE.**

Rem. & Bal. Code, § 470, authorizing the court to decide upon the grounds for vacating a judgment before deciding upon the validity of the defense, and section 367 providing that, upon the trial of an issue of fact by the court, it shall make findings of fact, did not require findings of fact upon vacating a judgment for excusable neglect, as that is a discretionary matter reviewable on appeal upon the entire record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908-911, 915; Dec. Dig. § 388.\*]

**10. GARNISHMENT (§ 142\*)—PROCEEDINGS TO ENFORCE—ANSWER OF GARNISHEE.**

The answer of a garnishee, verified by its secretary, who stated that he had read it, knew its contents, and believed the same to be true, was sufficient, when liberally construed, within Rem. & Bal. Code, § 690, providing that it shall be under oath, in writing, and signed by the garnishee, though it was signed by the garnishee's attorney.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 268; Dec. Dig. § 142.\*]

**11. GARNISHMENT (§ 158\*)—PROCEEDINGS TO ENFORCE—EVIDENCE.**

Under Rem. & Bal. Code, § 285, requiring the liberal construction of pleadings with a view to substantial justice, a garnishee, who plead "no funds" and "nulla bona," was entitled to show that the principal defendant had antici-

ipated his salary and that nothing was owing him when it was garnished.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 288-297; Dec. Dig. § 158.\*]

**12. GARNISHMENT (§ 114\*)—OPERATION AND EFFECT—PROPERTY AFFECTED.**

Rem. & Bal. Code, § 683, providing that the writ of garnishment shall require the garnishee to state what he is indebted to the defendant or what property of defendant is possessed by him, or was when the writ was served, section 685 prescribing the form of writ in substantially the same language, section 688 declaring it unlawful for the garnishee to pay the defendant any debt or deliver any property to him after service of the writ, and section 692 authorizing the rendition of judgment against a defaulting garnishee for the full amount claimed, look to a trial of the issue presented by the garnishee's answer as of the date of the answer, and while a contract obligation arising before answer, but not yet due, would be held by the writ until the trial, debts created, salary earned, or property coming into the garnishee's hands subsequent to the answer, independent of prior contract, are not held, otherwise the head of a family, whose salary is exempt under section 703 for four weeks, would be deprived of means of supporting his family, should the trial be longer delayed, and, successive garnishments being permissible, the creditor is not thereby deprived of his remedy.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 233; Dec. Dig. § 114.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Everett Frieze against J. F. Powell and wife, wherein the Merle & Heaney Manufacturing Company was garnished. From an order vacating a default judgment against the garnishee defendant, and a subsequent judgment for plaintiff, awarding insufficient relief, plaintiff appeals. Affirmed.

Edward Nelson Sears, of Seattle, for appellant. Frank A. Paul and Hastings & Stedman, all of Seattle, for respondent.

ELLIS, J. This is an appeal by the plaintiff, at whose instance a writ of garnishment was issued, from an order vacating a default judgment against the garnishee defendant and from the judgment rendered thereafter upon the trial. The record discloses the following facts: On August 19, 1912, the plaintiff recovered a judgment in the sum of \$461.15 against the defendants Powell and wife. Powell was, at the time, employed by the garnishee defendant, Merle & Heaney Manufacturing Company. To avoid confusion, we shall designate the parties throughout as plaintiff, defendant, and garnishee. The garnishee is a corporation of the state of Illinois doing business in the state of Washington, having its principal place of business in Seattle. On August 31, 1912, the plaintiff sued out a writ of garnishment and caused a copy thereof to be served on the garnishee by delivering the same to one Charles Hedreen, who, it is alleged, was its manager in Seattle. Hedreen took no action in the matter, and on September 21, 1912, the plaintiff procured an order of default, and on the same day a

judgment against the garnishee for the full amount of the judgment against the defendants Powell, with interest and costs. On September 25, 1912, a petition to set aside the default and vacate the judgment was filed. This petition was verified by one of the attorneys for the garnishee; the verification stating that he made the affidavit on behalf of the corporation for the reason that no officer of the corporation was then within King county, and that the allegations of the application were true, as he verily believed. The grounds for vacation of the judgment set up in this petition were twofold. It is first alleged that the court acquired no jurisdiction to enter the judgment because Hedreen, upon whom service was made, was not the cashier or secretary of the corporation, nor its agent upon whom service might be made, and that he was only a salesman in the employ of the garnishee, not an officer, director, or trustee, and had no charge of any legal business of the corporation. It is then alleged: "That, at the time said pretended writ of garnishment was attempted to be served upon said Charles Hedreen, the Merle & Heaney Manufacturing Company was not indebted to the said J. F. Powell or to Mildred Powell, his wife, in any sum whatsoever, nor did it, at said time, have in its possession or under its control any property or effects belonging to said J. F. Powell or said Mildred Powell, his wife nor did said J. F. Powell or Mildred Powell, his wife, own or have an interest in any shares of stock in said corporation, but on the contrary, on August 31, 1912, and at all times since, said J. F. Powell, defendant in this action, was indebted to the Merle & Heaney Manufacturing Company for a considerable sum of money, and that therefore this garnishee had a complete defense to said writ of garnishment."

On October 5, 1912, a hearing was had upon the petition and an affidavit of the defendant Powell to the effect that, at the time the writ of garnishment was served, he was indebted to the garnishee, and that the garnishee did not then owe him and has not since owed him anything. His affidavit also set up the fact that Powell is a married man, has a family living with him dependent upon him for support; that his salary is \$100 a month, and claimed his exemption. Affidavits were also presented, controverting the allegations of the petition as to the garnishee's indebtedness to Powell, and setting up the fact that Hedreen was the manager and managing agent of the garnishee and was so held out and advertised by the garnishee in Seattle and King county, and, as such, had verified the assessment schedule of the garnishee for the purpose of taxation. These latter allegations were not controverted in any manner. It is asserted in the plaintiff's brief that the court, upon the hearing, refused to consider any of these affidavits, but we fail to find anything in the record reasonably justifying this statement. On the

contrary, the court, on October 8, 1912, signed an order vacating the judgment which expressly states that the court considered the application and affidavits in support thereof as well as the affidavits in resistance, and found that justice would be subserved by opening the default, vacating the judgment, and allowing the garnishee to answer. Though the original answer is not in the record before us, the record shows that such an answer was presented at the time of this hearing, since on that date the plaintiff moved to strike the answer because it was verified by the attorney. This motion was granted and 15 days allowed to file an amended answer. On October 29, 1912, the garnishee filed its amended answer, signed by its attorney, but verified by its secretary in Chicago, Ill. In this answer, the garnishee alleged that, at the time of service of the writ upon Hedreen, the manufacturing company was not indebted to the defendants Powell and did not have in its possession any property belonging to them, and has not, at any time since the service of the writ, owed them any money or had in its possession any of their property, and that they did not, either at the time of the service of the writ or since that time, own any shares of stock in the garnishee company. An affidavit of the plaintiff controverting this amended answer was filed, and a motion to strike this amended answer was apparently made, since there is in the record a journal entry denying the motion, but neither the motion itself nor any of the grounds upon which it is based in any manner appears in the record. The cause was tried before the court without a jury upon the issues raised by this amended answer and the controverting affidavit on January 23, 1913. The evidence shows that, prior to the service of the writ, the defendant Powell was employed by the garnishee on a salary of \$100 a month, which was paid \$50 on the 15th and \$50 on the last day of each month; that he has been continuously so employed from the date of the service of the writ to the date of the trial; that he had earned from August 1, 1912, to the date of the trial, January 23, 1913, \$588.45; that at times prior to August 31st there had been advanced to him sums aggregating \$46.75 on his I O U's, which were carried by the garnishee in its cash account; that on August 15th he was paid \$50, and on August 31st \$21 of the amount which had been advanced to him was charged against his salary, leaving a balance of \$29 of his salary then due, which was then paid to him; that, of his debt to the garnishee, there remained \$25.75, which was not deducted from his salary on that date, and which he still owed to the garnishee. It thus appeared that the garnishee really owed Powell on August 31, 1912, only \$3.25. The evidence further showed that from August 31st up to October 25th, when the amended answer was verified, Powell had earned \$196.15; that Powell is the head of a

family which is dependent upon him; and that the garnishee has advanced to him upon his salary during the period since August 31st from \$50 to \$60 a month.

The court made findings of fact reciting the entry of the original judgment against the defendants Powell, the service of the writ of garnishment, the employment of Powell by the garnishee, and found that on August 31, 1912, Powell was indebted to the garnishee in the sum of \$46.75; that on that date the garnishee paid Powell \$29 of the \$50 then due him as salary, applying \$21 on Powell's indebtedness to the garnishee, but expressly found that it did not appear that this was done prior to the service of the writ upon the garnishee. The court found that, since the service of the writ, the defendant Powell has earned \$588.45 and had earned up to October 25, 1912, the sum of \$196.15 for salary. The court concluded, as a matter of law, that the garnishee was liable to the plaintiff for \$196.15, less the exemption of \$100 claimed by Powell, and less the \$25.75 still owing by Powell to the garnishee of the amount which he owed at the date of the service of the writ, and that the plaintiff is entitled to judgment against the garnishee for \$70.40 and costs. Judgment was entered accordingly, and this appeal followed.

The plaintiff contends that the court erred: (1) In setting aside the default and vacating the judgment; (2) in refusing to make findings in support of the order vacating the judgment; (3) in denying the motion to strike the amended answer; (4) in admitting evidence of Powell's indebtedness to the garnishee; (5) in ruling that the service of the writ attached only that portion of the principal defendant's salary which accrued prior to the date of the filing of the garnishee's answer.

[1] 1. It is admitted that the vacation of a default judgment is a matter which rests in the sound discretion of the trial court, but it is urged that in this case that discretion was abused in that the application was fatally defective in form and was wholly wanting in merit.

[2, 3] The application, as we have seen, was, in form, a petition verified by the attorney for the garnishee. The plaintiff claims that it was fatally defective in that it was not supported by an affidavit of merits. The application rested upon two grounds. The first was that the service of the writ was ineffective because not made upon any officer or agent of the garnishee. The application on this ground would necessarily fall under the third subdivision of Rem. & Bal. Code, § 464, which permits the vacation or modification of judgments for mistake, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order. The second ground was that the person upon whom service was made, being ignorant of such matters, failed to take the necessary steps to protect the interests of the garnishee until after

the default was entered. Were it not that another section of the statute more appropriately covers this ground, it also might reasonably be held to fall within the same section, the seventh subdivision of which permits the vacation for unavoidable casualty or misfortune, preventing the party from prosecuting or defending. Section 467 provides that applications to obtain the benefit of subdivisions 3 and 7 of section 464 shall be by petition, verified by affidavit, etc. There is no requirement that such a petition shall be supported by an affidavit of merits, but only that the petition shall be verified by affidavit. If the application be considered as controlled entirely by section 464, it fully complied with the statute both in substance and form. *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053. The last ground of the application, however, more properly falls within the provisions of Rem. & Bal. Code, § 303, permitting the court, upon affidavit showing good cause therefor, after notice to the adverse party, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. It is urged that under this section the application should have been supported by an affidavit of some officer or agent of the garnishee, showing the excusable neglect claimed. There is nothing in the record, however, indicating that this particular matter was called to the attention of the trial court, and in any event, since the verification states that no officer of the corporation was, at the time, within King county, we think the petition was sufficient to confer jurisdiction upon the court. In support of his position, the plaintiff relies mainly upon *Bailey v. Taaffe*, 29 Cal. 423, which holds that such an application should be based upon an affidavit made by the moving party himself and not by his counsel. In the later decision of *Melde v. Reynolds*, 129 Cal. 308, 61 Pac. 932, the Supreme Court of California held that a motion signed by an attorney is sufficient to invoke the jurisdiction of the court, and that an affidavit of merits made by the defendant in person is not a jurisdictional element. The court said: "The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve rather than impede or defeat the ends of justice, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right."

We think, when the remedial purpose of the several sections of the statute above referred to is considered, the application, though not verified in person by any officer or agent of the corporation, but only by its attorney, was sufficient in form.

[4] The contention that the application was wanting in merits also rests upon two grounds. It is first claimed that the service of the writ upon the local manager of the

garnishee was sufficient. The statute (Rem. & Bal. Code, § 687) provides that writs of garnishment shall be served in the same manner as the summons in an action is served. Section 226, touching service of summons, provides (subdivision 9) that, if the suit be against a foreign corporation or nonresident joint-stock company or association doing business within this state, the service may be made by delivery to any agent, cashier, or secretary thereof. Construing this section, we have held that service made upon any agent having representative authority is sufficient. *Barrett Manufacturing Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161. In *Tatum v. Niagara Fire Ins. Co.*, 43 Wash. 373, 86 Pac. 660, we held that service of a writ of garnishment by delivery to a local agent authorized to solicit insurance was sufficient service upon a nonresident insurance company, and that the mode of service provided by Rem. & Bal. Code, § 6095, requiring the appointment of statutory agents for such companies doing business in this state, with authority to accept service of process, is not exclusive, but is cumulative to that provided for in subdivisions 6 and 9 of section 226. See, also, *Slevers v. Navigation Co.*, 24 Wash. 302, 64 Pac. 539; *Lee v. Fidelity Storage & Transfer Co.*, 51 Wash. 208, 98 Pac. 658.

[5] We hold that the service of the writ upon the garnishee's local manager was a sufficient service. The garnishee urges that this service was insufficient because the copy of the writ served was not certified under the seal of the court. The statute makes no provision that it shall be. Moreover, the garnishee, by appearing and requesting permission to defend to the writ, without preserving a special appearance, must be held to have waived objection to the sufficiency of the service. *Larsen v. Allan Line Steamship Co.*, 37 Wash. 555, 80 Pac. 181; *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859; *Seaton v. Cook*, 45 Wash. 27, 87 Pac. 914; *Teater v. King*, 35 Wash. 138, 76 Pac. 688.

[6, 7] The second ground of the plaintiff's contention that the application was without merit is based on the claim that the application made no showing of excusable neglect. In this connection, reliance is placed mainly upon the decision in *Moody v. Reichow*, 38 Wash. 303, 80 Pac. 461. In that case the motion to vacate the judgment was made after service of the motion by the defendant for a cost bond, and after a motion for default had been served and had been pending for more than a year without further appearance by the defendant. The facts set up in the application as showing excusable neglect were that the defendant had employed counsel whom he expected to take care of the case; that he understood the English language imperfectly; and that it was difficult for him to make known his defense. The court held that it was an abuse of discretion to vacate the default judgment after the lapse of so long a time when the record

showed nothing more than neglect. The case before us, however, comes much more nearly within the facts found in *Spoar v. Spokane Turn-Vereln*, 64 Wash. 208, 116 Pac. 627, in which the application stated facts closely similar to those in the *Moody Case*, but the application was made promptly after default and judgment had been entered. The vacation of the judgment was held not an abuse of the court's discretion. In the present case, the application was made within five days after the entry of judgment. In view of the liberal rule of service permitted by our statute, by which service on foreign corporations may be often made upon agents not at all familiar with legal proceedings, as appears by the application in this case, there should be permitted an equally liberal discretion in vacating defaults founded on such service to the end that justice may be done. This is especially true where, as here, the application is made in a short time after default. We hold that there was a sufficient showing of excusable neglect. The trial court did not abuse its discretion in setting aside the judgment.

[8] It is also claimed that no meritorious defense was shown. It is argued that the statement in the application that there was a meritorious defense was a mere conclusion. In this connection, reliance is placed upon *Hofer v. Sawtelle*, 43 Wash. 23, 85 Pac. 853. In that case, the petition contained nothing but the "bare conclusion that the appellants have a meritorious defense to the action." The petition here, however, specifically states that the garnishee owed no debt to the principal defendant, and had in its possession no goods belonging to the defendant. These things were not conclusions, but allegations of fact which, if established, would constitute a meritorious defense.

[9] 2. We find no merit in the claim that the court erred in refusing to make formal findings in support of its order vacating the judgment. The plaintiff bases his claims in this particular upon Rem. & Bal. Code, § 470, which provides that in such cases the court may first try out and decide upon the grounds to vacate or modify the judgment before trying or deciding upon the validity of the defense, and also on Rem. & Bal. Code, § 367, which provides that, upon the trial of an issue of fact by the court, its decision shall be in writing, and that the facts found and the conclusions of law shall be separately stated. We have repeatedly held that the last section mentioned has no application to equitable actions which are triable de novo on appeal. The application to vacate judgments entered by default because of excusable neglect, mistake, or inadvertence is, as we have seen, addressed to the sound discretion of the trial court. That discretion is also reviewable here upon the entire record. We have often held that we will not review the action of the court upon matters addressed to its discretion without having before us all of

the evidence upon which it acted. It seems clear that there is no more reason for requiring formal findings of fact in such a case as this than in equitable actions triable to the court. We hold that the provisions of section 367 have no application to such cases.

[10] 3. The claim that the court erred in refusing to strike the amended answer is based upon the fact that it was not signed by any officer of the garnishee defendant, though it was verified by its secretary. There is nothing in the record to show that this matter was ever called to the attention of the trial court. While there is in the record a journal entry indicating that the court overruled a motion to strike this answer, the motion itself does not appear. Moreover, the secretary of the garnishee defendant, in his verification, states that he has read the answer, knows its contents, and believes the same to be true. He signed this verification, swearing to the contents of the answer. We hold that this was a sufficient signing, within the meaning of the statute (Rem. & Bal. Code, § 690), which provides that the answer shall be under oath, in writing, and signed by the garnishee. There are decisions to the contrary, but the other rule seems to us highly technical and not in keeping with the liberal rule which we have always indulged in construing pleadings.

[11] 4. The contention that the court erred in admitting evidence that the defendant Powell, prior to the service of the writ, had been permitted to anticipate his salary to the extent of \$46.75 is based upon the theory that this was a counterclaim against Powell, of which evidence could not be admitted against the plaintiff without pleading it as such. The garnishee's amended answer was "no funds" and "nulla bona." Under this plea, and under the liberal rule of construction required by statute (Rem. & Bal. Code, § 285), the garnishee was entitled to introduce any evidence showing the condition of its account with the defendant Powell at the time of the service of the writ. That account showed that at that time he had anticipated his salary in the sum of \$46.75. Under this issue, raised by the petition and the contesting affidavit, this evidence was properly admitted. There are decisions from other jurisdictions to the contrary, but we think that pleadings in a garnishment proceeding should be construed with much liberality to the end that substantial justice may be done.

[12] 5. The trial court held that the writ of garnishment served to attach only that portion of the salary of the principal defendant which accrued prior to the filing of the answer of the garnishee. The plaintiff insists that the writ should be held to attach the defendant's salary up to the date of trial, and that this court has so held in *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902. It is true that the language used *arguendo* in that decision would at first seem so to in-

dicade, but the exact question here involved was not present in that case. The matter there decided was that an order quashing the service of a writ of garnishment is appealable as a final determination of a proceeding. A review of the sections of the Code governing garnishments seems to us to justify the view that the writ serves only to hold moneys or goods of the defendant in the hands of the garnishee at the date of the service of the writ, or at any time thereafter until the service of the answer of the garnishee, and to hold such moneys or goods coming into his hands at any time before trial, but pursuant to any contract or agreement creating an obligation to pay the money or hold the goods, subsisting as an obligation at the time of service or answer or at any time between those dates. The decision in *Tatum v. Geist* is not necessarily contrary to this view. Rem. & Bal. Code, § 683, provides that the writ shall command the garnishee to appear and answer under oath "what, if anything, he is indebted to the defendant and was when such writ was served, and what personal property or effects, if any, of the defendant he has in his possession or under his control, or had when such writ was served." Section 685, prescribing the form of writ, uses substantially the same language. Section 688 declares that it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects after the service of the writ. Section 692 declares that, if the garnishee make default, the court may render judgment against him for the full amount claimed by the plaintiff against the defendant, or, in case judgment has been rendered against the defendant, for the full amount of such judgment, with interest and costs. Section 693 provides that, if it appear from the answer of the garnishee or otherwise that the garnishee is indebted to the defendant or was so indebted when the writ was served, judgment shall be entered in favor of the plaintiff and against the garnishee for the amount of such indebtedness.

It seems to us that, construing these sections together, they look to a trial of the issue presented by the answer of the garnishee, which issue can only speak as of the date of the answer. Of course, if the answer discloses or the evidence shows a contract obligation from the garnishee to the principal defendant, arising before answer and still subsisting, though not yet due, the debt created by such an obligation would be held by the writ of garnishment till the date of trial, since proof of that fact would fall within the issue presented by the answer, and the controverting affidavit, if the answer is controverted. But as to debts created or salary earned subsequent to the answer or moneys or goods of the defendant coming into the garnishee's hands subsequent to the answer, and in good faith whol-



ly independent of any antecedent contract or agreement, the contrary would be true. They are not within any issue presented by the answer, nor raised by the controverting affidavit. Salary of a defendant may be garnished as soon as earned, though before it becomes due, but it cannot be garnished before it is earned. *Bambrick v. Bambrick Bros. Construction Co. (Mo.)* 132 S. W. 322. This would seem to follow from the clear analogy between garnishment and attachment. An attachment holds only the goods attached. The issue of ownership presented speaks as of the date of the attachment. The same would be true in the case of garnishment, but for the fact that, by the statute, the garnishee is required to answer under oath not only what, if anything, he was indebted to the defendant when the writ was served, but is indebted when he answers. To hold that salary or wages unearned at the time of answer but earned between that time and the time of trial is attached by the writ would work a hardship upon a defendant who is earning a salary and is the head of a dependent family. Such a defendant is entitled to have exempt from garnishment current wages or salary to the amount of \$100. *Rem. & Bal. Code, § 703*. There is no provision for an exemption for \$100 or any other sum from his salary for each month or for any period longer than four weeks. To construe the garnishment statute as holding the salary of a defendant so situated up to the date of the trial would deprive him, if the trial were for any reason long delayed, of any means of supporting his family during the interval between answer and trial. Such a holding would seem to be both unjust and unnecessary; unjust in that it would deprive the family of the defendant of any means of support; unnecessary in that successive garnishments may be issued by a plaintiff. Such successive garnishments would permit the defendant to claim his exemption in each case out of the fund accruing from his salary up to the date of the answer. Our construction meets the full purpose of the garnishment law. It affords a remedy to the creditor without depriving the debtor of the reasonable exemption provided in the same connection. The remedial character of the garnishment should not be held to override the humane purpose of the exemption. As said by the Missouri Court of Appeals: "As an original proposition, the doctrine is unpalatable to us that the future wages of the head of a family, even though he resides in another state, can be thus appropriated. Considering the fact that the business of many mercantile, manufacturing, and other establishments range over other states than those where the concerns are domiciled, and that they often have numerous foreign employes, we can easily see how a great hardship may be entailed by allow-

ing unearned salaries to be thus seized, especially as our garnishment statutes carry the lien of the garnishment to the date of the garnishee's answer. Such companies may be deprived of the services of useful employes, who will refuse to continue to work for them if repeated garnishments continually absorb their wages so that they cannot support their families. *Dinkins v. Crunden-Martin Wood-entware Co., 99 Mo. App. 310, 320, 73 S. W. 246, 249.*

The answer is required to speak as of its date. If controverted, the issue is framed on that answer and necessarily speaks as of that date. The trial is had of that issue, not of an issue which rests on facts arising subsequent to that date. Under statutes making the writ of garnishment take effect on all debts due at service or "thereafter to become due," it is generally held unearned wages do not constitute a debt either due or to become due within the statutory meaning. *Thomas v. Gibbons, 61 Iowa, 50, 15 N. W. 593; Foster v. Singer, 69 Wis. 392, 34 N. W. 395, 2 Am. St. Rep. 745.* A review of decisions cited from other jurisdictions would be of little profit, however, the statutes being, in most cases, not the same as our own. We find no error warranting a reversal or modification of the judgment.

It is affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

BEVERLY v. DAVIS et ux. (No. 11,487.)

(Supreme Court of Washington. May 8, 1914.)

1. MORTGAGES (§ 32\*)—DEED OR MORTGAGE.

Whether an instrument is a deed or a mortgage is determined at the inception of the transaction; the intention of the parties determining its nature.

[Ed. Note.—For other cases, see *Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\**]

2. MORTGAGES (§ 32\*)—DEED OR MORTGAGE—ACTIONS.

An action to have a deed absolute on its face declared a mortgage is founded on fraud, and the fullest inquiry is permissible to ascertain the intention of the parties.

[Ed. Note.—For other cases, see *Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\**]

3. MORTGAGES (§ 36\*)—DEED OR MORTGAGE.

It is presumed that a deed absolute on its face, with an option to repurchase, is what it purports to be, so that one asserting that it was intended as a mortgage must prove his assertions by clear and convincing evidence.

[Ed. Note.—For other cases, see *Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. § 36.\**]

4. MORTGAGES (§ 38\*)—DEED OR MORTGAGE.

While the existence of a written promise to repay money advanced is strong evidence in determining whether an instrument was a deed or mortgage, it is not conclusive that a personal debt exists, since, if a loan is shown, an implied promise to repay arises therefrom.

[Ed. Note.—For other cases, see *Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\**]

\*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*



**5. MORTGAGES (§ 38\*)—DEED OR MORTGAGE—EVIDENCE.**

Evidence held to sustain a finding that a deed absolute on its face, with an option to repurchase, was intended as a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\*]

**6. MORTGAGES (§ 597\*)—REDEMPTION.**

The statutory right of redemption inheres in a mortgage, and cannot be waived, whether the mortgage be in the usual form or in the form of an absolute deed; the rule being "once a mortgage, always a mortgage."

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1742-1752; Dec. Dig. § 597.\*]

**7. MORTGAGES (§ 591\*)—RIGHT OF REDEMPTION.**

The statutory right of redemption cannot be cut off by a strict foreclosure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1693, 1694-1708; Dec. Dig. § 591.\*]

Department 1. Appeal from Superior Court, Okanogan County; C. H. Neal, Judge pro tem.

Action by Martha E. Beverly, née Martha E. Hull, against E. R. Davis and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Smith & Gresham, of Conconully, for appellants. Whitney & Hughes, of Wenatchee, and Burton & Jennings, of Twisp, for respondent.

GOSE, J. The purpose of this action is to have a transaction, evidenced by a deed and option, declared a mortgage. The court found that the instruments were intended as a mortgage, directed the defendants by an interlocutory order to state the amount of the indebtedness within 30 days, or, in case of failure to do so, left them to seek their remedy in an independent action to foreclose the mortgage. The defendants filed a statement of the amount advanced to the plaintiffs within the time fixed, and the court thereafter, upon notice to the plaintiffs, determined the amount due. Whereupon a judgment was entered in favor of the defendants, and against the plaintiff wife, for \$3,298.02, with interest. It was also adjudged that the mortgage be foreclosed, and that the property be sold in the manner provided by law for the sale of real estate on mortgage foreclosure. The defendants have appealed.

The essential facts are these: The respondent wife, hereafter called the respondent, then a widow, on the 13th day of January, 1912, conveyed to the appellant husband, hereafter called the appellant, by a deed of general warranty, 160 acres of land in the Methow Valley in Okanogan county. She also assigned him 483 shares of water stock. On the same day, and as a part of the same transaction, the respondent and the appellant executed a contract which is in form an option. The contract recites the execution of the deed, acknowledges that the respondent has received \$100 in cash, and recites that

the appellant has agreed to pay certain of her obligations, which are enumerated, and which aggregate \$2,125. It provides that the appellant shall pay the enumerated items, and that: "If at any time on or prior to May 1, 1912, the said Martha E. Hull [the respondent] desires to and shall pay to said E. R. Davis the aggregate of the amount so paid, together with cash payments, with interest thereon at the rate of twelve per cent. per annum from this date, then the said E. R. Davis shall reconvey said premises to said Martha E. Hull; but, if such payments shall not be made strictly as herein provided for, it shall be optional with the said E. R. Davis to reconvey said premises. This to be considered merely as an option to purchase, expiring on said date." The appellant paid the enumerated items. On the 23d day of April following they extended the option to the 1st day of November; the appellant then advancing to the respondent \$150, and agreeing to advance \$350 additional, the entire sum to be used by the respondent in improving the property. This agreement provides that the advances are subject to the same terms and conditions as those made under the first agreement, and that they should draw the same rate of interest. The respondents were married on the 29th day of April. On the 5th day of June the appellant and both respondents entered into another contract, which recites that the appellant "has agreed to loan" to the respondent \$500, of which \$275 has been paid; that, in consideration of respondent's waiving any right to a lien against the land for "work and labor" while in possession of the land, the appellant agrees to advance the remaining \$225 upon the execution of the contract. The respondent remained in possession of the land.

The respondent testified, in substance, that the money was advanced as a loan at interest at the rate of 12 per cent. per annum, and that she thought the papers evidenced a mortgage, until a short time before the April extension. The theory of the appellant is that there was an absolute sale and conveyance of the land, with an option to repurchase, and that there was no loan and no debt, either express or implied. The action was commenced within six weeks after the last option expired.

[1-3] The controlling legal principles are simple and well settled in this state. The character of the transaction is fixed at its inception, and the intention of the parties, when properly ascertained, must determine its nature. The action is grounded in fraud, and equity permits the fullest inquiry, to the end that the intention of the parties may be ascertained and enforced. The presumption is that the transaction is what it purports, and the one asserting that the written instrument masked the real transaction must prove his case by clear and convincing evidence.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Johnson v. National Bank of Commerce, 65 Wash. 261, 118 Pac. 21; Kegley v. Skillman, 68 Wash. 637, 123 Pac. 1081; Hoover v. Bouffleur, 74 Wash. 382, 133 Pac. 602.

[4] But it is argued that there was no debt; hence there could, in the very nature of things, be no mortgage. Upon this phase of the case it is sufficient to say that, if the respondent's version of the transaction is true, there was a loan, and hence an enforceable obligation to repay. The court, as we have seen, adopted this view, and entered a personal judgment against the respondent. While the existence of a written promise to repay the money advanced is of great evidentiary value in arriving at the intention of the parties, yet the absence of such a promise is not conclusive that no personal debt exists. If the circumstances show a loan, an implied promise to repay springs from that fact alone. Kirkpatrick v. Post, 53 N. J. Eq. 591, 32 Atl. 267.

Was the transaction an absolute sale, with only an option to repurchase, or was it a loan upon the land and the 483 shares of water stock? In determining this question, we will speak principally of only one phase of the evidence. The appellant said that there are "boulders, small rock, rock that will weigh 200 pounds, down to the size of your fist," upon the land, and, when asked, "Are there very many of them?" answered, "They are very thick." He also said that \$3,000 would be a fair price for the land. Two of his witnesses fixed the value of the land and water stock at \$2,500, another fixed it at \$3,000, and still another at \$1,500. The respondent's testimony is to the effect that 60 acres of the land carrying water rights are under a water ditch; that about 70 acres are in cultivation; that 115 to 120 acres are tillable; that 40 to 45 acres were planted to apple trees two years old in January, 1912; and that about 5 or 6 acres were then in alfalfa. The respondent said that the land was reasonably worth \$15,000. Her husband said that the appellant stated to him that it ought to be worth \$18,000. This appellant denies. The land is on the Methow river, four or five miles from the town of Twisp. Mr. McGee, a merchant at Twisp, said that the land was worth \$9,000. Mr. Sackett, who was engaged in the loan and real estate business at Twisp, valued it at not less than \$10,000, and a neighbor of the respondent put the value at \$8,000. The witnesses unite in saying that the land had not appreciated in value since the execution of the deed. The trial court no doubt adopted the values fixed by the respondent's witnesses. We say this confidently, because in all other respects the evidence, apart from the writings, seems to preponderate in favor of the appellants. If the value fixed by the appellants' witnesses is correct, appellants should welcome a public sale, as it will at least afford them a chance to realize upon

their judgment \$8,298.02, with interest at 12 per cent. per annum from March, 1913. On the other hand, if the respondent's witnesses correctly valued the land, it would be unconscionable to treat the transaction as a sale absolute in terms, with only an option to repurchase. Hoover v. Bouffleur, *supra*. If the property is reasonably worth \$8,000 to \$10,000, the difference between the amount advanced and the value of the property is so great as to bring the case within the rule of Johnson v. National Bank of Commerce, *supra*.

[5] The evidence is not entirely clear as to whether the several witnesses, in giving their opinion upon the question of value, included the water stock. We assume that they did. If they did not, the result would not be changed. In each instance the value of the land would be enhanced to the extent of the value of the stock. One of the appellants' witnesses stated definitely that, in his opinion, the land, together with the stock, was worth about \$1,500. Tested by the rules announced in the previous citations, we cannot say upon the entire record that the court erred in treating the respondent's evidence as clear and convincing, and declaring the transaction a mortgage.

[6, 7] The appellants contend that the respondent should have been required to redeem within a reasonable time. We have held that the statutory right of redemption inheres in a mortgage, and cannot be waived; that the rule is "once a mortgage, always a mortgage." Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, 2 L. R. A. (N. S.) 267, 111 Am. St. Rep. 997; Boyer v. Paine, 60 Wash. 56, 110 Pac. 682. We have also held that the statutory right of redemption cannot be cut off by a strict foreclosure. Dane v. Daniel, 23 Wash. 379, 63 Pac. 268. There cannot be one rule where the mortgagee takes the legal title as security and another where he takes a mortgage with the usual defeasance clause. The procedure ought to be the same in both cases.

The judgment is affirmed.

CHADWICK, ELLIS, and MAIN, JJ.,  
concur.

ANDERSON v. SEATTLE PARK CO.  
(No. 11,352.)

(Supreme Court of Washington. May 12, 1914.)

I. NEGLIGENCE (§ 134\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries received by a fall on the steps leading into the pool of a natatorium, evidence held to show that the steps and pool were in a reasonably safe condition, and that there was no negligence on the part of the proprietor.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**2. EVIDENCE (§ 472\*)—OPINION EVIDENCE—COMPETENCY—OPINION AS TO FACT IN ISSUE.**

In such an action, testimony by a witness for the plaintiff that a smooth concrete surface like that on the steps would, when wet, constitute a dangerous footing was an opinion on the issue of fact to be tried, and was not competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195, 2248; Dec. Dig. § 472.\*]

**3. NEGLIGENCE (§ 44\*)—DEGREE OF CARE REQUIRED—SAFETY OF NATATORIUM.**

The proprietor of a natatorium is required to keep the swimming tank and steps leading to it in a reasonably safe condition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59; Dec. Dig. § 44.\*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Andrew Anderson against the Seattle Park Company to recover for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss.

Ira Bronson and J. S. Robinson, both of Seattle, for appellant. Edwin C. Ewing, of Seattle, for respondent.

**CROW, C. J.** Action by Andrew Anderson against Seattle Park Company, a corporation, to recover damages for personal injuries. From a judgment in his favor, defendant appeals.

On July 16, 1911, the respondent paid his entrance fee for the use of a natatorium owned and operated by appellant, and shortly thereafter attempted to enter a large swimming tank by means of a flight of five concrete steps leading from the main floor of the natatorium. The steps were about 15 or 16 inches in width, with 8-inch risers. The concrete finish on each tread was smooth, and there was an iron hand rail running down the side of the steps. The water in the tank was maintained at a level with the top of the third step, but when the tank was used by bathers the steps were wet. Respondent started down these steps without taking hold of the handrail, as bathers were in his way. He slipped upon the second step, and, in falling, sustained the injuries of which he now complains.

[1] The only assignment which we need consider is that the trial judge erred in denying appellant's motion for judgment notwithstanding the verdict. Respondent testified that the cause of his falling was the slimy or slippery condition of the steps. He further testified that he had been in the tank several times, and had used the steps on at least two previous occasions.

[2] One of his witnesses testified, as an expert, that a smooth concrete surface, when wet, would constitute a dangerous footing. This testimony, being an expression of his

opinion on the issue of fact to be tried, was not competent. He further testified that several appliances which he mentioned might be used to overcome this danger, but, upon cross-examination, admitted that he knew of no natatoriums using any such appliances. This, in substance, is a statement of all the evidence offered by respondent to show negligence upon the part of appellant. Appellant introduced uncontradicted evidence to the effect that during the summer months the entire tank was emptied, washed with fresh water, and scrubbed three times a week, and that there was a constant circulation of water at all times when the tank was in use. A swimming instructor, who had been employed at the natatorium for several years, testified that he had seen thousands of people go up and down the steps upon which respondent was injured, but that he had never seen any one of them slip or fall. Undisputed evidence was introduced to show that the steps were constructed in accordance with the universal custom of similar natatoriums, and that cement steps similar to the ones in question were considered the safest. Relative to the alleged slimy or slippery condition of the steps, appellant introduced numerous witnesses who had used them during the month of July in the year 1911, and also upon other occasions. All of these witnesses testified that they had not then, nor at any other time, observed a slimy or dangerous condition of the steps or tank. One of them had used the steps the evening previous to the accident, and another one the evening after the accident. It is apparent from the entire record that respondent's fall was an accident pure and simple.

[3] Appellant was required to keep the steps and tank in a reasonably safe condition, which the undisputed evidence shows was done. In the recent case of *Belles v. Tacoma*, 140 Pac. 324, the plaintiff claimed damages for injuries sustained in falling on a defective board in the floor of a public building. In holding that she could not recover, we said: "If it had been shown that other persons had slipped thereon so as to lose their balance or fall, and this fact had been brought home to the officers of the city, a different question might have been presented. But the fall of a single person proves nothing. Persons have been known to slip and fall on the best-constructed walks."

Respondent has failed to show any negligence on the part of appellant. *Ohlberg v. Standard Furniture Co.*, 68 Wash. 414, 115 Pac. 837, 34 L. R. A. (N. S.) 1079.

The judgment is reversed, and the cause remanded, with instructions to dismiss.

**MOUNT, PARKER, and MORRIS, JJ.,** concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**FERGUSON-HENDRIX CO. v. FIDELITY  
& DEPOSIT CO. OF MARYLAND.**

(No. 11,575.)

(Supreme Court of Washington. May 8, 1914.)

**1. CONSTITUTIONAL LAW (§ 230\*)—FACTORS (§ 2½, New, vol. 17 Key-No. Series)—EQUAL PROTECTION OF LAW—BONDS.**

Laws 1907, c. 139, § 1, making it unlawful for a commission merchant to engage in selling farm products on commission, without first obtaining a license therefor, and giving a bond executed by a surety company authorized to do business in the state, is not unconstitutional for requiring a bond to be executed by a surety company doing business in the state, and denying the right to deposit money or give personal security instead.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.\*]

**2. CONSTITUTIONAL LAW (§ 48\*)—PRESUMPTION OF CONSTITUTIONALITY.**

It is presumed that a statute is constitutional, and it will only be held unconstitutional where it plainly appears to be so.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**3. FACTORS (§ 2½, New, vol. 17 Key-No. Series)—COMMISSION MERCHANTS—FAILURE TO OBTAIN LICENSE—BOND—EFFECT ON CONTRACT.**

Laws 1907, c. 139, § 1, makes it "unlawful" for a commission merchant to engage in the business of selling farm products, etc., on commission, without first obtaining a license from the commissioner of horticulture, and giving bond executed by a surety company authorized to do business in the state. Section 11 makes any person engaging in selling such products on commission, without complying with the act, guilty of a misdemeanor, and subject to punishment by fine, and section 12 authorizes the commissioner of horticulture to revoke any license issued under the act upon a license holder being convicted of a violation thereof. *Held*, that the failure of a produce commission company to procure a license as required would not authorize the dismissal of an action brought on a bond given by an employé of the commission company to reimburse it for a loss from the employé's fraud, etc.

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Ferguson-Hendrix Company against the Fidelity & Deposit Company of Maryland. From a judgment for defendant, plaintiff appeals. Reversed.

Kerr & McCord, of Seattle, for appellant. Marion A. Butler, of Seattle, for respondent.

GOSE, J. This is an action to recover for an alleged breach of the conditions of a fidelity bond. A judgment was entered upon the pleadings, dismissing the action. The plaintiff has appealed.

The appellant, a commission merchant, employed one Busey as bookkeeper and cashier, and took from the respondent a compensated surety bond, wherein it agreed to reimburse the appellant to the extent of the bond for any pecuniary loss it should sustain "by reason of any personal act or acts of fraud or dishonesty" committed by Busey in the performance of his duties as bookkeeper and

cashier. It is alleged that during the life of the bond Busey, through acts of fraud and dishonesty in the performance of his duties as cashier and bookkeeper for appellant, caused it to sustain a loss of \$2,922.98. The respondent resists liability upon the ground, among others, that the appellant, at the time of taking the bond and continuously thereafter, was a commission merchant whose principal business was selling farm, dairy, orchard, and garden produce on commission, and that it had not complied with the provisions of the Laws of 1907, p. 266 et seq. It is alleged that the appellant had neither applied for nor obtained a license from the commissioner of horticulture, nor given a bond to the state as required by that act. This not having been denied, a judgment was entered dismissing the action.

Section 1 of the statute to which reference has been made makes it "unlawful" for a commission merchant to engage in the business of selling farm, dairy, orchard, and garden produce "on commission," without first obtaining a license from the commissioner of horticulture to carry on such business, and giving a bond to the state "executed by a surety company" authorized to do business in the state, the bond to be in the sum of \$3,000 for the benefit of persons consigning produce to be sold on commission, the form of the bond to be approved by the Attorney General. Other sections of the act make detailed provision for the keeping and rendering of accurate accounts, and making punctual reports and remittances to the consignors. Section 11 of the act provides that any person or corporation engaged in selling such products on commission, who fails to comply with any of the provisions of the act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$500. Section 12 provides that the commissioner of horticulture shall revoke any license issued under the provisions of the act, upon a holder of a license being convicted of any violation of the act.

[1] The appellant first contends that the act is unconstitutional, in that the bond is required to be executed by a surety company authorized to do business in the state, thus denying it the right to deposit money or to give personal security. We cannot yield our assent to this view. In *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. Rep. 681, a similar act was sustained. The act there reviewed required the warehouse commission to fix the amount of the bond of commission merchants, and provided that, upon its execution with "sufficient security" and the payment of \$1, the commission should issue a license. The court, in a carefully considered opinion, said that the wisdom of the act was a legislative question; that the measure was a lawful regu-

lation for the public good, a legitimate exercise of the police power of the state; that it was not class legislation; but that, on the contrary, it was framed to meet "the crying evils which it was believed had grown up with this branch of business." In *Clark's Estate*, 195 Pa. 520, 46 Atl. 127, 48 L. R. A. 587, the court sustained the constitutionality of an act authorizing a receiver, guardian, trustee, executor, or administrator, etc., required by law or order of the court to give bond as such, to include as an expense in the execution of the trust such reasonable sum as he may have paid to a surety company for becoming his surety, to be allowed by the court in which he was required to account. The court observed that there was a material difference between the qualities of the insurance afforded by indemnity companies and a private individual, who was usually the relative or friend of the principal or a "professional bail goer," without responsibility. It is well known that lapse of time, fluctuations in values of property, the uncertainty of human life, and the risk of a dishonest surety often render personal security inadequate when called upon to meet its promised responsibility. These were doubtless some of the reasons which influenced the Legislature in requiring that the bond be executed by a surety company authorized to do business in this state.

[2] The appellant relies upon *State ex rel. v. Robins*, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427, 2 Ann. Cas. 485, where a statute requiring a similar bond was held to be in contravention of the Bill of Rights, in that it was an unconstitutional restriction upon the liberty to contract, and that it denied "equal protection and benefit" in violation of the Constitution. It was conceded that the law was valid if the public welfare justified or required it; but it was argued that the surety bond does not increase the protection of the obligee. It was said: "We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution therefor of corporate security, and the reasons which we have given persuade us that the public welfare does not require it." It was further remarked that it was evident to the court that it would be more economical for the public to become its own insurer of the good faith of its officials, which would result perhaps in no official bond in any case. We had supposed that under the Constitution the question as to whether the public welfare justified or required the state to exert its police power was a legislative question, and that ordinarily courts would not thwart the legislative will, if any reason existed or could be suggested for the exercise of the power. It is certain that personal sureties have frequently failed to respond to their obligations, and we must assume that the Legislature knew this fact and considered that the character of bond under review would afford a

safer and hence a better security to those who would be its beneficiaries. It would seem that the power to exact the security would include the right to determine the character and sufficiency of the security; that the greater power would include the lesser power. The presumption always obtains that a legislative act is constitutional, and it will only be held unconstitutional where it so plainly appears to be so as to free the mind from reasonable doubt. Guided by these principles, and for the reasons suggested, we are constrained to hold the law a valid exercise of the police power of the state.

[3] The respondent contends that there can be no recovery upon the bond because the statute makes it "unlawful" to carry on a commission business, without obtaining a license, and giving a bond, and penalizes the offender, although the act does not in terms make a transaction without a license or bond void, and authorities are cited to that effect. We have held to the contrary. *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595. We were there reviewing the Insurance Code (Laws 1911, p. 195, § 33), which contains prohibitory words which we treated as being legally equivalent to the word "unlawful." That act also provided for a revocation of the license, and for the imposition of a fine. We said: "Plaintiff's error lies in the assumption that the contract between the copartnership and the defendant was void; whereas, the rule is that a contract which violates a statutory regulation of business is not void, unless made so by the terms of the act." The reasoning in that case is controlling here. There can be no legal distinction in respect to the issue at bar between a statute which says "thou shalt not" do a certain thing, and one which says that "it shall be unlawful" to do the same thing, where each provides penalties, without in terms declaring that any transaction had without first complying with the statute shall be treated as void.

Moreover, we think there is a sound distinction between an action for the recovery of the agreed price of liquor sold in defiance of a statute requiring a license, as was the case in *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 750, and a case of this character, where the action is upon a bond given by a compensated surety guaranteeing the fidelity of an employé. Here the failure to comply with the statute is so collateral to the contract sued upon that it would seem that there is no just reason for denying liability upon that ground. *Ingersoll v. Randall*, 14 Minn. 400 (Gil. 304). Any other view would protect the burglar in the possession of goods taken from the store of a commission merchant who had not complied with the statute, and would justify a fire insurance company in refusing to pay for goods of a commission merchant destroyed by fire, if perchance it discovered he was

without a license. In short, it would make of such a merchant an outlaw, and his property the prey of the unscrupulous and the lawless man. We do not feel disposed to stand sponsor for so monstrous a doctrine. In *Miller v. Ammon* it was said: "The general rule of law is that a contract made in violation of the statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." We announced the same principle in the recent case of *Stirtan v. Blethen*, 139 Pac. 618.

We think the court was in error in dismissing the action. The judgment is reversed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

### HARDWOOD INTERIOR CO., Inc., v. BULL et al. (Civ. 1153.)

(District Court of Appeal, First District, California. March 13, 1914.)

#### 1. MECHANICS' LIENS (§ 23\*)—BENEFIT TO OWNER—NECESSITY.

Under Code Civ. Proc. § 1183, providing that all persons performing labor upon, or furnishing materials to be used in the construction, alteration, addition to, or repair of, any building shall have a lien upon the property, it is not a prerequisite to a lien that the owner receive a benefit from the labor done or the materials furnished.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 24; Dec. Dig. § 23.\*]

#### 2. MECHANICS' LIENS (§ 26\*)—NATURE OF IMPROVEMENT—"ALTERATION."

Leveling and waxing a floor so as to render it suitable for dancing is an alteration of the building within Code Civ. Proc. § 1183, providing that contractors performing labor upon the alteration of any building shall have a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 27-29; Dec. Dig. § 26.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 360-365.]

#### 3. MECHANICS' LIENS (§ 277\*)—VARIANCE BETWEEN NOTICE AND PROOF.

There is no variance between the notice of lien and the proof, where the lien, as does the evidence, shows the character of the work, and the mere fact that the lien speaks of the work detailed therein as an improvement does not create a substantial variance; the proof showing the leveling and waxing a floor so as to make it suitable for dancing.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 546-554; Dec. Dig. § 277.\*]

#### 4. INTEREST (§ 19\*)—CONTRACTS—QUANTUM MERUIT—RIGHT TO INTEREST.

An action to enforce a mechanic's lien, based on a contract to surface and wax the floor of a building to make it suitable for dancing for an agreed price, is not in the nature of one upon quantum meruit so as to defeat the lien claimant's right to interest, though the petition alleged that the agreed price was a reasonable one.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 35-40; Dec. Dig. § 19.\*]

#### 5. INTEREST (§ 19\*)—AMOUNT OF RECOVERY—QUANTUM MERUIT—INTEREST.

Where an action is based upon quantum meruit, a lien claimant is limited to the rea-

sonable value of the work done or materials furnished, and no interest may be charged until judgment is rendered.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 35-40; Dec. Dig. § 19.\*]

#### 6. MECHANICS' LIENS (§ 161\*)—"VALUE" OF LABOR OR MATERIALS.

Under Code Civ. Proc. § 1183, providing for a mechanic's lien "for the value" of the labor or materials furnished, the phrase "for the value" means, in the absence of fraud, the agreed value in cases based upon contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 280-283, 606; Dec. Dig. § 161.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7275-7280, 7826.]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Hardwood Interior Company, Incorporated, against J. E. Bull, Arthur E. Elworthy, and Frederick W. Elworthy, carrying on business under the firm name and style of Bull & Elworthy Company, and the Unique Dancing Pavilion, Emma C. Ferris, and John W. Ferris. From a judgment for plaintiff, defendant Emma C. Ferris appeals. Affirmed.

Charles S. Wheeler and John F. Bowie, both of San Francisco (Nathan Moran, of San Francisco, of counsel), for appellant. Samuel M. Samter, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendant Emma C. Ferris, owner of the lot and building described in the complaint, from a judgment foreclosing a mechanic's lien upon said real estate. Prior to the time when this controversy arose Emma C. Ferris leased to defendants, J. E. Bull and Arthur E. and Frederick W. Elworthy, copartners, the loft of the premises affected, which loft was to be used exclusively as a dancing hall. Thereafter said copartners entered into a contract with the plaintiff to surface and wax the floor of the loft in order to make it suitable for dancing; the price agreed upon for the work being the sum of \$316. The work consisted of making the floor level and smooth by sandpapering it with a machine operated by electricity and by hand labor, after which it was waxed. The agent of the appellant knew that this work was being done, and gave no notice that the owner would not be responsible for the cost of it by posting written notice to that effect in a conspicuous place on the premises as provided in section 1192 of the Code of Civil Procedure. The work was completed, and, the partnership defendants having paid only a portion of the bill therefor, a lien was filed by the plaintiff against the property, and subsequently this action was commenced to foreclose the same.

It is under the terms of section 1183 of the

Code of Civil Procedure that plaintiff claims to be entitled to a lien. That section provides that "contractors, subcontractors, \* \* \* and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, \* \* \* shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished." It is conceded that the work done did not constitute a matter of "construction," nor "addition to," nor a "repair to" the building; and the question, therefore, presented for decision is: Was the work upon the floor of the loft an alteration to a part of the building?

[1, 2] While it may be true, as suggested by appellant, that the theory upon which the mechanic's lien law is based is that the owner receives a benefit which he is estopped to deny, yet our statute does not seem to contemplate, as an essential prerequisite to the existence of a lien under it, that the owner must be benefited by the labor bestowed or the materials furnished. Having in mind matters of alteration, we can readily imagine instances where a change in a part of a building would be a detriment to the property, and yet be so unquestionably an alteration as to come clearly within the language of section 1188, Code of Civil Procedure, and be lienable. In the present case, while we think that the question is a close one, we are of the opinion that the work done upon the building was of a more substantial character than the mere cleaning or polishing of the floor, or superficial work of that character, and was in fact an alteration of the floor as the word "alteration" is defined by the standard lexicographers (*Sessions v. State*, 115 Ga. 18, 41 S. E. 259, 260), and that consequently the contractor doing or furnishing the same is entitled to a lien under the section of the Code mentioned, notwithstanding that the record fails to show that the work was of any benefit to the owner of the building on which it was bestowed. If this work had been done for the owner of a building after it was a completed structure, we have no doubt it would be considered lienable. If lienable in such a case, it is lienable in this case also.

The appellant could, if she had any doubt concerning the question as to whether or not this character of work came within the purview of the act, have relieved herself from responsibility by posting a nonliability notice.

[3] There is no variance between the notice of lien and the proof. The lien, as does the evidence, shows the character of the work. The mere fact that the lien speaks of the work detailed therein as an "improvement"

cannot be regarded as creating a substantial variance between the lien and the proof.

[4, 5] It is contended by the appellant that no interest should have been allowed prior to the rendition of the judgment. In support of this contention it is claimed that the action was in the nature of one upon quantum meruit, and that, the amount being unliquidated, no interest could be charged until the amount due plaintiff was determined at the trial.

[6] The record does not support this contention. The action was based upon a contract for a definite sum. During the trial the defendant contended that, notwithstanding this fact, plaintiff was limited in its recovery to the reasonable value of the work done. Acting upon this theory, the trial court permitted evidence, over the objection of plaintiff, to show that double pay had been charged for night work. Plaintiff thereupon introduced testimony to show that the amount agreed upon by the parties was a reasonable one. Upon the conclusion of the evidence the trial court held the defendant liable to the plaintiff for the amount of the contract price, less the sum of \$18.75. It is undoubtedly true, as claimed by appellant, that when the action is based upon quantum meruit a lien claimant is limited in his recovery to the reasonable value of the work done or materials furnished, and, as that reasonable value requires determination, no interest can be charged until judgment is rendered. It can hardly be said, however, that an extra charge for night labor is of itself evidence that the charge is unreasonable. Moreover, while the complaint in this action contains an allegation that the agreed price is a reasonable one, the action was based upon a contract in which the terms were fixed and definite, and judgment should have been given for the full amount prayed for. *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312; *Hines v. Miller*, 126 Cal. 683, 59 Pac. 142; *Pacific, etc., v. Fisher*, 106 Cal. 224, 39 Pac. 758. Section 1183 provides that certain designated persons shall have a lien "for the value" of the labor done and materials furnished, and this phrase has been construed to mean, in the absence of fraud, the "agreed value" in cases based upon contract. *Jewell v. McKay*, 82 Cal. 144, 150, 23 Pac. 139. It follows that the court should not have disallowed the sum of \$18.75 included in the contract price. The amount claimed being fixed and definite, the plaintiff should have been given judgment for the full amount of his claim; and, this being so, he was entitled to have interest allowed.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

**KERR v. SNOWDEN et al.** (Civ. 1473.)

(District Court of Appeal, Second District, California. March 16, 1914.)

**1. PLEADING (§ 8\*)—DENIALS—CONCLUSION.**

A denial in ejectment that "defendants, or either of them, now unlawfully withhold possession from plaintiff of any of the lands described in plaintiff's said complaint" is evasive and a mere conclusion, and hence not sufficient to raise an issue as to defendants' possession.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

**2. EJECTMENT (§ 9\*)—TITLE TO SUSTAIN ACTION.**

One can only recover in ejectment upon a legal title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

**3. PUBLIC LANDS (§ 41\*)—CERTIFICATE OF PURCHASE—EFFECT.**

A certificate of purchase of unappropriated government land from the United States Department of Agriculture is prima facie evidence of title in the holder, only because it is made so by Code Civ. Proc. § 1925.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 103-105; Dec. Dig. § 41.\*]

**4. PUBLIC LANDS (§ 41\*)—MUNIMENT OF TITLE.**

Code Civ. Proc. § 1925, making the certificate of purchase of unappropriated government lands prima facie evidence that the holder or assignee is the owner of the land described therein, would not make entries from a tract book from the office of the register of United States lands describing certain land as sold to a certain person, and giving the number of the certificate, etc., competent evidence of the issuance of the certificate of purchase or its assignment.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 103-105; Dec. Dig. § 41.\*]

**5. EJECTMENT (§ 90\*)—SALE—ESTABLISHMENT OF TITLE.**

Evidence that one claiming title to land as unappropriated government land purchased by her obtained a restraining order, directed to defendant, against interfering with her in making improvements required as a condition to the issuance of certificate of purchase, and that she made the improvements under the restraining order, was not admissible in ejectment; the issue being whether such claimant had, in fact, acquired the government's title, and not how she acquired it.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. § 90.\*]

**6. PUBLIC LANDS (§ 106\*)—IMPROVEMENTS—DETERMINATION OF SUFFICIENCY.**

Determination of whether one claiming unoccupied government land had made the improvements prescribed as a condition to the granting of a final certificate of purchase is for the United States Land Department; its ruling thereon being final, in absence of fraud or mistake.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.\*]

**7. EJECTMENT (§ 11\*)—TITLE TO SUPPORT ACTION—ACQUISITION OF TITLE—TIME.**

In ejectment plaintiff must recover upon his title as it existed when the action was commenced, so that he could not rely upon a title acquired under a final certificate of purchase of public land issued months after the commencement of the action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 42-46; Dec. Dig. § 11.\*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Louise E. Kerr against W. L. Snowden and another. From an order denying defendants' motion for a new trial, they appeal. Reversed, and new trial ordered.

Eshleman & Swing, of El Centro, for appellants. George H. P. Shaw, of El Centro, and R. D. McPherrin and Shaw & Dyke, all of Imperial, for respondent.

**SHAW, J.** Action in ejectment. The case was tried before a jury, which rendered a verdict for plaintiff. Judgment followed. Defendants moved for a new trial, in support of which they offered a statement of the case. The motion was denied, and this appeal is from the order denying the same.

The land, 160 acres in area, is situated in Imperial county. The complaint, filed April 12, 1909, alleged that on January 28, 1907, plaintiff was seised in fee of "that certain 160 acres of land, \* \* \* embraced in desert land entry No. 3024 and in said desert land entry described as the S. E. ¼ of section 3, township 15 south, range 14 east; also known as the S. E. ¼ of section 38, township 14 south, range 14 east, S. B. M., according to the Imperial survey; and also described as tract No. 37, in township 14 south, range 14 east, S. B. M., according to the resurvey of said township authorized by act of Congress July 1, 1902"; that defendants, without right or title, entered into possession and ousted and ejected plaintiff therefrom, and unlawfully withhold possession thereof to her damage in the sum of \$500; that the rents, issues and profits for the time that plaintiff was excluded from the property is \$300. By their answer defendants deny plaintiff's title and the alleged ouster; "deny that defendants, or either of them, now unlawfully withhold possession from plaintiff of any of the lands described in plaintiff's said complaint."

[1] This last denial as quoted is not only evasive, but a mere conclusion; hence insufficient to raise an issue as to defendants being in possession of the land. *De Godey v. Godey*, 39 Cal. 157. The allegation of the complaint in this regard must therefore be deemed admitted. Plaintiff's title is based upon the claim that on July 21, 1906, at which time the land was vacant, unappropriated government land, one Harry R. Hay made a desert land entry thereon, numbered 3024, and received from the United States land department a certificate of purchase, wherein the land was described as the southeast ¼ of section 3, township 15 south, range 14 east, and that in January, 1907, Hay assigned this certificate of purchase to plaintiff. At the time of the filing of the complaint herein, this certificate of purchase and assignment thereof to plaintiff constituted the sole documents upon which plaintiff

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



based her claim of title to the property. While the issuance of the certificate of purchase did not, in fact, transfer the government title to plaintiff's assignor, such certificate, by virtue of section 1925, Code of Civil Procedure, is made primary evidence that the holder or assignee thereof is the owner of the land described therein.

[2,3] In the absence of this provision of the Code, since one can only recover in ejectment upon a legal title (*Conlan v. Quinby*, 51 Cal. 412), plaintiff, as assignee of the certificate, could not maintain the action. "The certificate of purchase is evidence prima facie of title, only because the section of the Code makes it such evidence." *Haven v. Haws*, 63 Cal. 452. And in *McTarnahan v. Pike*, 91 Cal. 540, 27 Pac. 784, it is said: "It is by virtue of that section (1925) alone that certificates of sale are made primary evidence of ownership."

Neither the certificate of purchase issued to Hay nor the assignment thereof was offered in evidence; nor was any proof made tending to show that they or either of them were lost or destroyed. In lieu thereof, the court, over defendants' objection, permitted plaintiff to introduce in evidence a certified copy of page 77, vol. 18, of what is designated as the tract book from the office of the register of United States lands, showing the description of the land sold by the government to Harry R. Hay, date of sale, number of certificate, and a notation thereon in pencil: "Assigned to Louise E. Kerr, 736 Westlake avenue, Los Angeles, 1-25-07."

[4] Our attention is not directed to any provision of law requiring the register to keep such tract book and make such entries or memoranda therein. Conceding the entries to have been made in the performance of official duty (section 1920, Code Civ. Proc.), we are nevertheless of the opinion that the provision contained in section 1925, Code of Civil Procedure, which is in derogation of the common law, cannot be construed as authority under which the memoranda and entries made by the register can be deemed competent evidence of the issuance in form, substance, and execution, of the certificate of purchase, or the legal assignment thereof to plaintiff. Like a deed or other written instrument, the validity and interpretation of these documents in writing are questions of law for the court to determine, not the register of the land office, whose functions are ministerial. This rule is universal, and citation of authorities in support thereof is unnecessary. It therefore follows that the court erred in its ruling in admitting the certified copy of the tract book, pencil memoranda and notations therein, as evidence proving plaintiff's title to the property.

[5] On January 26, 1910, after the commencement of the trial, plaintiff, over defendants' objection, was permitted to file a supplemental complaint, wherein she alleged that about July 1, 1909, she obtained a re-

straining order directed to defendants, restraining them from interfering with her in the performance of making improvements upon the land, required by the government as a prerequisite to the issuance of final certificate of purchase therefor, and that, under and by virtue of said restraining order, she went upon the land and made certain improvements thereon, as a result of which she made her final proof in the United States Land Office, which proof was accepted and approved, and a final certificate of purchase issued to this plaintiff for the land described in the original complaint; and she was also permitted, over defendants' objections, to offer evidence in support thereof. These rulings constituted error. The granting of the writ of injunction restraining defendants from interfering with plaintiff while she performed the required work as a condition of procuring a final certificate of purchase did not tend in any wise to establish her title. The question involved was whether she *had*, *in fact*, acquired the government's title, not *how* she acquired it.

[6] If, at the commencement of the suit, she held a patent or certificate of purchase, which latter, as we have seen, under section 1925, Code of Civil Procedure, constitutes prima facie evidence of title, then, under the pleadings, it was immaterial whether she had made the improvements prescribed by the government as a condition precedent to the granting of a final certificate. The determination of such question is for the United States Land Department, and, acting within the authority conferred, its final ruling thereon can only be attacked for mistake or fraud.

[7] The final certificate of purchase was obtained months after the commencement of the suit. It is a rule of universal recognition that in ejectment the plaintiff must recover, if at all, upon the state of his title as it existed at the time when he commenced the action. *Johnston v. Jones*, 66 U. S. (1 Black) 209, 17 L. Ed. 117. "Title acquired after the commencement of the action will in no case entitle the plaintiff to recover." *Tyler on Ejectment*, p. 76. To the same effect see volume 15, Cyc. p. 29; *Sacramento Savings Bank v. Hynes*, 50 Cal. 195; *Warvelle on Ejectment*, § 228; *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153. The only proof offered in support of plaintiff's alleged title was the tract book and notations therein from the register's office and the final certificate of purchase issued long after the bringing of the action; both of which documents having been erroneously admitted in evidence, it must follow that the order denying defendants' motion for a new trial must be reversed.

Other errors were committed, due apparently to an erroneous theory as to the issues involved under the pleadings. Defendants, without asserting any right thereto, admit their possession of land the title to which was, that the commencement of the action, alleged by plaintiff to be vested in her. They

deny that she had title to the land as alleged. This is the chief issue upon which, if decided in plaintiff's favor, judgment must follow for her. Such title must be evidenced by a patent, or, in lieu thereof, a certificate of purchase (section 1925, Code Civ. Proc.) issued or assigned to her, the validity and interpretation of which are questions for the court, and not the jury. If issued, then, under the present state of the pleadings, it is immaterial whether or not she performed the conditions required by the government as a prerequisite to its issuance. A new action (if not barred), based upon the final certificate of purchase issued to plaintiff, or upon a patent, if one has been issued, would greatly simplify the case, and in the trial thereof be the means perhaps of avoiding many errors of which defendants justly complain.

The order is reversed, and the court directed to grant defendants' motion for a new trial.

We concur: CONREY, P. J.; JAMES, J.

#### SCRAGG v. SALLEE. (Civ. 1184.)

(District Court of Appeal, Third District, California. March 13, 1914.)

#### 1. JURY (§ 85\*)—COMPETENCY OF JURORS—BIAS AND PREJUDICE.

In an action for injury to plaintiff caused by his wagon colliding with defendant's automobile, *held*, under the evidence, that the trial court did not abuse its discretion in overruling defendant's challenge to a prospective juror on the ground of implied bias.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 406; Dec. Dig. § 85.\*]

#### 2. JURY (§ 85\*)—COMPETENCY OF JURORS—DISCRETION OF COURT.

The determination of the question whether a person is qualified and competent as a juror is within the discretion of the trial court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 406; Dec. Dig. § 85.\*]

#### 3. APPEAL AND ERROR (§ 1045\*)—HARMLESS ERROR.

Defendant could not on appeal complain of error of the trial court in overruling his challenge for cause of a juror, where it did not appear that, having exhausted the remainder of his peremptory challenges after thus challenging the juror in question, he had occasion or desire to use any additional peremptory challenge, or that the jury as finally accepted was not satisfactory to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4124-4127; Dec. Dig. § 1045.\*]

#### 4. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EVIDENCE.

In an action for an injury to plaintiff by defendant's automobile, questions asked plaintiff whether defendant, in a conversation with him after the accident, said "anything about he being in the habit of driving at a reckless speed," etc., and "had you seen [defendant] driving an automobile on the streets," etc., though erroneous, were rendered harmless by the answers; they being in the negative.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

#### 5. EVIDENCE (§ 500\*)—OPINION EVIDENCE—QUALIFICATION OF WITNESS.

In an action for an injury to plaintiff by defendant's automobile, the court properly permitted a witness for defendant to state that he had never seen automobiles driven in the streets of the city any faster than defendant was going at the time of the accident, and that "he had seen other automobiles go pretty fast," etc.; the purpose of the questions not being to qualify the witness as an expert as to the rate of speed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 500.\*]

#### 6. EVIDENCE (§ 222\*)—STREETS—USE AS HIGHWAY—ACTION FOR INJURY—EVIDENCE.

In an action for an injury to plaintiff caused by defendant's automobile colliding with his wagon on a city street, the court properly permitted a witness to detail conversations with defendant after the accident, in which he stated that he was going about 15 miles per hour when the accident occurred, and that he failed to blow his horn, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786-800, 803-808; Dec. Dig. § 222.\*]

#### 7. APPEAL AND ERROR (§ 1052\*)—HARMLESS ERROR—EVIDENCE.

Error in excluding evidence was rendered harmless by its subsequent admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.\*]

#### 8. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EVIDENCE.

In an action for an injury caused by defendant's automobile, a question to defendant on cross-examination whether he had not in fact on numerous occasions run his automobile through the streets of the city at the rate of 30 and 35 miles per hour was rendered harmless by a negative answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

#### 9. MUNICIPAL CORPORATIONS (§ 705\*)—STREETS—USE AS HIGHWAY—VIOLATION OF ORDINANCE.

The violation of a municipal speed ordinance is conclusive evidence of negligence, where such violation is the proximate cause of the injury, and that is so whether such ordinance is specially pleaded or not; evidence of the existence of such ordinance and its violation being admissible under the general allegations of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

#### 10. MUNICIPAL CORPORATIONS (§ 706\*)—ACTION FOR INJURY IN STREET—SUFFICIENCY OF EVIDENCE.

In an action for an injury to plaintiff caused by defendant's automobile colliding with his wagon at the intersection of city streets, evidence *held* to warrant a finding that the proximate cause of the accident was defendant's negligence in driving at an excessive speed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

#### 11. DAMAGES (§ 131\*)—MEASURE OF DAMAGES—INJURIES TO PERSON.

Plaintiff while driving a delivery wagon was struck by defendant's automobile, being thrown out, striking on his head and shoulders, rendering him unconscious at the time, and, while not confined to his bed for any time, was incapacitated for his work for two months, for which he received \$70 per month, and for a period of a year afterwards suffered pain in his

shoulder. *Held*, that a verdict for \$750 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 131.\*]

**12. APPEAL AND ERROR (§ 1004\*)—MEASURE OF DAMAGES—INJURY TO PERSON.**

In actions for personal injuries, the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury, and the appellate courts will not interfere, unless the amount awarded is so grossly excessive as to show passion or prejudice.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

**13. DAMAGES (§ 96\*)—MEASURE OF DAMAGES—INJURY TO PERSON.**

In awarding damages for a personal tort, the jury must take into consideration all the elements of damages shown by the proofs, and apply their best and honest judgment in the ascertainment of what, under the evidence, would be just compensatory relief.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 230-232; Dec. Dig. § 96.\*]

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by Samuel Scragg against Harvey Sallee. From a judgment for plaintiff, defendant appeals. Affirmed.

Reid & Dozier, of San Francisco, and W. D. Tillotson, of Redding, for appellant. Bush & Hall, of Redding, for respondent.

**HART, J.** This is an appeal from a judgment entered upon a verdict for the plaintiff in the sum of \$750, and from the order denying the defendant a new trial, in an action for personal injuries, in which the complaint alleges that the damages sustained by the former through the negligence of the latter amounted to the sum of \$5,018.

The injuries sustained by the plaintiff were received on the 2d day of April, 1910, in a collision between a delivery wagon, drawn by one horse, driven by him, and an automobile driven by the defendant. The complaint says that on the evening named the plaintiff was driving in a northerly direction on California street, in the city of Redding, Shasta county, and that the defendant was, at the same time, driving his automobile in a westerly direction along Yuba street, in said city; that at the intersection of California and Yuba streets the defendant's automobile ran into and collided with the delivery wagon of the plaintiff with such force that the latter was violently hurled from his wagon to the ground (striking on his head and shoulders, as we shall later see), whereby he suffered physical injuries the effect of which was to incapacitate him for the performance of the duties of his usual or customary employment for a period of 51 days, and required him to expend money for medical attention and medicine. It is alleged that the collision was the result of the carelessness and negligence of

the defendant in running his machine at the time at an excessive rate of speed, and in failing, on approaching the intersection of the streets where the accident occurred, to sound any bell, horn, or whistle, or otherwise give any warning of the approach of the automobile.

The issues submitted to the jury were made by specific denials by the answer of the averments of the complaint and the charge that the accident and its consequences were caused by the plaintiff's own negligence, in that, by his carelessness and want of caution, he drove in front of the defendant's machine, and thereby negligently contributed to the cause of the injuries here complained of.

[1] 1. The first point urged in support of the claim that the cause should be remanded for a retrial is based upon the ruling of the court disallowing the challenge, interposed by the defendant, of venireman W. L. Gay for implied bias. The defendant, it appears, used one of his peremptory challenges in removing Gay from the jury box, and thereafter exhausted the remainder of the peremptory challenges to which he was entitled under the law.

The record upon the trial of the challenge of Gay shows that he repeatedly stated that he was not acquainted with either of the parties to this action; that he knew nothing of the facts or merits of the controversy, had no opinion and had expressed none with reference to the case, had no prejudice against automobiles; and that, if sworn to try the case, he could and would, by the aid of the law as given to the jury by the court, consider and decide the questions of fact submitted to him and his fellow jurors with perfect fairness and impartiality. But, upon his examination by the attorney for the defendant, the fact was developed that the day before going to Redding in response to the summons calling him to jury duty he held a conversation over the telephone with one Middleton, who also had been summoned to serve on the same panel in the superior court, and that during the course of said conversation some reference was made to the present case. It appears that both Middleton and Gay resided a short distance from the county seat and in the same neighborhood. When asked what was said in the conversation between him and Middleton about the case, Gay explained that his purpose in calling up Middleton was to ask the latter if he could take him (Gay) to Redding in his (Middleton's) buggy; that thereafter the following conversation occurred between them: "He [Middleton] says, 'What is this case?' and I says, 'I don't know, but \* \* \* I think it is an automobile running into a wagon'; and he says, 'I guess so,' or something of that kind. We were both speaking about being a little busy, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not wishing to serve or something of that kind, \* \* \* and I says something about—I can't remember the exact words, but I says, 'What do you think about automobiles running around over the country \* \* \* and their rights,' as near as I can remember; and he says, 'Well, I don't think they have any more right on the road than a wagon has.' The juror declared that the foregoing constituted, in substance, all that was said by either of them in the conversation referred to.

Middleton corroborated Gay as to the general nature of the conversation had between them at the time mentioned. He said that Gay asked him if he (Middleton) had any prejudice against automobiles, to which he replied, "I don't think they [automobiles] had any more right to the road than a wagon had, or any other rig."

But one Battams, on the trial of the challenge, testified that, at about the time at which Gay and Middleton admitted having conversed together as above indicated, he overheard a conversation carried on over the telephone between two parties, whose names or identity he did not then know; that said parties talked about being members of the jury panel and the case "of a fellow in an automobile running into a man with a wagon"; that one remarked to the other, in response to a query as to what he thought of the case of a "fellow in an automobile running into a man with a wagon": "I think a wagon has got as much right on the road as an automobile, and, where the automobile runs into a wagon, on my part, I haven't much sympathy for the man in the automobile coming up to trial. I think where a man runs into a wagon with an automobile \* \* \* he ought to be prosecuted."

Gay, on further examination by counsel for defendant after Battams had testified, denied that either he or Middleton said in the conversation referred to that a person guilty of "running an automobile into a wagon should be prosecuted."

[2, 3] It will be observed that there can hardly be said that there is a conflict in the testimony touching the challenge of Juror Gay upon the ground of implied bias. His own testimony, as we have shown, is to the effect that he was without an opinion upon the merits of the case, had no knowledge of the facts, knew neither of the parties to the action, and had and nourished no prejudice against the use of automobiles upon the public streets or roads, and had never given expression to any such prejudice. The witness Battams, it will be noted, did not say that it was Gay who said that a person who should run an automobile into a wagon ought to be prosecuted therefor, nor did he directly say that Gay, in the conversation to which he listened, assuming said conversation to have been the one carried on between Gay and Middleton over the telephone, said anything

from which it could be inferred that he entertained a general feeling of hostility or prejudice against automobiles when used as vehicles upon the public highways. Battams merely declared that he heard one or the other, which one he did not know, say that a person who, driving an automobile on a highway, should run the machine into a wagon ought to be prosecuted. The court was justified in inferring that, if that remark was in fact made, it was more likely that it emanated from Middleton than from Gay, since, as the record shows, the former admitted, on his voir dire examination, that he had an opinion concerning the merits of the case which it would be difficult to remove by testimony or for him to lay aside. But, if it were necessary to concede that a conflict in the testimony addressed to the challenge arose by reason of Battams' narrative of the conversation overheard by him, still the question whether the juror was thus shown to be disqualified was one the determination of which rested in the discretion of the trial court. And, furthermore, assuming that there is a conflict in the testimony addressed to the challenge, and that it may justly be held that the court abused its discretion in denying said challenge, the defendant is now in no position to avail himself of the effect of such error, since it does not appear that, having exhausted the remainder of his four peremptory challenges after thus challenging Gay, he "had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him." *People v. Schafer*, 161 Cal. 573, 576, 119 Pac. 920, 921.

[4] 2. The plaintiff, over objection by the defendant, was allowed to reply to the following question propounded to him by his attorney: "Have you or not entirely recovered from your injuries?" The answer to said question was: "I have not. In the winter there, when it started to rain, it affected me just the same as rheumatism did, and drew my neck down, and my neck got just as stiff." The trial occurred a little over a year from the date of the accident, and the specific ground of objection to said question was and is that it was intended and tended to show that the plaintiff had suffered permanent injuries, of which no claim is specially pleaded in the complaint, a requisite which counsel for the defendant contend must be observed in pleading a personal injury case to authorize proof of permanent injury. But we think that the testimony was competent, under the general ad damnum clause of the complaint, as conducing to prove the pecuniary loss suffered by the plaintiff from the injuries inflicted upon him by reason of the collision. The rule is that the future and permanent effect of injuries directly or necessarily resulting to the plaintiff from the negligence of the defendant need not be specially pleaded in or

der to warrant proof thereof or recovery therefor. *It is only such damages which are not the necessary result of the injuries which must be specially pleaded.* Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Bonneau v. North Shore R. R. Co., 152 Cal. 418, 93 Pac. 106, 125 Am. St. Rep. 68; Castino v. Ritzman, 156 Cal. 587, 105 Pac. 739; Zibbell v. S. P. Co., 160 Cal. 237, 253, 116 Pac. 518.

There are numerous elements which may enter into the whole of the damage which necessarily results from the infliction of certain bodily injuries. Among these is that of physical and mental suffering which the injured party has endured and will endure from his injuries as the cause (Sutherland on Damages [3d Ed.] § 945), and "it is not necessary in such a case to state separately the amount of the loss that is caused by each element of damage. A general statement of the whole amount of damage will suffice when all the damage claimed is the natural and ordinary effect of the injuries alleged." Castino v. Ritzman, *supra*. In the case at bar the plaintiff himself testified that he did not claim to be permanently disabled as a result of the injuries sustained by him, and the testimony brought out in response to the question here complained of merely tended to show, not that he was permanently so disabled, physically, as that his earning power was materially deteriorated, but that some of his injuries, influenced to some extent, it may be inferred from his answer to the question, by certain climatic conditions, still intermittently caused him to suffer physical pain and perhaps, as a consequence, some degree of mental anguish, an element which, as declared, it was proper to disclose to the jury under the general statement in the complaint of the aggregate damage, measured in money, directly resulting to him from his injuries.

3. The court overruled objections by the defendant to the following questions asked of the plaintiff; the first referring to a conversation he had with the defendant a short time after the accident: (1) "Did he say anything about he being in the habit of driving at a reckless speed through the streets of Redding?" (2) "Had you seen Mr. Sallee driving an automobile on the streets of Redding previous to that time?" The rulings on the objections to the foregoing questions are asserted to be erroneous and the effect of the questions prejudicial to the defendant. But, even if the questions were improper, the answers returned to them rendered them innocuous. To the first question the plaintiff in effect replied in the negative, and to the latter he replied, categorically, in the affirmative, not attempting, however, to describe the rate of speed at which he had seen the defendant drive his machine on occasions prior to the time of the accident.

[§] 4. Exceptions 10 and 11 involve an attack upon the action of the court in permitting the witness Shelton, over objections by

the defendant, to say that he had never seen automobiles driven by others over the streets of Redding any faster than the defendant was traveling at the time his machine collided with the plaintiff's wagon, and that he had seen "other automobiles in the city of Redding go at a pretty fast rate of speed." The witness saw the defendant driving his machine toward the street crossing where the collision happened just prior to the accident, and had testified that the machine was then moving "unusually fast." In order to show that he was capable of forming an approximately accurate judgment of the rate of speed at which the machine was going, the questions now under consideration were put to him. There was no impropriety in the questions nor in the testimony brought out thereby. Their purpose was not to qualify the witness as an expert upon the rate of speed at which the automobile was traveling when the collision occurred (for the matter of the speed of vehicles traveling over the public highways does not involve scientific inquiries), but merely to show that the witness had habits of observation in noting generally the speed made by vehicles so traveling, and was therefore competent to give a more reliable estimate of the rate of speed at which the machine of the defendant was moving at the time of the accident than otherwise he might have been. Kramm v. Stockton Elec. R. R. Co., 136 Pac. 523.

[§] 5. Obviously, the court committed no error in allowing the witness Bush to detail a conversation had with the defendant subsequent to the accident, and in which the latter stated (so the witness was permitted to say, over objection by the defendant) that, when his machine struck the wagon, it was "going at a speed of not less than 15 miles an hour." The admission of the defendant so testified to was significant, not only because it tended to show that the speed at which the defendant was driving his machine at the time of the accident was such that it would be difficult to stop it in a sudden emergency, but also by reason of the fact that section 463 of the Municipal Code of the city of Redding, which was received in evidence, prescribes a penalty for driving an automobile over or upon the streets of said city at a greater rate of speed than 8 miles an hour, or, when approaching a crossing of intersecting streets and crossing the same, at a rate of speed in excess of one mile in 15 minutes. There is no more familiar or better understood rule of evidence than that which authorizes proof of the extrajudicial admissions or declarations of a party against his own interest as to the matter or question in issue. Code Civ. Proc. § 1870, subd. 2. What is here said is equally applicable to the claim of error noted in the exception to the ruling of the court permitting the plaintiff to state that the defendant, subsequent to the date of the accident, stated to him (plaintiff) that he was

"going over the speed limit," and that he did not "blow his horn" or give any other warning on approaching the crossing because "he never thought of it."

[7] 6. The defendant asked the witness Cummins, the owner of a garage and a dealer in automobiles, a number of questions the purpose of which was to secure from the witness his opinion as to the probable effect of a collision of an automobile, of the weight and the power which the defendant's machine was shown to possess, going at the rate of 10 or 12 miles an hour, with the rim of the rear wheel of an ordinary express wagon. The questions, having been objected to by the plaintiff, were disallowed, and the rulings are here assigned as errors. But the witness later on was permitted, without objection, to state fully his opinion as to the effect of such a collision upon the automobile, and the extent of the damage thus resulting to the machine, according to the opinion expressed by him, was amply sufficient to show to the jury what, under the circumstances, would most likely happen to the wagon. Thus it will be noted that the error involved in the rulings foreclosing answers to the questions referred to, conceding but not deciding that the court thereby committed error, was cured.

[8] 7. Objection to the following question propounded to the defendant on his cross-examination was overruled, and the ruling is here specified as erroneous: "Isn't it a fact that you have run your machine through the streets of Redding on numerous occasions at 30 and 35 miles an hour?" The defendant replied to the question in the negative, and whether the ruling thereon was right or wrong need not be decided, since the answer thereto was manifestly harmless or without prejudice. The legal integrity of some other rulings of the court respecting matters of evidence is challenged; but an examination of said rulings has convinced us that the criticism directed against them is destitute of substantial merit.

[9] 8. The action of the court in giving, refusing, and modifying certain instructions is complained of. The only objection in this respect to which the defendant gives special attention in his briefs relates to the rejection of the instruction, as preferred by the defendant, which would have told the jury that the violation of a statute or city ordinance establishing a limit of speed beyond which vehicles of any kind may not be driven over streets or public highways does not of itself constitute negligence, but that an infraction of such a law merely constitutes evidence of negligence to be considered by the jury in connection with other evidence addressed to that proposition. The court, however, read to the jury the instruction after modifying it, so that it declared, in substance, that the driving of an automobile over a street in the city of Redding at a rate of speed in excess

of that limited by the ordinance of said city would of itself constitute negligence upon the part of the driver, and that "in such case it is not necessary that the plaintiff make any further showing of negligence on the part of the defendant, in order to recover, provided that such negligence is the proximate cause of the injury," and provided, further, that the plaintiff received the injury without fault on his part.

While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence. *Siemers v. Elsen*, 54 Cal. 418; *Driscoll v. Market Street, etc., Ry. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 208; *Harrington v. L. A. Ry. Co.*, 140 Cal. 514, 519, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Bresee v. L. A. Traction Co.*, 149 Cal. 131, 139, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 799, 103 Pac. 1082. Therefore the statement that such an act is "of itself negligence," or "negligence as a matter of law," or "negligence per se" (equivalent expressions), is, in this state, strictly correct. It follows that the court made no mistake in modifying the instruction in the respect indicated.

We have not overlooked the cases arising in other jurisdictions (noted in volume 2, § 1901, of *Thompson on Negligence*), and to which attention has been directed by counsel for the defendant, wherein it is held that, to constitute the violation of a municipal speed ordinance negligence as a matter of law, such ordinance must be pleaded, and that, where in such case it is not pleaded, proof of the existence and of the violation of the ordinance amounts to no more than evidence of negligence, to be considered with other evidence received in the case upon that subject. The theory of that proposition is, obviously, that the plaintiff, not having pleaded the ordinance, does not rely upon it as the foundation of his right of action. The rule as so enunciated and applied, so far as we are advised, has never been recognized or applied in California. In practical effect the rule as thus enunciated would leave to the determination of the plaintiff, primarily, the question whether the violation of such an ordinance is negligence per se or only evidence of negligence. Manifestly, the violation of a municipal ordinance fixing the limit beyond which vehicles may not be driven over the streets of a city is, no less than the violation of a general act of the Legislature upon the same subject, negligence *as a matter of law*. The only distinction which can be discerned between an ordinance and a

general statute of the state dealing with precisely the same subject, so far as is concerned the effect of the violation thereof, lies in the proposition that in the one case, as a general rule, the courts must acquire knowledge of the existence of the local regulation by means of affirmative proof thereof, while in the other the courts presumptively know and must take judicial cognizance of its existence. But non constat that the violation of the ordinance does not constitute negligence per se merely because the court in a case in which the question could arise has not acquired knowledge in a competent way of the existence of the ordinance. The result of the want of such knowledge by the court would only be to deprive it of the authority or right to announce to the jury that such violation is negligence as a matter of law. The rule adopted and followed in this state appears to be the more logical. It does not stop to make inquiry as to the particular nature of the negligence of which the defendant has been guilty, and which has directly caused the damage complained of, but authorizes the plaintiff, where he relies for a recovery upon an act constituting negligence as a matter of law, to prove the act under his general allegations of negligence. In other words, if the negligence which was the proximate cause of the injuries complained of consisted of the violation of a municipal ordinance prescribing a maximum limit at which vehicles may be driven upon the streets of a city, then the plaintiff must first invest the court with knowledge of the existence of such ordinance, which he may do without having specially pleaded it, and then he may make proof of its violation by the defendant in support of the general allegations of negligence contained in his complaint.

[10] 9. The next assignment involves the question of the sufficiency of the evidence to justify and support the verdict.

The evidence is in sharp conflict upon the question whether the defendant's negligence was the sole proximate cause of the damage, or whether the plaintiff himself, by the manner in which he was driving his wagon, was so culpably careless as to have been the direct cause thereof. In this state of the evidence, it is not of course, up to a reviewing court to say on which side the truth of the matter lies. The plaintiff testified that he was driving his horse in an ordinary trot on California street and going north; that the defendant, when he first noticed him, was driving his machine on the left-hand or wrong side of Yuba street, going west; that the defendant was driving at a very rapid rate of speed—he judged at about the rate of 25 miles an hour—that when he first saw the machine it was approaching the intersection of the streets above named as he was making the same crossing. "I had no chance to do anything at all," he continued, "didn't have a chance to jump out, or jump, or noth-

ing, and the machine struck me and sent me into the air." He was thrown to the pavement, striking, as before stated, on his head and shoulders. He arose but immediately fell to the ground again in an unconscious condition, from which he was not revived until after having been removed to a drug store near by and treated by a doctor, who happened to be near the scene of the accident when it occurred. He testified that the defendant did not sound his horn or give any other warning on approaching the crossing. He further declared that, in the course of a conversation with the defendant a day or so after the accident, the latter admitted that, when his machine struck the plaintiff's wagon, he was driving it "pretty fast"—that he was "going over the speed limit." The defendant further stated to the plaintiff in that conversation, so the latter declared, that the reason he did not "blow his horn" was because "he never thought about it."

The witness Bush testified that the defendant, some days after the mishap, admitted to him that, when the collision occurred, he was driving his machine beyond the speed limit as fixed by the ordinance.

Other witnesses, who were near the scene of the collision when it took place, testified that the machine was moving at a very rapid rate of speed; some of them saying that, while they could hardly approximate the rate they could say that the machine was going "unusually fast," while others fixed the speed at which the machine was going at between 12 and 15 miles an hour. And some of the same witnesses corroborated the plaintiff's testimony that no warning was given by the defendant as he was nearing and in the act of crossing the intersection of the two streets.

Readily it will thus be seen that there was sufficient testimony presented by the plaintiff to justly warrant the jury in finding that the collision was precipitated wholly through the negligence of the defendant, and, as stated, with this finding we are not justified in interfering, notwithstanding that the defendant's testimony, corroborated to some extent by that of other witnesses, called by him, would amply have sustained the conclusion that the defendant was not, at the time of the collision, driving his machine at an excessive rate of speed, measured either by the terms of the ordinance or otherwise, that the plaintiff carelessly drove in front of the machine, and that but for such carelessness the accident would not have occurred.

[11, 12] 10. It is lastly contended that the amount of the damages awarded by the jury, when compared to the character and extent of the injuries sustained by the plaintiff, is so excessive as irresistibly to lead to the conclusion that the verdict was the result of passion or prejudice. While it is to be conceded that the injuries suffered by the plaintiff were not shown to be of a very serious nature, still we cannot say that the award of

damages is so excessive as to indicate that the jury, in considering the evidence relating to that feature of the case, and in reaching a conclusion thereon, were influenced by passion or prejudice. It has been repeatedly said by the courts as well as the text-writers that, "in actions for personal torts, the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury," and that the appellate courts "will not interfere in such cases, unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury, in reaching their verdict, were actuated by passion or prejudice." *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach & Mission R. R. Co.*, 36 Cal. 590; *Wilson v. Fitch*, 41 Cal. 386; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Morgan v. S. P. Co.*, 95 Cal. 501, 30 Pac. 601; *Marshall v. Taylor*, 98 Cal. 55, 63, 32 Pac. 867, 35 Am. St. Rep. 144; *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 513, 42 Pac. 983; *Lanigan v. Neely*, 4 Cal. App. 760, 772, 89 Pac. 441; *Clare v. Sacramento Elec., etc., Co.*, 122 Cal. 504, 55 Pac. 326; *James v. Oakland Traction Co.*, 10 Cal. App. 785, 799, 103 Pac. 1082.

[13] The evidence shows that the plaintiff, while not confined to his bed or home during any period of time after he was injured, was nevertheless incapacitated for the proper performance of his accustomed duties, for which he received as compensation the sum of \$70 per month, for a period of nearly two months. It further shows that for a period of a year from and after the accident he at times suffered pain in the shoulder which was injured as a result of the collision. Considering this evidence, we do not feel justified in saying that the verdict is excessive, or so far beyond a just admeasurement of the damages suffered by the plaintiff as to warrant the presumption that it was brought about otherwise than by a conscientious consideration of the facts by the jury. It is true that it can hardly be said that the plaintiff suffered any very serious detriment in so far as is concerned the loss of wages earned in the performance of the labor to which he had customarily applied himself; but, as the Supreme Court says in the case of *Clare v. Sac. Elec., etc., Co.*, 122 Cal. 504, 55 Pac. 326, "compensation for personal injuries is not dependent upon the cutting off or diminution of wages by reason of the injury, nor is the amount thereof measured by the amount of income or wages lost." The rule is, in brief, that the jury must take into consideration all the elements of damage shown by the proofs and apply their best and honest judgment in the ascertainment of what, under all the evidence, would be just compensatory relief. This, we must assume

from the state of the evidence and the small amount (compared to the sum sued for) awarded to the plaintiff, is precisely what the jury did in this case.

We have found no just cause for disturbing the verdict for any of the reasons assigned, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

#### PARR v. BAER et al. (Civ. 1289.)

(District Court of Appeal, First District, California. March 16, 1914.)

#### 1. MASTER AND SERVANT (§ 36\*)—CONTRACT OF EMPLOYMENT—ACTION BY EMPLOYÉ.

Plaintiff was employed for a year under a written contract to sell goods for defendants, and during the year defendants wrote to plaintiff dismissing him for inability to sell the goods, to which plaintiff replied, calling attention to his contract, and stating that he had fully carried it out, and therefore could not accept the discharge, and awaited further instructions. Defendants replied, stating that the partner who had dismissed plaintiff was in Europe, and they must stand by his action, but were prepared to give plaintiff another opportunity, on condition that the written contract between them be considered void, to which plaintiff replied that he would not accede to their suggestion, and that "you are again advised that I am still in your employ and await your instructions," to which defendants replied that "the firm will consent to give you another show, and should you make good nobody will be more pleased than ourselves," and further urged him to push the trade. Plaintiff was afterwards discharged, and sues upon the contract to recover his salary for the time during which the above negotiations took place. *Held*, that plaintiff could maintain an action on the contract, under the rule permitting a recovery for salary under a contract of employment, where there is a reasonable doubt whether he should sue on the contract, or sue for damages for a breach thereof by wrongful discharge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 12, 42; Dec. Dig. § 36.\*]

#### 2. APPEAL AND ERROR (§ 171\*)—ADHERING TO THEORY BELOW.

Where the case was tried on the merits as an action for salary due under a contract of employment, without regard to whether it should have been brought on the contract or as an action for damages for breach thereof, the judgment for plaintiff should not be reversed because of any defect in the form of the action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by R. E. Parr against John Doe Baer and others. From a judgment for plaintiff, defendants appeal. Affirmed.

D. Hadsell, of Berkeley, for appellants. L. S. Melsted, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor for the sum of \$418.31 and costs of suit, in an action brought



to recover said sum, alleged to be due as salary under a contract for the employment of plaintiff by the defendants for one year.

The defense presented by the defendants at the trial, and urged here as the principal ground for reversal of the judgment, is that the plaintiff was discharged by defendants during the term of said contract, and that, this being an action for the salary due upon the contract of employment after such discharge, instead of an action for damages by reason of his discharge, the plaintiff was not entitled to recover in this case, but should be relegated to his remedy in the appropriate form of action. The facts constituting and surrounding the alleged discharge of the plaintiff and his admitted employment are substantially these:

The defendants are a firm of New York merchants selling goods in California through orders taken by traveling agents, of which the plaintiff became one under a written contract of employment for a year, dated March 22, 1909. Not long after his engagement the plaintiff began receiving letters from the defendants urging greater efficiency, and complaining as to the number and value of orders taken. On May 17, 1909, the plaintiff received a letter from the senior member of the firm reiterating these complaints, and saying in the course of their recital: "Under these circumstances we regret that we have to discharge you." The letter ended with a request that the plaintiff would return the \$70 expense money "you have now on hand." To this letter the plaintiff replied, calling the attention of the firm to his contract of employment for one year, and declaring that he had fully carried it out on his part, and stood ready and willing to fulfill it to its completion, and closing with the statement: "I cannot, therefore, accept such discharge as named in your letter, and await your further instructions." To this letter the plaintiff received no reply, and hence on June 21, 1909, sent another letter to the defendants, inclosing a copy of the former one, and again repeating that he stood ready and willing to fulfill his contract, and awaited their instructions. To this letter the plaintiff received a reply from another member of the firm, stating that: "Mr. Max Baer, who dismissed you from our employ, is at present in Europe, and we therefore must stand by his discharge. We, however, are prepared to give you another test and try you once again, but only on condition that our contract of March 22 is considered null and void; and if your further efforts prove satisfactory we will endeavor to influence our Mr. Max Baer to reinstate you." To this letter the plaintiff wrote a reply, expressing his inability to see any reason why the contract should be altered or abrogated, and ending: "You are again advised that I am still in your employ and await your instructions." To this letter

the plaintiff received from Mr. Max Baer a reply, stating that "the firm will consent to give you another show, and should you make good nobody will be more pleased than ourselves," and ending: "Take the San Francisco trade thoroughly in hand and try to do the right thing for the house you represent." In October the plaintiff was discharged, whereupon he brought this action upon his contract to recover his salary during the period of the above correspondence.

It is the appellants' contention that it appears from the foregoing facts and correspondence that the plaintiff was unequivocally discharged by the defendants on May 22, 1909, and hence that his only available remedy was by an action for damages for the breach of his contract of employment by his discharge, and, this not being that form of action, he cannot recover.

[1] From the foregoing facts and correspondence, however, we are not prepared to say that the plaintiff was bound to consider his alleged discharge of May 22d to be either unequivocal or final. He evidently did not so consider or accept it, even though in one of his replies he did speak of it as a discharge; and since his insistence that he was not discharged resulted in the apparent withdrawal of the defendants from their position, and in the continuance of the plaintiff in his employment under his contract, we think this case comes fairly within the rule laid down in the cases of *Stone v. Bancroft*, permitting a plaintiff to recover in an action for his salary due upon his contract of employment whenever there is room for a reasonable doubt as to which form of remedy he should seek. *Stone v. Bancroft*, 112 Cal. 652, 44 Pac. 1069; *Stone v. Bancroft*, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717. And we are all the more inclined to apply the rule to this case since it appears that the whole subject of plaintiff's effort and ability to find other employment during the period of interruption was gone into on the trial, and since the court reduced the amount of the plaintiff's recovery in the sum of \$14 shown to have been earned by him in some other work during that period.

[2] The action having been thus treated upon the trial as one to recover what was actually and justly due to plaintiff without respect to the form of the action, we think the reasoning of Mr. Justice McFarland in the case of *Kurtz v. Forquer* is capable of exact application to the case at bar, and that, the case having been tried upon its merits without regard to its form, the judgment should not be reversed for any alleged defect in form in no way affecting the merits of the case. *Kurtz v. Forquer*, 94 Cal. 91, 29 Pac. 413.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

**PEOPLE v. BUDD. (Cr. 228.)**

(District Court of Appeal, Third District, California. March 17, 1914.)

**1. INDICTMENT AND INFORMATION (§ 3\*)—OFFENSES UNDER JUVENILE COURT ACT—PRACTICE.**

Pen. Code, § 682, requiring every public offense to be prosecuted by indictment or information, except enumerated offenses, including misdemeanors, of which jurisdiction has been conferred on superior courts sitting as juvenile courts, without providing any mode of procedure as to the excepted cases, does not authorize a trial by the superior court sitting as a juvenile court, on a complaint filed for the misdemeanor which the Juvenile Court Act (St. 1911, p. 672, § 26) defines, though Code Civ. Proc. § 187, providing that a court having jurisdiction may adopt any suitable mode therefor conformable to the spirit of the Code, if applicable, applies only to those cases where no course of proceeding is pointed out by the Code or some statute, and the prosecution must be by indictment or information, as provided by Penal Code, § 888, notwithstanding section 889, which refers only to accusations for removal of officers.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9-23; Dec. Dig. § 3.\*]

**2. STATUTES (§§ 76, 87\*)—SPECIAL LAWS—PRACTICE IN COURTS.**

Pen. Code, § 682, subd. 4, added by St. 1911, p. 658, if construed as authorizing prosecutions on complaint filed in the superior court, charging misdemeanors of which jurisdiction is conferred on superior courts sitting as juvenile courts, while section 888 provides for prosecutions in the superior court on indictment or information, contravenes Const. art. 4, § 25, subd. 3, prohibiting special laws regulating the practice of courts and subdivision 33, prohibiting special laws when a general law can be made applicable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½, 87, 96; Dec. Dig. §§ 76, 87.\*]

**3. INFANTS (§ 20\*)—JUVENILE COURT ACT—JURISDICTION.**

The Juvenile Court Act (St. 1911, p. 658) confers on the superior court jurisdiction of offenses created by law, and does not create a new court distinct from that of the superior court, and the Legislature may not adopt, for the prosecution of such offenses, a procedure materially different from that prescribed by the Constitution and statutes for the prosecution of criminal offenses in the superior courts.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.\*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

George Budd was convicted of crime, and he appeals. Reversed.

R. Platnauer, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted, under the provisions of section 26 of the statute of 1911, designated and known as the "Juvenile Court Law" (Stats. 1911, pp. 658-672), of the crime of "encouraging, causing, and contributing to the dependency" of one Mamie Giannattasio, a female person, under the age of 21 years.

This appeal is brought to this court by the defendant from the judgment and the order denying his motion for a new trial.

The document charging the offense for which the defendant was prosecuted, and of which he was adjudged guilty, is an ordinary complaint or deposition, verified before the county clerk, and not subscribed to by the district attorney.

At the time fixed for his arraignment, the defendant demurred to said complaint upon both general and special grounds, and at the same time moved to set aside said complaint upon the grounds: (1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) that said complaint is not subscribed by the district attorney of the county. The court overruled the demurrer and denied the motion to set aside the complaint.

[1] The first point made of the several upon which the defendant relies for a reversal is that raised by the motion to set aside the complaint, viz.: That, prior to the time of the filing of that document, he had not been legally committed by a magistrate for the offense of which he is therein accused, and that, therefore, the court could not and did not acquire jurisdiction to try him for said crime.

In the case of *Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501, the precise point thus presented was passed upon by the District Court of Appeal of the second district, in an application for a writ of prohibition to restrain the superior court, sitting as a juvenile court of Los Angeles county, from proceeding further in the trial of the petitioners, who were charged, by a complaint such as the one here, with the same offense as that with which the defendant in the case at bar is charged. Mr. Justice Shaw, of that court, prepared the opinion, and, while denying the writ on the sole ground that there was available to the petitioners an adequate remedy in the ordinary course of law, held that, in cases arising under section 26 of the juvenile court law, it was imperatively necessary that the usual procedure prescribed for the prosecution of felonies or indictable misdemeanors should be followed—that is, that the prosecution of such cases should either be by indictment or by information, after a preliminary examination of the charge before and commitment by a magistrate. The opinion in that case satisfactorily answers the argument of the Attorney General in support of the course adopted in this case. We, therefore, approve the result arrived at in said case as to the point under consideration and the reasoning leading thereto, and adopt the following portions of the opinion therein as a part of the opinion herein:

"Section 26 of the juvenile court act, which defines the misdemeanor in question, pro-

vides that 'the juvenile court shall have jurisdiction of all such misdemeanors.' Section 682 of the Penal Code provides: 'Every public offense must be prosecuted by indictment or information, except: 1. Where proceedings are had for the removal of civil officers of the state. 2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which the state may keep, with the consent of Congress, in time of peace. 3. Offenses tried in justices and police courts. 4. All misdemeanors of which jurisdiction has been conferred upon superior courts sitting as juvenile courts.' Subdivision 4 was added by the amendment of 1911. It is under and by virtue of this last subdivision of section 682 that respondents claim the right to prosecute the petitioners upon the complaint filed in the superior court. Petitioners, however, contend that the exception provided by subdivision 4 is unconstitutional, in that it is repugnant to subdivisions 3 and 33 of section 25, article 4 of the Constitution, which provide: 'The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: \* \* \* Third. Regulating the practice of courts of justice. \* \* \* Thirty-Third. In all other cases where a general law can be made applicable.' While section 682 provides that every public offense, except those enumerated in subdivisions 1, 2, 3, and 4, must be prosecuted by indictment or information, it does not make, or purport to make, any provision for the prosecution of cases falling within the enumerated exceptions. The section is permissive in declaring that such prosecutions need not be by indictment or information, but it does not in terms forbid the same, or define any other mode of practice for the cases so excepted. Other sections of the Code, however, prescribe the pleadings and procedure to be followed in cases classed as 1, 2, and 3, but nothing 'in the juvenile act, nor in the Penal Code, other than section 888 thereof, purports to provide a procedure for the prosecution of the misdemeanor with which petitioners are charged. While section 1426 of the Penal Code authorizes the prosecution of misdemeanors in justices' courts upon a verified complaint, we find no like provision which in terms authorizes a prosecution in the superior court upon such pleading. Hence it follows that if it cannot be prosecuted by indictment or information, as provided by section 888, the law in terms makes no provision for the trial of such cases. Assuming that section 187 of the Code of Civil Procedure applies, which application may be doubted under section 31 of the Code of Civil Procedure, nevertheless the provision therein that a court vested with jurisdiction to try a case may adopt any suitable mode therefor conformable to the spirit of the Code is limited to those cases where no course of procedure is pointed out by the Code or some statute. Section

888 specifically points out and designates a complete mode of procedure. It expressly provides that 'All public offenses triable in the superior courts must be prosecuted by indictment or information, except as provided in the next section,' which next section refers to accusations filed in the superior court for the removal of officers in accordance with sections 758 and 759, Penal Code.

[2] "In our opinion, subdivision 4 of section 682 cannot be construed as authorizing the prosecution and trial of petitioners on a verified complaint filed in the superior court. Moreover, such interpretation given the section would, in our judgment, render it repugnant to subdivision 3 of section 25, article 4 of the Constitution, prohibiting the Legislature from passing special laws 'regulating the practice of courts of justice,' as well as render it obnoxious to subdivision 33 of said section, which prohibits the passage of a special law 'where a general law can be made applicable.' Not only does a general law exist (section 888), which is applicable to the prosecution of all misdemeanors, jurisdiction of which is vested in the superior courts, but the provision accepting the interpretation of subdivision 4, section 682, as construed by respondents to authorize a prosecution of misdemeanors arising under section 26 of the juvenile act by complaint, is an attempt to provide and apply to such cases a special and different procedure than that prescribed by general law for the prosecution of like misdemeanors triable in the superior court. In the present case there is no conceivable reason why the prosecution of the misdemeanor in question should not be subject to the general rules in regard to pleadings and procedure made applicable to all misdemeanors triable in the superior court. *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530. \* \* \* In *the Mills Sing Case*, 13 Cal. App. 740, 110 Pac. 694, this court said: 'The juvenile act making the offense under consideration triable in the superior court, section 888 of the Penal Code applies, which provides that all public offenses triable in the superior court must be prosecuted by indictment or information, except as to accusations for the removal of certain officers. Section 809 of the Penal Code directs the filing of an information after commitment by a magistrate, and section 950 of the Penal Code specifies what such information must contain. It follows, therefore, that the preliminary examination and commitment are precedent conditions to the information upon which, and upon which only, can the superior court proceed to try one charged with a public offense, even though it be a misdemeanor.' In our judgment, the verified complaint filed in the superior court is insufficient to give the court jurisdiction to try petitioners for the offense charged. The prosecution in such case must, as required by section 888 of the Penal Code, if not by indictment, be conducted under an

information, as a prerequisite to the issuance of which the accused is entitled (Const. § 8, art. 1) to a preliminary examination and commitment, provision for which is made in sections 858 and 883 of the Penal Code, and which is applicable alike to the misdemeanor with which petitioners are charged, as well as to all others, jurisdiction to try which is vested in the superior court."

There is nothing said in the case of *Edington v. Superior Court*, 18 Cal. App. 739, 124 Pac. 450, 128 Pac. 338, which is in conflict with the foregoing views, or which supports the position of the Attorney General in this case.

[3] But it may be argued that it is within the competence of the Legislature to confer upon the superior court, as a juvenile court, special and peculiar power with respect to misdemeanors created by the Juvenile Court Act, and that it could therefore prescribe any procedure for the trial of misdemeanors arising under said act which it might deem appropriate or the more convenient.

It must be borne in mind that the Legislature, by the juvenile court law, does not pretend to set up a new court or one distinct from that of the superior court. The act merely confers upon the superior courts jurisdiction of certain offenses created thereby. This is not only clearly implied from the title of the act which, after stating its purposes, among which is the creation of certain offenses, reads, "And giving to the superior court jurisdiction of such offenses," but is expressly declared by section 2 of the law, which provides, among other things, that "the superior court in every county of this state shall exercise the jurisdiction conferred by this act." See *Edington v. Superior Court*, supra.

While it is true that it is within the constitutional power of the Legislature to confer upon the police or justice's courts the jurisdiction to try high grade, or what is commonly termed indictable, misdemeanors, in which case undoubtedly the procedure peculiar to those courts would be appropriate (*Union Ice Co., etc., et al. v. Rose*, 11 Cal. App. 357, 104 Pac. 1006; *People v. Sacramento Butchers' Association*, 12 Cal. App. 471, 487, 107 Pac. 712; *In re J. C. Westenberg* [Sup.] 139 Pac. 674), nowhere has it ever been held that, where jurisdiction is conferred upon the superior courts of a class of misdemeanors, the Legislature may adopt for the prosecution of such cases a procedure materially different from that prescribed by the Constitution and the statute for the prosecution of criminal cases in said courts.

The defendant objects to the complaint for other and additional reasons, contending that it is ambiguous and uncertain in that it charges a number of different and distinct offenses under section 26 of the juvenile court

law. It is further claimed that the court erred to the detriment of the defendant in certain of its rulings upon evidence, and in the matter of its charge to the jury. But, since a reversal must be ordered upon the point first considered, we do not feel called upon to review and pass upon the points last referred to. Besides, we may assume that, if the people elect to proceed anew against the defendant for the offense of which it was attempted to accuse him in the document upon which he was tried and convicted in the present case (Pen. Code, § 997), any errors which may have been made in the purported trial with which this appeal is concerned, either in the statement of the offense or the rulings on questions of evidence and the instructions, will readily be discovered and avoided in the trial of the accused under a proper pleading.

For the reasons given in the above-quoted opinion in the case of *Gardner v. Superior Court*, supra, the judgment and the order appealed from in the case at bar are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

HEFFERNAN v. DAVIS. (Civ. 1158.)  
(District Court of Appeal, Third District, California. April 8, 1914. Rehearing Denied May 8, 1914.)

1. LANDLORD AND TENANT (§ 35\*)—OPERATION AND EFFECT—PART PERFORMANCE.

Where a tenant entered into and held possession of land under a lease, invalid under Code Civ. Proc. § 1973, because not subscribed by the tenant, he was estopped in an action for the rent to aver its invalidity, and, being thus estopped, the action could be maintained under the lease for the rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 35.\*]

On Rehearing.

2. PLEADING (§ 237\*)—ACTIONS FOR RENTAL—PLEADING—AMENDMENTS.

Where, in an action for rent, the complaint set out a lease and averred that defendant went into possession thereunder, but the facts as brought out on the trial showed that defendant did not hold the land by virtue of the lease, plaintiff should have been permitted to amend her complaint so as to conform to the facts and recover for use and occupation, since such an amendment would not introduce a new and different cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 608-619; Dec. Dig. § 237.\*]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Catherine M. Heffernan, administratrix, against J. T. B. Davis. From a judgment for defendant, plaintiff appeals. Reversed. Rehearing denied.

W. R. Garrett, of Upland, and L. F. Coburn, of Yreka, for appellant. B. K. Collier, of Yreka, for respondent.

CHIPMAN, P. J. This is an action of unlawful detainer. The cause was tried by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court and defendant had judgment. Plaintiff moved for a new trial, which was denied, and she appeals from the judgment and order.

[1] It is alleged in the complaint that, on or about March 25, 1906, plaintiff's intestate by lease demised and let to defendant the premises described as follows: N.  $\frac{1}{2}$  of section 22, township 40 N., range 4 W., M. D. M., situated in Siskiyou county, a copy of which said lease is as follows: "This certifies that I have this day, March 25th, 1906, leased to J. T. B. Davis, the Van place on Sec. 22, T. 40, N. E., 4 W. M. D. M. for the term of six years from date, at a yearly rental of one hundred and fifty dollars, per year, payable yearly in advance. The tenant to improve the place and keep in good order. J. O. Welsh." It is further alleged that "defendant went into possession and occupation of said premises by virtue of said lease and still holds and occupies the same"; that no part of the said yearly rental has been paid, and the whole thereof is due and unpaid, amounting to \$750; that on November 14, 1912, "within one year after the last yearly rent became due as aforesaid, by the terms of said lease, demand in writing was made by the plaintiff of the defendant for the payment of the said rent amounting to \$750 as aforesaid, or that he surrender the possession of said premises, \* \* \* but said defendant has neglected and refused, for the space of more than three days after said demand as aforesaid, to quit the possession of said demised premises or pay the rent thereof, due and unpaid as aforesaid, and the same still remains due and unpaid." Defendant, in his answer, denies that the said Welsh let to defendant the said premises "by a lease a copy of which is attached to said complaint or by any written lease whatever"; denies that defendant "went into possession of said property under said lease," or that "he still holds or occupies the said premises under said lease or at all; and in this regard this defendant says that defendant never entered into any written contract for the lease of said or any premises from the said J. O. Welsh; and further says that this defendant never subscribed to any agreement, note, or memorandum of lease, for the said premises described, or for any other premises from the said John O. Welsh; and that said pretended agreement set out in said complaint is invalid under section 1973 of the Code of Civil Procedure of the state of California"; denies that any sum is due under said lease; admits the demand as alleged in the complaint; "and states in this regard that said defendant immediately after the receipt of said demand for possession delivered up and quit the possession of said premises and since said time has no longer been in possession of same."

The court made findings: That said Welsh "did not on or about March 23, 1906, lease, demise, or let to the defendant the premises described in plaintiff's complaint"; that "de-

fendant did not go into possession of said premises under said lease and defendant does not now hold or occupy the same"; that "no sum of money became due for the rent of said premises under said pretended lease"; that plaintiff made demand as alleged in the complaint and defendant failed to pay rent as there alleged; and "that the defendant quit the possession of said premises; and that defendant does not unlawfully hold same or continue in possession of same." The court also finds: That "said paper writing denominated a lease is invalid under section 1973 of the Code of Civil Procedure of the state of California." As conclusion of law, the court found that plaintiff is entitled to take nothing and that defendant recover his costs. At the trial it was admitted that John O. Welsh executed the lease, "Exhibit A," to plaintiff's complaint. This document bears date March 25, 1906, but rental is claimed for the years commencing March 25, 1908, and the years commencing March 25, 1909, 1910, 1911, and 1912. It was alleged in the answer that defendant quit possession upon receipt of the demand and notice alleged in the complaint and no longer holds possession. This would seem to justify the inference that defendant then held possession of the premises.

Plaintiff offered in evidence the document, Exhibit A, to which defendant objected on the ground that "it was irrelevant, incompetent, and immaterial, and that if it would connect with any land that Mr. Davis had, why Mr. Davis would not be bound by it, \* \* \* and it is not signed by Mr. Davis, and that it is invalid under section 1973, subdivision 5, of the Code of Civil Procedure. Court. I think that this is the case where the objection comes in as it has, that Mr. Davis has not signed it, and, the suit being against him, I think the objection is well taken and it is sustained. Plaintiff excepted." Defendant Davis was then called as a witness and was asked to state whether or not he went into possession of the land mentioned in the complaint. Objection was made as before and that "it is seeking to prove by parol a contract that the statute says must be in writing." Like objection was made and sustained to a question whether or not he had "paid Mr. Welsh for the use and occupation of the land as described."

The theory of the defense and the rulings of the court rested on the proposition that, because the defendant did not sign the lease, it could not be made binding upon him by showing that he went into and held possession under it. The contention of defendant, as shown in his brief, is that plaintiff cannot recover on the lease and that his remedy is for use and occupation, citing *Falck v. Barlow*, 110 Md. 159, 72 Atl. 678, 17 Ann. Cas. 538.

An oral contract for the sale of real property is invalid, but may be executed by the parties to it and its specific performance enforced.

ed in equity in case there has been part performance. *Hill v. Den*, 121 Cal. 42, 44, 53 Pac. 642. See section 1972, Code Civ. Proc.

In *Niles v. Hancock*, 140 Cal. 157, 73 Pac. 840, the court seems to intimate that, if there had been an actual taking of possession of the land by the vendee, it would have constituted part performance of what was an insufficient compliance with section 1973.

It was said in *Pearsall v. Henry*, 153 Cal. 314, 318, 95 Pac. 160: "When it is clearly and unequivocally made to appear that there has been a performance by a party on his part of an oral agreement required by the statute \* \* \* to be in writing, under such circumstances as to make it inequitable to allow the other party receiving the benefit thereof to repudiate it on the ground that it was not in writing, he is estopped from doing so."

In the case cited by respondent the action was ejectment in which the defendant set up an equitable defense, possession under a written lease. It appeared that the lease was not acknowledged or recorded in the public records which rendered it insufficient under the Maryland statute to convey legal title for the term of ten years. It was claimed, however, to be good in equity. The court held that the "tenancy, unless it had been terminated in some lawful manner, would constitute a good legal defense to the action, and should not therefore have been set up by an equitable plea." A reversal was ordered for the reason that an equitable defense was not allowable in actions at law. Under our practice no such distinction exists. Here there was full performance by defendant, i. e., it was sought to show that he entered under the lease as written, enjoyed its benefits for the period claimed, and surrendered possession only after notice to quit. There was a change of position of plaintiff's intestate whose possession was surrendered to defendant. He now claims that he can defeat the action by resort to the statute of frauds, notwithstanding his use and occupation of the premises by virtue of an instrument in writing which bound his lessor. If this can be done, it seems to us the statute would be made to aid in the perpetration of a fraud, whereas its purpose is to prevent fraud. It was said, in *Glass v. Hulbert*, 102 Mass. 30, 3 Am. Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was

intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds."

In *Browne* on the Statute of Frauds the author states: "It is settled by a long series of authorities that a part execution of a verbal contract within the statute of frauds has no effect at law to take a case out of its provisions (citing cases); but this of course does not apply in those jurisdictions where law and equity powers are merged in the court, sitting nominally as courts of law." *Browne* on Stat. of Frauds (5th Ed.) § 451. Cases are cited in note to *Falk v. Barlow*, supra, holding that where a tenant enters under an agreement invalid by reason of the statute of frauds, and continues in possession paying a yearly rental for the same, and the rent is received by the owner, the tenant becomes a tenant from year to year. Here, however, no question arises as to the extent of the term of the tenancy, for the claim is for unpaid rental past due. If, as it was proposed to show, defendant went into possession and remained in possession under the lease, the writing became something more than a unilateral offer and, as was said in *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037, "this was a sufficient execution to make the writing a binding obligation," though not executed by the party sought to be charged.

In *Reedy v. Smith*, 42 Cal. 245, the contract involved was for the building of a certain dam and was signed by the defendants only; but, as it was acted upon by the other party and was executed, it was held to be binding on both parties, and it was said that no question of the statute of frauds could be raised. In *Crescent City Wharf & Lighter Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426, it was held that the seal of the lessee was not necessary to the validity of the lease, but that claiming under it and occupying and maintaining the wharf and paying rent was sufficient to make it binding.

"When a contract is signed by one of the parties only, but is accepted and acted upon by the other party, it is just as binding as if it were signed by both of the parties." 9 Cyc. 300. "Where all engagements which the statute covers have been performed, an action lies upon the special contract for the enforcement of all remaining engagements, including the payment of the stipulated price for the property conveyed or services rendered." *Browne* on Stat. of Frauds, § 124. Here the action is for the enforcement of the engagements which have been performed. "A lessee accepting a lease under seal and entering into the use and occupation of the premises may become liable for the performance of the conditions of the lease, although

the same is not signed by him." 24 Cyc. 903, and cases cited.

It seems to us, however, that if, as was sought to be shown, defendant entered into possession of the land and held that possession under the lease, he is estopped to aver its invalidity and that, as he cannot be heard to challenge its validity, the action may be maintained upon it. To permit this defendant to raise this objection now, after he has enjoyed the possession and use of the land and after years of silence as to any defect in the lease, would promote injustice and must be condemned as unconscientious and therefore not to be permitted. This question of estoppel is exhaustively treated in *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154, to which nothing need be added.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

#### On Rehearing.

CHIPMAN, P. J. [2] The complaint distinctly alleges that defendant went into possession of the premises under the lease pleaded. It is true that there was no evidence that defendant did so enter into possession, and the offer made by plaintiff does not in terms call for an answer by the defendant, called as a witness for plaintiff, to the direct point of his entering into possession under or by virtue of the lease. But it seemed to us that enough appeared to show that the trial court was of the opinion that not only was the paper signed by the lessor incompetent to establish any right in plaintiff, but that any evidence tending to show by parol proof of entry under the so-called lease would be equally incompetent.

If it should turn out on a new trial that defendant never knew that such a document existed and therefore did not enter into possession under it, a different situation would be presented. In such event plaintiff should be permitted so to amend her complaint as to meet the facts as they existed and if, as is contended by defendant, she can recover only for use and occupation irrespective of the lease, plaintiff should be given an opportunity to do so by amending her complaint. We do not think that such an amendment would introduce an entirely new and different cause of action. The use and occupation of the premises and nonpayment therefor constituted the basis of the action and could have been set up in the original complaint by a separate count, and we see no reason why it may not be done at this time if the facts warrant it. *Born v. Castle*, 22 Cal. App. 282, 286-288, 134 Pac. 347.

The petition is denied.

We concur: BURNETT, J.; HART, J.

#### Ex parte JACKSON. (No. 2124.)

(Supreme Court of Nevada. May 12, 1914.)

PROSTITUTION (§ 3\*)—INDICTMENT—"PERMITT."

An indictment charging that the defendant permitted his wife to be in a house of prostitution, is sufficient to charge an offense under Rev. Laws, § 6445, making it a felony for a person to connive at, consent to, or permit his wife being in any house of prostitution, the word "permit" in such indictment and statute meaning not merely failure to prevent, but requiring an active wish, or at least willingness in defendant's mind that his wife remain in such house after knowledge that she is there.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 3; Dec. Dig. § 3.\*

For other definitions, see Words and Phrases, vol. 6, pp. 5315-5318; vol. 8, p. 7752.]

Original application in the Supreme Court by Little Poole Jackson for a writ of habeas corpus. Proceeding dismissed.

Dixon & Miller, of Reno, for petitioner. George B. Thatcher, Atty. Gen., and M. B. Moore, Dist. Atty., of Reno, for respondent.

NORCROSS, J. This application raises the question of the sufficiency of an indictment to charge a public offense. The indictment, in part, reads: "That said defendant, \* \* \* being then and there the husband of one Edna Pearl Jackson, \* \* \* did then and there willfully, unlawfully and feloniously permit her, the said Edna Pearl Jackson, to be in a house of prostitution, to wit, the house. \* \* \*"

Section 6445 of the Revised Laws contains the provision: "Every person who, \* \* \* being the husband of any woman, \* \* \* shall connive at, consent to, or permit her being \* \* \* in any house of prostitution," shall be guilty, etc.

It is contended by counsel for petitioner that the word "permit" comprehends some lawful control or authority over the action of another; that power to "permit" an action cannot exist without the corresponding power to refuse; that there can be no guilt in permitting a thing to be done where power to prevent does not exist; that a husband has no such legal power or control over the actions of a wife as gives him authority to prevent her entering a house of prostitution if she desires so to do; that not having power in law to prevent such action upon the part of a wife, an indictment which charges only that the husband permitted such action fails to charge an offense.

We shall not enter upon a consideration of the question whether a husband or wife has any legal control over the actions of the other. This court, however, judicially knows that both the husband and wife usually have a powerful moral suasion over the actions of each other. It is in this sense, we think, the word "permit" is used in the statute. In *People v. Conness*, 150 Cal. 114, 88 Pac. 821, the court said: "It would not be unreason-

able or absurd, or an undue restriction of personal liberty, to forbid all persons from remaining in a bawdyhouse, nor to forbid any person from allowing, or permitting another to remain there, in the sense in which the words 'allow' and 'permit' are used in this statute. \* \* \* The statute is in the disjunctive, and it declares that if the husband shall 'allow' his wife to remain in a house of prostitution, he is guilty of a felony. The word 'allow' here means more than mere 'abstinence from prevention,' as the court below defined it in an instruction given to the jury. It has almost the identical meaning of the word 'permit,' also used in the statute. It implies some sort of assent on the part of the husband. There must be some active wish, or at least willingness, in his mind, after he has knowledge of her presence in the house, that she should continue there; something more than mere indifference to her whereabouts, or passive sufferance in a case where the circumstances do not call upon him to interfere with her conduct. Where he does not, directly or indirectly, place or leave her in the house, or connive at, consent to, or permit of her going there (using the word 'permit' in the same sense which we attribute to the word 'allow'), he must, to some extent, be an accomplice in her remaining there, after he has knowledge of the fact." See, also, *People v. Duncan* (Cal. App.) 134 Pac. 797; *People v. Nitta*, 17 Cal. App. 152, 118 Pac. 946; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873.

The indictment, we think, is not objectionable as not stating a public offense.

The proceeding is dismissed.

TALBOT, C. J., and McCARRAN, J., concur.

#### PROSOLE et al. v. STEAMBOAT CANAL CO. (No. 2104.)

(Supreme Court of Nevada. May 4, 1914.)

#### 1. WATERS AND WATER COURSES (§ 128\*)—APPROPRIATION FOR IRRIGATION—STATUTORY PROVISIONS—APPLICABILITY.

Laws 1913, c. 140, making water for beneficial purposes appurtenant to the place of use, unless it becomes impracticable to beneficially use water at the place, in which case the right may be severed and transferred, and become appurtenant to another place, does not affect the rights acquired by one obtaining, for several years prior to the act, water for irrigation from a water company engaged in selling water for irrigation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 143; Dec. Dig. § 128.\*]

#### 2. WATERS AND WATER COURSES (§ 142\*)—WATER COMPANIES—OBLIGATIONS.

A company owning and operating an artificial waterway and diverting water from a natural stream solely for gain by the sale of the water to others, who actually apply it for irrigation, acquires no right to the water except the right to dispose of it for a reasonable compensation, and when the water is once disposed

of to a landowner applying the water for irrigation the control of the company over the water terminates.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 15, 152; Dec. Dig. § 142.\*]

#### 3. WATERS AND WATER COURSES (§ 127\*)—WATER RIGHTS—APPROPRIATION.

There is no absolute property in the waters of a natural stream, and the only right one may acquire thereto is by diverting the waters for a usufructuary purpose, and a water right, to be available, must be attached to the land and become in a sense appurtenant thereto by actual application.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 144; Dec. Dig. § 127.\*]

#### 4. WATERS AND WATER COURSES (§ 133\*)—APPROPRIATION OF WATER—RIGHTS ACQUIRED—"APPROPRIATOR."

One who obtains water for irrigation from a water company, diverting water from a stream into an artificial waterway for sale, is an appropriator of water within the rule that a prior appropriation is a prior right, and the company is but his agent, and the right of user is equivalent to an easement in the artificial way of the company to the extent of the amount of water delivered by the company, which right is contingent only on the acts of the actual appropriator in paying a reasonable compensation for the water obtained.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 146; Dec. Dig. § 133.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 474.]

#### 5. WATERS AND WATER COURSES (§ 142\*)—APPROPRIATION OF WATER—RIGHTS ACQUIRED.

The right of an actual appropriator of water for beneficial use, whether he obtains the water by diverting it from a natural water course or by purchase from a water company, is a part of the freehold.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 15, 152; Dec. Dig. § 142.\*]

#### 6. WATERS AND WATER COURSES (§ 254\*)—APPROPRIATION OF WATER—RIGHTS ACQUIRED.

Where a consumer of water for irrigation obtained the water from a company engaged in the business of diverting water from a natural stream and delivering the same to lands by means of a canal for a valuable consideration, and the company delivered to the consumer annually for several years a specified quantity of water, all used to irrigate the land of the consumer, who improved his property on the faith that the company would continue to deliver water, he obtained an implied contract to obtain water from the company for a reasonable compensation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 311; Dec. Dig. § 254.\*]

Appeal from District Court, Washoe County; Cole L. Harwood, Judge.

Action by Palmira Prosole and another against the Steamboat Canal Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Summersfield & Richards, of Reno, for appellant. Mack, Green & Heer, of Reno, for respondents.



MCCARRAN, J. The appellant company, being the owner of the Steamboat Canal, has for many years been engaged in the business of diverting water from the Truckee river and delivering the same to and upon the lands under that canal for a valuable consideration. It is admitted that for many years last past and until the year 1909 the defendant by means of its canal conveyed to and upon the lands of the respondents, and delivered to respondents, 50 inches of water for a valuable consideration, to wit, the sum of \$6 per annum for each inch of water so conveyed and delivered. It is admitted that in the year 1910 the appellant company refused to deliver to the respondents the usual 50 inches of water, notwithstanding the fact that respondents offered to pay the customary charge for said water. The appellant company in that year delivered to the respondents a much smaller quantity of water and one which was alleged and found by the lower court to be insufficient for irrigation of the lands of the respondents. The case was commenced in the lower court and judgment in that court rendered upon the theory that an annual purchaser of water at a stipulated price, from a corporation engaged solely in the business of diverting water from a natural stream and conveying the same through its own canal and at its own cost, to purchasers thereof, the latter, taking the same from the canal where it is discharged, acquires a prior right to purchase and compel the delivery of such water as he has been accustomed to receive, as against any other purchaser of water flowing in such canal whose initial purchase thereof commenced at a later date than did that of such claimant. The trial court held this to be true as a principle of law and issued an injunction against the appellant company in favor of respondents restraining the appellant from failing to permit 50 inches of water to flow through and from the Steamboat Canal upon the lands of plaintiffs so long as there shall be diverted from the Truckee river and flowing in such canal sufficient water to supply the plaintiffs the said 50 inches of water, and also to supply those who are older in point of time than the plaintiffs as consumers of water from said canal the amount they customarily received therefrom, and also from diverting or permitting the diversion of other waters from said canal so that the said 50 inches of water shall not flow to and upon the lands of plaintiffs so long as plaintiffs will comply with a reasonable regulation of the defendant with regard to said Steamboat Canal and shall pay the defendant any reasonable charge made by it for the transmission and delivery of said 50 inches of water. The appeal in this case is from the judgment only, on the judgment roll alone, and incidentally the question as to whether or not the complaint states facts sufficient to constitute a cause of action is raised.

In reviewing this case we are confronted with somewhat different conditions from those under which and in the light of which other courts have in recent years passed upon this all-important subject. There is nothing in the Constitution of Nevada applicable to this subject from which we may derive any light whatever. In the year 1907 (Laws 1907, c. 18) our Legislature passed an act to provide for the appropriation and distribution and use of the water by which it is declared that all natural water courses and natural lakes and the waters thereof, which are not held in private ownership, belong to the state and are subject to appropriation for beneficial uses. Section 2 of the act is as follows: "All existing rights to the use of water, whether acquired by appropriation, or otherwise, shall be respected and preserved, and nothing in this act shall be construed as enlarging, abridging or restricting such rights." Section 3 prescribes: "There is no absolute property in the waters of a natural water course or natural lake. No right can be acquired to such waters, except an usufructuary right—the right to use it, or to dispose of its use for a beneficial purpose. When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of a natural water course or lake, except at such times as the water is required for a beneficial purpose." Revised Laws of Nevada, §§ 4673, 4674.

The Legislature of Nevada in the year 1913 passed an act to provide a water law for the state of Nevada, and section 4 of this act provides: "All water used in this state for beneficial purposes shall remain appurtenant to the place of use; provided, that if for any reason it should at any time become impracticable to beneficially or economically use water at the place to which it is appurtenant, said right may be severed from such place of use and simultaneously transferred and become appurtenant to other place or places of use, in the manner provided in this act, and not otherwise, without losing priority of right heretofore established; and provided, that the provisions of this section shall not apply in cases of ditch or canal companies which have appropriated water for diversion and transmission to the lands of private persons at an annual charge." Statutes of Nevada 1913, p. 192.

[1] It is our judgment that whatever rights were acquired by respondents in this case, they were not affected by the act of 1913, inasmuch as it is admitted that the respondents received from appellant the amount of water claimed and applied the same to beneficial use at all times between the years 1890 and 1909, or thereabouts. Hence, if the respondents had acquired any rights by the application of this water to a beneficial use, the acquisition of that right was prior to the year 1913, and we are not inclined to view the

latter act as being retrospective in so far as cases of this character are concerned. Moreover, in our judgment, it is unnecessary to either construe the act of 1913 as applicable to the facts in this case, or to apply that act to the facts here presented.

In determining the case at hand no principal proposition is to be determined, i. e., under the facts as presented here, what constitutes appropriation of public waters, and who is the actual appropriator as between the ditch company, by and through whose canal and instrumentalities the public waters are in the first instance diverted, and the owner and reclaimer of lands upon which and over which the waters thus diverted from the public stream are conveyed?

A secondary proposition presents itself, and which in a sense is concurrent in importance to the first or major proposition, i. e., does a perpetual right to the use of water from an irrigating canal, acquired or reserved under contract either expressed or implied, constitute a right in the nature of an easement in the canal which the owner of the canal has no power to cut off so long as the party in whose favor the easement has accrued meets the reasonable demands of the canal owner in the way of charges or recompense for services in the delivery of the water by and through the means of his canal?

[2] This court formerly decided, and the several legislative acts have declared, that there is no absolute property in the waters of any natural water course or natural lake in the state. A canal company, which owns and operates an artificial waterway and diverts water from a natural stream solely for the purpose of gain through the sale and distribution of that water to others who, after receiving the water, actually apply it to the soil for the reclamation and irrigation thereof, can acquire no right to such waters, excepting the right to dispose of its use, and for this latter right they are entitled to reasonable monetary benefit. When water is once disposed of by the original diverting agent—the canal company—to one who, being the owner of irrigable lands, applies the same to those lands, the power of control of the agent ceases, because his only power of control at all was based upon the obligation imposed upon him by law to dispose of the water to those who would actually apply it to the land. The right of a company of this character to divert public waters carries with it a corresponding duty, i. e., to dispose of its use for beneficial purposes. The one cannot exist without the performance of the other. In other words, there is no right created by the mere diversion of water from a public water course. This act of itself carries with it no right; but, when the act of diversion is coupled with the act of application to beneficial purpose, the appropriation is accomplished.

[3] Early legislation in this state formulat-

ed little, if any, law applicable to the subject at hand. It was not until 1903 that an attempt was made to formulate a law applicable to the acquirement and appropriation of the public waters of the state. The act of 1903 (Laws 1903, c. 4) was superseded by the act of 1905 (Laws 1905, c. 46), and that act in turn gave place to the act of 1907 (Laws 1907, c. 18), and the act of 1907 was repealed by the act of 1913 (Laws 1913, c. 140). It is unnecessary in this case for us to take up even incidentally the several acts referred to. Suffice it to say that the act of 1907 was in force at the time at which it is alleged in this case the appellant company failed to deliver the water to respondent. The doctrine that a prior appropriation constitutes a prior right has long since been adhered to in the jurisdictions embraces within the arid and semi-arid region of this country, and has been formulated and announced by this court in former decisions. It cannot be questioned that this doctrine is strictly applicable to the right acquired by one who, being the owner of irrigable lands, directly diverts water from a public stream by means of his own instrumentalities or his own ditch. In the case at hand we are confronted with the question as to whether or not this rule shall be made applicable to those who obtain water from a canal or waterway constructed by another for the purpose of diverting water from a public stream for sale and distribution.

In determining this question it must be constantly kept in mind that absolute property in the waters of a natural stream does not exist; that the only right that one can acquire to such water and the only right by reason of which one can divert such waters from their natural water courses is for a usufructuary purpose and in cases of this character—the purpose of applying the water thus diverted to irrigable lands. In other words, a water right for agricultural purposes, to be available and effective, must be attached to the land and become in a sense appurtenant thereto by actual application.

[4] In this case the appellant company makes no claim based on its ownership or possession of the lands under its canal, and, so far as we are advised by the pleadings, it is not now, nor was it at the time of its construction, the owner of the lands which it sought to cover by the construction of its canal. We deem it fair to assume, therefore, that the sole aim and object and purpose of the construction of the canal and the aim and object and purpose of its operation and maintenance until the present time is for the purpose of disposing of the water which it diverts from the public stream to those who own or possess the lands lying under the ditch. The act of diversion on the part of the appellant company could not, as we have reasoned it, constitute a complete and valid appropriation. It required more than the mere diversion of the water to complete

the appropriation under the doctrine as heretofore referred to. Hence the diversion of the water from the canal of the appellant company and its application to a beneficial use by the owners or possessors of irrigable lands constituted the culminating act in perfecting the appropriation. This latter step, namely, the application of the water itself to the lands for the purpose of reclamation and irrigation, fulfilled the primal and essential object to all legislation and judicial expression upon this subject, i. e., the cultivation of the soil.

The history of the arid West is replete with legislation and judicial expression upon the subject of irrigation. Much of the modern law applicable to this subject has grown out of conditions found prevalent in this region, and the paramount thought, both in the legislative acts of the several states and in the judicial expressions coming from the several jurisdictions, is the actual economic application of the exceedingly scarce, but all-important element, water to the soil, with the end in view that the latter may perform its highest function in producing sustenance for humanity. Hence it follows, as it has been reasoned out by many courts of last resort in able and well-considered opinions, that he who applies the water to the soil, for a beneficial purpose, is in fact the actual appropriator, although the application may be made through the agency of another, who by and through his own means and instrumentalities diverts the water, in the first instance, from its natural course.

As was well stated by the Supreme Court of Arizona in the case of *Slosser v. Salt River Valley Canal Company*, speaking through Mr. Justice Sloan: "The appropriator may thus, immediately, by constructing and owning his own ditch or canal, or, mediately, by acquiring the permanent right to the service of another's ditch or canal, whether the latter be owned by a natural or artificial person, perfect his appropriation. A corporation thus organized for the purpose of furnishing water for agricultural purposes, to be used by others in privity of contract with it, becomes the mere agent of the latter, and, under the statute, may divert from a public stream water which the latter may acquire and use for purposes of irrigation. The measure of its right so to do is the needs and requirements of those owners or possessors of arable and irrigable lands with whom, by contract, it stands in relation as agent. The doctrine of agency, therefore, unless we concede to such corporations a right not enjoyed by other inhabitants under the statute, must be invoked, in order to confer upon them any right to the diversion of water from a public stream." *Slosser v. Salt River, etc., Co.*, 7 Ariz. 376, 65 Pac. 336.

It being our judgment that the rule as asserted in the case of *Slosser v. Salt River, etc., Co.*, supra, is applicable in this case, it follows that the appellant company can be

regarded in no other light than that of the agent for those who, having in years past taken the water from the canal of appellant, have applied the same to beneficial use, and who have thus acquired a right of user equivalent to an easement in the canal of appellant to the extent of the amount of water delivered to them by appellant. This right is contingent only upon the acts of the actual appropriator in meeting the reasonable demands of the conveyor for services performed by way of delivery of the water to the point of diversion from the latter's canal. *People ex rel. Standard v. Canal Co.*, 25 Colo. 213, 54 Pac. 626; 2 *Wiel on Water Rights*, § 1340.

The Supreme Court of Colorado, in the case of *Wright v. Irrigation Co.*, 27 Colo. 313, 61 Pac. 603, held in substance that a contract existing between the company, as the conveyor of the water from the natural stream, and the actual appropriator, is not for the purchase of the given volume of water, but rather the acquirement of the right to use the canal of the conveyor as a means of conducting a given volume, or so much thereof as may be necessary to irrigate a certain number of acres.

The Supreme Court of Idaho, in passing upon this subject in the case of *Farmers' Co-op. Co. v. Riverside Irr.*, 14 Idaho, 450, 94 Pac. 761, adhered to a different rule from that announced by the Supreme Court of Arizona and the Supreme Court of Colorado, wherein the Supreme Court of Idaho said: "The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the use of such water, after having 'once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes,' becomes a perpetual right, subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use."

It must be observed in this respect, however, that the Supreme Court of Idaho in formulating this rule did so under express provisions of its Constitution.

[5] That the right of an actual appropriator or user of water once acquired from the original converter is an easement has been subjected to some considerable criticism by those who have given thought to this subject, and it has been said that to term this right an easement it must be such as would pass as an appurtenance without further description in a conveyance of the realty on which or to which the actual right of user had been exercised. But, applying the doctrine of appropriation as hereinbefore referred to, and, answering this criticism in the light of practical and material observations, it is at once apparent that the very criticism itself is an answer to the proposition on which the criticism is based, because the very right itself, relating as it does to the land upon which it

is applied, although in a sense incorporeal, nevertheless, by reason of its application, becomes an integral part of the freehold. The water and the land to which it is applied become so interrelated and dependent on each other in order to constitute a valid appropriation that the former becomes by reason of necessity appurtenant to the latter. The right of a direct appropriator to use the waters of a public stream and to apply the same to beneficial use has been termed an "incorporeal hereditament," and it has been said that a consumer under a ditch, constructed and maintained for the sole purpose of distribution and sale, possesses a like property. 2 *Well on Water Rights* (3d Ed.) p. 1240, and authorities there cited.

[6] It is the contention of appellant in this case that, inasmuch as plaintiffs allege only an annual delivery of 50 inches of water prior to 1910 and the failure and refusal to furnish such amount of water to respondents in that year, no continuing contract is established thereby between respondents and appellant. This contention is in our judgment not well founded. As disclosed by the record, the respondent went upon the land in question and reclaimed the same, and by and through the continuous use of the water diverted from appellant's canal cultivated and improved the land and caused the land to produce crops. The appellant company, having once furnished the water to respondent, and having by the initial delivery of water and by the continuous delivery thereof for a successive number of years held out to respondent that he could improve the land in question in reliance upon such water, it would be unreasonable to say that the appellant could now deprive respondents of the use of the water so long as the amount of water diverted by respondent was economically essential to the cultivation of the land. Having delivered the water and having observed the acts of respondents in applying the water and improving the land and exerting their energies toward the creating and upbuilding of property based upon a faith and a justifiable expectation that the company would continue to deliver the water, the appellant, in our judgment, cannot now be heard to deny the existence of an implied contractual relation between itself and respondents.

Following out the reasoning that he who actually applies the water to the soil is the appropriator, even where he obtains the water from the canal of one who has diverted it for distribution, the law of appropriation must apply to determine his right as against other users from the same canal or system. Hence the rule that a prior appropriation constitutes a prior right applies to the appropriators of water, where the appropriation is made by and through the agency of another, as well as where the appropriation is made directly from the public stream. The re-

spondents in this case were entitled to the amount of water formerly diverted and used by them so long as the delivery of that water to them did not interfere with those whose rights of appropriation under the same system were prior in point of time. *Lanning v. Osborne* (C. C.) 76 Fed. 319; *Mandell et al. v. San Diego Co.* (C. C.) 89 Fed. 295. As was said by Judge Ross in the case of *Mandell v. San Diego, etc., Co.*, supra: "A consumer whose land is situated within the flow of such a distributing system, \* \* \* and who has, by means of water thereby supplied to him, made valuable improvements on his land, cannot be thereafter lawfully deprived of such water in order that the distributor may supply later comers, even though a larger area, by reason of more favorable conditions, may thus be brought under cultivation. Such a rule would manifestly work destruction to the just and well-established rule that in cases like this the first in time is the first in right."

It is the duty of the diverting corporation, in cases of this kind, where a consumer has once established a right to the use of water by acquiring the same and applying it to a beneficial purpose, to continue to furnish him water in preference to later applicants, provided he has never waived his rights nor forfeited the same. The company has the right, and it is its duty, to discriminate between appropriators of water from their irrigation system, giving the preference to those appropriators who are oldest in point of time. In cases of this character the company is but a diverter, inasmuch as its only purpose and power is to divert the water from the natural waterway. The consumer is the converter, inasmuch as it is he who converts the water to the land covered by the canal, and, having once applied the water to the land for beneficial purposes, he should not be deprived of the use or benefit of such water in favor of later applicants, so long as he complies with the reasonable requirements of the diverting company. 3 *Kinney, Irr. & Water Rights*, § 1500.

The question as to the amount of damages assessed by the jury in the trial court in this case is not before us.

The judgment should be affirmed.

It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

DARROUGH v. NEVADA MILLING & ORE PURCHASING CO. (No. 2082.)

(Supreme Court of Nevada. May 15, 1914.)

CORPORATIONS (§ 432\*)—REPRESENTATION BY OFFICERS AND AGENTS—EVIDENCE AS TO AUTHORITY.

In an action against a corporation upon a note, defended upon the ground that the person executing the note was not its president, either de jure or de facto, because not a stock-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't. Indices

holder, evidence held to sustain a finding that he was a stockholder and president with authority to execute the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.\*]

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by Mrs. J. T. Darrough, administratrix, against the Nevada Milling & Ore Purchasing Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

P. E. Keeler, of Long Beach, Cal., for appellant. F. K. Pittman, of Tonopah, for respondent.

MCCARRAN, J. In this action Mrs. J. T. Darrough, as administratrix of the estate of J. T. Darrough, deceased, sued to recover \$4,000, loaned by her deceased husband to C. S. Lemon, as president of the Nevada Milling & Ore Purchasing Company, a New Jersey corporation. From the judgment of the trial court in favor of respondent, and from the order of that court denying appellant's motion for a new trial, appeal is taken.

It is the contention of appellant herein that C. S. Lemon was not the president of the Nevada Milling & Ore Purchasing Company, either de facto or de jure, for the reason that no shares of stock had been issued to C. S. Lemon, and under the laws of New Jersey the holding of stock in a corporation is made a prerequisite to qualification for office in the corporation. It is admitted by appellant that the money was loaned by respondent to C. S. Lemon, and that the note given in security for the loan was signed by C. S. Lemon, as president of the Nevada Milling & Ore Purchasing Company. They contend, however, that although the money borrowed by Lemon from J. T. Darrough was used in the construction of a mill at Manhattan, nevertheless, the appellant company was not liable for the loan, for the reason that Lemon was an independent contractor, and was constructing the mill under an agreement with appellant company to turn the same over to appellant company when it was completed. It is the contention of the appellant that the mill, never having been completed by Lemon, was never turned over by Lemon to the appellant company, and was never accepted by the appellant company.

The uncontradicted testimony of Mrs. Davidson, bookkeeper for the appellant company and employed by C. S. Lemon, president and general manager of the company at Manhattan, is to the effect that the money borrowed from Darrough was used in paying off debts incurred in the construction of the mill, and for labor performed in and about the same. In that respect she testified as follows: "Q. Were you working for said company during the month of November, 1907? A. Yes. Q. If you answer the pre-

ceding question in the affirmative, state whether or not you are familiar with the execution of a note of \$4,000, on the 6th day of November, 1907, in favor of J. T. Darrough, for money loaned to the company for paying the debts of the company. A. Yes. Q. If you answer the preceding question in the affirmative, state the facts within your own knowledge concerning the execution of said note. A. I know within my own knowledge Charles S. Lemon borrowed from J. T. Darrough, for the use of the company in paying its debts and defraying the expenses of said company, and the money was used for that purpose. Q. If you know, state what was done with the money received from J. T. Darrough in consideration of the execution of said note. A. It was used for defraying the expenses of the company and paying its debts. \* \* \* Q. State what authority, if you know, the party executing said note had for executing the same on behalf of said the Nevada Milling & Ore Purchasing Co. A. Charles S. Lemon negotiated and made contracts for the purchasing of all ore for said company, and bought all the machinery for the company, and fitted the entire mill complete, and hired all men, and he was the only official of said company at that time in Manhattan."

At the trial of the cause in the lower court the appellant herein introduced in evidence certain pages of the minute book kept by the corporation, and respondent introduced the remainder of said book in support of her contention. From the record it appears that the minute book introduced in evidence is a bound volume, the pages of which are firmly fastened, constituting one book or volume. This is significant only in so far as it indicates that certain minutes, although not signed by the secretary, are, however, in the same volume in which other minutes appear duly signed. It appears from this record that the first meeting of the stockholders of the Nevada Milling & Ore Purchasing Company was held at Camden, N. J., March 25, 1907, and at that meeting the stockholders passed a resolution and caused the same to be entered upon the minutes, which resolution is as follows: "Whereas, Clifford McClellan and Chas. S. Lemon, have offered to sell to this company property as follows: The use of the Griffin process for saving gold and silver, also certain valuable contracts in hand including a contract with Douglas and Kendall, leases for the treating of ores now on their dumps. Also the Manhattan Mining Company, Chipmonk Mining Co., the Original Manhattan Mining Company, the Manhattan Consolidated Mining Company, and the Seyler-Humphreys Mining Company, all bearing date of January 15, 1907. Also buildings and all requisite machinery to complete and operate a mill or at least nine stamps together with mill site and water rights for same; in consideration

of the issue of stock of this company to the amount of one hundred thousand dollars (\$100,000) par value; and whereas, it appears to the stockholders that such property is necessary for the business of this company, and that the same is of the value of one hundred thousand dollars (\$100,000); resolved, that the board of directors of this company be and they are hereby authorized and directed to purchase the said property above mentioned for the said price and to issue said stock in payment thereof; provided, that in the judgment of the board of directors, the said property is of the value above stated. \* \* \* Resolved, that the board of directors be and they hereby are authorized and directed to accept said property as full payment of the subscription for stock of the incorporators, and to issue full-paid stock to the incorporators, or their assigns, to the amount of their respective subscriptions."

Following the meeting of the stockholders, and on the same date, the directors held a meeting, at which meeting F. R. Hansell was elected president, and George H. Martin was elected secretary, and at the same meeting the board of directors, pursuant to the authorization passed by the stockholders, adopted a resolution and caused the same to be entered upon their minutes, part of which is as follows: "Resolved, that this company accept the offer of Clifford McClellan and C. S. Lemon to sell to this company the property described in the resolution of the stockholders passed March 25, 1907, authorizing the purchase, and the board of directors do hereby adjudge and declare that said property is of the fair value of one hundred thousand dollars, and that the same is necessary for the business of this company. \* \* \* Further resolved, that the president and the treasurer be and they hereby are authorized and directed to issue to the order of said vendors the full-paid capital stock of this company to the aggregate amount of one hundred thousand dollars, as provided in said agreement."

The waiver of notice, as signed by the directors and filed in the minutes of the meeting of March 25th, at which meeting the foregoing resolution was passed, shows that the directors' meeting was held for the purpose of electing officers, and to authorize the purchase of property necessary for the business of the company. The total authorized capital stock of the company, according to its articles of incorporation, was \$100,000, and as appears from the foregoing resolution passed by the stockholders of the corporation at their first meeting, and by the directors of the corporation at the first meeting of their board, the entire authorized capital stock of the company was directed to be issued to McClellan and Lemon, the vendors, in payment for the property mentioned in the resolution. This resolution was passed by the stockholders, at their first meeting, and designated the property as the Griffin

process for saving gold and silver, contract with Douglas and Kendall for treating ores on the dumps of their mining property, contracts with the Manhattan Mining Company, the Chipmonk Mining Company, the Original Manhattan Mining Company, the Manhattan Consolidated Mining Company, and the Seyler-Humphreys Mining Company, also a mill site and water rights for the same, and buildings and requisite machinery to complete and operate a mill of at least nine stamps. The president and treasurer being, by the board of directors, authorized and directed to issue the full capital stock of the company, amounting to \$100,000 to Lemon and McClellan, the presumption must be that the officers of the corporation did as they were directed to do by their board of directors, and it must reasonably follow that the entire capital stock of the corporation was issued to McClellan and Lemon, pursuant to the direction of the board of directors; hence, it is manifest that C. S. Lemon became the holder of stock in the corporation on the 25th day of March, 1907. Moreover, the stockholders of the corporation recognized C. S. Lemon as a holder of stock, for it appears that at 12 o'clock on the same day on which the foregoing transactions took place, to wit, the 25th day of March, a special meeting of the stockholders of the company was held, at which special meeting the resignations of F. R. Hansell, as president, and George H. B. Martin, as secretary and treasurer, were presented, and on motion accepted by the company and at the same time Charles S. Lemon, Clifford McClellan, and Charles A. Porter were nominated directors of the company to serve for the unexpired terms of the directors resigned. It further appears that at 2:30 p. m. on the same day, to wit, the 25th day of March, 1907, pursuant to waiver of notice signed by all the directors, a directors' meeting was held, at which meeting Mr. Charles S. Lemon was elected president.

Prior to the election of Lemon as president of the corporation it appears that an agreement for the purchase of property was entered into between Lemon and McClellan, as vendors, and the Nevada Milling & Ore Purchasing Company, acting by and through F. R. Hansell, its president, and George H. B. Martin, its secretary, and part of which agreement is as follows: "Whereas, the board of directors of the company have ascertained, adjudged and declared that the said property and rights are of the fair value of one hundred thousand dollars (\$100,000) and that the acquisition thereof is necessary for the business of the company and to carry out its contemplated objects; now therefore, this agreement witnesseth: That the vendors have sold, assigned, transferred and set over, and do hereby sell, assign, transfer and set over unto the company, its successors and assigns, all their right, title, and interest in and to the following described property, to

wit: \* \* \* Also buildings and all requisite machinery to complete and operate a mill of at least nine (9) stamps together with mill site and water rights for same."

Whatever might be contended by appellant as to the acts of Mr. Lemon being void for want of authority, it cannot, in our judgment, be contended that the acts of the board of directors of the company, of which board of directors F. R. Hansell was president, were other than valid, and the words used in the agreement for the purchase of the property, as disclosed by the instrument appearing in the minutes, signed by F. R. Hansell as president, and as heretofore set forth in part, are words signifying conveyance, and cannot in our judgment be viewed in any other light than as an absolute conveyance of the property enumerated in the agreement from McClellan and Lemon, as vendors, to the Nevada Milling & Ore Purchasing Company, appellant herein. The contention of appellant as to the acts of Lemon being void for the reason that he was not a stockholder of the corporation, and hence could not legally hold office as president, is, in our judgment, not well founded, in view of the minutes of the corporation, reference to which have heretofore been made. In our judgment, Lemon was undoubtedly a holder of stock in the corporation on the 25th day of March, 1907. But, whether Lemon was or was not the legally constituted president of the corporation, the transaction between Lemon and McClellan, as vendors, and the appellant corporation was unquestionably completed on the 25th day of March. Prior to the time at which Lemon took office as president, the property as enumerated in the several instruments found in the minutes had been offered to the stockholders at their meeting by Lemon and McClellan, as vendors. The stockholders of the corporation recommended that the board of directors purchase the property and issue the entire paid-up capital stock of the corporation in payment; the board of directors in turn declared the property to be worth the sum of \$100,000, and directed the issuance of the full paid-up capital stock of the company to the aggregate amount of \$100,000 to Lemon and McClellan.

The contention of the appellant company as to Lemon being an independent contractor in the construction of the mill, and that the mill was never taken over by the company from Lemon is, in our judgment, not well founded, in view of the resolution passed by the board of directors and appearing in the minutes of the company and of date of September 4, 1908, in which resolution the following appears: "Whereas, the said company is the owner of a certain ten stamp-mill in the town of Manhattan, county of Nye, state of Nevada, commonly known as the 'Lemon Mill'; and whereas, the company has at and before the execution of this

agreement with cash contributed or advanced to it, paid in full all labor claims against said mill so that all labor liens against said mill may be forthwith released; \* \* \* and whereas, the company has in like manner furnished a bond of a duly qualified surety company for the release of all attachments against the said mill and furthermore will, after the execution hereof, make any necessary arrangements to provide like bonds to relieve the said mill from any attachments to be levied against it hereafter on account of the company's indebtedness so that the lessee, in the agreement hereinafter mentioned, may have uninterrupted possession and control of said premises during the term of said agreement." By the resolution as it appears in the minutes of the corporation, of which the foregoing is a part, it is apparent that the corporation recognized liens against the mill, and liquidated the same as debts against the corporation incurred under the direction and management of Charles S. Lemon. Moreover, they expressly declared their ownership of the mill, thereby declaring that the mill, although not completed, was built by Lemon, acting for and in behalf of the company.

Bernard Ruckdeschel, one of the principal witnesses for the appellant company, testified in his deposition relative to purchasing certain lien claims against the Lemon Mill, and in that respect the witness said: "I consulted the attorney for the company because I was not willing to make any move towards purchasing these claims unless I was assured that the company recognized them as absolute and exclusive first liens against its property."

It appears from the minutes of the corporation that attorney Frederick L. Berry, of Tonopah, was, by resolution, made the fiscal agent for the corporation in the state of Nevada, and, as appears from the record, he was later made attorney for the corporation to represent it in certain suits in which the corporation was made defendant and in which labor liens were filed against the Lemon Mill, as the property of appellant company. The deposition of Frederick L. Berry was offered in behalf of the appellant company in the trial court, and in that deposition he testifies as follows: "Q. Did you know one Charles S. Lemon? A. Yes. Q. What connection did he have with the property on which the liens were placed [referring to the case of Giffen v. Nevada Milling & Ore Purchasing Co.]? A. He was the manager of said property referred to in question 19. Q. Was he the manager of the place and have complete charge of said property? A. Yes. Q. Did he ever admit to you the correctness of claims as set forth in plaintiff's complaint [referring to Veith v. Nevada Milling & Ore Purchasing Co.]? State where, when, and under what conditions it was. Answer fully. A. He did.

Early in the month of April, 1908, at Manhattan, Nev., in what was known as the Patterson-Mikulich building, he exhibited to me his time books and books of account, checking over each item mentioned therein, and, after devoting at least two hours thereto, stated that the claims were correct. This statement was made in the presence of Bernard Ruckdeschel, and Horace G. Williams, who were then and there present giving the matter their undivided attention. Q. In what capacity was he acting when he made statements as set forth in your answer to question 21? A. He was acting as manager of the Nevada Milling & Ore Purchasing Company."

In accordance with the by-laws of the company the president was invested with the general and active management of the business of the company, and was empowered to execute bonds, mortgages and other contracts under the seal of the company. In the suits commenced for the foreclosure of labor liens filed against the Lemon Mill, the appellant company appeared and filed its pleadings in defense thereto, and in each instance C. S. Lemon, in verifying the pleadings in behalf of the appellant company, made oath that he was the president of the same, and in each instance Mr. Frederick L. Berry, the duly authorized agent for the appellant company, appeared as attorney for the company in the presentation of its pleadings and defenses.

The whole record discloses acquiescence on the part of the appellant company in the acts of C. S. Lemon. Moreover, the record discloses that C. S. Lemon, at the time of his election as president of the corporation, was unquestionably a holder of stock in the corporation. As president of the corporation, he took up his headquarters in the town of Manhattan for the purpose of generally managing the affairs of the corporation, and when the property which he was constructing became involved in litigation, growing out of labor liens, the company assumed the responsibility, and, as its resolution shows, paid in full all labor claims against the mill known as "the Lemon Mill," and, as is disclosed by the resolution, these labor liens were paid with cash "contributed or advanced to the company."

The testimony of Mrs. Davidson is to the effect that the money borrowed from J. T. Darrough, of whose estate the respondent is the duly authorized administratrix, was "for the use of the company in paying its debts and defraying the expenses of said company, and the money was used for that purpose." The loan was negotiated by C. S. Lemon, as president of the appellant company. The money was secured by a note signed by the appellant company, by C. S. Lemon, president, and these acts of Lemon were performed during the time at which the company,

by resolution duly adopted by its board of directors, made open declaration, by filing its list of officers with the Secretary of State of the State of Nevada, that Charles S. Lemon was its duly elected and qualified president.

The judgment of the lower court should be affirmed.

It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

STATE ex rel. WOOD v. BOARD OF COMRS OF TETON COUNTY.  
(No. 3464.)

(Supreme Court of Montana. April 22, 1914.)

1. COUNTIES (§ 13\*)—ORGANIZATION—PETITION—REQUISITES.

Under the statute providing that, when it is sought to divide any counties and form a new county, a petition signed by at least one-half of the qualified electors of the proposed new county, whose names appear on the official registration books at the last general election, shall be presented to the board of county commissioners of the county, from which the largest area is proposed to be taken, and that, where the proposed county is to be formed from two or more counties, separate petitions shall be presented from the territory taken from each, and each petition shall be signed by at least one-half of the qualified electors of each proposed portion, a petition for a new county out of territory of two existing counties need only be signed by one-half of the qualified electors of the territory proposed to form a new county, as shown by the official registration books at the last general election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 13.\*]

2. COUNTIES (§ 13\*)—NEW COUNTIES—ORGANIZATION—COUNTER PETITIONS.

A counter petition for the exclusion of territory from a new county, sought to be organized, must contain the signatures of at least 50 per cent. of the qualified electors resident in the territory sought to be excluded, and the burden is on the counter petitioners to show that fact on the hearing.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 13.\*]

3. COUNTIES (§ 13\*)—ORGANIZATION—COUNTER PETITION—VERIFICATION.

A verification to a counter petition asking for the exclusion of territory sought to be included in a new county, to be organized, which merely avers that each affiant believes that the counter petition is signed by at least 50 per cent. of the qualified electors of the territory sought to be excluded, does not show that the counter petition was so signed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 13.\*]

4. COUNTIES (§ 13\*)—ORGANIZATION—COUNTER PETITION—VERIFICATION.

Under the New Counties Act, which does not require that counter petitions for exclusion of territory sought to be included in new counties to be organized shall be verified, an affidavit to a counter petition for the exclusion of territory is not evidence of the facts averred in the affidavit, since the functions of affidavits are defined by Rev. Codes, §§ 7792-7898, and their use is confined to pleadings and papers as are required to be verified.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 13.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



5. COUNTIES (§ 13\*)—ORGANIZATION OF NEW COUNTIES—BOARD OF COUNTY COMMISSIONERS—ACTION—REHEARING.

The board of county commissioners ordering an election on the subject of organizing a new county, and adjourning sine die, has no authority to grant a rehearing on petition therefor by qualified electors residing in the territory sought to be excluded from the proposed new county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 10; Dec. Dig. § 13.\*]

Mandamus by the State, on relation of Royal S. Wood, against the Board of County Commissioners of Teton County. Alternative writ vacated, and proceedings dismissed.

Norris & Hurd, of Great Falls, for relator. Freeman & Thelen, of Great Falls, and Phil I. Cole, of Choteau, for respondent.

SANNER, J. Certain petitions for the creation of Toole county out of portions of Teton and Hill counties were presented to the board of county commissioners of Teton county and set for hearing on January 8, 1914. On that date the board convened, heard the petitions, held the same to be sufficient, and ordered an election for April 25, 1914. The relator challenges the proceedings upon the grounds: (1) That the petition from Hill county was not signed by 50 per cent. of the qualified electors resident in the territory described therein; and (2) that on January 7, 1914, a counter petition, seeking the exclusion of a portion of such territory, was duly filed, signed by more than one-half of the qualified electors resident in such portion which counter petition the board refused to grant. If the relator's position is sound in either respect, the proposed new county cannot, for lack of sufficient valuation, be created. A peremptory writ of mandate is sought to compel the board to reconvene and give proper legal effect to the counter petition for exclusion and to the original petition from Hill county, by granting the one and denying the other.

[1] The specific complaint against the original petition from Hill county is that the territory affected contains not less than 800 resident qualified electors; that said petition, after allowing for withdrawals therefrom, had but 371 signers, which was less than 50 per cent. of the qualified electors; and that the board, in determining said petition to be sufficient, relied, not upon the statutory verification thereto, but upon the testimony produced, and instead of ascertaining the number of qualified electors resident in the territory affected on January 8, 1914, used as a basis the registration list of Hill county for the general election of 1912. To establish the contention that this proceeding was inadequate, reliance is placed upon the decision of this court in *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297. The most cursory examination of the *Furnish* decision will demonstrate that it is rigidly

confined to counter petitions for exclusion, and does not in terms or effect apply to original petitions for the creation of new counties. There was a reason for this, and it may be found in the language of the act then and now under consideration. We remarked: "The Legislature could have said that a counter petition to exclude territory should be signed by 50 per cent. of the qualified electors thereof whose names appear upon the great register, but it did not say that, and the conclusion must be that it did not mean that, unless by such a conclusion the statute is rendered inoperative or unconstitutional." Now, whatever may have been the reasons, that is, what the Legislature did say, in effect, in prescribing the character of the original petitions, for the act in express terms provides: "Whenever it is desired to divide any county or counties and form a new county out of a portion of the territory of such then existing county or counties, a petition shall be presented \* \* \* to the board of county commissioners of the county from which the largest area of territory is proposed to be taken. \* \* \* Such petition shall be signed by at least one-half of the qualified electors of the proposed new county, whose names appear on the official registration books used at the general election held therein last preceding the presentation of said petition." The unmistakable meaning of this language is claimed to be destroyed by the proviso immediately following, viz.: "That, in cases where the proposed new county is to be formed from portions of two or more existing counties, separate petitions shall be presented from the territory taken from each county; and each of said separate petitions shall be signed by at least one-half of the qualified electors of each of said proposed portions"—but it is quite clear to our minds that this is a subsidiary, precautionary provision designed, not to change the qualifications of the signers as fixed in the principal clause and which the Legislature apparently thought it unnecessary to repeat, but to guard against another possibility. To illustrate by the present case: It could be maintained, without the above proviso, that the proceedings to create Toole county were properly initiated if the petition or petitions for the whole territory to be embraced in the proposed new county contained the signatures of 50 per cent. of the registered electors thereof, notwithstanding that 50 per cent. of such electors residing in the portion to be taken from Hill county had not expressed their assent. The obvious purpose of the proviso was to prevent any such situation.

That no distinction was intended to be based upon the creation of a new county wholly out of one old county, on the one hand, or out of two or more old counties, on the other, is suggested by the requirements

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

of the act touching the manner of verifying the petitions. "There shall be attached to \* \* \* said petition or petitions the affidavit of three qualified electors and taxpayers within each county sought to be divided, to the effect \* \* \* that it is signed by at least one-half of the qualified electors of the proposed new county, or of the proposed portion thereof taken from each existing county, where the proposed new county is to be formed from portions of two or more existing counties, \* \* \* and that each of such persons so signing was a qualified elector of such county therein sought to be divided, at the date of such signing." The reference here is undoubtedly to such qualified electors as are eligible for signers; else the verification is useless. But unless we arbitrarily strike from the act the provision that the petition must be signed by at least one-half of the registered electors of the proposed new county, it follows that, as regards the creation of a new county out of one old one, the signers must be (a) qualified electors of the territory affected, (b) whose names appear on the registry for the preceding general election, and (c) who constitute in number 50 per cent. of all such persons. This, in effect, was the holding in *State ex rel. Bogy v. Board of County Commissioners*, 43 Mont. 533, 117 Pac. 1062; and, if it be true of a petition for the creation of a new county out of one old county, the identity of language used makes it true where the new county is sought to be created out of more than one old county. The same consideration applies with regard to what the board must find, viz.: "That said petition contains the genuine signatures of at least one-half of the qualified electors of the proposed new county, or in cases where separate petitions are presented from portions of two or more existing counties as herein required, that each of said petitions contains the genuine signatures of at least one-half of the qualified electors of that portion," etc. This language, standing alone, would under *State ex rel. Lang v. Furnish*, supra, be held to refer to persons possessing the constitutional qualifications of an elector, but it does not stand alone. It has distinct relation and reference back to the original requirement of the act touching the qualifications of signers. *State ex rel. Bogy v. Board of County Commissioners*, supra. As these must, in the case of a new county sought to be created wholly out of an old county, be electors who have registered, so they must be in the case where the new county is sought to be created out of portions of two or more old ones, because there is no warrant in the language for discrimination.

The county commissioners of Teton county were therefore correct in adopting the previous registration as a criterion to determine whether a sufficient number of persons had signed the original petition from Hill county. The verification to the petition, and the evi-

dence taken, alike disclose, and the relator does not question, that the 371 persons whose names remained upon the Hill county petition after allowing all withdrawals constituted at least 50 per cent. of the qualified electors of the territory affected who had registered for the preceding general election. The relator's first contention, therefore, cannot be upheld.

[2] 2. It was not only necessary that the counter petition in question contain the genuine signatures of at least 50 per cent. of the qualified electors resident in the territory sought to be excluded, but the burden was upon the counter petitioners to show that fact upon the hearing. *State ex rel. Lang v. Furnish*, supra. No effort whatever was made to sustain this burden, but, as stated by counsel, the counter petitioners "stood upon their petition." Not only did they do this, but vigorous resistance was offered on their behalf to the examination of two of the witnesses whose oath effected such verification. Much might be said concerning the attitude of these persons regarding the proceedings, and it is insisted that the board was justified in treating the verification as valueless on account of their testimony and conduct at the hearing. This it is not necessary to conclude, because the verification was valueless for other reasons.

[3] In the first place, it does not assert that the counter petition is signed by at least 50 per cent. of the qualified electors of the territory described, but merely that each of the verifiers believes such to be the case. Assuming that such verification might suffice to give status to a pleading or paper required by law to be verified, it could not under the most liberal view be taken as evidence of anything more than the belief of the verifiers. But it is the fact itself that is of importance, and proof of a mere belief of that fact does not suffice. *Benep-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024.

[4] Moreover, the New Counties Act does not require that the counter petitions for exclusion of territory be verified. Attention was called to this fact in the *Furnish* case, where it was said they could not be taken as prima facie evidence that the signers constituted 50 per cent. of the qualified electors of the territory sought to be excluded, without an affidavit to that effect. We now go further and say that, since the statute neither requires such verification nor authorizes the acceptance of it as probative, the counter petition, though verified, cannot be given any evidentiary value. The functions of an affidavit in this state are defined by article 2, c. 3, tit. 3, pt. 4, of our Revised Code of Civil Procedure, and their use for giving prima facie verity to pleadings and papers is confined to such as are required to be verified. While, as remarked in *State ex rel. Arthurs v. Board of County Commissioners*, 44 Mont. 51, 118 Pac. 804, the proceedings under the

New Counties Act are in a sense informal, and the board is to be viewed as the people's forum where the layman can be heard without the aid of counsel; yet the matter is by no means haphazard. The petitions and counter petitions are in the nature of pleadings, final action is taken when the election is ordered, such final action is made to depend upon evidence, and the evidence must be of a character to warrant it. In the absence of statutory authority, an affidavit is not such evidence. 2 Cyc. 35; 1 R. C. L. 766.

The relator insists, however, that the verification of the counter petition is *prima facie* evidence under the Arthurs Case; but this is a misapprehension of the purport of that decision. No question of proof was before the court in that case; the question being whether the counter petition was sufficient as such. The body of the counter petition failed to state certain facts, but these were stated in the verification, and we said that the body could be aided by the verification so as to make a complete statement of facts; and so we should hold concerning the counter petition at bar, had its sufficiency as such been attacked. The question here is upon the quantum of proof, and for that the Arthurs Case is no authority.

Since it was not shown to the board that 50 per cent. of the qualified electors of the territory sought to be excluded had signed the counter petition in question, the denial of it was proper.

[§] 3. After the order calling the election had been made and the board had adjourned *sine die*, a petition for rehearing was addressed to the board and filed on March 5, 1914, wherein it was offered to show, among other things, that the number of qualified electors resident in the territory sought to be excluded was not to exceed 64, and that the counter petition for exclusion contained the genuine signatures of 42 of such electors. This petition was denied, and rightly so. We know of no provision or principle authorizing the granting of a rehearing by the board in such cases. The order for the election had gone forth; it was valid on the facts presented; and there was nothing further for the board to do.

The alternative writ heretofore issued herein is vacated, and the proceedings are dismissed at the relator's costs.

Dismissed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE ex rel. FOSTER v. RITCH et al.  
(No. 8471.)

(Supreme Court of Montana. April 22, 1914.)

COUNTIES (§ 16\*)—CREATION OF NEW COUNTIES—ADJUSTMENT OF RIGHTS AND LIABILITIES—"COUNTY PROPERTY."

Bridges, which are declared by Rev. Codes, § 1337, as amended by Laws 1913, c. 72, § 3,

to be part of the public highway, are not "county property" within the meaning of that term as used in Laws 1911, c. 112, § 7, requiring the value of such property to be ascertained and considered in the adjustment of the property rights and liabilities between an old county and a newly created county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 12-15; Dec. Dig. § 16.\*]

Original proceedings in Supreme Court by the State of Montana, on the relation of C. A. Foster, against John B. Ritch and others as Board of Commissioners appointed to adjust the indebtedness and property of Valley and Sheridan Counties, upon the creation of Sheridan County. Application dismissed.

Galen & Mettler, of Helena, for relator. D. M. Kelly, Atty. Gen., and J. H. Alvord and C. S. Wagner, Asst. Attys. Gen., for respondents.

HOLLOWAY, J. Upon the creation of Sheridan county from a portion of Valley county, the commission appointed by the Governor to adjust the property rights and indebtedness reported that the new county owed the old one \$108,436.98. This proceeding was instituted by a resident taxpayer of Sheridan county to compel the commission to reassemble and to reapportion the indebtedness. The ground of complaint is that, notwithstanding there were "in Valley county, Mont., divers and sundry expensive steel bridges, aggregating in value at that time more than \$162,000, and there were then located in Sheridan county bridges aggregating in value not to exceed the sum of \$54,000," the commission declined to consider the value of these bridges in determining the net indebtedness of Valley county and the proportion thereof properly chargeable to Sheridan county.

The only question for determination upon this application is whether "bridges" are to be deemed county property, within the meaning of that term as used in section 7, chapter 112, Laws of 1911, and their value to be ascertained and employed in the final adjustment of the property rights and liabilities of the old county and the new one. We are not furnished any information by this application as to the character of the bridges referred to, or the source from which the funds employed in their construction were obtained. The description is in the most general terms, and, in the same way we say that bridges, generally speaking, are not such county property as that their value shall enter into consideration in the adjustment of the indebtedness of the old county with the new one. A bridge is to be treated as but a portion of a public highway. *Reid v. Lincoln County*, 46 Mont. 81, 125 Pac. 429; *State ex rel. Horsley v. Carbon County*, 38 Utah, 563, 114 Pac. 522; *Independent Highway Dist. v. Ada County*, 24 Idaho, 416, 134 Pac. 542. Indeed, that question is settled by our own Code. Section

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1837, Revised Codes, as amended by section 3, chapter 72, Laws of 1913, provides: "All highways, roads, lanes, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property are public highways." It was clearly not the intention of our Legislature that all public highways, including the roads, streets, alleys, courts, culverts, and bridges composing the same, should be appraised as county property, and the value, thus set upon them, considered in adjusting the county indebtedness. It may be that a bridge upon a road which has been abandoned has a distinct, independent value, and bridges constructed from special funds created by the sale of bonds, or otherwise, may possess the character of "county property," in the sense in which that term is used in the act now under consideration; but those questions are not before us now, and cannot be considered in this proceeding.

Upon the record as presented, the relator is not entitled to any relief, and the application is therefore dismissed.

Dismissed.

BRANTLY, C. J., and SANNER, J., concur.

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**STATE ex rel. COTTER v. DISTRICT  
COURT OF LEWIS AND CLARK  
COUNTY et al. (No. 3452.)**

(Supreme Court of Montana. April 22, 1914.)

**1. EXECUTORS AND ADMINISTRATORS (§ 17\*)—  
APPOINTMENT OF ADMINISTRATOR—PREFERENCE RIGHT.**

The surviving husband or wife is, under Rev. Codes, § 7432, entitled to letters of administration to the exclusion of any other person unless a ground of incompetency enumerated in section 7436 is shown, and a refusal to give the preference in the absence of a showing of incompetency is violative of section 7472.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

**2. STATUTES (§ 106\*)—TITLE—REVISION OF  
STATUTES—"GENERAL REVISION."**

A single act which has for its purpose a revision by amendment of all the Code provisions on a subject and simply mentioning in the title the sections intended to be revised by amendment is a "general revision" act within Const. art. 5, § 23, providing that no bill, except bills for general revision of the laws, shall contain more than one subject expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 119, 120; Dec. Dig. § 106.\*]

**3. STATUTES (§ 105\*)—TITLE.**

In the absence of any constitutional provision on the subject, an act may be enacted without any title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.\*]

**4. STATUTES (§ 105\*)—TITLE—REVISION OF  
STATUTES.**

The prohibition in Const. art. 5, § 23, providing that no bill, except general appropriation bills and bills for the revision of the laws,

shall be passed containing more than one subject expressed in the title, is aimed at ordinary legislation only, and the purpose is to prevent fraud and to notify the people of the subjects of legislation that are being considered that they may have an opportunity of being heard thereon.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 106.\*]

**5. STATUTES (§ 106\*)—TITLE—REVISION OF  
STATUTES.**

Where the Code commissioners presented for adoption by the Legislature four Codes, which, with amendments thereto, were adopted, and, pending the adoption, a bill entitled "An act to amend sections 90, 95, 110 and 112 of the Civil Code" was introduced and became a law subsequent to the adoption of the Civil Code, the bill must be deemed a revision measure within the exception in Const. art. 5, § 23, and a provision in the body thereof repealing section 91 of the Civil Code carried into Rev. Codes, § 3657, was valid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 119, 120; Dec. Dig. § 106.\*]

**6. STATUTES (§ 219\*)—CONSTRUCTION—CON-  
STRUCTION BY OTHER DEPARTMENTS—EF-  
FECT.**

Where successive Attorneys General declared that a statute governing the remarriage of divorced persons had been repealed, the court, in case of doubt, would hesitate before adjudging the statute in force.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.\*]

Application by the State, on the relation of Harry C. Cotter, against the District Court of Lewis and Clark County and the Judge thereof for a supervisory order annulling an order of the district court. Order annulled with directions.

W. D. Rankin, of Helena, and H. A. Frank, of Butte, for relator. G. B. Nolan, of Helena, for respondents.

BRANTLY, C. J. On December 22, 1913, Mary Margaret Cotter died in Lewis and Clark county, leaving a will in which Thomas Cruse, her father, is named as her sole legatee. The will does not designate an executor. On December 29th Thomas Cruse filed in the district court a petition asking that the will be admitted to probate and that he be appointed administrator with the will annexed of the estate of the deceased. On January 9, 1914, the relator herein, as surviving husband of the deceased, appeared to contest the will by filing written grounds in opposition to the probate of it. At the same time he presented to the court a petition asking that he be appointed special administrator pending a determination of the contest. On January 16th Thomas Cruse filed his petition asking that he be appointed, presenting therewith, in writing, objections to the appointment of the relator on the grounds, among others, that he is not the surviving husband of the deceased, and that he is incompetent to act as administrator by reason of his improvidence. The petitions and objections were heard together, with the result that on January 27th the court

made and caused to be entered an order denying the petition of the relator, and appointing Thomas Cruse. Thereupon, there being no appeal, the relator applied to this court for a supervisory order annulling the order of the district court and directing the appointment of himself. Two questions are submitted for decision, viz.: Whether, upon the facts disclosed, the relator is the surviving husband of the deceased; and whether he is incompetent by reason of his improvidence.

[1] Upon the assumption that he is the surviving husband of the deceased, and legal cause was shown for the appointment of a special administrator (that such cause was shown is not now controverted), the relator was prima facie entitled to the appointment. The surviving husband or wife is entitled to general letters of administration, to the exclusion of any other person (Rev. Codes, § 7432), unless at least one of the grounds of incompetency enumerated in section 7436 is shown. In selecting a person to act as special administrator, the court or judge is expressly required to give preference to the person who is entitled to letters testamentary or of administration. Section 7472. A refusal to accord the preference thus given, in the absence of a showing of incompetency, is a direct violation of this provision. *State ex rel. Eakins v. District Court*, 34 Mont. 226, 85 Pac. 1022.

[2-4] It appears that the deceased obtained a divorce from her first husband by a decree of the district court of Lewis and Clark county, on May 19, 1911, and that she and the relator were married at Boulder, in Jefferson county, on October 26, 1911. It was insisted by counsel for Thomas Cruse in the district court, and the same argument was made at the hearing in this court, that the second marriage, being within the prohibition of section 3657 of the Revised Codes, was void, and hence that the relator, not having thereby become the lawful husband of the deceased, occupies the position of a stranger to the estate, and is not entitled to administer it, without regard to the question whether he is otherwise competent. Counsel for the relator have proceeded upon the assumption that section 3657 was repealed by an act of the legislative assembly approved March 6, 1895, and hence could not affect the validity of the marriage. This assumption, it is said by counsel for Thomas Cruse, is unwarranted because the invalidity of the repealing act is apparent on its face, in that the title of it, as enacted and approved by the Governor, contained no reference to section 3657, and was therefore obnoxious to the provisions of section 23, art. 5, of the Constitution, which declares: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title;

but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Section 3657 reads as follows: "When a divorce is granted for any of the causes mentioned in section 3643, the innocent party cannot marry until after the expiration of two years, and the guilty party cannot marry until after the expiration of three years from the entry of the judgment of divorce; but this section shall not prevent the parties to the action for a divorce from re-marrying each other at any time."

To a proper understanding and decision of the question presented, a brief statement of the history of the legislation is necessary. The Code commission created by the act of the territorial Legislature approved March 14, 1889 (Laws 16th Sess. p. 116), filed with the Secretary of State on February 4, 1892, the result of its labors in the form of four Codes, which, with amendments thereto, were adopted by the fourth legislative assembly, as the Civil Code, Code of Civil Procedure, Penal Code, and Political Code, and were published as the Codes of 1895. When the assembly convened in January, 1895, it at once became a question what course should be pursued by it in adopting these Codes. The plan recommended by the Code committee was to enact each Code as a whole by a separate bill with certain excepted provisions, and thereafter to enact such amendments by separate bills as might be deemed necessary (House Journal, p. 115); and this plan was adopted and pursued. House Bill 36, to establish a Civil Code, was introduced on January 17th (House Journal, p. 86). It was finally adopted on February 19th (House Journal, p. 280), and approved by the Governor on the same day. The parts, divisions, titles, chapters, articles, and section numbers, except certain sections which had been stricken out, remained as they were when the Code was reported by the commission. By its own terms, the Code was to become effective on July 1, 1895. On February 1, House Bill 142 was introduced, entitled: "An act to amend sections 90, 95, 110 and 112 of the Civil Code of the state of Montana." This was approved and became a law on March 6th. It consisted of two sections. The first re-enacted sections 90, 95, and 112, as amended; the second provided: "Sec. 2. That section 91 of the Civil Code of the State of Montana is hereby repealed." Section 91, it will be observed, is not mentioned in the title. Section 110 is not anywhere mentioned in the body of the bill. Amended sections 90, 95, and 112 found their way into the Code as finally published, under the section numbers 145, 160, and 177, and appear in the Revised Codes as sections 3656, 3658, and 3675. Section 110 appeared in the Code of 1895 as section 175, and is section 3673 of the Revised Codes. All of these sections relate to the subject of divorce. The commissioner provided for by

the same legislative assembly to compile and codify the general laws enacted by the third and fourth legislative assemblies, to arrange the same in proper form and to insert their various provisions in the several Codes in their appropriate places, being of the opinion that section 91, *supra*, had not been repealed, because not mentioned in the title of the bill, brought it forward into the Codes as section 146, and it appears in the Revised Codes as section 3657.

It was said by this court, in considering the validity of another statute enacted at the same session of the Legislature, the title of which was similarly defective: "The task of the fourth legislative assembly was a most arduous one. It was essentially a session of codification and general revision of all the laws of the state, both those which had been carried forward from the session acts of the territory, and those which had been enacted at the third session of 1893." In *re Ryan*, 20 Mont. 64, 50 Pac. 129. This statement is amply justified by the brief history of the course of legislation during the sitting of that assembly, and the plan adopted to accomplish the task before it. Recognizing the impossibility of considering section by section the four Codes, consisting of some 10,000 sections, within the 60 days allotted to it under the Constitution in which to complete its work, it was compelled to adopt some more practicable and expeditious plan to secure their adoption. The plan adopted, though anomalous, is not obnoxious to any express or implied provision of the Constitution so far as we are advised. It cannot be doubted that a single bill having for its purpose a revision by amendment of all the Codes, simply mentioning in its title the sections intended to be revised by amendment, would have been a general revision measure. By the very terms of the section of the Constitution, *supra*, it would not have been objectionable, because that character of bill falls clearly within its exception. But for the provision, a bill of any description enacted without any title is valid. *Lane v. Commissioners of Missoula County*, 6 Mont. 473, 13 Pac. 136; *Cooley on Const. Lim.* p. 202. The prohibition is aimed at ordinary legislation with the subject of which the members of the legislative body and the public are not supposed to be familiar. Its purpose is: "First, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." *Cooley Const. Lim.* p. 205.

[8] The obvious reason for the exception of appropriation bills and bills for the codification and general revision of the laws is that the first are necessary for the maintenance of the government, and hence their validity ought not to be open to question for informality; and the latter are so extraordinary in their character that both the members of the legislative body and the public are presumed to know what is being done. Furthermore, it would be impracticable to formulate a title which would cover every subject embraced in such a bill. In any event, a bill of either class does not fall within the prohibition. Can it be maintained that an omnibus revision bill covering all the Codes, or a similar bill covering any one of them, would have been within the exception, while a bill the plain purpose of which was to revise the laws upon a particular subject found in any of them, is not? We think not. In view of the plan of procedure adopted at the outset and consistently pursued throughout the session to accomplish a definite result, *viz.*, the adoption of the Codes, with such amendments as were deemed necessary and advisable to render them harmonious and consistent with each other, and to eliminate conflicts which existed between many of their provisions and other acts of the Legislature which it was designed to preserve and keep in force, we think that the separate bills, the obvious purpose of which was to revise and harmonize or amend the laws on particular subjects, should be regarded as revisionary in character and be held to fall within the exception also. Of such a character was House Bill 291, enacted at the same session of the Legislature, the validity of which was drawn in question in *Re Ryan*, *supra*. Its title indicated that the purpose of it was to revise, by way of amendment, numerous sections of the Political Code then in the course of enactment by the Legislature, and other laws theretofore enacted relating to municipal corporations. In the body of it was a provision amending section 3466 of that Code, but there was no mention of this section in the title. The validity of it was upheld on the ground that, since its title sufficiently disclosed its purpose to be a revision of the laws relating to municipal corporations, the omission to mention in the title the amended section might be treated as a clerical oversight. While the decision is put upon the ground that the title sufficiently indicated the purpose of the bill, the fact that its purpose was a general revision of the laws on the particular subject evidently had great weight in inducing the court to the conclusion it reached.

It must be borne in mind that the act in question was introduced and was on its passage at the same time the Code itself was under consideration. The title so far as it expressed the subject was not misleading. Indeed, it was in a sense legislation being

considered concurrently with that embodied in the Code, intended to become a substantial part of it and to become operative at the same time the Code itself went into effect, viz., on July 1, 1895. It would never have become operative unless the Code itself had been adopted. For the reason that the bill was introduced as a part of the general plan of codification and revision in hand, we think it should be classed under the head of revisionary legislation on the subject of divorce, and to fall within the exception of the Constitution applicable to such legislation, and as not rendered invalid by the apparent defect in its title.

[8] If we entertained any doubt upon the subject, we would incline to uphold the legislation for this reason: Soon after the Code went into effect, the question arose as to whether section 3657, supra, was operative. The Attorney General of the state was of the opinion that it had been effectively repealed by the act in question, and so instructed the county attorneys throughout the state. His successors in office have been of the same opinion, all having given written opinions to that effect. For this reason the county attorneys have refrained from instituting prosecutions for violations of section 495 of the Penal Code of 1895 (Rev. Codes, § 8358), and have advised the clerks in their respective counties that the prohibition found in section 3621 of the Revised Codes, is inoperative. The result is that many marriages have been contracted during the 19 years intervening since the adoption of the Codes of 1895, the validity of all of which, if we should reach a contrary view of the law, would be brought in question. The legitimacy of a multitude of children born of such marriages during these years would be rendered doubtful, and the titles vested in them under the laws of succession would at once become the subject of controversy. While such considerations as these should not deter a court from declaring the law as it finds it, nevertheless in a doubtful case it would hesitate to announce a conclusion that would entail such consequences.

Counsel for respondents cite the case of *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100, as directly in point in support of their contention. The title of the act there in question was unintelligible and misleading because its purpose as expressed in the title was to amend a chapter of the Penal Code relating to gaming which had been stricken from the bill to establish that Code, and was not a part of it when it was finally adopted and approved by the Governor. There was not, therefore, before the Legislature at that time, anything which could be the subject of amendment. This, it seems, was a sufficient reason to invalidate the act. Be that as it may, under the circumstances the act could not have been sustained upon any other theory than that it was a piece of

independent legislation dealing with the subject of gaming, and hence did not fall within the exception in favor of revisionary legislation. For these reasons we do not think the case in point.

In the foregoing discussion we have assumed that if section 3657, supra, were operative, it would render void any marriage falling within its prohibition. Since we have reached the conclusion that it was repealed by House Bill 142, supra, it is not necessary to determine whether it would have had this effect or would have rendered such marriage voidable only.

From the foregoing the conclusion follows that the marriage between the relator and deceased was valid, and that as the surviving husband he is prima facie entitled to be considered first by the court in the selection of a competent person to act as special administrator. There is scarcely any evidence in the record of a substantial character tending to show that he is incompetent by reason of his improvident habits. It is apparent, however, that the district judge denied his application and made the order of appointment as it did, upon the theory that the marriage was void, and that relator is not eligible for this reason. The question whether he is not eligible because of improvidence was thus not considered nor determined. We shall not undertake to make a finding in this behalf, and decide finally that he is entitled to the appointment, but leave this question for decision by the district court.

The order is therefore annulled, with direction to the district court to grant the petition of relator, unless, from the evidence taken or which may be taken at a further hearing, it is found that he is incompetent because of improvidence. In this event the court will appoint some suitable and competent person selected by the relator, or in default of such selection, the petitioner Thomas Cruse.

HOLLOWAY and SANNER, JJ., concur.

### KERN v. FELLER.

(Supreme Court of Oregon. April 14, 1914.)

#### 1. VENDOR AND PURCHASER (§ 39\*)—VALIDITY OF CONTRACT—SALE OF TOWN LOT.

L. O. L. § 3264, providing that any person selling any town-site lot that has been laid out, before the plat thereof has been recorded, shall forfeit \$50 for every lot so sold, but imposing no penalty on the vendee, does not prevent the vesting of title in the grantee under such sale.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 9; Dec. Dig. § 39.\*]

#### 2. PRINCIPAL AND AGENT (§ 105\*)—AUTHORITY OF AGENT—RECEIVING PAYMENTS.

A contract, whereby defendant employs agents to plat land and sell the lots, and agrees to execute a deed to any lot to the purchaser on payment of \$50, it being further agreed that the defendant should receive a named sum in specified payments for the entire tract, does not authorize the agents or their assignee to receive

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any money as defendant's agents, nor require the execution of a deed by defendant till the payment of at least \$50 per lot to him.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 298-310, 374; Dec. Dig. § 105.\*]

### 3. PRINCIPAL AND AGENT (§ 131\*)—RIGHT OF ACTION—GROUNDS.

Where defendant employed agents to plat land and sell the lots, and agreed to convey any lot on the payment of \$50 by the purchaser, plaintiff, who paid to an assignee of the agents' contract a sum in cash for certain lots, and additional sums in the satisfaction of debts of the assignee and in advertising, is not entitled, on failure or rescission of the contract of sale to him, to recover any portion of the purchase price from defendant, who never received any part thereof.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 458-464; Dec. Dig. § 131.\*]

Department 1. Appeal from Circuit Court, Multnomah County; F. M. Calkins, Judge.

Action by Albert E. Kern against Francis Feller for the sum of \$3,400. From an involuntary judgment of nonsuit, plaintiff appeals. Affirmed.

Thos. O'Day and J. M. Haddock, both of Portland, for appellant. J. H. McNary, of Salem, and H. J. Bigger, of Portland, for respondent.

RAMSEY, J. On June 21, 1912, the defendant was the owner of a tract of 200 acres of land in Marion county, which is described in the complaint. On said 21st day of June, 1912, the defendant entered into a written contract with the United Securities Company, a partnership, consisting of B. N. Garrett and H. H. Hoffman. The second and third paragraphs of said contract are as follows:

"Second. That for and in consideration of one dollar (\$1.00) cash in hand paid by the agent, receipt of which is acknowledged and confessed by the owner, the owner hereby appoints, constitutes and empowers the agent as his sole and exclusive agent to plat or divide, or subdivide said lands in a town site, with streets and alleys, etc., at the option of the agent, and to offer for sale, and to sell the town lots therein to any one whomsoever, and upon any terms that the agent may see fit; provided, that no lot in said town site shall be sold for less than fifty dollars (\$50.00). The owner agrees that upon the payment of fifty dollars (50.00) in cash that he will execute a good and lawful title to the lot purchased to the purchaser thereof.

"Third. It is agreed and warranted by the agent that the owner shall receive the sum of two hundred and twenty-five dollars (\$225.00) per acre for said land, and that the owner shall receive from the sale of said lands, or otherwise, a sum not less than one thousand dollars (\$1,000.00) within ninety days from the date of this contract, and an additional sum of one thousand dollars (\$1,000.00) within five months, and an additional sum of

one thousand dollars (\$1,000.00) within six months, an additional sum of three thousand dollars (\$3,000.00) within twelve months, an additional sum of three thousand dollars (\$3,000.00) within eighteen months, an additional sum of three thousand dollars (\$3,000.00) within twenty-four months, an additional sum of three thousand dollars (\$3,000.00) within thirty months, and the entire balance of the purchase price within three years from the date of this contract, and that when the agent has paid, or caused to be paid, to the owner said sum, the owner will then and thereupon deed to the agent, or to the agent's clients, at the option of the agent, all lands remaining in the said tract not already deeded under the terms of this contract. All deferred payments to bear interest at the rate of six (6) per centum per annum. Said interest payable annually."

After alleging the execution of said contract, the plaintiff alleges that said securities company caused a plat of said lands into lots and blocks to be made, and presented the same to the defendant for dedication on July 10, 1912, and that the defendant and his wife duly executed a dedication for said land, and dedicated to the public use the streets, etc., marked on said plat, and that said proposed town was designated on said plat as Armstrong, Marion county, Or. The complaint alleges, also, that said securities company, on September 11, 1912, assigned said contract to the Armstrong Townsite Company, a corporation. The complaint further alleges that said assignment was made with the knowledge and acquiescence of the defendant, and that the defendant accepted said Armstrong Townsite Company as his agent, under the terms of the contract previously made by the defendant with the securities company, as stated supra. The complaint alleges, also, that said Armstrong Townsite Company, as agent of the defendant, on August 24, 1912, sold to the plaintiff lots 13 and 14 in block 34, of said Armstrong for the sum of \$1,100, which the plaintiff paid to said company, agent of the defendant, and said agent, designating itself as seller, agreed to cause to be executed to the buyer a good and sufficient warranty deed together with a complete abstract of title to said property; that the deed to said lots was to be furnished as soon as necessary details were completed. The complaint alleges, also, that on September 17, 1912, said Armstrong Townsite Company sold to the plaintiff lots 24, 25, 26, and 27, in block 36 in Armstrong for \$2,300, which the plaintiff paid to said agent, and that, in the said contract of sale, it was agreed that a deed was to be issued to the plaintiff, not later than 30 days from the date of said contract of sale. The complaint alleges, also, that the plaintiff, relying upon said contract and upon the fact that a deed would be issued to him, conveying a good and sufficient title, clear

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



of incumbrances, purchased said lots and paid the purchase price therefor, as stated supra. The complaint alleges, also, the facts to be that the plaintiff demanded a deed to said lots, to wit, at the time the deed was to be issued to him in accordance with said contract; but that the defendant herein has refused and does still refuse to issue a deed to the plaintiff for said lots, or either of them. The complaint alleges, also, that the defendant refused to permit said plat of said proposed town of Armstrong to be filed for record in the office of the county clerk of Marion county; that there is, by reason of the defendant's refusal to permit said plat to be filed in the office of the county clerk of Marion county, no public record in Marion county, or at all, of the lots, blocks, or either of them mentioned in said plat; and that the defendant, or his agent, is unable to show an abstract, designating said property, or any of the lots and blocks in said Armstrong; and that without said plat being filed for record in the office of the county clerk of Marion county, Or., no good and sufficient title to said property can be conveyed to this plaintiff; and that, upon the failure of said defendant to make and execute a deed for the property hereinbefore mentioned, the plaintiff elected to rescind his contract of purchase of said lots and demanded of the defendant the return of the purchase price of said property, to wit, the sum of \$3,400, which the defendant has refused, neglected, and still refuses to pay; that, by reason of the facts herein alleged, there is due from the defendant to the plaintiff the sum of \$3,400, and interest thereon from October 20, 1912. The complaint demands judgment against the defendant for said sum and interest.

The answer of the defendant denies most of the allegations of the complaint and sets up affirmative matter, which was denied by the reply. When the evidence in behalf of the plaintiff was in, on motion of the defendant, the trial court rendered against the plaintiff a judgment of nonsuit, on the ground that the plaintiff's evidence failed to make out a prima facie case for the plaintiff.

The evidence shows that on August 24, 1912, the Armstrong Townsite Company, for the alleged consideration of \$1,100, entered into a written agreement with the plaintiff, whereby said company agreed to sell and convey, and the plaintiff agreed to purchase, lots 13 and 14 of block 34, of said town of Armstrong. This agreement recited that the plaintiff had paid said \$1,100, and that said contract was executed in lieu of a deed, and that a deed was to be issued as soon as necessary details should be completed, but it does not state what those "details" were. This contract was executed by said company, and the plaintiff, and it does not refer to the defendant in any manner. It was executed under the seal of said company, and it does

not purport to have been executed by an agent. It was executed before the execution of the assignment by the securities company to the Armstrong Townsite Company, referred to infra.

The Armstrong Townsite Company and the defendant on the 17th day of September, 1912, entered into another written contract of the same form as the one described supra, by which said company agreed to sell and convey, and the plaintiff agreed to purchase, for the consideration of \$2,300, lots 24, 25, 26, and 27 in block 36 of Armstrong. This contract recites that the plaintiff had paid said consideration, and that said contract was given in lieu of a deed, but that a deed was to be issued not later than 30 days from the date of said contract. This contract neither mentions nor refers to the defendant, and it does not purport to have been executed by an agent. Both of said contracts provide that the seller shall cause a good warranty deed to be executed to the buyer for said lots, and also furnish a complete abstract of title, when the buyer has fulfilled all of the conditions of said contracts.

On September 11, 1912, the United Securities Company executed to the Armstrong Townsite Company a written assignment of which the following is a copy (omitting the date and signatures and names of the witnesses): "For and in consideration of one (\$1.00) dollar and other valuable considerations, to us in hand paid this day (September 11, 1912) by the Armstrong Townsite Company, receipt of which is hereby acknowledged, we, the undersigned B. N. Garrett and H. H. Hoffman, doing business under the firm name and style of United Securities Company, do hereby sell, assign and set over to said Armstrong Townsite Company, an Oregon corporation, all our right, title and interest in and to that certain option and contract of purchase to a certain two hundred (200) acre tract of land from one Francis Feller of Woodburn, Oregon, dated June 21, 1912, and hereby relinquish to said corporation any claim, estate or interest that we or the United Securities Company, may have in the land described and included in said option and contract of purchase, which contract and supplemental agreement is attached hereto, and made a part of this agreement." Then on the same page is the following: "This assignment is approved this \_\_\_\_\_ day of September, A. D. 1912. \_\_\_\_\_, Owner." This approval was evidently written with the intention of getting the defendant to sign it, but he did not sign it, and by his answer he denies that said assignment was executed with his knowledge or acquiescence, or that he accepted said Armstrong Townsite Company as his agent.

The evidence shows that the plaintiff made no contract with the defendant, and that he never paid the defendant anything for the lots referred to in the complaint, and that he

never demanded of the defendant the execution of the deed. The plaintiff testifies that he never met the defendant. He testifies, also, that he never saw either of the lots referred to, and that he agreed to pay and did pay for six lots in the town site of Armstrong \$3,400, or \$566.66 per lot, without having seen either of them, and when no plat of the proposed town had been filed for record.

According to the contract that the defendant made with the United Securities Company, he obligated himself to make a conveyance for a lot on the payment of \$50 in cash. The defendant claims that he paid more than ten times that amount for each of the six lots mentioned in the complaint, without having seen either of them. The evidence of the plaintiff shows that he is engaged in the printing and publishing business, and that the larger part of what he claims to have paid for said lots was paid by doing printing and advertising for Garrett and Hoffman, or the Armstrong Townsite Company.

The United Securities Company was the partnership name under which Garrett and Hoffman did business. The Armstrong Townsite Company is a corporation, organized after the execution of the contract between the United Securities Company, and the defendant, set out supra, and the plaintiff claims that the United Securities Company assigned all of its rights and interests in said contract to the Armstrong Townsite Company. The plaintiff testifies (Ev. pp. 12, 13) that he made a contract with Garrett and Hoffman, or the Armstrong Townsite Company, to do advertising for them for the two lots; the purchase price of said lots being \$1,100. He says that he did advertising for them on said contract amounting to \$796, and that the rest of the \$1,100 had not been used. He testifies, also, that he paid Garrett and Hoffman, or the Armstrong Townsite Company, \$500 in cash, and that they owed him \$250, which he loaned them, and for which they had given him a note, and that he surrendered this note to them on the purchase price of the six lots. While the evidence of the plaintiff is not very clear on this point, we conclude therefrom, and from the other evidence produced by him, that the plaintiff paid Garrett and Hoffman or the Armstrong Townsite Company, of which they were officers, in cash only \$500, and that they owed him for borrowed money for which they had executed a note for the sum of \$250. These two items aggregate \$750. The remainder of the consideration for said lots consisted of what Garrett and Hoffman and said company owed the plaintiff for printing or advertising. The plaintiff testifies that the purchase price of said two lots was \$1,100, to be paid in advertising, and that he paid thereon in advertising \$796, leaving unpaid on the purchase price of said two lots \$304. He seems still to owe on the purchase price of said two lots \$304, to be paid in advertising.

The agreed purchase price of the four lots

was \$2,300. According to the evidence of the plaintiff, he paid the Armstrong Townsite Company on the purchase price of said four lots, in cash \$500, and canceled a debt that said company or its officers owed him for money loaned, in the sum of \$250, and paid the remainder in advertising. The amount paid on the purchase price of said four lots in advertising seems to have been \$1,500.

We are unable to make out, from the evidence, the exact amount that the plaintiff claims to have paid for the six lots; but it is approximately as follows: He paid in cash \$500 and canceled an indebtedness for money loaned in the sum of \$250, and paid \$2,296 in advertising, making the aggregate sum paid for the six lots \$3,045. On pages 14 and 15 of the evidence, the plaintiff testifies that after deducting the part of the advertising that was unused, as stated supra, and putting the amount that was owing him for money loaned at \$250, the amount that he paid for the six lots was \$3,124.96. We are unable to understand how he gets that amount; but the exact amount that he claims to have paid is not material, in the view that we take of the case.

Testifying as to what was done with the consideration paid for the said lots, B. N. Garrett says: "Why, practically all the consideration was used by Mr. Hoffman and myself and the corporation in exploiting and putting this town site before the people. It was practically all of it used for that purpose. The \$500 in cash that we received from Mr. Kern was used in paying for bills and various other items that was incurred in the exploiting of the Armstrong Townsite Company, and every cent of it went into the exploitation of the Armstrong Townsite Company." Thus, the evidence shows that the defendant did not receive any part of the consideration that was paid by the plaintiff for said lots. This witness says that practically the whole of the consideration paid was used by him and Hoffman and the corporation in exploiting the Armstrong Townsite Company, and that every cent of the \$500 that was paid in cash was used for that purpose by them. These facts are important, because they show that not a cent of the consideration was paid to or received by the defendant. The large bill for advertising was charged to the Armstrong Townsite Company, or to Garrett and Hoffman, and did not go to the defendant. The \$250 debt for money loaned was loaned to said company or to Garrett and Hoffman, and the plaintiff held a note therefor.

The plaintiff testifies that he had no business transactions with the defendant, and that he never even met him. He admits that he knew that the Armstrong Townsite Company, or Garrett and Hoffman, were agents for the defendant, and that he had seen the contract between the defendant and the United Securities Company; but he claims that he did not read all of it. He says that he

knew that Garrett and Hoffman had a contract with the defendant for a deed, and that he relied upon that.

The evidence shows that on September 17, 1912, the defendant conveyed to the Armstrong Townsite Company, by a warranty deed, with other property, the six lots described in the complaint which the plaintiff purchased of that company. Said deed, so made to said company, was executed on the same day that said company sold four of said lots to the plaintiff, as stated in the complaint.

The defendant having conveyed all of said lots to said company as stated supra, the title to said lots was not in him after September 17, 1912, and hence he had no power to convey them to the plaintiff. By force of said conveyance, the title to said lots was vested in the Armstrong Townsite Company, and it had power to convey the same to the plaintiff.

[1] The fact that the plat of said town had not been filed for record in the office of the county clerk of Marion county did not prevent the vesting of the title to said lots in said company.

Section 3264, L. O. L., provides that, if any person shall sell or offer for sale any townsite lot that has been laid out, until the plat thereof has been recorded, shall forfeit and pay \$50 for every lot so sold or offered for sale, to be collected before any court having jurisdiction thereof, in the name of the county. This section does not purport to forbid or make void such a sale. It provides a penalty for selling or offering for sale any lot, but it imposes no penalty upon the vendee for buying any lot. If the statute had directly forbidden the sale of lots before the recording of the plat, a different question would be presented. Our statute is like the Iowa statute on this subject. In that state, sales of lots before the recording of the plat are held to be valid.

In Watrous & Snouffer v. Blair, 32 Iowa, 58, the syllabus of the case is: "Section 1027 of the Revision, imposing a penalty upon any person who shall sell or lease any lot in any town, \* \* \* until the plat thereof has been duly acknowledged and recorded, does not operate as a prohibition upon the sale itself, but only imposes a penalty upon the seller, and hence the purchase of such lot, the plat of which is not recorded, is not rendered invalid by said section."

In Mason v. Pitt, 21 Mo. 393, a case where a town lot was sold without the plat having been recorded, the court says: "But the answer to this whole matter of the plat being unrecorded is that the contract is executed, the title has passed, and the law imposes no penalty on the vendee."

A statute of Ohio provided that, if any proprietor of any town should sell any lot before a map thereof should be recorded, he should forfeit and pay a penalty of \$50 for each lot sold. Strong v. Darling, 9 Ohio,

202, was an action to recover money to be paid for lots, where the plat had not been recorded, and the court passing on that case says: "It is argued by the defendants that the plaintiff cannot recover upon this covenant, because it violates the act referred to, which is a penal statute. \* \* \* We think the facts set up in this case do not bar the plaintiff's action." The facts set up in that case were that the money sued for was owing for the sale of a lot in a town, and that the plat of said town had not been recorded.

In Harris v. Runnels, 12 How. 79, 13 L. Ed. 901, a part of the syllabus is: "Where a statute prohibits an act or annexes a penalty to its commission, it is true that the act is made unlawful; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract in contravention of it." See, also, Bemis v. Becker, 1 Kan. 226.

The defendant's deed of the date of September 17, 1912, vested in the Armstrong Townsite Company the title to the six lots that said company sold to the plaintiff, and it was not thereafter within the power of the defendant to make a conveyance of said lots to this plaintiff. The plat of said town was complete and about to be presented to the county court of Marion county for approval, and it seems that the defendant brought a suit in the circuit court of Marion county against the Armstrong Townsite Company and others to obtain an injunction preventing the presentation of said plat to the county court of said county for its approval and the filing of said plat in the office of the county clerk of said county, and a temporary restraining order was granted in said suit. What was the final result of said suit is not shown by the evidence; but the plaintiff is not bound thereby, because he was not made a party to said suit. It is not necessary to decide whether the plaintiff would have the right to have said plat filed of record, or not. The question for decision is whether, under the facts of this case, as shown by the evidence, the plaintiff, under the issues made, is entitled to recover from the defendant what he claims to have paid for said lots.

From the 17th day of September, 1912, the title to said lots was vested in said company. On the day that the defendant conveyed said six lots to said company, said company executed the contract to sell four of them to the plaintiff, and a short time prior thereto said company entered into a contract to sell the other two lots to the plaintiff. According to the evidence, the plaintiff contracted with said company and its officers, and not with the defendant, and all that the plaintiff paid for said lots was paid to said company, and its officers, and by them expended in exploiting said town site. None of it was paid to the defendant. The defendant never received any part thereof.

[2] The Armstrong Townsite Company and

its officers had no authority to receive, as agents of the defendant, any of the money or advertising which the plaintiff claims to have paid them, and they did not receive the same as his agents. All that was paid them was received by them as vendors of said lots, and spent by them in defraying their expenses. The defendant was not liable for the advertising, or "the exploiting" of the Armstrong Townsite. He did not agree to pay any of the expenses of advertising, or for finding purchasers. He was to be paid by the United Securities Company \$45,000 for his 200 acres of land. He agreed that said United Securities Company could sell the lots upon any terms it should see fit, excepting that no lot should be sold for less than \$50, in cash, and he agreed that, upon the payment of \$50, in cash, for any lot he would execute a good and lawful title to the purchaser therefor.

It is clear, we think, that the defendant was not to make a deed for any lot until \$50 in cash was paid therefor, and that such cash payment was required by the contract as we interpret it, to be made to him. The United Securities Company was not to receive any commission for making sales. This company was to pay the defendant \$225 per acre for the 200 acres of land, and, when that sum was paid, that company was entitled to have all of the land remaining unsold conveyed to it. It was to be paid for its work, by receiving the conveyance to it of what remained of the land, after the defendant was paid the \$225 per acre. The \$225 per acre was to be paid out of the proceeds of the land "or otherwise." But the defendant was not obliged to convey any lot until he was paid \$50 therefor in cash. The plaintiff saw the contract between the defendant and the United Securities Company, and is chargeable with notice of its contents. If the assignment of said contract to the Armstrong Townsite Company was valid, that company took the assignment subject to all the provisions and terms of said contract. Said company could not pay its debts by selling those lots to its creditors. The duty of making a deed and of conveying a lot could, under said contract, be imposed on the defendant only by paying him for it at least \$50 in cash.

[3] The plaintiff does not claim to have paid in cash more than \$500 for said lots, and no part of this was paid to the defendant. All that he claims to have paid in excess of the \$500 consisted in debts for advertising and money loaned, which said company and its officers owed him. It was contended, on the argument, that this is an action for money had and received, and we think that it is; but the plaintiff failed to prove the facts essential to sustain such an action. An action for money had and received is an equitable action, and governed by equitable principles to a large extent. 27 Cyc. 849. 27 Cyc. 869, says: "To sustain an action for

money had and received, it must appear that the money in question belonged to the plaintiff; that it was secured by defendant without plaintiff's consent and without giving any valid consideration; or, if with the plaintiff's consent, upon a consideration that has failed. To maintain an action for money had and received, plaintiff must show that the defendant actually received his money, or prove such facts as to raise a fair presumption that he received it." The same volume, on page 854, says: "The question, in an action for money had and received, is: To which party does the money in equity, justice, and law belong? All that the plaintiff need show is that the defendant holds money which, in equity and good conscience, belongs to him; but, if he fails to show such superior right, he cannot recover."

In this case the evidence shows that the defendant did not receive a cent of the plaintiff's money. All of the money that the plaintiff claims to have paid was paid to the Armstrong Townsite Company, and its officers on a contract between that company and the plaintiff for the sale, by the former to the latter, of the six lots, and said company spent it in paying the debts and expenses of said company and its officers. Neither said company nor its officers had any authority to receive money for the defendant, on the sale of the lots. The defendant conveyed said lots to said company, as stated supra, and said company sold them to the plaintiff. The legal title to them appears to be still in said company. We hold that the plaintiff failed to make out a prima facie case, and that the court below properly granted a judgment of nonsuit.

The judgment of the court below is affirmed.

McBRIDE, C. J., and BURNETT, J., concur.

#### STATE v. JENSEN.

(Supreme Court of Oregon. April 14, 1914.)

#### 1. CRIMINAL LAW (§ 1153\*)—APPEAL—REVIEW—QUESTIONS OF FACT.

Under L. O. L. § 732, declaring incompetent as witnesses children under 10 years of age who appear incapable of receiving just impressions of the facts or of relating them truly, the decision of the trial court as to the competency of a witness four years of age will not be disturbed if there is any evidence to sustain it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\*]

#### 2. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for assault with intent to rape, the admission of evidence of a prior assault by accused upon another female with intent to rape infringes the constitutional right of the defendant to demand the nature and cause of the accusation against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

### 3. WITNESSES (§ 277\*)—IMPEACHMENT — DEFENDANT IN CRIMINAL PROSECUTION.

Under L. O. L. § 1534, giving the defendant in a criminal prosecution the right to testify, but providing that he shall then be deemed to have given the prosecution the right to cross-examination on all facts to which he has testified, it is error, in a prosecution for assault with intent to rape, to permit cross-examination of the defendant, who has testified, as to trouble between him and another girl, to which he made no allusion on his direct examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*] McNary, J., dissenting in part.

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

J. Jensen was indicted for an assault with intent to commit rape on a female child of the age of four years, and convicted of simple assault, and appeals. Reversed, and new trial ordered.

John A. Jeffrey, of Portland (Chas. E. Lenon, of Portland, on the brief), for appellant. John A. Collier, Deputy Dist. Atty., of Portland (Evert L. Jones, Deputy Dist. Atty., of Portland, on the brief), for the State.

BURNETT, J. [1] It is first contended that the court was wrong in allowing the complaining witness to testify, she being but four years of age. It is said in section 732, L. O. L., that the following "persons are not competent witnesses \* \* \* children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; \* \* \*"

It is settled in the case of *State v. Jackson*, 9 Or. 459, that the competency of a child under 10 years of age to be a witness is a preliminary question to be decided as a fact by the trial judge who has the opportunity to see and hear the witness and determine more accurately the propriety of admitting the testimony of such a witness than we can on any mere paper record. It is a principle that when there is any evidence to sustain the decision of the trial court on such a question, the appellate court will not disturb its determination. *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474; *Virginia I. C. & C. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362; *American F. & F. Co. v. Settergren*, 130 Wis. 338, 110 N. W. 238; *Allen v. Durham Traction Co.*, 144 N. C. 288, 56 S. E. 942; *Horne v. Cons. Ry., Lt. & P. Co.*, 144 N. C. 375, 57 S. E. 19; *Municipal Court v. Kirby*, 28 R. I. 287, 67 Atl. 8; *Yates v. Garrett*, 19 Okl. 449, 92 Pac. 142; *Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035.

[2] Over the objection of the defendant the court permitted another female witness for the prosecution to tell of an alleged assault by the defendant with an intent to commit rape upon her at a time and place entirely disconnected from the transaction mentioned in the indictment. The law on this question

is settled in this state adversely to the prosecution by the cases of *State v. Start*, 85 Or. 178, 132 Pac. 512, 46 L. R. A. (N. S.) 266, and *State v. McAllister*, 136 Pac. 354. To allow such testimony is to infringe the constitutional right of the defendant to demand the nature and cause of the accusation against him. Such procedure might be palliated if there was any provision for giving the defendant notice of the other charges in such cases; but it is utterly repugnant to justice and fair play to accuse a person of a stated crime and make that the excuse for what is really trying him for a number of others by springing them unheralded upon the attention of the jury to produce a verdict of guilty which might not result except for the bias thus imparted to the minds of the jurors. *State v. Dunn*, 53 Or. 304, 314, 318, 99 Pac. 278, 100 Pac. 258.

[3] The defendant was a witness in his own behalf and over his objection he was compelled by the court on cross-examination to testify respecting an alleged trouble between him and a young girl in Bellingham, Wash., to which he had made no allusion whatever in his direct testimony. Section 1534, L. O. L., here follows: "In the trial of or examination upon all indictments, complaints, informations, and other proceedings before any court, magistrate, jury, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury, or other tribunal before which such testimony may be given; provided, his waiver of said right shall not create any presumption against him; that such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal." Under this statute the ruling of the court on this question is contrary to the following cases: *State v. Lurch*, 12 Or. 99, 6 Pac. 408; *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *State v. Bartness*, 33 Or. 110, 54 Pac. 167; *State v. Miller*, 43 Or. 325, 74 Pac. 658; *State v. Deal*, 52 Or. 568, 98 Pac. 165; *State v. Lem Woon*, 57 Or. 482, 107 Pac. 974, 112 Pac. 427. While an ordinary witness may be cross-examined as this defendant was, for which *State v. Bacon*, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8, and other like precedents are authority, yet the cross-examination of a defendant must be strictly confined to matters disclosed in his direct examination, subject to the qualification that he may be impeached by showing that he has been convicted of a crime, or that he has made state-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ments inconsistent with his present testimony on material matters.

For these reasons the judgment of the circuit court is reversed, and a new trial ordered.

EAKIN and BEAN, JJ., concur. McNARY, J., specially concurs.

McNARY, J. (specially concurring). To the result reached in this case by Mr. Justice BURNETT, I concur upon the proposition that error was committed by the court in requiring defendant on cross-examination to testify concerning matters extraneous to those elicited from him on his direct examination. Upon the other ground of reversal I dissent, following the doctrine announced in the dissenting opinions in the case of *State v. Start*, 65 Or. 178, 132 Pac. 512, 46 L. R. A. (N. S.) 266, and in the case of *State v. McAllister*, 136 Pac. 354.

#### GUY L. WALLACE & CO. v. FERGUSON, State Insurance Commissioner.

(Supreme Court of Oregon. April 14, 1914.)

#### INSURANCE (§ 12\*)—REGULATION OF AGENTS— ISSUANCE OF LICENSE.

Under Laws 1911, pp. 376, 377, §§ 1-4, providing that the making of contracts between individuals, firms, or corporations, providing indemnity among each other from fire loss or other damage to their own property, shall constitute the business of insurance, but shall not be subject to the laws relating to insurance corporations or associations except as provided in the act, and authorizing the issuance to agents for such parties of a license on the payment of a fee, and compliance with other requirements of the act, the insurance commissioner has no power to prescribe additional requirements, and agents who have complied with the statutory requirements are entitled to the license.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 11; Dec. Dig. § 12.\*]

In banc. Original petition by Guy L. Wallace & Co. for writ of mandamus to J. W. Ferguson, Insurance Commissioner of the State of Oregon. Writ allowed.

This proceeding is based upon an original writ of mandamus emanating from this court, directing the defendant, as the insurance commissioner of the state, to issue to the plaintiff the certificate of authority described in section 4 of chapter 222 of the General Laws of 1911, or to show cause why he has not done so. The writ alleges in terms a compliance by the petitioner with the provisions of that statute and the refusal of the officer to furnish the certificate. In substance, the return to the writ admits the declarations thereof, and states that the commissioner is invested with large discretion in all matters pertaining to insurance, in pursuance of which he has prescribed certain conditions and regulations respecting applications for the certificate in question with which the plaintiff has not complied, and assigns this

as a reason for not issuing the evidence of authority desired. A reply was filed, and the cause has been argued on the question of whether or not the commissioner has authority to promulgate the stated conditions precedent to the issuance of the certificate.

Maurice W. Seitz, of Portland, and John A. Carson, of Salem (Seitz & Clark, of Portland, and Carson & Brown, of Salem, on the brief), for plaintiff. A. M. Crawford, Atty. Gen. (James W. Crawford, Asst. Atty. Gen., on the brief), for defendant.

BURNETT, J. (after stating the facts as above). Accompanying the pleadings in the case are sundry exhibits, and what seems to be testimony taken before a stenographer and notary public; but these were not presented to the court at the hearing, although section 625, L. O. L., states that "in the Supreme Court the writ may be allowed by the court or any judge thereof, but shall only be tried and determined by the court; and all issues of either fact or law therein shall be tried by the court." The case, however, may be determined upon the pleadings, and will be so treated.

The act (Laws 1911, p. 376) under which the petitioner professes to be operating provides as follows:

"Section 1. That the making of contracts between individuals, firms or corporations, providing indemnity among each other from fire loss or other damage to their own property shall constitute the business of insurance but shall not be subject to the laws of this state relating to insurance corporations or associations except as provided in this act.

"Sec. 2. The attorney, agent, or other representative acting for such individuals, firms or corporations shall file with the insurance commissioner of this state before transacting business therein a declaration in writing verified by the oath of such attorney, agent or other representative setting forth: (a) The name or title of the office through which such individuals, firms or corporations exchange such contracts; (b) a copy of the form of contract, power of attorney and rules under and by which such indemnity is to be affected; (c) the location of the office or offices through which such contracts are to be issued; (d) a statement showing the joint cash assets and liabilities.

"Sec. 3. Such attorney, agent or other representative acting for such individuals, firms or corporations shall also file with the insurance commissioner a power of attorney authorizing the insurance commissioner to make and accept service in any proceeding in any of the courts of justice in the state of Oregon or any of the United States courts therein, which shall stipulate and agree on the part of such attorney, agent or other representative acting for such individuals,

firms or corporations that any legal process which is served on the insurance commissioner shall be of the same legal force and validity as if served on the individuals, firms or corporations contracting for the exchange of indemnity among themselves."

Section 4 provides, in substance, that the representative through whom insurance contracts of the character described in the act are issued or negotiated shall procure from the insurance commissioner a certificate of authority containing certain provisions therein named, which credential shall be renewed annually during the month of December for the ensuing calendar year on proper application to the insurance commissioner, and prescribes a fee of \$15 in connection therewith.

After stating that the plaintiff is a corporation organized for the purpose of acting as attorney or agent for those desiring to exchange insurance among themselves, the return alleges: "That the business in which Guy L. Wallace & Co., plaintiff, is engaged, is subject to a reasonable regulation by the insurance department of this state, and the insurance commissioner is authorized and empowered by law to prescribe and enforce such reasonable conditions as he may deem advisable to be observed by such companies as plaintiff herein, before permission is given to engage in such business in this state." This allegation is nothing else than a conclusion of law, and states no facts affecting the case. The return further sets out certain regulations which the commissioner has prescribed to be observed in such cases as this, but which are not found in the statute already quoted. Finally, the defendant bases his refusal to issue the certificate solely upon the neglect of the plaintiff to comply with these rules which he has established. The commissioner, being a creature of the statute and not a common-law officer, must find his authority in the statute establishing his office and prescribing his duties. It is the law of his official being and the boundary of his official activities. The enactment already quoted states explicitly that insurance of the kind mentioned therein "shall not be subject to the laws of this state relating to insurance corporations or associations except as provided in this act."

In *Bankers' Deposit, etc., Co. v. Barnes*, 81 Kan. 422, 105 Pac. 697, it is said: "Whether the regulation proposed by the superintendent of insurance be or be not desirable as a safeguard to the people of the state, we cannot, considering the provisions of these statutes, reasonably infer that the Legislature intended to leave anything to his discretion in the matter. On the other hand, it seems that the Legislature has prescribed every step and requirement to be taken by or demanded of the applicant to entitle it to a certificate of authority to do business,

and has provided that upon the taking of these steps it shall be the duty of the superintendent of insurance to issue a certificate of authority. The statute seems indeed to be an express negation of any further requirement."

Legislation in this state has gone far along the path of paternalism in relation to insurance, and the conditions laid down by the commissioner to which reference has been made might possibly be effectual progress in the same direction; but the sanction for such action rests alone with the legislative power, and cannot be assumed by a mere administrative officer. The case is, analogous to the situation described in *State v. Des Chutes Land Co.*, 64 Or. 167, 129 Pac. 764, where the state land board incorporated in the contract with the defendant certain conditions not authorized by the statute under which the stipulation was made, and it was there held that the agent of the state, acting under a public law, must find sanction for his doings in the statute itself. The unauthorized provisions were held not to be binding.

The record here shows a full compliance by the petitioner with the requirements of the statute, leaving no alternative to the defendant except to furnish the certificate; and a peremptory writ will be issued to that end.

#### TATE v. NORTH PACIFIC COLLEGE.

(Supreme Court of Oregon. April 14, 1914.)

##### 1. COLLEGES AND UNIVERSITIES (§ 9\*)—REQUIREMENTS FOR DEGREE—"SATISFACTORY EXAMINATIONS."

The requirement for a diploma and degree, set forth in the catalogue of a dental college, that the candidate shall pass satisfactory examinations means that the examinations shall be satisfactory to the faculty, whose duty it is to conduct them.

[Ed. Note.—For other cases, see *Colleges and Universities*, Cent. Dig. §§ 23-28; Dec. Dig. § 9.\*]

##### 2. COLLEGES AND UNIVERSITIES (§ 9\*)—CONTRACT FOR TUITION.

The issuance by a college of a catalogue stating the requirements for graduation and for the conferring on candidates of the degree of Doctor of Dental Medicine, and the entrance, matriculation, and attendance of sessions by a student with knowledge of those requirements, constitutes a contract by the student to comply with the requirements, and by the college to issue a diploma on compliance with the requirements.

[Ed. Note.—For other cases, see *Colleges and Universities*, Cent. Dig. §§ 23-28; Dec. Dig. § 9.\*]

##### 3. COLLEGES AND UNIVERSITIES (§ 9\*)—RIGHT TO DEGREE—CONCLUSIVENESS OF FACULTY DECISION.

The faculties of colleges, who are authorized to examine their students and pass on the question whether students have performed all the conditions required to entitle them to degrees, exercise quasi judicial functions, and their decisions are conclusive if they act within

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

their jurisdiction, in good faith, and not arbitrarily.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 23-28; Dec. Dig. § 9.\*]

**4. COLLEGES AND UNIVERSITIES (§ 10\*)—ACTION—BURDEN OF PROOF.**

In a suit by a student to compel a college to confer the degree of Doctor of Dental Medicine upon him, where he alleges that the faculty after informing him that he had passed with good standing, acting in bad faith and arbitrarily, purposely mislaid or destroyed his examination papers, insisted on his taking another examination, and then gave him so low a grade as to prevent his passing, it was incumbent on him to prove such bad faith and misconduct.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 29-31; Dec. Dig. § 10.\*]

**5. COLLEGES AND UNIVERSITIES (§ 10\*)—ACTION—SUFFICIENCY OF EVIDENCE.**

In a suit by a student, to compel a college to confer a degree upon him, evidence *held* not to show that the faculty had acted in bad faith or arbitrarily in refusing to give him a passing grade, or to confer a degree upon him.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 29-31; Dec. Dig. § 10.\*]

**6. EVIDENCE (§ 318\*)—HEARSAY—NEWSPAPER PUBLICATION.**

In a suit by a student to compel a college to confer a degree upon him, pictures purporting to show the college graduating class and a statement clipped from a newspaper were not competent evidence, being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1183-1200; Dec. Dig. § 318.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by George S. Tate against the North Pacific College. From a decree for defendant, plaintiff appeals. Affirmed.

This is a suit in equity for a decree requiring the defendant to issue to the plaintiff a diploma, and to confer upon him the degree of Doctor of Dental Medicine. The court below rendered a decree in favor of the defendant. The plaintiff appeals. The facts appear in the opinion of the court.

W. H. Fowler, of Portland (T. J. Hewitt and Johnson & Stout, all of Portland, on the brief), for appellant. M. M. Matthiessen, of Portland (Wood, Montague & Hunt, of Portland, on the brief), for respondent.

RAMSEY J. The defendant is a corporation, organized and existing under the laws of this state, and engaged in conducting a college for the education and training of students in the science of dentistry. It had power to make rules and regulations for the government of its students, in the manner and methods of study, and to adopt rules, fixing the conditions upon which it would grant to its students diplomas and degrees. The defendant, prior to the time that the plaintiff became a student in its college, adopted and published the following rule, fixing the conditions upon which

it would graduate its students, and confer upon them the degree of Doctor of Dental Medicine: "The candidate must be twenty-one years of age, and must possess a good moral character, which will include good deportment while at college. Students who have devoted the required time to the study of dentistry, and have fulfilled all requirements, and passed satisfactory examinations in all the subjects of study, and have successfully completed the required infirmity course, receive the degree of Doctor of Dental Medicine." There were other rules as to the payment of tuition; the time required for graduation, etc. A student was required to attend the college three college years to entitle him to a diploma, and a degree. The complaint alleges that the plaintiff entered the defendant college at the beginning of the fall term of 1905, and was enrolled as a student, and entered upon and pursued his studies in the college, under the direction of the faculty, during the school terms of 1905 and 1906, 1908 and 1909, and 1909 and 1910; that after taking the examination in the spring of 1910, he was told by the faculty of the defendant that his examination was satisfactory, and that he had passed with good standing, but that he could not receive his degree for the reason that he had not continued his studies for a sufficient length of time, according to the rules of the college, and that if he would complete his time, which was short, about two months, he should receive his diploma and degree. The complaint alleges, also, that, during the fall of 1910 and the spring of 1911, he made up his time, and completed his course, and was told by the faculty that everything was complete and satisfactory to the faculty and the defendant, and that he should receive his diploma and degree, and, with this understanding and promise, the plaintiff paid, and the defendant accepted, the graduation fee, which was not due until graduation, and the plaintiff became and was entitled to receive from the defendant his diploma and degree. The complaint alleges, also, that during the spring of 1911, the defendant, through its faculty, who were its agents and servants, resolved to deprive the plaintiff of his rights and prevent his receiving his degree and diploma, and that after he had passed his final examination they purposely mislaid or destroyed his examination papers, and that the faculty of the defendant declared that they did not know his standing, on account of said loss of papers, and insisted that he take another examination, which said faculty stated was a mere matter of form, which said examination plaintiff charges was unnecessary, unreasonable, and unusual, and was insisted on in order that it might be in the power of the faculty to give him such a low grade that he could not pass. That, without knowing or suspecting the intent on the part

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



of the faculty to deprive him of his degree and standing, the plaintiff agreed to and did take another examination, on which examination he was entitled to high credit; but, for the purpose of making the plaintiff fail in said examination, the faculty gave the plaintiff low markings on some of the studies theretofore passed by a high grade, thereby bringing the average down below the required grade. The complaint alleges, also, that the grade required to pass in said college is 75 per cent.; that the plaintiff's average for his senior year, in spite of the low grade given him by the defendant, was 67 per cent., and that his average, for the full three years, in spite of the low grading was 72.5 per cent. The complaint alleges that the plaintiff was entitled to a diploma and a degree. The answer denies most of the allegations of the complaint. It admits that the plaintiff paid all tuition and fees. The catalogue of the defendant for 1905-1906, on page 1 thereof, provides that the regular course of instructions in the defendant college for those desiring to obtain a degree is composed of three regular sessions of 32 teaching weeks each, exclusive of vacations and holidays, and, that the session for 1905-1906 should begin October 2, 1905, and it states, also, that "students will not be given credit for a full course, when admitted later than 10 days after the opening of the session."

There seems to be a conflict in the decisions as to whether, in a case of this kind, the person demanding a diploma should proceed by *mandamus*, or bring a suit in equity for specific performance of contract.

It was held in *People ex rel. Cecil v. Bellevue Hospital*, 60 Hun, 107, 14 N. Y. Supp. 490, and in the *State v. Lincoln Medical College*, 81 Neb. 533, 116 N. W. 294, 81 Neb. 545, 118 N. W. 122, 17 L. R. A. (N. S.) 980, that *mandamus* is a proper remedy, while *State v. Milwaukee Medical College*, 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407, and other cases, hold that a suit for specific performance is a proper remedy. In this case no question is raised as to the proper remedy, and we will assume that the court has jurisdiction of the matter in controversy, without going into the authorities upon this point.

[1] Among the requirements for a diploma and a degree set forth in the catalogue of the defendant, and set out supra, it is required that the candidate shall "pass satisfactory examinations." This means that his examinations shall be *satisfactory to the faculty*, whose duty it is to conduct the examinations.

[2] The defendant issued its catalogue, stating its requirements for graduation and for the conferring upon candidates of the degree of Doctor of Dental Medicine, and the plaintiff, with knowledge of those requirements, entered the college, matriculated, and attended its sessions, with the intention of

obtaining said degree. These acts on the part of the college and of the plaintiff constituted a contract. The plaintiff agreed that he would comply with all the requirements of the college, and the college agreed that it would issue to him a diploma, and confer upon him said degree *on his complying with said requirements*. To entitle the plaintiff to a diploma and a degree he must have fulfilled all of said requirements.

[3] In *People v. Bellevue Hospital*, 60 Hun, 108, 14 N. Y. Supp. 490, the court says: "The circulars of the respondent indicate the terms upon which students will be received, and the rights which they were to acquire by reason of their compliance with the rules and regulations of the college in respect to qualifications, conduct, etc. When a student matriculates under such circumstances, it is a contract between the college and himself that, if he complies with the terms therein prescribed, he shall have the degree, which is the end to be obtained. This corporation cannot take the money of a student, allow him to remain and waste his time (because it would be a waste of time if he cannot get a degree), and then *arbitrarily* refuse, when he has completed his term of study, to confer upon him that which they have promised, namely, the degree of doctor of medicine which authorizes him to practice that so-called science. It may be true that this court will not review the discretion of the corporation in the refusal, for any reason or cause, to permit a student to be examined and receive a degree; but where there is an absolute and arbitrary refusal, there is no exercise of discretion."

In *People v. New York H. M. Medical College and Hospital* (Sur.) 20 N. Y. Supp. 380, the court says: "Courts may be versatile, but they must be careful not to infringe upon the discretion vested in excise boards, colleges, or inferior tribunals, nor to substitute its discretion for theirs. The determination by these bodies of any questions within the scope of their jurisdiction is, as it should be, as conclusive and free from control upon *mandamus* as that exercised by the highest jurisdictions in the county. \* \* \* In the present instance, the [defendant] college, in passing on the qualifications of the relator, acted as a quasi judicial body, exercising an ample discretion vested in it by the act under which it was incorporated, and its determination cannot be reversed upon *mandamus*. \* \* \* The relator charges bad faith and ill will upon the part of some of the officials of the college, but these allegations do not alter the underlying fundamental principle which controls. The court cannot re-examine the relator as to his qualifications to practice medicine, nor go over the studies in which he is said to be deficient. If it attempted to do so, the relator's road would be easy, for, with his experience, imperfect though it may be, he would no doubt pass a better medical

examination than any court could be expected to give him."

7 Cyc. 289 says: "A college or university may, however, refuse a degree to a contumacious student, or to one who has not complied with the conditions required therefor, but it cannot *arbitrarily* refuse to allow one who has complied with such conditions the right to take the final examination which would entitle him to a degree or deny him a certificate of attendance and that he has satisfactorily passed the final examinations, when the conduct on account of which his degree is denied occurs *after* final examinations."

There is some doubt as to the extent to which courts can review the action of colleges in refusing diplomas and degrees to their students. The faculties of colleges, who are authorized to examine their students and pass on the question whether the students have performed all the conditions prescribed, to entitle them to degrees, exercise quasi judicial functions, and their decisions are conclusive, if they act within their jurisdiction, and in good faith, and not arbitrarily.

[4] In this case, the plaintiff contends that the faculty acted in bad faith and arbitrarily, in refusing him a diploma and a degree. He claims that he successfully passed the final examinations in 1910, and that the faculty informed him that he had passed with good standing; but that he could not receive his degree at that time, because he had not continued his studies for a sufficient length of time, and that, if he would complete his time, he would receive his diploma. He alleges, also, that he completed his time, and that in 1911, the defendant, through its faculty, decided to refuse to grant him a diploma and a degree, and purposely mislaid or destroyed his examination papers, and declared that they did not know his standing on account of the loss of said papers, and insisted that he take another examination. He alleges that the last-mentioned examination was unnecessary, unreasonable, and unusual, and that it was insisted on in order that the faculty might give him a grade so low as to prevent his passing, and, not knowing or suspecting the intention of the faculty to deprive him of his degree, he agreed to take, and did take, another examination. He alleges that his second examination was of such a character as to entitle him to high credit; but that the faculty, for the purpose of causing him to fail in said examination, gave him low markings in some of the studies, thereby bringing his average down below the required grade, and then refused to graduate him. Said misconduct is charged in the complaint. It was incumbent on the plaintiff to prove such bad faith and misconduct.

[5] While the plaintiff, in his complaint alleges that he passed the examinations in the spring of 1910, and that the faculty informed him that he passed with good standing, he admits, on page 28 of the evidence, that at

the examinations in 1910, he did not take the infirmity examinations, and he admits, also, that that was one of the most important examinations in the course. Hence we must conclude that in 1910 he did not pass the examinations in all of the branches of the course, and that his contention that the only thing that prevented his graduating at that time was the fact that he had to make up about two months' time is not proved by the evidence. The plaintiff testifies that Dr. Miller, dean of the faculty, told him in 1911 that he did not think that there was any reason why he should not graduate that year, and that he had a very good record; but this statement was made before the final examination. The plaintiff testifies that he made up the time in accordance with the requirements of Dr. Miller. After the final examination in 1911 the plaintiff says that Dr. Miller told him that he had not given the plaintiff any grade in 1910, and, being asked whether Dr. Miller had told him that his grade was satisfactory, he answered: "*He did not say that it was.*" He simply said that he had mislaid my papers, and had not given me any grades in my 1910 examinations." He testifies that four members of the faculty examined him in 1911, when he failed in part of the work. The plaintiff admits that he was treated properly in the examinations for the freshmen and junior years, and he admits that his grading in most of his written work was very low, and that it ranged from 70 to 80 per cent.

[6] The pictures and the statement clipped from the Oregonian, containing pictures of what purported to be the graduating class of the college for 1910, were not competent evidence. They were mere hearsay. There was nothing to show that the college gave out the information contained in said clipping, or in any manner authorized its publication.

We have examined the evidence and the authorities cited in the briefs, and some others, and we are constrained to find that the plaintiff failed to make out a prima facie case. He charges the faculty with misconduct; but fails to swear to it, or prove it.

The notice that the defendant served on him, notifying him that he would not be granted a degree, stated that *the faculty* (not Dr. Miller) had adjudged that he was not qualified to receive the degree. His grading for the first and second years was very low. He failed to prove that the faculty was guilty of misconduct or bad faith, or that they acted arbitrarily. If the plaintiff had been given, at the last examination, all the credits that he claims he should have been allowed, he would have passed by a very narrow margin. The power to determine whether the plaintiff was entitled to a degree was vested in the faculty of the defendant. They examined him in the various branches taught by the defendant, and required for graduation, and decided, after such examination,

that he was not qualified to receive the diploma or the degree, and the college refused to graduate him. In the absence of proof of bad faith, or misconduct or arbitrary action, on the part of the faculty, their decisions cannot be reversed by the court.

The unsworn statement made in the court below by Dr. Miller was not evidence, and we did not consider it.

Perhaps the plaintiff, by a few months' study and work, can make up his deficiencies and obtain a degree from the defendant or some other college.

The decree of the court below is affirmed.

MOORE, BURNETT, and EAKIN, JJ., concur.

### RUGENSTEIN v. OTTENHEIMER.†

(Supreme Court of Oregon. April 14, 1914.)

#### 1. WITNESSES (§ 263\*)—RECALLING WITNESS—DISCRETION OF COURT.

In an action for personal injuries, it was within the discretion of the trial court to permit plaintiff to be recalled and questioned if, in her testimony the day before, she attempted to be accurate in fixing distances on map, and if she was trying to change her evidence of the distances of which she had spoken; her answer being in the negative.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 900-903; Dec. Dig. § 283.\*]

#### 2. APPEAL AND ERROR (§ 971\*)—REVIEW—QUESTIONS OF FACT—QUALIFICATIONS OF EXPERT WITNESS.

It being the duty and within the province of the court as a preliminary question of fact to determine whether a witness is qualified as an expert, the appellate court will not disturb the decision, unless there is no evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.\*]

#### 3. EVIDENCE (§ 536\*)—EXPERT TESTIMONY—QUALIFICATIONS OF WITNESS.

That a physician is not regularly licensed to practice in the state does not militate against his competency as an expert witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2343, 2344, 2347; Dec. Dig. § 536.\*]

#### 4. EVIDENCE (§ 545\*)—EXPERT TESTIMONY—QUALIFICATIONS OF WITNESS—DETERMINATION.

That a witness has been licensed to practice medicine in another state, and is so engaged at the time of trial, is competent evidence in determining his fitness to testify as an expert, and to sustain a decision admitting his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2360-2362; Dec. Dig. § 545.\*]

#### 5. TRIAL (§ 96\*)—RECEPTION OF EVIDENCE—MOTIONS TO STRIKE OUT—EVIDENCE ADMISSIBLE IN PART.

Where several statements in the testimony of a physician were such as might properly be made by a nonexpert witness, a motion to strike out all his testimony on the ground that he was not qualified as an expert was properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.\*]

#### 6. EVIDENCE (§ 528\*)—EXPERT TESTIMONY—SUBJECT-MATTER.

In an action for personal injuries, testimony of a physician that it is almost impossible for any physician to state just the extent of an injury from a shock, because it sometimes shows up 10 or 15 years afterwards, that one cannot tell the extent or duration of it in the future, and that there are cases of shock from fright where the condition has become permanent, is admissible to show what suffering will accrue from the injuries in the future.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2385-2387; Dec. Dig. § 528.\*]

#### 7. TRIAL (§ 237\*)—ASSESSMENT—INSTRUCTIONS.

Where the court charges that, when the jury have ascertained what plaintiff's injuries were, how much she will be compelled to pay for doctors' bills, and what she has lost in wages, they may award such sum as they think will reasonably compensate her, and take the facts in the case and do what is right between the parties, without regard to anything, except as conscience dictates, under the evidence and rules of law given them, the refusal of a charge that, before they are warranted in allowing any sum for permanent injuries, they must be reasonably certain, from a preponderance of the evidence, that the plaintiff has sustained permanent injury, and it is not enough that they may believe that a permanent injury is possible, is error, though the court gives the ordinary instructions about the party holding the affirmative of the issue being required to prove it by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542, 548-551; Dec. Dig. § 237.\*]

#### 8. TRIAL (§ 244\*)—INSTRUCTIONS—PROMINENCE OF PARTICULAR MATTER.

In an action for injuries to a pedestrian by an automobile on the paved street of a large city, an instruction that it is admitted that plaintiff was crossing the street between crossings, and that it was her duty to exercise reasonable care, and to look and listen before crossing or attempting to cross to ascertain whether vehicles were approaching, and to exercise the care which any reasonable and prudent person would exercise in crossing the street between intersections, was properly refused, as it emphasized the circumstance that the crossing was not at the intersection of streets, which was immaterial where the streets were paved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

Bean, J., dissenting.

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Albertine H. Rugenstein against Henry H. Ottenheimer. From a judgment for plaintiff, defendant appeals. Reversed for further proceedings.

The substance of the plaintiff's grievance against the defendant is that on a day mentioned she was crossing Washington street in the city of Portland at a point where there was no intersecting street, and that while she was thus walking a chauffeur in the employ of the defendant ran the latter's automobile against her, throwing her violently down upon the pavement, whereby she suffered injuries for which she would recover damages. The ownership of the automobile and the employment of the chauffeur then in charge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 2, 1914.

are admitted by the answer; but the other allegations of the complaint are traversed. The substance of the affirmative matter in the answer is that, although the defendant was not personally present, yet his chauffeur was driving his automobile down Washington street when the plaintiff, without stopping to look or listen for vehicles, undertook to cross the street where there was no sidewalk or crossing for pedestrians, and carelessly walked against the car so suddenly that it was impossible to bring it to a full stop at once, and that whatever injury she received was due to her own heedlessness. The new matter in the answer was denied. From a verdict and judgment for the plaintiff in the sum of \$3,500, the defendant appeals.

Thos. G. Greene and A. H. McCurtain, both of Portland (Bauer & Greene, of Portland, on the brief), for appellant. Guy C. H. Corliss, of Portland (Corliss & Skulason, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] The first error of which the defendant complains is predicated upon the court's permitting the plaintiff to be recalled and asked if, in her testimony the day before, she attempted to be accurate in fixing the distances on the map, and if she was trying by her declaration to change her evidence about the various distances of which she had spoken; her answer being in the negative. The objection goes to the weight of the testimony of the witness rather than to its competency. It was within the discretion of the court to allow her to return and explain what she meant by her former statement.

The bill of exceptions states that S. F. Grover was called as a witness for the plaintiff and testified that he was not engaged in the practice of medicine in Oregon; that he is a naturopath, and had not been licensed to practice medicine in Oregon; that he had been licensed to practice medicine in California in March, 1900, and had been practicing since then. He testified that he was called to attend the plaintiff professionally, and was asked the following question: "What condition did you find her in there, as to nervousness, pain, and other matters?" The defendant objected to the testimony of the witness on the ground that he is not a regularly licensed physician to practice in this state. The objection was refused, and an exception is based on that ruling. The same witness was further asked this question: "Now, Doctor, just tell the jury what you saw there, as to the patient's condition, when you first called on her." With like result, the defendant objected to that question because the witness had not shown himself properly qualified as a physician.

[2] It is the duty and within the province of the court as a preliminary question of fact to determine whether or not a witness is

qualified as an expert, to the end that he may give an opinion in evidence, and the appellate courts will not disturb the decision of the nisi prius tribunal, unless there is no evidence to sustain the preliminary decision of that court. *Geer v. Durham Water Co.*, 127 N. C. 849, 37 S. E. 474; *Virginia I. C. & C. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362; *American F. & F. Co. v. Settergren*, 130 Wis. 338, 110 N. W. 238; *Allen v. Durham Traction Co.*, 144 N. C. 288, 56 S. E. 942; *Horne v. Cons. Ry., L. & P. Co.*, 144 N. C. 375, 57 S. E. 19; *Mun. Court v. Kirby*, 28 R. I. 287, 67 Atl. 8; *Yates v. Garrett*, 19 Okl. 449, 92 Pac. 142; *Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035.

[3, 4] The objection that the witness was not a physician regularly licensed to practice in this state does not militate against his competency as an expert. The only object of license is to prevent an unqualified person from practicing medicine and surgery; but a man may be ever so learned and well-qualified to give an opinion, and yet not be engaged in practice. The fact that the witness had been licensed to practice medicine in California, and had been so engaged since then, was competent evidence for the consideration of the court in determining his fitness as an expert; and so the decision of the court as to the qualification of the witness must stand.

[5] As disclosed by the bill of exceptions, the witness Grover gave several statements about the condition of the patient which are within common knowledge and observation, and might properly be related by a nonexpert witness, and hence the court very properly denied a motion to strike out all his testimony.

[6] The defendant also assigns as error the action of the court in permitting the witness Grover to testify as follows: "Q. Well, what I am getting at is, Doctor, there may be fright from a shock without any serious injury to the body, which will disturb the condition of the nervous system, and will last for some time; is that true? A. Well, it is almost impossible for any physician to be able to state just the extent of an injury from a shock, because it sometimes shows up 10 or 15 years afterwards, and disables a person in many other respects—it is impossible to tell accurately. Q. Can you tell the extent or duration of it in the future? A. No; you cannot. Q. Well, are there cases, Doctor, of shock that is from fright, where the condition had become permanent? A. Oh, yes, sir." It is well settled that in personal injury cases the plaintiff may recover, not only for the pain and suffering already experienced, but also for what of suffering the preponderance of the testimony establishes will accrue from the injury in the future. To this end the opinion testimony of experts may be given as to what would be the result of the injury already experienced. The testimony of the witness Grover, just quoted, was admissible

on that point. Its weight and credibility were questions for the jury, who were entitled to consider it for what it was worth. Reviewing the case of *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 306, cited by the defendant at the hearing of the case at bar, the New York Court of Appeals, in *Cross v. Syracuse*, 200 N. Y. 393, 94 N. E. 184, 21 Ann. Cas. 324, says: "The reasonable certainty rule, therefore, laid down in the *Strohm* Case applies only to the development of diseased conditions apprehended in the future, but not present at the time of the inquiry. There is no intimation in that case that opinion evidence is not properly receivable as to the probable effects or duration of an existing condition. There are many subsequent cases which show that this court did not intend to hold that expert testimony was inadmissible as to the consequences likely to flow from the present condition of an injured person."

[7] The defendant complains, also, that the court was at fault in refusing to give the following instruction, which he requested: "Before you are warranted in allowing the plaintiff any sum by way of compensation for any alleged permanent injuries, if you should come to the question of damages, you must be reasonably certain, from a preponderance of the evidence, that the plaintiff has sustained permanent injury and disability, and it is not enough that you may believe that a permanent injury is possible."

In speaking of the measure of damages, the trial court said: "And she is entitled to recover the damages which naturally flow from this accident. How much was she injured? How much pain and suffering has she endured? Are her injuries of a temporary or permanent kind? If they are a permanent kind, how much of a permanent kind are they, and what ought she to reasonably recover for the condition she was put in, through the negligence of this chauffeur—if you find he was negligent—and, in addition, she has stated that she was not able to work, that she has lost her wages, and that she will be compelled to pay doctors' bills, and so forth; if these are true, how much ought she to recover for all these things? And, when you have ascertained satisfactorily to yourselves what her injuries were, and how much she will be compelled to pay for doctors' bills, and what she has lost in the way of wages, by reason of this injury, then you may award her such a sum as you think will reasonably compensate her. \* \* \* Now, gentlemen, take the facts in this case—do what is right between the plaintiff and the defendant here, without regard to anything, except as your own conscience dictates it to you, under the evidence, and under the rules of law as I have given them to you."

The amount of damages, like other elements of a personal injury case, is a fact to be established by the testimony. The deter-

mination of that question is not to be left to mere surmise or speculation. The verdict on that point should be the result of a careful consideration and comparison of all the evidence in the case. Instead of permitting them to give what they thought, the court should have told the jury to allow for damages if anything, the amount established by a preponderance of the evidence. As stated by Mr. Justice Brown in *Galveston, etc., Ry. Co. v. Powers*, 101 Tex. 161, 164, 105 S. W. 491, 493: "Neither expert witnesses nor the jurors may be turned loose in the domain of conjecture as to what may by possibility ensue from a given statement of facts. The witness must be confined to those which are reasonably probable, and the verdict must be based upon evidence that shows with reasonable probability that the injury will produce a given effect."

True enough the court, in the concluding clause of the excerpt from its instruction above noted, told the jury that their conclusions must be reached "under the rules of law as I have given them to you." In the same breath the judge told them to act without regard to anything, except as their own consciences dictated it to them, and earlier in the charge he laid down as a rule of law that the jury might award plaintiff such a sum as they thought would reasonably compensate her. Under all these circumstances the defendant was entitled to the instruction requested against rendering a verdict on the mere possibility that the injury might prove permanent. "That an injury may possibly result in permanent disability will not warrant the assessment of damages for a possible disability, unless it is also reasonably certain to follow." *Ohio & Miss. Ry. Co. v. Cosby*, 107 Ind. 32, 36, 7 N. E. 373, 375. The following citations illustrate the same principle: *Atlanta & W. R. R. Co. v. Johnson*, 66 Ga. 259; *Fry v. Dubuque, etc., Ry.*, 45 Iowa, 416; *Curtis v. Rochester, etc., Ry.*, 18 N. Y. 534, 75 Am. Dec. 258; *Dawson v. Troy*, 49 Hun, 322, 2 N. Y. Supp. 137; *Raymond v. Keseburg*, 91 Wis. 191, 64 N. W. 861; *Smith v. Milwaukee B. & T. Exch.*, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; *Kucera v. Merrill Lbr. Co.*, 91 Wis. 637, 65 N. W. 374; *Savage v. Third Ave. R. Co.*, 25 Misc. Rep. 426, 54 N. Y. Supp. 932; *Hall v. Cedar Rapids, etc., Ry.*, 115 Iowa, 18, 87 N. W. 739; *Galveston, etc., Ry. v. Powers*, 101 Tex. 161, 105 S. W. 491, 493; *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916; *Johnson v. Connecticut Co.*, 85 Conn. 438, 83 Atl. 530. On this point this court, speaking by Mr. Justice Moore, in *Patty v. Salem Flouring Mills Co.*, 53 Or. 350, 357, 98 Pac. 521, lays down the rule thus: "The degree of proof required of a plaintiff, who, in order to obtain a favorable judgment, must sustain the material issues involved, is generally classed as a probability. If, when he rests his case, the facts which were incumbent up-

on him to establish appear from the evidence as merely possible, the court, upon motion of the adverse party, should grant a judgment of nonsuit for failure to prove a material issue. When, however, after the plaintiff rests his case, it appears from his evidence that the facts devolving upon him to make manifest are quite probable, his cause has passed the danger point of a nonsuit and, together with the defendant's evidence, if offered, should be submitted to the jury for them to determine the credibility of the witnesses and the weight of the testimony by comparing and considering the balancing probabilities."

True enough the court, in the present case, gave the ordinary instructions about the party holding the affirmative of the issue being required to prove it by a preponderance of the evidence; but this is not by the mark. The measure of proof thus correctly declared is one thing, and what is to be proven is quite another. In the very nature of affairs permanency of injury, future suffering, and the like are problematical and speculative in most cases other than those where loss of bodily members is involved. Hence the rule is that at least a probability of such elements of damage must be shown to exist. To show a mere possibility is but a failure of proof. In other words, the necessary probability of future suffering may be proven by a preponderance of the evidence; but it is not enough to disclose a mere possibility by that measure of proof or any other. That would be carrying speculation too far into the realm of uncertainty.

[8] Error is assigned on the refusal of the following instruction requested by the defendant, which is a fair sample of several others he offered on the same subject: "You are further instructed that it is admitted in this case on the part of the plaintiff that she was crossing Washington street in the city of Portland at the time of this accident between Nineteenth street and Trinity Place, or between street crossings, and that it was the duty of the plaintiff under such circumstances to exercise reasonable care and to look and listen before crossing or attempting to cross said street in order that she might ascertain whether vehicles were approaching, and that it was the duty of the plaintiff when crossing the street at said point to exercise the care which any reasonable and prudent person would exercise in crossing the street between intersections."

It is not believed that in these modern days of paved streets a lesser degree of care obtains between street intersections than ought to be observed where streets cross each other. The rule might have been different in reason when streets were spanned at intervals by crosswalks leaving the remainder of the highway impassable for pedestrians so that footmen ordinarily would not be expected to cross at any place but

the crosswalk. The rule fails with the failure of the reason where streets are paved so that pedestrians may be expected as of right to use any portion of the thoroughfare. True enough that, while pedestrians have a preference on sidewalks, still they have at least equal rights with vehicles in crossing or traveling upon other parts of the street. It is a duty, both of pedestrians and those in charge of vehicles, to look and listen and otherwise exercise reasonable prudence in observing the approach of each other so as to avoid collisions, and this rule is appropriate at all points of the street. Of course the concrete application of the rule must depend upon the circumstances. A greater degree of absolute care is required on a crowded thoroughfare than on the comparatively vacant street of a small country town; but the principle is that in all cases reasonable care commensurate with the risk must be exercised by those who are likely to be affected by the movements of others. The instruction requested was well enough in respect to requiring the plaintiff to look and listen; but it is open to criticism in undertaking to emphasize the circumstance that the crossing was not at an intersection of streets. While the rule announced by the court might have been stated in greater detail, it is believed that the law was substantially stated by the language of the charge: "Now, a person is bound to exercise all of their faculties, and to do those things which the ordinarily prudent person would do—they are required to exercise that reasonable care which an ordinarily prudent person would exercise under the existing circumstances, having in view the probable danger which might come to them, and that is what she was required to do, in crossing that street."

For the reasons above given, however, the judgment is reversed for further proceedings.

MOORE and RAMSEY, JJ., concur.

BEAN, J. (dissenting). I am unable to concur in that part of the foregoing opinion upon which the reversal is based relating to a refusal of the court to give the following instruction: "Before you are warranted in allowing the plaintiff any sum by way of compensation for any alleged permanent injuries, if you should come to the question of damages, you must be reasonably certain, from a preponderance of the evidence, that the plaintiff has sustained permanent injury and disability, and it is not enough that you may believe that a permanent injury is possible." In my opinion this requested instruction was fully covered by the charge given by the court, although not in the exact language, and precluded the jury from finding upon any issue on a mere possibility.

The court gave the following instruction, among others (see page 176 et seq. of Tran-

script): "Now, I have said to you that the burden of proof is upon the plaintiff to satisfy you by a preponderance, or outweighing of the testimony, that the chauffeur, Albert J. Maxson, was negligent, and that that negligence was the proximate cause of the injury which came to her, and that damages resulted therefrom, and the amount of damages, all of these matters, she must establish to your satisfaction by a preponderance or outweighing of the testimony. \* \* \*

With the exception of contributory negligence which Mr. Ottenheimer has alleged in his answer, all other matters in this case, the burden of proof is upon Miss Rugenstein. Now, you may ask yourselves, 'What is meant by the term "preponderance of proof," and in legal contemplation, whenever a person makes a statement, he has got to prove it, and how does he prove it?' Well, he has to prove it by testimony—by a preponderance or outweighing of the testimony—he has to prove it by testimony which weighs the more according to the scale of probability, that what he says is more satisfactory to you, more probable, than the other side. We don't argue for demonstration—that is not possible in the affairs of human mundane, but we do argue that there shall be a preponderance, and we sometimes use a symbol; \* \* \* you may liken the weighing of testimony to an apothecary's scale, one side representing the plaintiff, and the other side representing the defendant. \* \* \*

I think the instruction given fully covered the instruction requested, and that the charge could not have been misunderstood by the jury. For that reason, I think the judgment should not be reversed.

#### WOLF et al. v. EPPENSTEIN et al. †

(Supreme Court of Oregon. April 14, 1914.)

#### 1. PARTIES (§ 30\*)—DEFENDANTS—JOINDER—ACTION FOR RENT.

An action for rent cannot be maintained against one who signs an instrument agreeing to pay rent, if the lessees fail to pay, jointly with the lessees, if the sufficiency of the complaint is properly challenged on the ground of misjoinder of parties.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 42-45, 47, 48, 51; Dec. Dig. § 30.\*]

#### 2. PARTIES (§ 75\*)—"DEFECT OF PARTIES"—DEMURRER.

A "defect of parties" plaintiff or defendant, specified in L. O. L. § 68, subd. 4, as a ground for demurrer to the complaint, means that the presence of other parties is necessary to a complete determination of the cause, and a demurrer on that ground must show that the parties are too few, and name those who should be brought in.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1933, 1934; vol. 8, p. 7631.]

#### 3. PARTIES (§ 75\*)—MISJOINDER OF PARTIES—WAIVER OF OBJECTION.

Under L. O. L. § 68, subds. 4, 5, providing that defendant may demur to a complaint when

it appears on its face that there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united, section 71 providing that, when any of the matters enumerated do not thus appear, the objection may be taken by answer, and section 72 providing that if no objection be taken, either by demurrer or answer, defendant shall be deemed to have waived the same, except the objection to the jurisdiction of the court, or that the complaint does not state facts constituting a cause of action, unless the objection of misjoinder of parties is taken either by demurrer or answer, the defect is waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\*]

#### 4. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT.

On an issue, in an action at law, whether a defendant signed a guaranty subject to an agreement that another guarantor should be secured, the finding of the trial court that he did not do so, based on testimony that the word "we" in the contract was changed to "I" when defendant signed it, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

#### 5. TRIAL (§ 404\*)—FINDINGS BY COURT—CONSTRUCTION.

Where the testimony of lessees as to the kinds of business carried on by other tenants, relied on as an eviction, fully sustains the allegations of their pleading and is not controverted, a finding that the averments of the pleading were wholly unproven should be regarded as a conclusion of law that the testimony was insufficient to justify an abandonment on the ground of constructive eviction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.\*]

#### 6. LANDLORD AND TENANT (§ 130\*)—CONSTRUCTION OF LEASE—COVENANT OF QUIET ENJOYMENT.

Unless otherwise expressly stipulated, a landlord demising real property impliedly covenants that the tenant shall not be disturbed in the possession and quiet enjoyment of the premises during the continuance of the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470-481; Dec. Dig. § 130.\*]

#### 7. LANDLORD AND TENANT (§ 190\*)—RENT—EVICTION OF TENANT.

When a tenant is deprived of the enjoyment of the premises by the immoral act of the landlord, such conduct of the landlord is equivalent to an eviction, authorizing the vacating of the property, and constituting a valid defense to an action for any rent subsequently accruing.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 765-769; Dec. Dig. § 190.\*]

#### 8. LANDLORD AND TENANT (§ 190\*)—RENT—EVICTION OF TENANT.

Where the use of adjoining premises owned by the same landlord and occupied by other tenants has not changed since the commencement of defendant's lease, and the landlord is not shown to have created a nuisance by leasing the adjoining premises for immoral purposes, or to have connived with, or consented to, such use, defendant is not relieved from the payment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 765-769; Dec. Dig. § 190.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 2, 1914.

Action by H. Wolf and another against A. P. Eppenstein and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This action was commenced March 8, 1913, to recover money. The plaintiffs H. Wolf and Marcus Wolf on February 9, 1912, leased for the term of three years, from the first of the following month, a room on the ground floor designated as No. 93 Sixth street, in a three-story building which they owned in Portland, Or., to the defendants A. P. Eppenstein and Fred N. Clark "for the purpose of conducting a liquor store to be known as a bottling business"; the lessees agreeing to pay therefor, in advance, \$250 a month for the first year and in the same manner \$300 a month thereafter. On a separate sheet of paper, but attached to other sheets thereof on which were set forth the terms and conditions of the lease, the defendant John Rometsch subscribed his name to a memorandum which reads: "In consideration of one dollar (\$1.00) this day paid by H. Wolf and Marcus Wolf, the receipt of which is hereby acknowledged, and the further consideration of H. Wolf and Marcus Wolf this day executing the foregoing lease to A. P. Eppenstein and Fred N. Clark (we) I, the undersigned, do hereby guarantee that the said A. P. Eppenstein and Fred N. Clark will carry out the terms provided in said lease and pay the rent to the said parties of the first part, as provided in said lease, but should the said A. P. Eppenstein and Fred N. Clark, the parties of the second part in said lease, fail or refuse to pay the rent as provided in said lease for any reason whatever (we) I hereby guarantee and agree to assume the payment of the rent upon the premises from the time of said failure, and agree to guarantee to pay the same to the said parties of the first part when it becomes due, promptly according to the terms of said lease." When the demise was consummated, and at all the times mentioned herein, the plaintiffs had a tenant who occupied as a restaurant a room adjoining that leased to the defendants. The plaintiffs had also let the second story of their building to be used as another restaurant, and the third story they had leased to be occupied by roomers. Pursuant to the terms of their lease, Eppenstein and Clark, at the time specified, took possession of No. 93 Sixth street, which premises they held until March 19, 1912, when, with others, they incorporated the Keystone Liquor Company, under which name the business was thereafter conducted. That corporation by Eppenstein, without indicating his agency, issued to plaintiffs checks for the payment of the rent as installments thereof severally matured. The bottling business proving unprofitable, the plaintiffs, upon information thereof, reduced the rent for August and September, 1912, to \$200 a month. With such exceptions the stipulated rent was otherwise paid to January 1, 1913, when the premises were vacated by

Eppenstein and Clark, who left the key to the door with the plaintiffs.

The complaint herein alleges in substance the making of the lease, the signing of the guaranty, upon a consideration, the breach in the performance of the contract, the demand upon Eppenstein and Clark to pay the installments of the rent, and their refusal to comply therewith. Judgment is demanded from the defendants and each of them for \$250, with interest from January 1, 1913, a like sum, with interest, from February 1st of that year, and \$300, with interest, from the first of the succeeding month.

The answer of Eppenstein and Clark admits the making of the lease, denies the other material averments of the complaint, and for a separate defense alleges the surrender of the premises March 18, 1912, to the Keystone Liquor Company, and that the plaintiffs, being notified thereof, made no demand thereafter upon them for the payment of the rent whereby they are released from any and all obligations arising out of the written contract. For a further defense, the execution of the lease is alleged, and it is averred that the plaintiffs thereby undertook that these defendants and their successor in interest should have the peaceable and quiet possession of the demised premises, in order that they might conduct therein a legitimate business in the sale of wines and liquors to the family trade, to maintain which successfully it was necessary that they should receive the patronage of respectable persons; that plaintiffs, well knowing these facts, and in violation of their duty, rented a part of the building adjoining room No. 93 to be used as a notorious saloon and café; that they leased the second story for a restaurant conducted by Chinese or Japanese; that they rented the third story to women who with their knowledge and consent used the premises as a house of ill fame; that all the places last named were so conducted with the knowledge and consent of the plaintiffs; that numerous police raids were made at such places and persons of ill repute and bad character were arrested thereat and notices thereof were published in the city newspapers, by means of which the building referred, including its location, became known as a resort of persons engaged in violating the laws of the state and the municipality; that all of such acts were without the consent and against the objections of these defendants and their successor in interest, who, relying upon the covenants of the lease, invested large sums of money in fixtures, etc.; that, by reason of the acts of the plaintiffs and their other tenants, respectable people, with whom these defendants expected and desired to transact business, refused to visit their premises or to deal with them, because of the bad reputation of the building and of the ill repute of the persons mentioned; that these defendants and their successor in interest notified the plaintiffs of



the condition and reputation of the building, and because of their failure to correct the evils complained of No. 93 Sixth street was abandoned January 1, 1913; and that, by reason of the breach of the covenant of quiet and peaceful enjoyment of the leased premises in the particulars specified, these defendants and their successor in interest have been damaged in the sum of \$10,000, for which judgment is demanded.

The defendant John Rometsch separately answered, denying the averments of the complaint, and for a further defense alleging in substance that he subscribed his name to the guaranty pursuant to an agreement that another guarantor would also be secured, of which facts the plaintiffs had notice; that, in the absence of any other guarantor, the defendants Eppenstein and Clark, without his knowledge or consent, delivered the writing to the plaintiffs, surrendered the possession of the room to the Keystone Liquor Company, to which corporation the plaintiffs attorned, and also abandoned the premises; and that, by reason of such facts, the plaintiffs ought not to be allowed to allege that he guaranteed the payment of any part of the stipulated rent. The prayer for judgment is that the action be dismissed as to him.

The replies put in issue the allegations of new matter in the several answers, upon which issues the cause was tried without a jury, and, from the testimony received, findings of fact were made according to the averments of the complaint, and to the effect that the averments of the answer of Eppenstein and Clark were wholly unproved; that there was not sufficient evidence adduced to establish the eviction of these tenants; and that the lease was still subsisting, and its terms had not been violated by the plaintiffs. The court further found that the allegations of the answer of Rometsch were not substantiated, and that, prior to the commencement of this suit, the plaintiffs had demanded from the other defendants the sum of money alleged to be due. As conclusions of law it was determined that plaintiffs were entitled to a recovery of the sums prayed for in the complaint. A judgment having been rendered in accordance therewith, the defendants appeal.

Ed Mendenhall, A. S. Dresser, and W. T. Hume, all of Portland, for appellants. H. K. Sargent, of Portland (Alex Sweek, Seneca Fouts, and J. F. Shelton, all of Portland, on the brief), for respondents.

MOORE, J. (after stating the facts as above). [1] No demurrer to the complaint was interposed, and hence that pleading was not challenged on the ground of misjoinder of parties or of causes of action. Nor was any motion made to require the plaintiffs to elect as to whether they would proceed against the principals or the guarantor. In *Tyler v. Trustees of Tualatin Academy*, 14 Or. 485,

13 Pac. 329, it was held that, in a contract of guaranty, the liability of the principal and that of the guarantor was several, and they could not be joined as parties to the same action. In *Bowen v. Clarke*, 25 Or. 592, 37 Pac. 74, in a demise under seal P. Basche, one of the persons named in the contract as a lessee, wrote after his name the word "surety." In an action by the landlord against the lessees, it was insisted that the term "surety," as thus employed, made the defendant, who adopted the word of limitation, a guarantor who could not be joined with the other lessees. In deciding that case Mr. Justice Bean, referring to the inquiry proposed and to the defendant named, says: "The principal question presented is whether the defendant P. Basche can be sued jointly with the other defendants, the solution of which depends upon whether his undertaking is original or collateral. If his contract is collateral, and one of guaranty only, his liability and that of his principals is several, and cannot be enforced by a joint action." Further in the opinion, in adverting to the limiting word so used, it is observed: "When the undertaking of the surety is not for a direct performance by himself, but only that his principal shall perform, and that he will be bound in case of default, his undertaking is not original, but collateral, and therefore his liability depends upon the terms of his contract, and not upon the character in which he may execute it. Now in this case the lease was executed by all the parties, at the same time, upon the same consideration, and for the same purpose, and the undertaking of the appellant is not made conditional or dependent upon the default of the other defendants, but is an original, unconditional undertaking for a direct performance on his part. It is plain, therefore, within the rule stated, that his contract is not one of guaranty, or an agreement to answer for the debt, default, or miscarriage of another, but that of a joint obligation as to the plaintiff and, as a consequence, may be declared upon as such."

An examination of the writing to which Rometsch subscribed his name, a copy of which is hereinbefore set forth, will show that it is a collateral engagement to answer for the default of the principals, Eppenstein and Clark, upon their failure faithfully to perform the terms of the agreement. If the sufficiency of the complaint herein had been properly challenged on the ground suggested, the action as instituted could not have been maintained as against Rometsch. Thus in *Viriden v. Ellsworth*, 15 Ind. 144, a demise was executed by the landlord to Ford, whereupon Viriden subscribed his name to an indorsement on the lease as follows: "For value received, I guaranty the payment of the rent, as stipulated by said Ford, in case of nonpayment, by him." In an action to recover the rent, Viriden was made a party and demurred to the declaration on the grounds

of misjoinder of parties and of causes of action. The demurrer was overruled, and, judgment having been rendered as prayed for by the complainant, the action of the lower court was reversed. The Supreme Court holding that the undertaking of the guarantor was distinct from that of the principal and collateral thereto, for which reason there was a misjoinder as stated. To the same effect is the case of *Cross v. Ballard*, 46 Vt. 415. It was there insisted that the defendants, Blake and Baker, having joined with the defendant Ballard, the lessee, in all their pleas, were estopped and could not claim that the memorandum at the bottom of the lease to which they subscribed their names, to wit, "For the payment of said contract being fulfilled on the part of said J. N. Ballard, we the undersigned will become responsible," rendered them guarantors. The court, in referring to the memorandum adverted to, said: "This is an independent guaranty, collateral to the principal contract, and does not render Blake and Baker joint contractors with Ballard." A judgment against all of the defendants was reversed as against the guarantors and affirmed as to the principal. In that case it would seem that the declaration did not state facts sufficient to constitute a cause of action as against the guarantors, though the sufficiency of that pleading does not appear to have been challenged in the trial court.

[2, 3] Under the statute prescribing the rule of practice in Oregon, a defendant may demur to a complaint when it appears upon the face thereof that there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united. L. O. L. § 68, subds. 4 and 5. When any of the matters so enumerated do not thus appear, the objection may be taken by answer. Id. § 71. If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action. Id. § 72.

A defect as to parties plaintiff or defendant, as specified in subdivision 4 of section 68, L. O. L., means that the presence of other parties is necessary to a complete determination of the cause. A demurrer interposed on that ground must show that the parties are too few and name those who should be brought in. The clause of the statute last referred to relates to a nonjoinder and not a misjoinder. *Cohen v. Ottenheimer*, 13 Or. 220, 10 Pac. 20; *Tieman v. Sachs*, 52 Or. 560, 98 Pac. 163; *Powell v. Dayton, etc., R. R. Co.*, 13 Or. 446, 11 Pac. 222; *State ex rel. v. Metschan*, 32 Or. 872, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692. Unless the objection on the ground of a misjoinder is either taken by a demurrer or answer in the court below, the defect is waived. *Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997;

*Bohn v. Wilson*, 53 Or. 490, 101 Pac. 202; *In re Young's Estate*, 63 Or. 120, 126 Pac. 992.

As the name of Rometsch appeared on the face of the complaint, and by reason thereof a demurrer would not lie, in consequence of there being too many parties, the defect could have been called to the attention of the trial court by an answer, but, the sufficiency of the initiatory pleading not having been challenged in any manner, the defects adverted to were waived.

[4] John Rometsch, as a witness, testified that he signed the guaranty pursuant to an agreement with the other parties to this action that another guarantor would also be secured; that, after he had subscribed his name to the writing, the words "we," were changed to "I" without his knowledge or consent. His sworn declarations in these particulars appear inferentially to be corroborated from the circumstance that there was received in evidence a duplicate copy of the lease on which all the names of the parties are appended, and no alterations appear to have been made.

Simon Wolf, as a witness for plaintiffs, testified that he was present when the lease was executed, and, after detailing the conversation relating to the consummation of the contract, he in answer to the inquiry, "Now, when was that 'I' written over the word 'we'?" replied, "That was changed there when Mr. Rometsch put his name at the bottom of this agreement."

The finding of the court is in accordance with the testimony last given in respect to this branch of the case, and, as such conclusions of fact in the trial of an action at law without a jury is predicated upon proper evidence, it is conclusive of the matter. *Williams v. Gallick*, 11 Or. 337, 3 Pac. 469; *Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172; *Gorman v. McGowan*, 44 Or. 597, 76 Pac. 769, and note. Other findings of fact upon subordinate issues are also supported by testimony, reasonable inferences, and presumptions, thereby rendering such conclusions likewise controlling.

[5] The remaining question is whether or not the action of the plaintiffs in respect to the maintenance of alleged nuisances in and about the demised premises authorized Eppenstein and Clark to abandon their contract on the theory that the conduct of their landlords was equivalent to a constructive eviction. The testimony of the lessees, as to the kinds of business conducted by other tenants who occupied parts of the plaintiffs' building and the bad reputation of such places, whereby the expectations of these defendants to secure a successful trade were thwarted, fully support the averments of their answer. Their sworn declarations and those of their witnesses in these particulars were not controverted by any testimony given by or on behalf of the plaintiffs. It is believed that the findings of fact in substance that the

avermments of the answer with respect to the matters now under consideration were wholly unproven should be regarded rather as a conclusion of law and to the effect that the testimony given by the defendants' witnesses was insufficient to justify an abandonment of the leased premises on the ground of a constructive eviction.

[6] No changes were made in the occupation of any part of the building or in the business pursuits of any of the other tenants after Eppenstein and Clark entered the premises under their lease; and, such being the case, are the plaintiffs responsible for the conduct of other tenants or the bad reputation of their places of business when no testimony was given to show that any part of the building was leased for immoral purposes or that the plaintiffs consented to or connived at the transaction of any performance involving moral turpitude? Unless otherwise expressly stipulated, the landlord, by devising real property, impliedly covenants that the tenant shall not be disturbed in the possession and quiet enjoyment of the premises during the continuance of the term. Tyler's *Landlord and Tenant* (9th Ed.) § 304. This author in the following section says: "This covenant, whether expressed or implied, means that the tenant shall not be evicted or disturbed by the lessor, or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers."

[7] When a tenant is deprived of the enjoyment of demised premises by the immoral act of the landlord, such conduct on the part of the lessor is equivalent to an eviction, authorizing the lessee to vacate the real property, and constituting a valid defense to an action against him for the recovery of any rent subsequently accruing. *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727. In that case apartments in a building having been leased and possession thereof taken by the lessee, the landlord thereafter, brought into another room, under the same roof, lewd women whose noise and disturbance at night caused the lessee and his family to vacate the demised premises; and it was held that the evidence of the moral turpitude was sufficient to be submitted to the jury under a plea of eviction by the landlord in an answer to a declaration for rent, and that, based upon such evidence, the jury might find the plea was true whereby the lessor would be debarred from his rent, the same as an actual and physical entry by the latter and the expulsion of the tenant. The rule thus adopted has in some instances been declared to constitute an "extreme case," and the legal principle so announced has been modified by some courts. It is difficult to assign a reasonable ground for overturning or modifying in any manner that decision, the justice of which would seem to commend it to all virtuous persons.

[8] The rule to be extracted from the principal case would seem to be that when a landlord demises a room for a laudable purpose, and thereafter leases another room in the same building, and the business conducted in the latter apartment so disturbs the use and occupation of the tenant of the other room as to render it practically unavailable for the purpose for which it was leased, he may, in consequence of a breach of the implied covenant of quiet enjoyment, vacate the premises, and his abandonment will be construed to be a constructive eviction, relieving him from the obligation thereafter to pay rent, and also entitling him to damages sustained by reason of such infraction of the agreement. *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Wade v. Herndl*, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748; *Milheim v. Baxter*, 46 Colo. 155, 103 Pac. 376, 133 Am. St. Rep. 50; *Duff v. Hart* (Com. Pl.) 16 N. Y. Supp. 163. In an action for the recovery of rent, if it appears that the tenant moved from the demised premises because a house of ill fame is conducted in a part of the same building, he must, in order to escape the payment of rent, in an action for the recovery thereof, show that the landlord created the nuisance by leasing a part of the premises for immoral purposes, or that such practice existed by his connivance and with his consent. *Cogle v. Densmore*, 57 Ill. App. 591; *Gilhookley v. Washington*, 4 N. Y. 217; *Townsend v. Gilsey*, 1 Sweeny (N. Y.) 155.

The evidence in the case at bar does not show that plaintiffs leased the other rooms in their building for illegal purposes, or that any business involving moral turpitude was conducted therein with their connivance or consent.

Such being the case, the conclusion reached by the trial court, and the judgment based thereon should be affirmed; and it is so ordered.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

#### LEONARD et al. v. WALKER et al.

(Supreme Court of Oregon. April 14, 1914.)

#### 1. PARTITION (§ 78\*)—SUITS—MODE OF ACTUAL PARTITION—STATUTORY PROVISIONS.

Under L. O. L. § 443, providing that in making partition, the referees shall divide the property and allot the portions to the respective parties, quality and quantity considered, and section 444, authorizing the court to confirm or set aside the report in whole or in part, it is the duty of the referees to apportion the land in value according to the respective interests, without regard to the acreage, and, when this is not done, the report should be set aside.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 265-278; Dec. Dig. § 78.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. PARTITION (§ 78\*)—SUITS—MODE OF ACTUAL PARTITION—EQUALITY OF VALUE.

In a suit for partition, a decree giving to the parties acreage substantially in proportion to their respective shares, but giving to parties who are entitled to one-fifth each, respectively, land worth \$3,125, \$3,425, \$2,958.40, and to a party entitled to two-fifths land worth \$3,884.50, is reversible error.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265-273; Dec. Dig. § 78.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by America Ann Catherine Leonard and another against James P. Walker and others. From the decree, defendants John P. Leonard and wife appeal. Reversed and remanded.

This is a suit to partition the real estate of John Leonard, deceased, consisting of many tracts of low land adjacent to lakes and the Willamette slough in Multnomah county, Or., between the following named heirs and the widow: The widow is entitled to a life interest in half the real estate, Melinda K. Walker to one-fifth of the remaining real estate, Anna Gillihan, one-fifth, Andrew Leonard, one-fifth, and John P. Leonard, one-fifth in his own right, and also the one-fifth interest of Geo. W. Leonard. The court adjudged the interests of each of the heirs as above mentioned, and appointed viewers to partition the land between the tenants in common, namely, Alex Bonser, P. A. Frakes, and G. A. Taylor, who made partition and reported the same to the court, from the decree of the court confirming which John P. Leonard appeals.

Frank Schlegel, of Portland, for appellants. Bert E. Haney, of Portland (Joseph & Haney, of Portland, on the brief) for respondents.

EAKIN, J. [1] No question is made as to the portion allotted to the widow, and we have only to do with the effect of the partition by the referees among the four children. Section 443, L. O. L., provides: "In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered. \* \* \*" Section 444 provides: "The court may confirm or set aside the report in whole or in part, and if necessary appoint new referees"—that is, the allotment must be of the several portions to the respective parties, quality and quantity relatively considered, and to each equal values according to their respective shares. If not so done, the court may not confirm the report, but may set it aside. It is said to be a fundamental rule in partition that the owners in common shall become owners in severalty in exact proportion in value to their respective interests rather than with regard to the equality of area; and, where the equal-

ties require it, the parties are entitled to have the actual value ascertained. 21 Am. & Eng. Enc. 1164. It is held that it is not necessary that the referees shall make a division in exact equality as to quantity, but they must so make the division that each party will receive his proportionate share in value. 15 Pl. & Pr. 816; Stannard v. Sperry, 56 Conn. 541, 16 Atl. 261. It is rarely possible to allot to each an equal area in such a case; the ultimate duty of the viewers being to make partition proportionately, quality and quantity considered, as nearly equal in value as practical, and, if necessary, require compensation by any party receiving an allotment the value of which is in excess of his share, payable to the party who is receiving an allotment less in value than his share. The interest may be thus equalized when it is impossible so to do otherwise. 30 Cyc. 261. The law contemplates that each shall receive the full value of his share as determined by the decree appointing the viewers.

[2] In this case the referees made little effort to determine values. At the time of giving their evidence on this trial they ventured some opinion as to values, but nothing definite. Frakes said that he did not think he could make any fairer distribution; that he did his duty as far as he knew how. Their report filed with the court makes no reference to values, but assigns certain acreage to each of the claimants. In giving their testimony Frakes and Taylor seem to acquiesce in Bonser's valuation as given in the trial. The effort seems to have been to apportion the acreage, namely, J. P. Leonard was given 134.86 acres, Mrs. Walker, 63 acres, Mrs. Gillihan 67 acres, and Andrew Leonard 83.4 acres. There were practically three classes of land involved. The land east of Willamette slough about the lakes is variously valued by witnesses from \$35 to \$90 per acre, some of it being put as low as \$10 to \$25 per acre. That west of the slough in the Jackson donation land claim, and that in section 36, is valued from \$75 to \$150 per acre; apparently all being classed as land of the same value. The 40 acres on the hill, in section 33, township 3 north, range 2 west, were estimated at from \$17.50 to \$25 per acre. The witnesses differ widely as to these values, so that we cannot determine which is right, nor is it our province to so decide. Their testimony as to the classification does not vary so much. The statute requires the referees to make a report of their proceedings, specifying therein the manner of executing the trust, which was not done in this case. Taking witness Paquet's valuation as a fair standard by which to compare the allotments—and it seems to be very impartial—we have: Melinda Walker, 40 acres, in section 32, at \$35 an acre, 23 acres, in section 36, at \$75, making a total of \$3,125;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mrs. Gillihan, 40 acres, in section 32, \$35 an acre, and 27 acres in section 36, at \$75, totaling \$3,425; Andrew Leonard 22.66 acres, in sections 28 and 33, at \$15 per acre, 38.74 acres in section 32, at \$25, and 22 acres, in section 36, at \$75, making a total of \$2,958.40; and J. P. Leonard, 40 acres, in section 30, at \$15 per acre, 40 acres in said section, at \$35, 14.46 acres in the Jackson donation land claim at \$75, and 40 acres, in section 33, at \$20, with a total of \$3,884.50. Thus J. P. Leonard's allotment is \$3,000, less than twice the allotment to either Andrew Leonard or Mrs. Gillihan, the one a little more and the other a little less; and their allotment is from \$1,100 to \$1,500 in value more than one-half of the J. P. Leonard allotment. This shows the allotment was not made according to the interest of the respective parties, quality and quantity relatively considered as contemplated by the statute. Plaintiffs' estimates, as shown at pages 7 and 8 of their brief, are not a fair valuation according to the values given by the witnesses on page 12 of the brief. The west side land, in section 36, and the Jackson tract are approximately of equal value per acre. The land in section 32 is valued by nearly all the witnesses at from \$10 to \$25 an acre more than the land in section 30, and the partition has apparently resulted in great prejudice to J. P. Leonard.

It will be well here to call attention to the error in description of the 14.46 acres in the Jackson donation land claim, in which the last course contains an error. It should be 40.01 chains, instead of 4.001 chains. This occurs in the complaint, order of the court, and the supplemental report of the viewers.

Because the referees in making the allotment apparently did not consider the quantity and quality, so that each party, according to his respective right as determined by the court, will receive the value of a share, the decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

**SURBAUGH et al. v. BUTTERFIELD.**  
(No. 2573.)

(Supreme Court of Utah. April 8, 1914. Rehearing Denied May 9, 1914.)

**1. PLEADING (§ 127\*)—ANSWER—ADMISSIONS—CONSTRUCTION, OPERATION, AND EFFECT.**

The admission in the answer, in an action for trespass by defendant's sheep and cattle, that defendant was the owner "of certain animals, to wit, sheep and cattle," was not an admission that he was the owner of the alleged trespassing animals, where, in connection with the admission, all the allegations of the complaint were denied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.\*]

**2. APPEAL AND ERROR (§ 171\*)—CHANGING GROUND OF OBJECTION.**

Where a case was tried as though at issue upon a material point, the plaintiff could not, for the first time on appeal, assume that the allegations regarding that point were not denied by the answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1023-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.\*]

**3. EVIDENCE (§§ 121, 317\*)—HEARSAY—STATEMENTS BY PERSONS NOT PARTIES OR WITNESSES—ORAL STATEMENTS.**

In an action for trespass by sheep and cattle, statements of a person herding them that they belonged to defendant were inadmissible, being hearsay and not *res gestæ* within that exception to the hearsay rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 308, 307-338, 1117, 1119, 1174-1192; Dec. Dig. §§ 121, 317.\*]

**4. EVIDENCE (§ 273\*)—DECLARATIONS—DECLARATIONS OF PERSON IN POSSESSION AS TO TITLE.**

The rule that declarations of a person in possession of property are admissible to show the nature of his possession only applies where the nature of his possession is material, and the declarations of a herder of trespassing sheep and cattle that they belonged to defendant were inadmissible to show defendant's ownership.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.\*]

**5. EVIDENCE (§ 273\*)—DECLARATIONS—DECLARATIONS OF PERSON IN POSSESSION AS TO TITLE.**

Declarations of the herder of trespassing sheep and cattle that they belonged to defendant, for whom he was working, were not admissible as showing the nature of his possession, as they did not show possession in him but in defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.\*]

**6. PRINCIPAL AND AGENT (§ 22\*)—CREATION AND EXISTENCE OF RELATION—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.**

The declarations of a herder of trespassing sheep and cattle that he was working for defendant, who owned them, were inadmissible, because agency cannot be proved in that way.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.\*]

**7. EVIDENCE (§ 242\*)—DECLARATIONS OF AGENT—SCOPE OF AGENCY.**

Declarations of a herder of trespassing sheep and cattle that they belonged to defendant, and that he was herding them for him, were inadmissible; it not being shown to be any part of his agency to so talk and gossip about his principal's affairs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 893-907; Dec. Dig. § 242.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by T. M. Surbaugh and another against Samuel Butterfield. From a judgment for plaintiffs, defendant appeals. Reversed and remanded for new trial.

A. A. Duncan, of Salt Lake City, for appellant. C. W. Collins, of Salt Lake City, for respondents.

STRAUP, J. This is an action for trespass. It is alleged the defendant's sheep and

cattle, between March, 1910, and July, 1911, trespassed on the plaintiffs' lands to their damage. The defendant, in his answer, admitted "that at the times mentioned" in the complaint "he was the owner, in possession, and chargeable with the care and control of certain animals, to wit, sheep and cattle," and denied all the allegations of the complaint. The case was tried to the court. The issues were found, and a judgment rendered in plaintiffs' favor. The defendant appeals.

He asserts the evidence is insufficient to show that the trespassing sheep and cattle were his, and that the court erroneously admitted evidence to prove ownership. One of the plaintiffs testified that in March, 1910, he saw a herder with the trespassing sheep and cattle. He was asked by his counsel: "Did you see any herder in charge of the stock up there during 1910? A. Yes; with the sheep. We went up to the camp where he was. Q. Did you make any inquiry of him as to whose herder he was, and whose stock those were? A. Yes, sir. Q. What did he tell you?" This was objected to as hearsay. The objection was overruled. "A. He came to meet us. We said to him, 'Whose sheep are those?' He says, 'Butterfield's.'" The defendant also made a motion to strike the testimony. It also was denied. The witness further answered: "And the cattle was herding on the mountain also a little farther north. We said, 'Whose cattle are those?' He says, 'They are Butterfield's.'" This also was objected to, and a motion made to strike. Both were denied. "Q. In 1911 did you see any herder in charge of the stock there on the property? A. We met the herder of the sheep, and met him taking the sheep off the ground. Q. Did you have any conversation with him as to who he was herder for? A. Yes. Q. And who the cattle and sheep belonged to? A. Yes, sir; Surbaugh and I both talked to him. Q. What did he tell you?" This, also, was objected to on the same ground. "A. Didn't tell whose stock they were. He said Samuel Butterfield's sheep."

The other plaintiff was asked by his counsel: "Q. Did you see any herder in charge of the stock there? A. Yes, sir. Q. Did you go and talk with him about the stock? A. Yes, sir. Q. Did he tell you for whom he was herding, and who the stock belonged to?" This was objected to on the same ground. Same ruling. "A. He told me they were Mr. Butterfield's sheep; that he was working for him; he was his herder. Q. Who did he say the cattle belonged to?" Same objection and same ruling. "A. Said the cattle belonged to Mr. Butterfield also. Q. Did you find any herder in charge of the stock there in 1911? A. Yes, sir. Q. Did you go over to him and have any conversation with him as to whose stock they were, and who he was herding for? A. Yes, sir. Q. What did he

say to you?" Same objection. Same ruling. "A. Said they were Mr. Butterfield's sheep; that he was Mr. Butterfield's herder. Q. What Mr. Butterfield? A. Samuel Butterfield."

[1, 2] Complaint is made of these rulings. If this evidence was improperly admitted, there is no sufficient evidence to show that the trespassing animals belonged to the defendant. He testified that they did not belong to him, and that they were not in his care nor under his control. The rulings are defended, first, on the ground that the evidence is harmless for, as is asserted, there was no issue as to the ownership of the trespassing animals. This, because of the defendant's admission in his answer that he was the owner, not of the alleged trespassing animals, but "of certain animals, to wit, sheep and cattle." That is not an admission that he was the owner of the alleged trespassing animals, when, in connection with the admission, all the allegations of the complaint are denied. In the next place, the case was tried on the theory that all of the material allegations of the complaint were put in issue, including the ownership and control of the alleged trespassing animals. The plaintiff attempted to prove ownership as though it was in issue. The rule is well settled that, when a case has been tried as though at issue upon all the material points, the plaintiff will not be permitted, for the first time in the appellate court, to assume the insufficiency of the answer, in the particular that material allegations regarded as denied and at issue were not denied. 21 Pl. & Pr. 667; Green v. L. S. & P. F. Co., 46 Cal. 408; Cave v. Crafts, 53 Cal. 135; Splers v. Duane, 54 Cal. 176.

[3-5] The rulings are further defended on the ground that the declarations of the so-called herder were admissible under the *res gestæ* rule. How often this battle-scarred veteran of the exception to the hearsay rule is ordered to the front to arrest onslaughts of the old hearsay guard! To justify this, language from texts to this effect are pointed to: Wood's Pr. Ev. § 155, "Declarations of a party in possession of property made at the time of the transfer to him as to the nature of his possession" are admissible. 16 Cyc. p. 1173, "Claim as to ownership or rights by one in possession of personal property may be shown by relevant declarations, although they were not made under the declarant's oath." Jones on Ev. (2d Ed.), Jones, Com's on Ev. 351, "The declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is, as a part of the *res gestæ*." About all the cases cited to support the texts are cited by the latter, Jones, Com's on Ev. Neither the texts nor the cases support counsel's contention. We think they are misconceived and misapplied. They relate to cases where the possession of the declarant,

or the nature or character of his possession, was relevant and material; cases involving declarations of former owners in possession of chattels, or of those in privity, or identified in interest with one claiming under or through the declarant, or declarations showing motive, design, intent, or purpose with which the declarant in possession acquired, held, or transferred the property, or declarations of authorized agents or other representatives. No claim is here made of agency, former owner, privity, identity of interest, or the like. When it is said the declarations of a former owner in possession of property, or of one identified in interest, or in privity with one claiming under or through him, or of an authorized agent, etc., are receivable, such declarations are received as being in the nature of admissions. But declarations of one in possession may also in some instances be received when such relations are not shown, when it is pertinent and relevant to show motive, design, intent, or purpose with which the declarant in possession acquired, held, or transferred the property. Or, as Jones puts it: "Declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession." But, as he and all the texts and cases say, where the nature and character of the possession of the declarant is material and relevant, and when such declarations tend to explain or characterize the nature of his possession, when the possession or the nature of the possession of the declarant is itself relevant and admissible, then his declaration explaining or characterizing such possession is also admissible. But here it is not made to appear wherein the possession or the nature of the possession of this undescribed and unidentified herder, or the motive, design, intent, or purpose with which he acquired or held possession, was in any particular relevant or involved. It is clear the evidence here was adduced, not to explain or characterize the so-called herder's possession, but to show ownership in another—in the defendant. "Whose sheep are those?" asked the plaintiffs of this stranger, the herder. He answered, "Butterfield's"—the defendant's. "Whose cattle are those herding on the mountain side?" He answered, "Butterfield's." Is it possible, in an action between the defendant and another, each claiming ownership of the cattle, such gossip would be evidence of the defendant's ownership? In the next place, this stranger, this declarant, was not even shown to be a possessor. All that was shown in that respect was that whatever possession he had was not his possession but that of another. "Did you make any inquiry of him as to whose herder he was? Did he tell you for whom he was herding, and who the stock belonged to?" were asked plaintiffs by their counsel. They answered the herder told them

the stock belonged to Butterfield; that he was working for him; that he was his herder. Of course counsel concede that agency cannot be shown by declarations of the alleged agent. But here *res gestæ* is again ordered to the front. Still whatever possession is shown by this evidence is, not that the herder was the possessor, but that another was by whom he was employed. Jones on Evidence, in the section referred to, § 351, Commentaries on Evidence, makes clear that declarations as these cannot be received under the rule. He there says that the declaration or explanation of one in charge of a vehicle as to the ownership of it, made not for explanatory purposes but with reference to an accident which had occurred, and to show that it belonged to the defendant in an action arising out of such accident, was inadmissible. Cases directly in point holding this evidence inadmissible are: *Cohn & Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 South. 853; *Charter v. Lane*, 62 Conn. 121, 25 Atl. 464.

[8, 7] When all is said and done, the case is this: The plaintiffs were permitted, over the defendant's objections, to prove agency—that the stranger, the declarant, was the defendant's herder—by the declaration of the alleged agent, and then, by his further declaration were permitted to prove, over defendant's objections, the defendant's ownership of the animals. Both offended against the well-established law of agency, for agency may not be shown in that way. Nor was it shown to be any part of the declarant's agency to so talk and gossip about his principal's affairs. So there was proof of neither agency, nor that the declarations were within the scope of the agency, or in the course of the agent's employment.

The judgment is reversed, and the case remanded for a new trial. Costs to the appellant.

McCARTY, C. J., and FRICK, J., concur.

#### MERCHANTS' BANK v. GOODFELLOW. (No. 2597.)

(Supreme Court of Utah. April 17, 1914.)

#### 1. BILLS AND NOTES (§ 119\*)—DRAFTS—PARTIES.

A draft signed G., though having the name E. both in its upper and lower left-hand corner, is on its face the draft of G., and not of E.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255-259; Dec. Dig. § 119.\*]

#### 2. BILLS AND NOTES (§ 26\*)—DRAFTS—CASHING BY BANK—RECOVERY OF DRAWER.

A bank which cashes for the payee a draft, on its face that of G. on E., though knowing G. was a buyer for E., may recover thereon of G. as drawer; it not knowing or having notice that it was given for goods sold by the payee to E., or that it was not drawn by G. for his own benefit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 31, 34; Dec. Dig. § 26.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. WITNESSES (§ 246\*)—WITNESS CALLED AND EXAMINED BY COURT.**

A party may not have testimony stricken merely because neither party called the witness, but the court of its own motion called him and had him testify.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 852-857; Dec. Dig. § 246.\*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by the Merchants' Bank against Jesse Goodfellow. Judgment for plaintiff, and defendant appeals. Affirmed.

Hutchinson & Bucher, of Salt Lake City, for appellant. Young, Snow & Ashton, of Salt Lake City, for respondent.

STRAUP, J. In this case the court found: "(2) That at Salt Lake City, Utah, on the 30th day of January, 1912, the defendant, Jesse Goodfellow, by his bill of exchange in words and figures as follows, to wit: 'Wool, Elsemann Brothers, 200 Summer Street. No. 3481 Salt Lake City, 1/30, 1912 At sight Pay to the order of J. W. Cochran \$500.00, five hundred and 00-100 % wool contract. [Signed] Jesse Goodfellow. Elsemann Brothers, Boston, Mass.'—requested Elsemann Bros. of the city of Boston, state of Massachusetts, to pay to the order of J. W. Cochran at sight \$500. (3) That the said defendant then and there delivered the same to the said J. W. Cochran. (4) That on the 30th day of January, 1912, at Salt Lake City, Utah, the said J. W. Cochran, for value received, indorsed the same to the plaintiff company. (5) That on the 6th day of February, 1912, the said bill of exchange was presented to the said Elsemann Bros. for acceptance, but was not by them accepted. (6) That the said bill of exchange was duly protested for nonpayment, and this plaintiff paid as costs of protesting the same, \$2. (7) That notice thereof was duly given to the defendant. (8) That the defendant has not paid the said bill of exchange, nor any part thereof, except the sum of \$33.40, which amount the defendant should be credited with and the amount deducted from the sums due on said bill of exchange." Judgment was rendered for the plaintiff in the sum of \$468.60. The defendant appeals.

[1, 2] The principal assignment of error relates to the ruling refusing the defendant's motion for a nonsuit. At the conclusion of the plaintiff's evidence the defendant interposed the motion "on the grounds that the draft sued on was the draft of Elsemann Bros. and not the draft of the defendant, Jess Goodfellow." We see nothing to support the motion. The plaintiff's evidence shows that in due course of business Cochran, who was a customer and a depositor at the bank, presented and indorsed the draft at the bank at Salt Lake City. The bank gave him face value for it, \$250 in cash and

a credit deposit of \$250. The president of the bank testified that he knew Elsemann Bros. by reputation, and from general repute also knew that the defendant "was a purchaser of wool acting for them." He further testified: "Mr. Goodfellow or Elsemann Bros. didn't do business with our bank, but I have probably handled a great many of their drafts before. I have known that Mr. Goodfellow was the agent of Elsemann Bros. for a good while, and I relied on that fact when I cashed the draft. I had known he was their agent for some time. I knew Mr. Goodfellow had been buying wool for Elsemann Bros. for a long time, and if it had been somebody I didn't know I would not have cashed the draft. The inducement for me to purchase the draft was the fact that Mr. Cochran had an account at the bank." This but shows that the witness knew who Goodfellow, the drawer, and Elsemann Bros., the drawee, were, and that the one was a general agent of the other. But nothing, except as appears from the face of the draft itself, was made to appear what the draft was given for, or on whose behalf, or for whose benefit it was drawn. The draft on its face shows it to be Goodfellow's and not Elsemann Bros.' draft. There is nothing to show that anything was said or done, or to indicate that the bank had any knowledge whatever that the draft was anything other than what it on its face appears to be—Goodfellow's draft, he the drawer, and Elsemann Bros. the drawee. Though the bank knew Goodfellow was a wool buyer for Elsemann Bros., yet, there is nothing unusual in an agent drawing on his principal, as was here done.

A further assignment is made that the court erred "in rendering judgment in favor of the plaintiff and against the defendant, the same being contrary to law and the evidence" in the particular "that the testimony" of the president of the bank referred to "was to the effect that when he cashed the draft sued upon in this action he knew the defendant was the agent of Elsemann Bros., and that he took the draft and cashed it as the draft of Elsemann Bros., and not as the draft of the defendant." That presents nothing but the question just considered. No assignment is made assailing the findings. They, as made, support the judgment. The assignment that the court erred in rendering judgment for the plaintiff thus presents nothing. But the defendant's evidence does not help him. He testified that he was the agent of Elsemann Bros., wool buyers at Boston, and that he had negotiations with Cochran respecting the purchase of wool; that he made him an offer which Cochran accepted, and then, as he testified, drew a contract which Cochran signed and gave him an advance of \$500, the draft sued on. The contract signed by Cochran was: "I have sold to Elsemann Brothers of Boston, Mass., wool of



about fifteen hundred head of my own sheep"—about 10,000 pounds, 14 cents per pound, etc. After the contract was signed and the draft delivered, Cochran gave Goodfellow his, Cochran's address "as No. 1460 Major Avenue, Salt Lake City." Goodfellow, as he testified, could not thereafter find Cochran, and found that he did not live at the address given him. He thereupon became suspicious of the transaction and wired Eisemann Bros. not to pay the draft. But nowhere by his evidence does he show any notice to or knowledge of the bank as to these negotiations, or any of the circumstances thereof.

[3] Another assignment relates to this: Neither party called Cochran as a witness. The court thereupon, on his own motion, called him and had him give testimony. It is not claimed that the testimony so given by him was irrelevant, or immaterial, or incompetent. But at the conclusion of his testimony the defendant moved that it be stricken "for the reason that it was not offered by either the plaintiff or the defendant, and is not a part of the proof in this case." The court denied the motion. The ruling is complained of. We do not see anything to that.

Let the judgment be affirmed, with costs.

McCARTY, C. J., and FRICK, J., concur.

#### SCHWAB SAFE & LOCK CO. v. SNOW. (No. 2592.)

(Supreme Court of Utah. April 17, 1914.)

#### SALES (§ 23\*)—PURCHASES FOR RESALE—ACCEPTANCE OF ORDERS—FAILURE TO DELIVER—LIABILITY.

The parties having entered into an agreement, whereby defendant was to buy and resell safes made by plaintiff, and plaintiff was to supply them for such purpose, and make prompt shipments of all sold and ordered by defendant, and plaintiff, on defendant complaining of delay in shipping safes of a certain style, and asking if he was to understand it would be useless to take any more orders for them, having replied that it would endeavor to fill his orders therefor as quickly as possible, and, on orders being subsequently made therefor, acknowledged them, and stated they would receive its prompt attention, and that shipments would be made as soon as possible, there was an unqualified acceptance of the orders, making it liable to defendant for his loss of profits on sales, because of its failure to make the shipments.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.\*]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the Schwab Safe & Lock Company against O. G. Snow. From a judgment granting a nonsuit on defendant's counterclaim, he appeals. Reversed and remanded for new trial.

Hutchinson & Bucher, of Salt Lake City, for appellant. Stephens, Smith & Porter, of Salt Lake City, for respondent.

STRAUP, J. The plaintiff sued to recover a money judgment on a blanket charge "for goods, wares and merchandise sold and delivered," of which it alleged a balance of \$561.72 remained due and unpaid. The defendant denied the indebtedness, and pleaded counterclaims. The case was tried to the court. The issues tried relate to those presented by the counterclaims. As to them the court granted a nonsuit, and then rendered a judgment for the plaintiff in the sum of \$561.72. The defendant appeals. The principal assignment involves a review of the ruling granting the nonsuit. The relation of the parties and the real transactions between them are shown by a somewhat voluminous correspondence. We can but give a substance of such parts of it as are deemed by us the most important.

In brief, the case is this: In April, 1906, the defendant, residing in Salt Lake City, wrote the plaintiff, residing in Lafayette, Ind., where it was engaged in manufacturing and selling safes, that one of its agents had conferred with him and was anxious to interest him in the safe business. He stated that, if he went into the business, "it would be with a view of putting a few first-class agents in the field and pushing the business, and, as traveling expenses are high in the west" requested "the very best prices for 'spot cash'"; and further requested catalogues and price lists quoting "your very best prices on the various kinds of safes." The plaintiff replied: "If you are inclined to handle our line of safes making us some good sales, we have no objection in furnishing catalogues and price lists quoting you our 'spot cash' with order prices." A price list was inclosed, and catalogues sent showing some 20 different grades of safes and price lists of each. Further correspondence followed, in pursuance of which the defendant appointed agents and sent them out to solicit orders. Contracts of sale were made between the defendant and the purchasers. The orders were sent to the plaintiff, who acknowledged receipt of them, and made shipments direct to the purchasers, but charged the safes to the defendant.

In May, 1906, after several orders had been received and acknowledged by the plaintiff, and some delay in shipments experienced, the defendant wrote the plaintiff: "What I do want, however, is prompt delivery, and if that cannot be done I do not care to sell any of them. I naturally supposed that your Co. kept them on hand ready for shipment as soon as ordered and paid for. The reason of making this remark is owing to the fact that in your answer to my order you simply say you have 'entered the order,' but say nothing about when the safes will be shipped, so for that reason I am at a loss to know whether you have them on hand, or whether I will have to wait till you

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

make them. You will appreciate the necessity of prompt delivery when your attention is called to the fact that I have to advance the agents their expense and part of their commission, and then have to advance the money to buy the safes, and then allow the purchasers to pay in small monthly installments after the safe has been delivered, whereby, you can readily see, a good deal of money will necessarily be tied up in the business anyway, and if I am obliged to wait for the safes to be made after I have paid for them, then in that event there is not enough margin in the proposition to induce me to handle them. Please advise me on this point by return mail."

To this the plaintiff replied: "*We can make prompt shipments*, but you must understand that safes must be lettered and varnished, which will consume a few days, especially as the varnish must be thoroughly dried before shipping in order to avoid the packing from adhering to the safes. We sometimes are short in some sizes, and consequently your orders are delayed for this reason, but we aim to carry all sizes in stock and make prompt shipments. *We assure you that no other safe manufacturers can make prompter shipments than we do*, and you will be convinced that our dealings with you are receiving our best attention, when we have proceeded any great extent with you in a business way."

The defendant continued to take orders, sending them to the plaintiff, who acknowledged receipt of them, and made shipments accordingly.

In September, 1906, the defendant wrote the plaintiff that he had been in the business long enough to satisfy him that by pushing it he could make a success of it, and asked that he be given "an agency contract" covering a designated territory—Utah, Idaho, Montana, Washington, Oregon, Nevada, and Arizona—and stated that, if protected in such territory, he could "appoint as many agents as the business will justify, and when they travel and canvass the various places I will eventually get some benefit out of the advertising they do from time to time, and of course, that will also benefit you as well. You will undoubtedly concede the fact that it requires a great deal more and harder work to introduce an unknown commodity into any community than it requires to sell an article well and favorably known throughout the country. Therefore it would not be the fair thing for me to work and spend a great deal of money in building up a trade, and, when I get it well upon the highway of success, then allow others to invade my territory and thus reap the benefit of the means and time I have spent in introducing the proposition therein. \* \* \* My plan would be to establish an agency of live, active, and energetic men, capable of getting business, so as to make it interesting as well as profitable to all parties concerned.

It may not be amiss to say that I have had a great deal of actual experience in handling agents in different lines of trade, so that is not at all new experience to me so far as that is concerned."

To this the plaintiff replied: "*If you continue to send us your business, we have been receiving in the past, we do not see why you should not go ahead and continue to build up your business, as we surely will give you all the protection possible.* We have several hardware dealers representing us in one or two of the states you named, but we do not believe they would interfere with your business in the least. We have had several inquiries from your city, but as long as you can handle our goods and give satisfaction we do not see why any change should take place. Your orders are being shipped out as quickly as possible, our factory being very much congested with orders at this season of the year, to say nothing about our being unable to get some material from the eastern markets, which has been somewhat of a hindrance to us in filling orders. *We now have a good supply of everything necessary for safe manufacturing, and if you can keep your orders coming in regularly, we will succeed in getting them out with very little delay.*"

Thus the defendant in the territory named continued with his agents in the field selling safes, and sending in the orders to the plaintiff to be filled.

In December, 1906, the plaintiff wrote the defendant that one from Montana wrote it "for a price on our safes, and we referred him to you as our representative in that territory, and we would suggest that you write him, and, if he wishes to sell safes as a dealer, would suggest that you quote him as low a price as possible so he can realize a profit."

It was further testified to by the defendant that he had about eight agents traveling and selling safes in Utah and in the other named states, and that he sold about 200 safes, which had been shipped to the purchasers by the plaintiff on sales made by him and upon his orders sent to it.

After the defendant had been engaged in the business for something over a year, a controversy arose between him and the plaintiff as to the plaintiff's delay in making shipments of safes sold by him and orders sent to it, especially with respect to the grade or kind of safe known as No. 80. In some instances there were delays of more than five months. Purchasers complained of the delay, and in some instances their orders were canceled. Considerable correspondence passed between the plaintiff and the defendant with respect to this.

In May, 1907, the defendant wrote the plaintiff: "When we wrote for information as to when the shipments would be made we were in hopes of getting some definite information regarding the matter, but must

confess that we are about as much in the dark as we were before the inquiry was made, for we don't know whether it takes a year to make patterns or whether a month, week, or a day, we really hope, however, that it don't require much time to make them, for we have recently sent you several orders for the same kind of a safe as the Stewart. As to substituting other kinds for the No. 80's, am sorry to have to say that it would be impossible to do that, as they are desired for special purposes in every instance when ordered. Are we to understand that it will be useless to take any more orders for the No. 80? And does that also apply with equal force to Nos. 110, 130, and 160? As it costs a good deal of hard cash outlay in getting orders, you will readily concede that we are certainly entitled to know what the reasonable prospects are for having the orders filled within a reasonable time. Therefore please give us definite information as to what numbers we ought to discontinue to get orders for, if any."

The plaintiff replied: "It takes more time to get out new patterns than you have any idea; especially when you are about five hundred orders behind all the time. We will endeavor to fill your orders on No. 80 safe as quickly as possible, but we will have to build them entirely by hand."

Later in that month the plaintiff wrote the defendant: "We would ask you to refrain from taking orders for No. 80 safes as much as possible, as we are not in a position to furnish them, only on long time delivery." But within a few days after that the plaintiff in acknowledging receipts of orders for No. 80 safes, stated: "We will endeavor to fill your orders for No. 80 safes as quickly as possible." Still later in that month, referring to further orders sent it by the defendant, the plaintiff wrote him: "It is a question of just when we can fill your order for a No. 80 safe, but we would advise that you hold off your customer as long as possible, and if we can make shipment all right and well. We dislike very much to cancel this order, and will do the best we can towards making shipment." But in June following, again acknowledging receipt of three orders for No. 80 safes, the plaintiff wrote the defendant that the orders "have been entered for prompt attention, shipments moving at earliest date possible."

So the defendant continued in the business, as before, selling safes, among them No. 80, and sent in his orders to the plaintiff, all of which were acknowledged by it, with statements to the effect that the orders had been entered, would receive prompt attention, and that the shipments would be made as soon as possible. Delays, however, continued in the shipments, complaints made by purchasers of nondeliveries, and in some instances the plaintiff canceled orders theretofore received and acknowledged by it for No. 80

safes. In March, 1908, the defendant wrote the plaintiff: "When will you be able to furnish any No. 80 safes?" The plaintiff replied: "In regard to No. 80 safes, desire to say that we have a new pattern in process of construction, and for the present we can furnish you about one per week. It will not be long before we can furnish you with any quantity of these safes you can use."

The defendant sold 10 No. 80 safes, one 110, and one 160, orders for which had been sent to the plaintiff and acknowledged by it, but of which shipments were not made or delayed, and the orders canceled. Because of the plaintiff's failure and delay in making shipments, the defendant, in the summer of 1908, ceased to do business with it. He then owed the plaintiff a balance unpaid on safes which had been sold and delivered amounting to \$561.62. The subject-matter of his counterclaims relates to his loss of profits as to sales made by him of the 12 safes referred to and which the plaintiff failed to deliver.

The court considered the transactions and the rights of the defendant from the viewpoint of whether the orders sent the plaintiff and received by it with respect to the safes sold by the defendant, and not delivered by the plaintiff, constituted, as between them, contracts of sale. The court held they did not, because of an insufficient acceptance of the orders by the plaintiff; that its acceptances—your orders received; have been entered; will receive prompt attention; shipments will be made as soon as possible—were not sufficiently specific and direct to constitute in law an unqualified acceptance. We think the court erred in that.

Under the circumstances disclosed and the shown relation between the parties, the defendant's sending in the orders and the plaintiff's acknowledging receipt of them, stating they had been entered, would receive prompt attention, and that shipments would be made as soon as possible, sufficiently show an acceptance. In the next place, we think the rights of the defendant are to be considered and measured from a broader viewpoint. The relation of the parties is shown to be something more than that of a mere vendor and vendee. A relation is shown whereby the defendant undertook to buy and resell plaintiff's safes, and the plaintiff to furnish and supply them for that purpose. One thing was very clearly understood between them, when the defendant entered upon the business, that the plaintiff was to make prompt shipments and deliveries of all safes sold and ordered by him. The necessity of that was fully explained to the plaintiff. It in clear terms promised to make prompt shipments, and assured the defendant that it could do so. That promise applied to all safes listed, including safe No. 80. True, after the defendant had entered upon the business and had his agents in the field, the

plaintiff requested the defendant to refrain as much as possible from taking orders as to safes No. 80, and to hold off his customers as long as possible; but it at no time directed him not to take orders for that safe. When the defendant wrote the plaintiff in May, 1907: "Are we to understand that it will be useless to take any more orders for the No. 80, and does that also apply to Nos. 110, 130, and 160? \* \* \* Give us definite information as to what numbers we ought to discontinue to get orders for, if any"—the plaintiff replied, "We will endeavor to fill your orders on No. 80 as quickly as possible." And, when it thereafter received orders for safes No. 80, it did not decline to accept them, but acknowledged receipt of them, stated that they would receive its prompt attention, and that shipments would be made as soon as possible. Because of its failure to make the shipments the defendant, as to those sales, lost his profits.

We think the case comes within the principles announced in *Jordan, Marsh & Co. v. Patterson Co.*, 67 Conn. 473, 35 Atl. 521, *Crane v. Barron*, 115 App. Div. 196, 100 N. Y. Supp. 937, *Manier v. Appling*, 112 Ala. 663, 20 South. 978, *Parlin & Orendorff Co. v. Boatman*, 84 Mo. App. 67, *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; and we are of the opinion that the defendant, as to his counterclaims, adduced sufficient evidence to make a prima facie case; and hence the court erred in granting the nonsuit. The defendant, on his counterclaims, is entitled to a trial on the merits. He has not had that.

The judgment is reversed, and the cause remanded for a new trial; costs to the appellant.

MCCARTY, C. J., and FRICK, J., concur.

**JUAB COUNTY v. BAILEY et al.** (No. 2595.)  
(Supreme Court of Utah. April 25, 1914.)

**MANDAMUS (§ 15\*)—DEFENSES—APPORTIONMENT OF TAX—STATE BOARD OF EQUALIZATION—HEARING—TIME.**

Comp. Laws 1907, § 2566, as amended by Laws 1909, c. 63, requires every mining corporation to file a statement of the gross yield during the year with the State Board of Equalization on or before the second Monday of February. Section 2560, as amended by Laws 1909, c. 63, requires the board to assess the actual value of such proceeds, authorizing the owner at any time between the third Monday in May and the third Monday in June to apply to have the assessment corrected, after which the board is required to apportion the assessment to the several counties in which the mining claims are located. Section 2561, as amended by Laws 1909, c. 63, provides that the board on or before the fourth Monday in June shall transmit to the county auditor of each county to which an apportionment is made a statement of the property assessed and the assessed value of the same as fixed and apportioned to the county, which is to be apportioned by the county board, etc. *Held* that, where a mining company incorrectly reported to the State Board of Equalization the gross yield of certain mines as

located in U. county when they were largely located in plaintiff county, and under such report the assessed valuation was apportioned to U. county, plaintiff, after such apportionment and the rate of taxation had been fixed in accordance therewith, and all levies had been completed, could not maintain mandamus to compel the State Board of Equalization to grant a hearing and reapportion the assessed value of such mining property to plaintiff county.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 47, 49; Dec. Dig. § 15.\*]

Application for writ of mandamus by Juab County against William Bailey and others, constituting the State Board of Equalization. Writ denied.

Powers, Marloneaux, Stott & McKinney, of Salt Lake City, for plaintiff. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for defendants.

FRICK, J. The plaintiff, Juab county, filed an original application to this court for a writ of mandate directed to the defendants William Bailey, Harden Bennion, John Watson and Amos S. Gabbott, "as the State Board of Equalization of Utah," to require said board to give the plaintiff an opportunity to present evidence to it and to grant it a hearing with respect to the apportionment of the net proceeds derived from what is known as the Iron Blossom mine, situate in both Juab and Utah counties in this state, owned by the Iron Blossom Consolidated Mining Company. The board interposed a general demurrer to the application. The apportionment of the net proceeds derived from said mine was made by said board pursuant to the following provisions of our statutes: Comp. Laws 1907, § 2566, as amended by Laws Utah 1909, p. 99, in substance provides that every person or corporation engaged in metal mining "must each year make out a statement of the gross yield of the above-named metals or minerals from each mine owned or worked by such person, corporation or association during the year next preceding the first Monday in January and the value thereof." The statement must be verified and must be filed with the Board of Equalization "on or before the second Monday in February in each year." Any mining company or person who fails to furnish the statement within the time and in the manner prescribed by the statute is subject to punishment. Section 2560, as amended as aforesaid, in part provides that the State Board of Equalization must meet on the first Monday in March and continue in open session until the first Monday in May "and later if the business of the board requires it." At such meeting the board must "assess at their actual value at 12 o'clock m. on the first day of January of each year \* \* \* the net actual proceeds of all mines or mining claims." All property must be assessed in the name of the owner and "as soon as such assessment is completed a copy of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

same must be furnished to the owner. On the third Monday in May the board shall again reconvene in open session \* \* \* and continue in session not later than the third Monday in June and at said session the owner of any property assessed by said Board of Equalization may apply to have the same corrected in any particular and the board may correct and increase or lower the assessment made by it." After all applications for corrections are disposed of, the board must apportion the assessment made by it to the several counties as directed. With regard to the apportionment of the net proceeds, the statute provides, "The net proceeds of all mines and mining claims shall be apportioned respectively to the counties in which the mines or mining claims assessed for the same are situate." Section 2561, as amended, provides, "The State Board of Equalization shall, before the fourth Monday in June, transmit by mail to the county auditor of each county to which such apportionment has been made a statement showing the property assessed and the assessed value of the same as fixed and apportioned to the county." Upon receipt of the statement the county auditor is required to enter the same in the "assessment book or roll as aforesaid which shows the total value of all property for taxation of the county." The county commissioners, acting as a board of equalization for the county, after the receipt of the statement from the county auditor, must apportion the property assessed "to the several city, town, school, road, or other lesser taxing district in the county," in accordance with the provisions of the statute. Section 2563 provides, "If the owner of any property assessed by the State Board of Equalization is dissatisfied with the assessment made by such board such owner may, between the third Monday in May and the second Monday in June, apply to the board to have the same corrected in any particular and the board may correct and increase or lower the assessment made by it so as to equalize the same with the amount of other property in the state." Section 2584 prescribes specially the powers and duties conferred and imposed upon the State Board of Equalization. One of the duties imposed is that the board shall transmit "on or before the fourth Monday in June to the county auditor of each county" the apportionment of the assessment made by the board.

We have thus stated the powers and duties of the State Board of Equalization with respect to the assessment and apportionment of property as well as may be in a general statement. The said board, after having complied with the foregoing provisions, must, before the last Monday of July of each year, determine the rate of the state tax to be levied and collected. Immediately after such rate is determined, the board must transmit the rate agreed upon to the

county auditor of each county and also to the State Auditor. The county commissioners of each county "must, between the first Monday in July and the second Monday of August of each year, fix the rate of county tax." It will thus be seen that it is absolutely necessary that the assessment, equalization, and apportionment of all property be completed within a certain period of time which is prescribed by the statute for the reason that the rate of taxation can only be determined and the levies made for the purpose of raising the necessary revenues after the valuation and apportionments are finally determined and certified. The plaintiff in its application, however, alleges that in making its report to the State Board of Equalization the Iron Blossom Consolidated Mining Company did not truthfully state the facts with regard to the county from which the ores producing the net proceeds which were reported for assessment were taken. It is contended that the ores from which the net proceeds were derived were taken from mining claims situate in Juab county, but that notwithstanding that fact such mining company reported that the same were taken from Utah county, and that the said Board of Equalization adopted the report of said mining company and thus apportioned said net proceeds, or at least a very large portion thereof, to Utah county, when the same should have been apportioned to Juab county, the plaintiff herein. The plaintiff county is therefore, it is contended, deprived of a large amount of property for taxation. Plaintiff also alleges in its application for a writ that it was not aware of the fact that the mining company had made the report as aforesaid until the 1st day of November, 1913, whereupon it, on the 14th day of that month, the day before the tax became delinquent, made an application to the State Board of Equalization to grant it a hearing and to allow it to produce evidence to prove that a specified amount of the net proceeds reported by said mining company should be apportioned to the plaintiff county and not to Utah county as was done by said board. The foregoing fact is alleged notwithstanding the fact that it is not denied that the apportionment as made by the State Board of Equalization was in fact transmitted to the proper officer of the plaintiff county in June as required by the statute. The State Board of Equalization refused to grant plaintiff its request, and hence this application.

We shall assume, without deciding and without expressing an opinion either way upon the question, that the State Board of Equalization has the authority to grant a hearing for the purposes stated in the application when such application is made to said board at any time before the apportionment on the net proceeds of mines is transmitted to the several counties as required by the statute. The question involved and to

be decided now, however, is: Can this court by writ of mandate coerce said board to grant a hearing for the purposes aforesaid after the apportionments have been made, the rate of taxation fixed in accordance with such apportionments, and all levies have been made pursuant thereto? Plaintiff alleges that it has a legal right to have apportioned to it all the net proceeds derived from all mines and mining claims which are situated in Juab county, and hence it is the duty of the State Board of Equalization to make the apportionment to said county as the law requires and not in accordance with the incorrect report made by the mining company. It is further alleged that the statute fixes no time within which a protest may be made or a hearing had, nor does it provide for any notice to be given to any county of the filing of a statement by the mining company. It is also urged that the plaintiff had no knowledge of the falsity of the statement filed by the mining company until November 1st, at which time all the apportionments had been made and the rate of taxation had been determined. Of course, all the foregoing allegations, if material, are admitted by the general demurrer. But even though they be admitted, does the conclusion that plaintiff is now entitled to a hearing upon the question necessarily follow? We think not. The plaintiff county was charged with knowledge respecting the provisions of the statute the same as every one else is charged with knowledge thereof. It therefore knew that the mining company must report the net proceeds of its mine to the State Board of Equalization within the time fixed by the statute and that the board would within a certain time also fixed by the same statute have to apportion said net proceeds either to Utah county or to the plaintiff.

We are of the opinion therefore that, if plaintiff desired to assail the correctness of the report made by the mining company, it was required to do so at some time before the apportionment was finally transmitted. To require the State Board of Equalization to reopen the matter after it has made the apportionment and the rate of taxation has been determined must result in producing gross uncertainty with respect to the amount of revenue any particular county will receive for a particular year. Suppose it should ultimately be decided that Utah county should surrender \$500,000 of net proceeds to Juab county after Utah county has determined the rate of taxation upon the whole amount of property within said county including said \$500,000, will not the amount of revenue for Utah county be reduced very materially while the amount for Juab county will be correspondingly increased? Utah county may thus suffer a deficit in its revenues, while Juab county may have a surplus. The purpose of the statute in requiring certain things to be done within a cer-

tain time is to prevent such incongruous results. In view that under our Constitution no debt can be incurred or obligation assumed by any county in excess of the revenues derived from the assessment of property for the current year makes it unnecessary for us to further dwell upon the importance that time is of the essence with regard to certain acts that must be performed either by the taxpayer or by the authorities who have in charge the assessment, apportionment, and determination of the tax rate. Nor does the allegation in the application that Utah county has been enjoined from disbursing the money derived from the net proceeds in question here help the matter. Indeed, it only emphasizes the fact that the amount of revenue a county may rely upon should not be kept in doubt and uncertainty. In the absence of an express provision of some statute to that effect, what power has the State Board of Equalization to grant a hearing the result of which might be the cause of frustrating the very purpose of the statute to which we have called attention? If there is no law requiring the State Board of Equalization to act in that regard, this court can create none.

Nor do we see why Juab county should be placed in a better plight than an aggrieved property owner would be. Suppose a property owner were excessively assessed, but failed to receive the notice of his assessment for some reason, and therefore failed to appear at the proper time and place to make his protest to the board of equalization, could he, after the whole matter had been closed, coerce that board by a writ of mandate to reopen his case and give him a hearing upon the matter? We think no one would so contend. It is urged, however, that in the taxpayer's case there is a notice provided, and if such a notice is issued and mailed as provided by the statute it is his misfortune that he does not receive it in time to make his protest. As regards the plaintiff's rights in the apportionment of net proceeds, it requires no notice, since it must know just when all persons engaged in mining within its limits must make reports respecting net proceeds for taxation. It also knows just when the apportionment thereof must be made. The taxpayer, however, cannot know in advance at what value his property will be assessed and hence he is powerless to act before receiving notice. It certainly would be impractical to require each taxpayer to visit the Board of Equalization to find out concerning his assessment. Besides, the statute provides for notice in the case of a taxpayer, and the statute in these things must control. Assuming therefore that plaintiff may assail the correctness of the reports made by those engaged in mining, it has ample time and opportunity before the apportionment is transmitted to ask the State Board of Equalization for a hearing upon that matter if a

hearing is necessary. If plaintiff can prevail in the present application, why can it not open up the apportionment made for the year 1912 and for the preceding year? Clearly the property owner who may have been excessively assessed would be denied such relief, and we cannot see how plaintiff can be given any greater rights. We are of the opinion that the authority of the State Board of Equalization to grant plaintiff's application is, to say the least, a matter of serious doubt. It is elementary that unless the right to have the act which is demanded from the officer, board, or tribunal is clear, and the duty to perform the same is equally clear, the writ will not issue.

Mechem on Public Officers, in sections 937 and 938, states the rule thus: "Such being the nature and functions of the writ, it is well settled that it can be resorted to only for the purpose of enforcing the performance of a specific duty already existing and clearly imposed upon the officer either by express law or as one of the necessary functions or attributes of the office which he holds. It is but a restatement of the previous rule, and it is equally well settled, that the writ will not be issued to enforce a doubtful right, nor where the legal duty is not clear. And the party applying for the writ must show by his application that all the conditions exist which are necessary to create the duty. They must not be left to inference." Nor does the maxim that whenever there is a wrong there is a corresponding remedy apply to the assessment, apportionment, and levy of taxes. Many irregularities which arise in the imposition and enforcement of taxes must go unredressed, either because the victim of the wrong does not move in time, or because in the nature of things redress is impracticable or is not provided for by law. Judge Cooley, in the concluding paragraph of his excellent work on taxation, sums up in most forcible terms the utter inability of the law to afford redress for all wrongs and irregularities in that regard. He says: "It will be apparent from what has appeared in this chapter that many serious errors may be committed and many wrongs done in the exercise of the power to tax, which the parties wronged must submit to, because the law can afford them no redress whatever. All injuries which result from an exercise of political or legislative authority are to be included in this category; and these are often the most serious which, in matters of taxation, the people are visited with. In all such cases, the authority of the judiciary is confined to an inquiry into the jurisdictional question, and, if it appears that the political or legislative body has kept within the limits of its authority, the judiciary must pause there, and admit its incompetency to inquire into wrongs which, within those limits, may have been

committed. The wrongs which spring from errors on the part of assessors are, in a large proportion of all the cases, as little susceptible of correction, unless the Legislature shall have provided a remedy by statute. Courts of equity have but a limited jurisdiction, extending to few cases beside those in which the impelling motive on the part of the assessors has been to do injustice and inflict injury. The chief protection of the citizen must at last be sought in the intelligence and integrity of public officers, and where these fail, as too often they do, the injury must frequently prove irreparable." 2 Cooley, Tax'n, p. 1523.

But the right of the plaintiff to invoke the action of the State Board of Equalization and the authority of that board to grant the relief prayed for at this time and under the circumstances disclosed in the application are too doubtful to authorize us to coerce that board to grant the hearing requested by the plaintiff.

The peremptory writ should therefore be, and it accordingly is, denied, at plaintiff's costs.

MCCARTY, C. J., and STRAUP, J., concur.

#### McCULLOUGH v. OREGON SHORT LINE R. CO. (No. 2589.)

(Supreme Court of Utah. April 11, 1914.)

##### 1. RAILROADS (§ 454\*)—FIRES—DUTY AS TO EQUIPPING LOCOMOTIVES—INSTRUCTIONS.

An instruction, in an action for fire set by a locomotive, that it is incumbent on the company to avail itself of the best mechanical contrivances and inventions in known practical use, to prevent escape of sparks, and that, if it fail to do so, it is liable for the injury, is erroneous as making the company an insurer, whereas its duty is only to use all reasonable care and diligence to procure and equip its locomotives with the most approved or effective modern practical appliances in general use for preventing the escaping of sparks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1668-1671; Dec. Dig. § 454.\*]

##### 2. EVIDENCE (§§ 123, 317\*)—HEARSAY—RES GESTÆ—CONVERSATIONS.

A conversation concerning the fire, which one heard after arriving at the place thereof, some time after it started, cannot be testified to, in an action for the setting of it by a locomotive, being hearsay and not part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368, 1174-1192; Dec. Dig. §§ 123, 317.\*]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by Henry McCullough against the Oregon Short Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

P. L. Williams, Geo. H. Smith, J. V. Lyle, and Paul Williams, all of Salt Lake City, for appellant. Geo. J. Marsh, of Ogden, for respondent.

STRAUP, J. This action is brought to recover damages for the destruction of plaintiff's barn by fire alleged to have been caused by defendant's negligence in permitting sparks of fire to escape from its locomotive operated by it on its track near by. The plaintiff had judgment. The defendant appeals.

[1] The chief complaint made is this: The court charged the jury: "You are further instructed that it is incumbent upon the railroad company to avail itself of the best mechanical contrivances and inventions in known practical use which are effectual in preventing the burning of private property by the escaping of sparks and coal from its engines. If you find that the defendant company has failed to do so, it is liable for injury to the plaintiff caused by the failure of said defendant to use them." That, the defendant urges, gave the jury a wrong test or measure of duty. We think the complaint is well founded. In defense of the charge the plaintiff cites 2 Rorer on Railroads, pp. 791-795, and cases there cited; 2 Thompson's Com's. Neg. (2d Ed.) §§ 2231, 2232; Watt v. N. C. Rd. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772; Metzgar v. C. M. & St. P. Ry. Co., 76 Iowa, 387, 41 N. W. 49, 14 Am. St. Rep. 224; C. & A. R. Rd. Co. v. Pennell, 94 Ill. 448. We think the cited authorities and cases do not support the charge. They do not, as does the charge, lay down an absolute duty to furnish "the best mechanical contrivances and inventions in known practical use," but the duty to use reasonable and ordinary care to equip locomotives with the most approved known practical appliances in general use. Even the deduction which counsel for the respondent themselves make from the cited cases does not support the charge. They say: "We submit that the true rule in this respect is that the railroad companies are charged by law with the use of reasonable care and diligence in the construction of its locomotives, with the operation of its road, with the employment of agents, with caring for its right of way, etc., and, as an incident to the use of reasonable care in the operation of its road, it is charged by law with the duty to provide and equip its engines in which fire is impounded with the best and most approved mechanical appliances in known practical use for the prevention of the escape of unnecessary fire from its engines." They thus recognize that the duty imposed is to use reasonable care and diligence to equip locomotives "with the best and most approved mechanical appliances," etc. But that is not what the charge declares. It states "that it is incumbent upon the railroad company to avail itself of the best mechanical contrivances and inventions in known practical use," and that, if it "fail to do so, it is liable for the injury" caused by such failure. Such a charge in effect makes the defendant an insur-

er and liable without averment or proof of negligence, which is not the law. The law generally on the subject is that a railroad company is required to use all reasonable care and diligence to procure and equip its locomotives with the most approved or effective modern practical appliance in general use for preventing the escape of sparks of fire. 33 Cyc. 1332; 3 Elliott on Railroads (2d Ed.) § 1224; 2 Thomp. Com. Neg. (2d Ed.) § 2232.

[2] Another assignment relates to this: A witness called by the defendant testified that he lived near by the fire. When his attention was called to it, he was in bed. He arose, dressed, and went to the fire. When he got there, "the main part (the barn) was all on fire, and the fire was well over the lean." He further testified that there was no perceptible breeze, and that "the flames would go almost straight up and gradually float off to the north"; and that when he arrived he saw present the plaintiff and three others. Then he was asked by defendant's counsel: "Q. State whether or not you heard any conversation concerning the fire at the time you went over there and saw Mr. Swenson, Mr. McCullough, and Mr. Rosevear and the man from the car? A. Yes, sir. Q. State what it was?" This was objected to as being incompetent, irrelevant and hearsay. The objection was sustained. The defendant contends it was entitled to the answer under the res gestae rule. We think not. We do not see anything made to appear to bring "the conversation" referred to within the rule, either as to what main and pertinent thing it tended to characterize or explain or as to its spontaneity.

Because of the error in the charge the judgment is reversed, and the case remanded for a new trial. Costs to the appellant.

MCCARTY, C. J., and FRICK, J., concur.

#### STATE v. PARK. (No. 2502.)

(Supreme Court of Utah. April 23, 1914.)

##### 1. ADULTERY (§ 14\*)—EVIDENCE—SUFFICIENCY—MARRIAGE.

On a trial for adultery, evidence held sufficient to support a jury finding that accused was married.<sup>1</sup>

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 27, 31, 32; Dec. Dig. § 14.\*]

##### 2. CRIMINAL LAW (§ 511\*)—SUFFICIENCY OF EVIDENCE—CORROBORATION OF ACCOMPLICES.

On a trial for adultery, evidence that accused, a married man, was alone with a 19 year old girl, a ward of the state industrial school, in a hotel room in the city where he resided, about 2:30 at night, and quite early the next morning, in connection with proof of false and contradictory statements as to his whereabouts that night, sufficiently corroborated her testimony that they occupied the same bed and had sexual intercourse, within Comp. Laws 1907, § 4862.

<sup>1</sup> State v. Thompson, 31 Utah, 228, 87 Pac. 709; State v. Greene, 33 Utah, 497, 94 Pac. 987; State v. Moore, 36 Utah, 531, 105 Pac. 288, Ann. Cas. 1912A, 284.



forbidding convictions on the testimony of an accomplice unless corroborated by other evidence tending to connect accused with the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.\*]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Albert Park was convicted of adultery, and he appeals. Affirmed.

J. W. N. Whitecotton, of Provo, and W. E. Rydalch, of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

MCCARTY, C. J. The defendant was, on the 29th day of January, 1913, convicted in the district court of Utah county of the crime of adultery alleged to have been committed in said county on the 1st day of September, 1912. It appears from the record that the girl with whom it is alleged the defendant committed the offense charged in the information was, at the time of the alleged offense, 19 years of age, and also that she was a ward of the Industrial School of this state. The girl, hereafter referred to as the prosecutrix, was called as a witness by the state and testified that she met and became acquainted with defendant at a dance in Springville City some time in August, 1912; that she again met defendant on the 1st day of September, 1912; and that the circumstances leading up to and under which the offense charged was committed were as follows: As the prosecutrix, in company with "a girl friend and two boy friends," were returning home from a dance in Springville at about 12:30 a. m., she and her companions stepped into an ice cream parlor, and immediately thereafter defendant, in company with "two girls and two boys," came in. The defendant invited the prosecutrix to join him and his companion in what seems to have been a "joy ride" to Spanish Fork and return. This the prosecutrix consented to do. The party then entered the automobile, which was started towards Spanish Fork; the prosecutrix and defendant occupying the front seat in the car. She further testified, quoting from the record: "When I got into the automobile at Springville, Bert (defendant) was alone in the front seat, and I took a seat beside him. \* \* \* Bert drove the machine. \* \* \* He said: 'We will go to Spanish Fork, and then I will let you out when we come back. We won't be gone long.' \* \* \* He said he would see me home. \* \* \* At Spanish Fork we drove up to one of the drug stores and there got some beer. The beer was put in the machine, and we started back towards Springville. We started up the road \* \* \* and stopped when we first drank. All the parties drank beer and there were six of us; we drank out of the bottles. We came back through Springville, and I asked to get out.

and they would not listen to me. From Springville we came right on to Provo. They (referring to the defendant's male companions) took their girls home. The boys came back and got in the car, and we drove around as far as the Lamar Hotel. The boys all got out and went around the hotel and left me in the car. The defendant came back, I should think in about 15 minutes, and the other boys left. Bert and I went down to the garage and came back to the Lamar Hotel, where we stayed the balance of the night. \* \* \* I carried some of the bottles (referring to the beer) to the Lamar Hotel in a rain coat. I had two bottles in each pocket. We went to our room, where we undressed nearly an hour afterwards. During that hour we were drinking and talking. \* \* \* We both occupied the same bed and had sexual intercourse." She also testified that as they were passing along the corridor of the hotel leading to their room she saw a man (Cal. Hanson) lying on a bed in one of the rooms; that they stopped and talked with Hanson about 10 minutes, and then went to their own room, No. 14, Hanson going with them; that Hanson remained and talked with them about 20 minutes and then returned to his own room; that it was after 2 o'clock a. m. when Hanson returned to his room. Cal. Hanson was called as a witness by the state and testified that on the night in question he occupied room No. 11 in the Lamar Hotel; that at about 2 o'clock a. m. defendant and the prosecutrix came to his room and talked with him about 10 minutes, and from his room (room No. 11) they all went to room No. 14; that he remained in room No. 14 about 20 minutes and then returned to room No. 11, leaving defendant and the prosecutrix together in room No. 14. "Q. Did you see them again after that? A. Not until next morning. Q. Did you see them in the morning? A. Yes, sir. Q. Where were they? A. In the room. Q. Both there? A. Yes, sir. Q. About what time? A. Well, I couldn't say hardly what time it was, quite early, probably 7 o'clock. \* \* \* She was dressed, in full costume, (and) Bert (defendant) was dressed, in full costume." Hanson also testified that they all took breakfast together that morning at a nearby restaurant. George T. Judd, who, at the time the offense charged is alleged to have been committed, was sheriff of Utah county, was called as a witness by the state and testified that he had a conversation with defendant about the 3d or 4th day of September, 1912; that he asked defendant "where he was on Saturday night the latter part of August," and that the defendant stated that he went to Springville and then back to Provo; that he also asked defendant where he stayed that night, and he answered that he stayed at home; that he asked defendant if "he knew the whereabouts" of the prosecu-

trix on that night, and that defendant answered that he did not. Mr. Judd also testified that he had another conversation with defendant a few days thereafter, about the 10th, quoting: "I asked him where he was on the night of the last of August and the 1st of September, and he said he was in the Lamar rooming house. I asked him why he did not so state to me in the former conversation. He said he did not know why. I asked him why he stayed in room No. 14 of the Lamar rooming house, and he said he did not stay there. He said he stayed in room No. 11 with Cal. Hanson that night."

[1] Counsel for the defendant, in their printed brief, contend that there is not sufficient evidence to support a finding that the defendant was a married man at the time of the alleged commission of the crime charged. The prosecutrix was asked on cross-examination if she made certain statements while testifying in the cause at the preliminary hearing before the committing magistrate in conflict with portions of her testimony given at the trial, and she answered that she did, but that her testimony in that regard given at the preliminary hearing was not true. On being further questioned by defendant's counsel as to why she so testified at the preliminary hearing, she answered: "Well, because after I heard that he was a married man I didn't want these things to get out about him and about me. That's why. Q. Because he was a married man? A. Yes, sir. Q. When did you learn that? A. After I had been there with him. \* \* \* Q. What other reason was there why you did not want to tell the truth \* \* \* when you testified at the other trial? A. Well, simply because \* \* \* I didn't want to testify against Bert (defendant)—in one way I didn't want to because I never have been with married men and I knew he was married. After I found out he was married, I was doing this for his wife's sake. Q. So, to save Bert's wife was one object and to save Bert was another? A. Yes, sir. Q. Now, was there any other thing? A. No, sir; just those two things." George T. Judd, a witness for the state, testified on this point as follows: "Q. Did you have any conversation with him (defendant) \* \* \* relative to whether or not he was a married man? A. Yes, sir. Q. What was the conversation? A. That he was married. Q. Was anything said about how many children he had? A. As I remember, he said that he had two. Q. What were you talking about? \* \* \* A. Talking about this case. \* \* \* Q. Do you know whether or not Mr. Park's wife is now alive? A. Yes, sir. Q. Is she? A. Yes, sir." We think this evidence was sufficient to support a finding by the jury that the defendant was a married man. *State v. Thompson*, 31 Utah, 228, 87 Pac. 709; *State v. Greene*, 33 Utah, 497, 94 Pac. 987; *State v. Moore*, 36 Utah, 521, 105 Pac. 293, Ann. Cas. 1912A, 284; *Underhill*, Crim. Ev. p. 446.

[2] The defendant offered no evidence, and the cause was submitted to the jury on the evidence introduced by the state, the substance of which we have set forth. When the state rested, the defendant made a motion that he be discharged on the ground that the prosecutrix was an accomplice, and that there was no evidence except that given by her "tending to show that any crime had been committed, \* \* \* and that there is no evidence whatever in the record corroborating the statements of the complaining witness," the prosecutrix. Defendant also requested the court to charge the jury as follows: "You must, under the evidence in this case, find and return a verdict \* \* \* in favor of defendant not guilty." The overruling of the motion and the refusal of the court to direct a verdict in favor of defendant are the errors assigned and relied on for a reversal of the judgment. Comp. Laws, 1907, § 4862, provides that a person cannot be convicted of a crime on the testimony of an accomplice unless such accomplice is corroborated by other evidence which of itself and without the aid of the testimony of the accomplice shall tend to connect the defendant with the commission of the crime charged in the information; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Counsel for defendant contend with much earnestness that the testimony of the prosecutrix was not corroborated by other evidence as required by the foregoing provision of the statute. We do not agree with counsel. Cal. Hanson testified that he went with defendant and the prosecutrix to room No. 14 of the Lamar rooming house at about 2:30 o'clock a. m. on the night in question, and that in about 20 minutes thereafter he went to his own room, leaving defendant and the prosecutrix together and alone in room No. 14, and that he again saw them alone in this room "quite early, probably 7 o'clock," the following morning. The evidence therefore tends to show that defendant, a married man, was seen alone with a girl 19 years of age, who at the time was a ward of the Industrial School of this state, at about 2:30 at night, an unusual and unseemly hour, in a room of a hotel in the city where he at the time resided, and was next seen in the same room alone with the girl "quite early" the following morning. From this conduct, unexplained, the inference is permissible that he remained alone with the girl in the room from 2:30 a. m. until 7 a. m., and, when considered in connection with the evidence of the witness Judd that the defendant made conflicting and false statements regarding the room occupied by him that night, is, we think, sufficient corroboration of the prosecutrix tending to connect the defendant with the commission of the offense.

The judgment is affirmed.

STRAUP and FRICK, JJ., concur.

**FIRST NAT. BANK OF MOSCOW v. REGENTS OF UNIVERSITY OF IDAHO.**

(Supreme Court of Idaho. April 24, 1914.)

**1. COLLEGES AND UNIVERSITIES (§ 10\*)—ACTION AGAINST BOARD OF REGENTS—JURISDICTION.**

The district court has jurisdiction to try an action against the Board of Regents of the State University to recover a balance for money advanced and material furnished in the construction of a building to be used by the university. *Moscow Hardware Co. v. Regents*, 19 Idaho, 420, 113 Pac. 731, and *First National Bank v. Regents*, 19 Idaho, 440, 113 Pac. 735, approved and followed.

[Ed. Note.—For other cases, see *Colleges and Universities*, Cent. Dig. §§ 29-31; Dec. Dig. § 10.\*]

**2. COLLEGES AND UNIVERSITIES (§ 7\*)—ACTION—PARTIES.**

The Act of March 6, 1913 (Sess. Laws 1913, p. 328), creating a State Board of Education, makes such board the successor to the old Board of Regents of the University of Idaho, and as such successor said State Board of Education has the power and authority to defend an action previously instituted against the old board for a pre-existing obligation.

[Ed. Note.—For other cases, see *Colleges and Universities*, Cent. Dig. §§ 16-19; Dec. Dig. § 7.\*]

**3. REMEDIES—ELECTION.**

*Held*, that the remedies sought by the plaintiff are not inconsistent remedies, and plaintiff could not be required to elect between them.

**4. HARMLESS ERROR.**

*Held*, that the lower court committed no error prejudicial to the rights of appellant.

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by the First National Bank of Moscow, a corporation, against the Regents of the University of Idaho, a corporation, for money advanced and material furnished in the construction of a university building. From a judgment for plaintiff, the State Board of Education, as successor to the former Board of Regents, appeals. Affirmed.

Forney & Moore, of Moscow, for appellant. C. J. Orland, of Moscow, for respondent.

**PER CURIAM.** This action was commenced against the Board of Regents of the University of Idaho to recover a balance for money advanced and material furnished in the construction of a building to be used by the university. Judgment was obtained for the sum of \$6,506.35, and the State Board of Education and the Board of Regents of the University of Idaho, as successor to the old Board of Regents, prosecuted this appeal.

[1] There is no merit in the contention that the district court was without jurisdiction and that the only jurisdiction to hear this case was in the Supreme Court. This court held to the contrary in *Moscow Hardware Co. v. Regents*, 19 Idaho, 420, 113 Pac. 731, and *First National Bank v. Regents*, 19 Idaho, 440, 113 Pac. 735. The doctrine there

announced is sound and consonant with the provisions of the Constitution and statute and is affirmed in so far as it applies to the Board of Regents of the State University.

[2] It is unnecessary for us to deal with the question presented by appellant as to the right to maintain such an action against the State Board of Education, which is also made the board of regents of the University, for the reason that this action arose before the adoption of the Act of March 6, 1913, which created the Board of Education, which is also the Board of Regents of the University of Idaho. The statute makes this board the successor to the old Board of Regents, and, whether or not an action can be maintained against this board, they have the power and authority to defend an action previously instituted for a pre-existing obligation.

[3] There is no merit in the contention that the court erred in refusing to require the plaintiff to elect between two alleged remedies. The remedies sought by the plaintiff are not inconsistent remedies. There was no error in the ruling of the court refusing to require an election.

[4] We discover no error in this case prejudicial to the rights of the appellant or that would call for a reversal of the judgment.

Considerable argument has been made by appellant in this case as to the manner of collection of the judgment herein in the event it should be affirmed. That is not a question which confronts us on this appeal. It is clear, however, that no execution can issue in the case, and that this judgment is merely an adjudication and judicial determination of the amount justly due from the appellant to the respondent. If the board does not pay the judgment or is not supplied with funds out of which to pay the same, respondents will have to go before the Legislature and seek its relief through that channel. This is a mere suggestion, however, and is in no way essential to the determination of this case.

The judgment is therefore affirmed, with costs in favor of respondent.

**FIX v. GRAY.**

(Supreme Court of Idaho. April 25, 1914.)

**1. TAXATION (§ 734\*)—CANCELLATION OF TAX DEED—RIGHT OF ACTION.**

Where a landowner owns two separate tracts of real estate in the same county aggregating 760 acres, and resides in another county, and had been in the habit for more than 20 years of writing to the assessor for statement of the amount of taxes due for the year, and upon receiving the statement of the amount sending his check in payment therefor, and in the year 1907 wrote a similar letter to the tax collector inquiring the amount of his taxes, but failed to give a description of the land he owned in the county, and the assessor replied, giving a statement of the amount due, and such

statement omitted a tract of 320 acres, and the landowner paid the amount called for by the statement, and received his receipt therefor, and failed and neglected to read the description contained in the receipt, and consequently failed to observe that he had not paid the taxes on all of his real estate in the county, but the amount so paid was approximately the same as he had paid the previous year upon his entire holdings in the county, and the 320 acres were thereafter advertised and sold for delinquent taxes, and the time for redemption expired, and a tax deed was issued to the purchaser, and during the subsequent years the landowner had continued to pay the taxes on this tract of land, as well as his other holdings in the county, and he had no notice of delinquency of taxes or sale of the property for 1907 until after the issuance of the deed, and he thereupon tendered the amount which had been paid, together with interest and penalties, *held*, that the property owner, upon payment of the taxes, together with interest, penalties, and costs, will be entitled to a decree canceling and setting aside the tax deed, and quieting his title to such property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470-1473; Dec. Dig. § 734.\*]

## 2. TAXATION (§ 734\*)—CANCELLATION OF TAX DEED—RIGHT OF ACTION—NOTICE.

Where property was sold for taxes delinquent for the year 1907, and the red ink entry was entered upon the tax roll as required by statute, and thereafter an entry was made opposite the description of the same land and on the same roll that the tax had been canceled by order of the board of commissioners, and the landowner never had any notice that there were any delinquent taxes held against the land, nor that it had been sold for delinquent taxes, and paid his taxes from year to year thereafter on such land, and, upon discovering that the land had been sold for delinquent taxes, and immediately upon the issuance of a tax deed therefor, tendered the amount of taxes so paid, together with interest, penalties, and costs to the purchaser, *held*, that the landowner was entitled to have the deed surrendered and canceled, and that the tax sale was irregular and voidable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470-1473; Dec. Dig. § 734.\*]

Appeal from District Court, Latah County; Edgar C. Steele, Judge.

Action by John M. Fix against H. M. Gray to cancel a tax deed, and to quiet title. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

James E. Babb, of Lewiston, for appellant. Miles S. Johnson, of Lewiston, for respondent.

**AILSHIE, C. J.** This action was instituted by the plaintiff to quiet his title to a certain tract of land to which the defendant held a tax deed. The cause was tried, and findings and judgment were made and entered in favor of the plaintiff, and defendant has appealed.

[1] The action involved a tract of 320 acres of land situated in Latah county. It appears that the respondent has owned this land since 1884, and during all the time he has lived in the city of Lewiston, Nez Perce county. The evidence discloses that respondent has

some 760 acres of land in Latah county, and that he was in the habit each year of writing over to the assessor of Latah county for statement of the amount of taxes due on his holdings in that county, and on receiving statement would return a check in payment therefor.

It seems that the assessor failed to send out the usual tax notices for the year 1907, and so respondent wrote the assessor to know what his 1907 taxes were, but did not give a description of any land he owned, merely inquiring as to the amount of taxes due on his property. The assessor replied, stating that his taxes were \$133. Thereupon, and on the 27th of December, 1907, respondent mailed a check to the assessor for the sum of \$133, in payment of what he supposed to be his total taxes on all his lands in that county for the year 1907. As a matter of fact, when the officer had written respondent, he had only sent him a statement of the amount due on one tract comprising 440 acres, and had overlooked stating the amount due on another and separate tract of 320 acres. Respondent testifies that he supposed this covered his entire holdings, and that he did not read the description in his tax receipt, and did not notice or observe that his check for \$133 had not paid his taxes on his entire 760 acres. It is also shown that the taxes on the entire 760 acres for the year 1906 had amounted to \$146.56, and respondent testifies that the amounts were so nearly the same that he supposed and understood that the \$133 for 1907 covered his entire holdings in Latah county for that year. In this way the taxes on the 320 acres of land for 1907 became delinquent, the property was advertised and sold for delinquent taxes, and the appellant herein bid in the property and, after the time for redemption expired, secured a tax deed. Respondent continued to pay the taxes on this land for each subsequent year of 1908, 1909, 1910, and 1911, and appears to have had no notice of the delinquency for 1907, and testifies that he knew nothing of the matter until after the issuance of the tax deed.

[2] It also appears that the assessor failed to enter in red ink on the assessment roll of 1907 the amount of delinquent taxes that had previously accrued against this property, and that on the assessment roll of 1908 the red ink entry appeared against the property of a delinquent tax for 1907, with a further record that the same had been canceled by order of the board of county commissioners; and it also appears that the record of the board of county commissioners actually shows an order canceling this delinquent tax.

The record finally stood, therefore, as if the red ink entry required by section 1755, Rev. Codes, had never been made, and in that respect brings this case within the rule announced in *Parsons v. Wrble*, 21 Idaho, 695, 123 Pac. 638. There was nothing in the

record to give notice to the property owner that this land had been sold for delinquent taxes.

Again, the record is quite clear that respondent was acting in good faith, endeavoring to keep his taxes paid, and that he did in fact pay all the taxes he had any notice were standing against his property, or that had ever been assessed against it. The taxpayer was evidently acting in good faith, and, on the other hand, the assessor and tax collector seems also to have acted in good faith, and not with any purpose of deceiving, defrauding, or misleading respondent.

While the facts and circumstances differ, the principle of law here involved is similar to that announced in *Smith v. Davidson*, 23 Idaho, 555, 130 Pac. 1071, and, for the same reason and on the same principle, entitles the property owner to the same equitable relief which was granted in that case. See, also, *Randall v. Dailey*, 66 Wis. 285, 28 N. W. 352; *Cooley on Taxation* (3d Ed.) 809.

A number of other reasons, some of which are valid, have been advanced in support of the judgment of the trial court, and to the effect that the respondent herein was entitled to the relief which the judgment awarded him. In view of the fact that we have concluded that the judgment in this case should be affirmed, it is unnecessary to discuss these several questions. It is quite clear that the respondent, who is the owner of this land, has acted in good faith, and, while perhaps not as diligent as he might have been, he ought not to lose his property under the circumstances, where he is ready and willing to reimburse the purchaser at the tax sale for all his outlay, together with interest and penalties. On the other hand, the appellant, who was the purchaser at this delinquent sale, has been in no way prejudiced, and will in no way be a loser, and he will receive his money back, together with a high rate of interest and such penalties as the statute prescribes.

We shall not further discuss the questions arising in this case. The judgment should be affirmed, and it is so ordered. The appellant will be taxed with the costs of this appeal.

The respondent, as a condition to clearing his title and canceling this tax deed, should pay to the appellant, or to the clerk for his use and benefit, all sums paid out by appellant, together with interest and penalties allowed on redemption, and should also pay the costs of this action in the district court. The appellant was not in any way at fault or to blame for bidding in this property, and he took a tax deed in the manner authorized and provided by law. He should not now be required to pay the costs and expenses entailed in the district court in having this deed set aside. The whole costs incurred in the district court should be taxed up against the respondent. On the other hand, if the district court rightly decided the case,

as we think it did, and that decision was against the appellant, and he saw fit to prosecute this appeal, he should pay the costs incurred in bringing the case to this court.

The cause will therefore be remanded to the district court, with direction to enter a modified decree in accordance herewith, and as modified the judgment of the district court will be affirmed; and it is so ordered. Costs of this appeal awarded in favor of respondent.

SULLIVAN, J., concurs.

#### STRONG et al. v. BROWN et al.

(Supreme Court of Idaho. April 15, 1914. Rehearing Denied May 15, 1914.)

#### 1. MINES AND MINERALS (§ 119\*)—EXCAVATION—NEGLIGENCE—NUISANCE.

It is lawful for the miner to sink holes, pits, and shafts on mineral lands, and to do so is not of itself an act of negligence, and an excavation, pit, or shaft made by a miner in the prosecution of his work is not of itself a nuisance.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 241; Dec. Dig. § 119.\*]

#### 2. MINES AND MINERALS (§ 119\*)—EXCAVATION—INJURY TO ANIMALS—LIABILITY.

The owner of a mining claim is not liable to the owner of live stock for damages resulting from live stock running at large falling into a pit, prospect hole, or mining shaft left open by the miner, and the locator or owner of mining claims is not bound by law to fence or inclose the same in order to protect live stock running at large on the public domain from being injured by falling into the same.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 241; Dec. Dig. § 119.\*]

Appeal from District Court, Bear Lake County; Alfred Budge, Judge.

Action by Elisha Strong and others against Lucius P. Brown and others for damages for loss of live stock. From judgment for defendants, plaintiffs appeal. Affirmed.

T. L. Glenn, of Montpelier, for appellants. Charles E. Harris, of Montpelier, for respondents.

AILSHIE, C. J. This action was commenced to recover damages for the loss of live stock that were running on the public range and strayed onto the premises of the defendants and fell into certain "pits" or excavations that had been made on the defendants' premises in the prosecution of work on their phosphate mines. A demurrer to the complaint was sustained and judgment of dismissal was entered, and this appeal was thereupon prosecuted.

The only question arising, therefore, is as to the sufficiency of the complaint to state a cause of action. The material allegations thereof are as follows:

"(2) That at all times herein mentioned the defendants were joint owners of and in pos-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

session of the following phosphate mining claims: [Here follows a description of the claims which are located in Bannock county].

"(3) That on the ——— day of May, 1912, plaintiffs were, and for some time prior thereto were, the owners of, in possession of, and entitled to the possession of the following described animals, to wit: [Here follows a description of the animals and allegations of the value thereof]; that in the month of April, 1912, the said mares and horse were turned upon the public range to graze; that while so on said range, the blue mare fell into a pit on said first claim and was killed thereby; that the gelding while so upon said range, fell into a pit on said second claim, and was killed thereby; that the said gray mare, while so upon said range, fell into a pit on said third claim, and was killed thereby; that the defendants, in utter disregard of the rights of plaintiffs, negligently, wrongfully, and carelessly, after digging said pits, failed to inclose the same, so as to protect stock turned upon the range, and, when said pits became filled with snow, they were so hidden from view that the said horses walked into said pits, and were thereby killed and destroyed, to plaintiffs' damage in the sum of five hundred and twenty-five dollars (\$525.00)."

[1, 2] The important and material question in this case is whether a miner, prospector, or landowner is guilty of negligence in leaving prospect holes, pits, or shafts open and unfenced on the public domain or elsewhere upon mineral lands. In other words, must the miner and prospector fence and inclose prospect holes, pits, and mining shafts and tunnels to protect live stock running at large from falling into them. In this case it stands admitted that the respondents were the owners and in possession of certain phosphate claims, and that they had opened "pits" on these claims, and the horses belonging to the appellants strayed onto the claims, fell into the pits, and died.

The statutes of the United States authorize the prospector and miner to go upon the public domain and prospect for precious metals and locate mining claims, and the statutes require that certain work must be done, which includes digging a pit or sinking a shaft in order to hold such location. It is clear, therefore, that to make such an excavation, either on a man's own land or upon the public domain, is not of itself a wrongful act, and the thing done does not of itself constitute a nuisance. The miner has a right to do these things, and that right is not one of sufferance or tolerance, but it is authorized by positive statute. On the other hand, under the laws of this state, a man may allow his horses to run at large, and they may roam and graze wherever their instinct may lead them upon unfenced and uninclosed lands. In other words, the owner of unfenced or uninclosed land cannot maintain an ac-

tion for damages against the owner of such stock because they happen to feed and graze upon his lands.

Neither the government of the United States nor the state of Idaho has enacted any statute requiring the locator of a mining claim to fence the same, or to in any way protect or inclose any pits, shafts, or excavations on such claim against live stock. In order for one to be liable for damages, he must be guilty of some act of negligence. Such negligence may consist of omission or commission. It seems to us that when a mining claim is left unfenced, as between the owner thereof and the owner of grazing live stock, there exists concurrent risks. The owner of the mining claim incurs the risk of having live stock herd and graze over his land and claim, and he takes the chances of any incidental damages which they may do his property by reason of having free ingress thereto. On the other hand, the owner of such live stock, while he has the privilege of permitting his live stock to run at large and graze over the uninclosed property, takes the concurrent risk of such stock getting into dangerous places, falling into pits or excavations, or getting into buildings or works belonging to the landowner and getting maimed or killed.

While the owner of such trespassing live stock cannot be held in damages by the owner of the real property, unless the land has been lawfully inclosed, on the other hand, the owner of such realty should not be held liable for an injury which such trespassing animals may receive under such circumstances. The man who turns his live stock out onto the public range takes innumerable risks of their being killed or injured. The mountainous country is full of crags, canyons, pitfalls, and innumerable places where they may as easily become injured as from falling into mining excavations. It would be a very dangerous precedent to establish in a state like this, where mining and prospecting are carried on by such a large number of people, to say that every miner and prospector must fence, or in some way secure and protect, every prospect hole, mining shaft, and pit against roaming live stock. We cannot believe that the law imposes such an obligation.

This court, in considering the respective rights of property owners to enjoy the free, unrestricted use of their several properties, in the case of *City of Bellevue v. Daly*, 14 Idaho, 551, 94 Pac. 1038, 15 L. R. A. (N. S.) 992, 125 Am. St. Rep. 179, 14 Ann. Cas. 1136, quoted with approval from Professor Beach as follows: "It may be stated, as a general proposition, that every man has a right to the natural use and enjoyment of his property, and if, while lawfully in such use and enjoyment without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the

rightful use of one's own land may cause damage to another without any legal wrong."

Our attention has been called to but one case which seems to be in point on the facts under consideration in this case, and that is the case of *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557, 59 L. R. A. 771, 94 Am. St. Rep. 818. There the defendant was the lessee of a mining claim and mill site. The property was not inclosed by any legal fence. He had placed upon the property a number of vats containing a solution of certain poisonous chemicals and water, and the plaintiff's cattle strayed onto the premises and drank of the solution and died. The plaintiff thereupon commenced an action against the defendant to recover damages to the extent of the value of the cattle. The Supreme Court of Montana gave the matter a very thorough consideration, and reached the conclusion that the mineowner was not liable for damages, that he had committed no wrong or tort, and was in no respect guilty of negligence, and should not be held for damages. In process of the court's discussion and consideration of this question, it was said: "This is his right, for the cattle are trespassing. The owners of domestic animals hold no servitude upon, or interest, temporary or permanent, in, the open land of another merely because it is open. If the landowner fails to 'fence out' cattle lawfully at large, he may not successfully complain of loss caused by such live stock straying upon his uninclosed land. For, under these circumstances, the trespass is condoned or excused; the law refuses to award damages. While the landowner, by omitting to fence, disables himself from invoking the remedy which is given to those who inclose their property with a legal fence, and while the cattle owner is thereby relieved from liability for casual trespasses, it is nevertheless true that the cattle owner has no right to pasture his cattle on the land of another, and that cattle thus wandering over such lands are not rightfully there. They are there merely by the forbearance, sufferance, or tolerance of the nonfencing landowner; there they may remain only by his tolerance. The cattle-owning plaintiff did not owe to the land-owning defendant the duty to fence his cattle in. The latter did not owe to the former the duty to fence them out. Neither of them was under obligation to the other in that regard. The defendant is not liable in this action, unless he was negligent. There cannot be negligence without breach of duty. Hence manifestly the defendant was not guilty of negligence in omitting to prevent the plaintiff's cattle from going upon his unfenced land."

The foregoing observations are peculiarly applicable to the facts of the case we have under consideration. We are satisfied that the trial court properly sustained the demurrer and dismissed the action, and that, under

the allegations of the complaint, the defendants were not liable for damages.

The judgment should be affirmed, and it is so ordered, with costs in favor of respondent.

SULLIVAN, J., concurs.

DARNELL v. HUME et al. (No. 3397.)  
(Supreme Court of Oklahoma. April 28, 1914.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 53\*)—LEASE—VALIDITY.

A lease or contract of rental, whether in writing or parol, for a period of one year beginning a day in the future, is valid.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 69, 80, 92; Dec. Dig. § 53.\*]

2. INDIANS (§ 16\*)—LEASING OF HOMESTEAD—VALIDITY.

A one-half blood Creek Indian making such a lease of her homestead is binding and not in conflict with the acts of Congress or those of the state of Oklahoma.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.\*]

Error from County Court, Tulsa County; N. J. Gubser, Judge.

Action by W. J. Darnell against Harvey Hume and others before a justice of the peace. Judgment for defendants was affirmed on appeal to the county court, and plaintiff brings error. Judgment for defendants.

This is a proceeding in error from the county court of Tulsa county. A petition in error was filed in time attached to case-made. The suit originally was before a justice of the peace for unlawful detainer of the N. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 1, township 17 N, range 14 E. The parties occupy the same relation in this court that they did in the court below. On the trial of said cause in the county court plaintiff introduced his lease or rental contract between himself and one Henrietta Sarty, who is a one-half blood Creek Indian. This lease, or rental contract rather, was dated the 26th day of November, 1910, to go into effect January 1, 1911, for a period of one year. At the trial this lease was introduced by plaintiff Darnell. Darnell, before taking the lease or rental contract for Henrietta Sarty, examined the records of Tulsa county, but found no record of a lease from her or any other person for the same land. His evidence is, however, that he saw the defendants below, now defendants in error, in possession of said land and using it, but he made no inquiry of them by what right or authority they were holding possession and using the same. On January 4, 1911, he caused notice to be served upon the defendants to vacate the premises, and they refused to do so. As said before, he began his action before a justice of the peace, and the judgment of that court was appealed from to the county court.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

At the trial in the county court, Henrietta Sarty, the allottee, testified that in 1909 she gave Mr. Weer a five-year lease on the premises, and that Mr. Weer held the land for 1910. Mr. J. E. Weer testified that he had the lease spoken of by Henrietta Sarty for five years and went into possession of said premises for the year 1910 under said lease, and learning his five-year lease was no good because the land was the homestead of the said Henrietta Sarty, she being, as stated, a one-half blood Creek Indian, and desiring to keep the land for the year 1911, he made a new agreement on August 6, 1910, with Henrietta Sarty for the year 1911, and said agreement was written on the back of the former lease, but that the writing was lost, but he testified that it was substantially in the following words: "Weer, Oklahoma, August 6th, 1910. It is hereby agreed that J. E. Weer is to have the within land for the year 1911. It is further understood that said J. E. Weer has a right to sublet the said premises"—which written agreement was signed by Henrietta Sarty and himself. All this was fully testified to by him, but this was denied by the allottee. And Weer also testified that he paid her in full, in the presence of the Indian agent, for the year 1911 and obtained a receipt therefor; and, while she testifies in a negative way that she did not sign the receipt herself, yet does not deny affirmatively that she received the money and goods from Weer as rent, and, also, states that the Indian agent decided that Weer was entitled to the land for the year 1911. Under this state of facts, the defendants, who are also tenants of Weer for the year 1910, sublet from Weer for the year 1911 the premises and were in possession of the same under the subletting from Weer when notice was served upon them by the plaintiff to vacate, which they declined to do; Weer having previously testified that the lease for the year 1911 between him and the allottee was independent of the old lease and was a separate agreement between them for the year 1911. Hence this action for forcible entry and detainer.

At the trial it was the contention of plaintiff in error that the transaction between Weer and the allottee was a lease for five years and not approved by the Secretary of the Interior, and therefore void under the act of Congress of 1908. Per contra, the contention of the defendants was that by the agreement between Weer and the allottee the lease was made in August, 1910, for one year to begin January 1, 1911. At the trial, the court instructed the jury, at the instance of plaintiff, that the case was one for the possession of land and under the law the title to the same could not be put in issue, and it was for the jury to decide who is entitled to the possession of the land and that only, and that the right of possession is the only issue that can be determined. He further instruct-

ed, at the instance of plaintiff, that in order for the plaintiff to recover he must show he had a perfect right to possession in January, 1911, at the time he gave notice to the defendants to quit and deliver possession to him, but in order to recover it is not necessary for the plaintiff to have been in the peaceable possession of the land prior to the bringing of this suit, and all that was necessary was for him to show that he had the right to possession on the day that notice was given by him to the defendants to quit. Further, that if the jury found those facts under this principle of the law requested by plaintiff's counsel the verdict should be for the plaintiff. He gave, at the defendants' instance, the following instructions: That should the jury find by a preponderance of the evidence that at the time the plaintiff Darnell took the lease from Henrietta Sarty, upon which he relies for possession, that the defendants, or either of them, were in the actual, open, visible, notorious, and exclusive possession of the premises in controversy, then and in that event the plaintiff was bound to inquire of the parties in possession of said premises as to his interest in said property, etc. These instructions were given at the request of both parties, and no exceptions reserved to the same. The verdict of the jury was that the defendants were entitled to the possession of the land and that they were not guilty. Judgment was entered upon said verdict. Motion for new trial was filed by the plaintiff, heard, and overruled; and the case comes here upon the record as substantially stated heretofore.

J. S. Severson, of Broken Arrow, for plaintiff in error. M. P. Howser, of Broken Arrow, and W. B. Williams, of Tulsa, for defendants in error.

RUSSELL, J. (after stating the facts as above). [1] It appears to us that the question involved in this case is whether or not the lease entered into between Weer and Henrietta Sarty, the allottee, for one year to commence the first of January, 1911, was a valid agreement for the use of the land for such period. Although the land in question was the homestead of Henrietta Sarty, and she being of the one-half blood, this did not affect her right to enter into an agreement with Weer to lease the premises for the duration of one year. Whether she leased it or not, as testified to by Weer and in a negative way denied by her, was an issue for the determination of the jury. The fact that it was a lease to begin in the future for a period of one year does not affect its validity or the right of the party to make such a lease, as has been determined by this court in several cases; the last expression of the court being in the case of *Annie M. Sullivan v. R. S. Bryant*. This is not a lease



for more than one year. It was testified to by Weer that the right to the premises for one year beginning in January, 1911, was in writing, and, after having shown that the writing was lost, he was permitted to testify orally as to the contents of said writing, and we certainly see no objection to this ruling.

[2] The case of *Sullivan v. Bryant*, 136 Pac. 412 (not yet officially reported), is decisive of the issue involved in this case.

We deem it unnecessary to further notice other matters raised in the assignments of error that cannot substantially affect the judgment of the lower court.

The judgment of the trial court is affirmed. All the Justices concur.

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**FAULK et al. v. BOARD OF COM'RS OF MARSHALL COUNTY et al. (No. 5956.)**  
(Supreme Court of Oklahoma. April 28, 1914.)

*(Syllabus by the Court.)*

**1. COUNTIES (§ 151\*)—CREATION OF INDEBTEDNESS—ELECTION.**

Where as is required in section 26 of article 10 of the Constitution that three-fifths of the voters of the county, city, or other subdivision of the state, voting at an election upon the proposition whether said county or any subdivision named in said section 26 shall become indebted for any purpose in an amount exceeding the income and revenue of such county, etc., in any year, and if as many as three-fifths of the voters vote in favor of such proposition, then such indebtedness is allowed.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 166, 218; Dec. Dig. § 151.\*]

**2. COUNTIES (§ 151\*)—CREATION OF INDEBTEDNESS—ELECTION—QUALIFICATION OF VOTERS.**

The qualification of such voter is prescribed in sections 1 and 4a of article 3 of the Constitution, and at elections held for the purposes defined in section 26, art. 10, his qualification is fixed without regard to his status as a property tax paying or non property tax paying voter.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 166, 218; Dec. Dig. § 151.\*]

**3. COUNTIES (§ 105\*)—CREATION OF INDEBTEDNESS—ELECTIONS—QUALIFICATION OF VOTERS.**

Section 1625, Rev. Laws 1910, empowering the board of county commissioners to contract for the erection of courthouses and jails and to issue bonds therefor provided that the same shall be issued if a majority of the qualified tax paying voters voting at an election at which such matter is submitted, etc., does not affect the percentage of three-fifths required by the constitutional provision; and *held*, further, that it is not a limitation on the qualification of a voter as stated in sections 1 and 4a of article 3 of the Constitution.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 165, 166; Dec. Dig. § 105.\*]

**4. COUNTIES (§ 105\*)—POWER TO CONTRACT—PUBLIC BUILDINGS—ELECTIONS.**

The board of county commissioners, under section 1625, Rev. Laws 1910, are empowered to contract for the purchase or erection of a courthouse and jail, when a majority of those voting in favor of the proposition submitted by the board are qualified property taxpaying voters.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 165, 166; Dec. Dig. § 105.\*]

Error from District Court, Marshall County; R. C. Allen, Judge.

Action by D. L. Faulk and others against the Board of County Commissioners of Marshall County, Oklahoma, composed of W. S. Lasiter and others, and against Edwin Kirk, County Clerk, and Ava Miller, County Treasurer. Judgment for defendants, and plaintiffs bring error. Affirmed.

An election was held in Marshall county on September 29, 1913, at which was submitted two propositions by the board of county commissioners, namely: (1) Shall the county commissioners be authorized to expend the sum of \$75,000 for the construction of a courthouse to be owned and used by the county, etc.; and (2) should an indebtedness be incurred by the issuance of a 5½ per cent. interest-bearing negotiable coupon bond of said county in the sum of \$75,000 for such purpose and a levy of a tax to pay the interest on said bonds, as well as to provide a sinking fund to pay the principal thereof?

The returns of the election were duly canvassed, and both propositions were declared to be carried by the requisite constitutional majority; and in the month of October, 1913, the board of county commissioners proceeded to the issuance of the bonds in said sum, and, the treasurer of said county being about to sell the bonds and deliver them, the plaintiffs in error began this action to enjoin the defendants in error upon the grounds as alleged that said propositions were not carried by the vote required, and therefore the election was void, and, having no adequate remedy at law, they prayed that the defendants be restrained by the district court of Marshall county. A restraining order was issued and the cause set down for hearing in the district court. Plaintiffs in error amended their petition. Defendants in error filed general and special demurrers to the petition, which were overruled by the Honorable R. C. Allen, district judge authorized to hold a term of the court in Marshall county. The defendants in error answered, and the allegations of the petition as well as those of the answer will be sufficiently reviewed, if necessary, in the opinion of the court without stating the matters here. As was said, temporary injunction was issued and the cause went to trial before Hon. R. C. Allen in the district court of Marshall county before the court, without the intervention of a jury, and was submitted upon the pleadings and agreed statement of facts signed by all of the counsel for both plaintiffs and defendants. Upon hearing of the cause, the court, on the 10th day of November, 1913, dissolved the temporary injunction issued in the case and dismissed the petition of plaintiffs. Plaintiffs' motion for a new trial was heard and overruled, time allowed in which to serve a case-made; and this proceeding

in error is regularly before the court to determine the questions at issue.

The agreed statement of facts filed in the district court of Marshall county and shown by the case-made on pages 30 to 32, inclusive, is as follows: "In the District Court of Marshall County, State of Oklahoma. D. L. Faulk et al., Plaintiffs, v. The Board of County Commissioners of Marshall County et al., Defendants. Stipulation. Come now the above-named plaintiffs in person and by their attorneys, Hatchett & Ferguson, and the defendants in person and by their attorneys of record, and stipulate and agree that the following contains a true statement of all the facts in this case: (1) That plaintiffs are residents and taxpayers of Marshall county, Okl.; that the defendants W. S. Lasiter, Hugh Wiggs, and A. P. Ray are the duly elected, qualified, and acting county commissioners of Marshall county, Okl.; that Ed Kirk is the duly elected, qualified, and acting county clerk of Marshall county, Okl.; and that Ava Miller is the duly elected, qualified, and acting county treasurer of Marshall county, Okl. (2) That on the 29th day of September, 1913, pursuant to proper and legal procedure, theretofore had, an election was regularly held in Marshall county, Okl., at which election there was submitted to the qualified electors of said county two propositions, as follows: 'First Proposition. Shall the county commissioners of Marshall county, state of Oklahoma, be authorized to expend the sum of seventy-five thousand (\$75,000.00) for the construction of a courthouse, in, to be owned by and for the use of said county? Second Proposition. Shall the board of county commissioners of Marshall county, state of Oklahoma, incur an indebtedness of said county, by issuing the negotiable coupon bonds of said county in the sum of seventy-five thousand dollars (\$75,000.00) for the purpose of providing funds for the purpose of building a courthouse, in, to be owned by and for the use of said county, and levy and collect an annual tax in addition to all other taxes upon all of the taxable property in said county, sufficient to pay the interest on said bonds as it falls due, and also to constitute a sinking fund for the payment of the principal thereof at maturity; said bonds to bear interest at the rate of five and one-half (5½) per centum per annum, payable annually? Said election was held in accordance with the laws then in force and in all respects was properly and legally conducted. That in said election, in all, 2,524 electors participated. That of said number, 2,054 were property tax paying voters. That at said election there were cast by non property tax paying voters, in favor of the first proposition, 303 votes and 149 votes against said proposition, and there were cast in favor of the second proposition by non property tax paying voters 811 votes and against said proposition 151

votes. That there were cast by the property tax paying voters at said election, in favor of the first proposition, 1,222 votes and against said proposition 820 votes, and that there were cast by the property tax paying voters at said election in favor of the second proposition 1,223 votes and against said proposition 826 votes. That at said election there were 13 ballots cast that were discarded as mutilated and not counted; these 13 being included in the total number above stated in this stipulation, to wit, 2,524 votes. That the figures as shown above were ascertained and determined by the returns of the county canvassing board and the count of the ballots made in open court, and that the same are the true and correct result of said election. It is further stipulated and agreed that, as shown by the above figures, more than three-fifths of all the legal votes cast at said election were cast in favor of both the first and second propositions; that more than a majority of the property tax paying voters of Marshall county at said election cast their ballots in favor of both the first and second propositions, but that less than three-fifths of the property taxpaying voters voting in said election cast their ballots in favor of either the first or second propositions. It is further stipulated and agreed that subsequent to said election and on, to wit, the 1st day of October, 1913, the county commissioners canvassed the returns from the various precincts and determined that both propositions had carried by more than 60 per cent. of both the non property tax paying voters and the property tax paying voters and by proper resolution declared both propositions carried; that no appeal was ever prosecuted from the action of the board of county commissioners. It is further stipulated and agreed that, subsequent to said election and the canvass made by the board of county commissioners, the defendants herein attempted to negotiate the bonds, and at the time of the institution of this suit were attempting to sell and negotiate said bonds. It is further agreed that this cause shall be submitted upon the pleadings and upon this stipulation of the facts. Hatchett & Ferguson, Attorneys for Plaintiff. W. I. Cruce, V. B. Hayes, E. S. Hurt, Geo. S. March, F. E. Kennamer, Geo. L. Sneed, J. O. Minter, Attorneys for Defendants."

Hatchett & Ferguson, of Durant, for plaintiffs in error. Chas. A. Coakley, Geo. S. March, E. S. Hurt, F. E. Kennamer, and Geo. L. Sneed, all of Madill, and W. I. Cruce, of Ardmore, W. M. Franklin and J. O. Minter, both of Madill, and W. E. Utterback and V. B. Hayes, both of Durant, for defendants in error.

RUSSELL, J. (after stating the facts as above). Plaintiffs in error, in their briefs, say, at the outset, that the only question

presented by the appeal in this case is: "Does the law require that only property tax paying voters vote on the proposition, and does it require 60 per cent. of such voters to incur the bonded indebtedness, *which it is admitted is in excess of the income and revenue for that year?*" The italics are ours and are made to call attention to that which is alleged as an admission is emphatically denied by defendants in error, and we will also say that we have searched in vain in the stipulation agreed upon to find if such an admission was made. However, be that as it may, whether the facts suggested by such an admission are made or not, and we are willing to concede that the submission was in excess of the income and revenue for that year, yet this is not by any means, in our opinion, decisive of the case, or does it affect the propositions involved.

[1] We will here quote section 28 of article 10 of the Constitution of the state of Oklahoma, which is as follows: "No county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness: Provided, that any county, city, town, township, school district, or other political corporation, or subdivision of the state, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same." That part of the provision of the Constitution quoted down to the proviso is pertinent to be considered in connection with the proposition raised in this case. It would appear that any of the subdivisions named in this section shall not be allowed to become indebted, in any manner, for any purpose, in an amount exceeding, in any one year, the income and revenue made provision for in that year without the assent of three-fifths of the voters in either of said subdivisions, voting at an election to be held for that purpose; that is to say, that it is only when it is proposed to become indebted, in any one year, exceeding the income and revenue for that year, that the assent of three-fifths of the voters is required.

The voters thereof, to our minds, refers to and means the voters of the county (as this is the subdivision at issue) who are by the Constitution qualified to vote, and, if as a voter he is within the constitutional requirement, he is a voter in the sense contemplated by the organic law.

[2] Who are the voters referred to, is a material inquiry. The qualifications are prescribed in sections 1 and 4a of article 3 of the Constitution. Section 1 is as follows: "The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote. \* \* \*"

The remaining part of said section has no application to the qualification of the voter under consideration. Section 4a is what is commonly known as the "Grandfather Clause."

It will be observed that the constitutional provision, section 28, art. 10, authorizes and sanctions the doing of the things therein named if a given number of the voters of the particular subdivision assents to it—which number is three-fifths, or 60 per cent. thereof.

[3] Section 1625 of the Rev. Laws 1910 (Harris & Day Code) is referred to and discussed by counsel for plaintiffs and defendants in error in their briefs. This section is as follows: "Whenever the board of county commissioners of any county considers it to be to the best interest of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same, and to issue bonds in payment therefor: Provided, however, that the bonds shall not be issued until the question shall have first been submitted to the people of the county and a majority of the qualified property taxpaying voters voting at any general election, or special election called by the board of county commissioners for the purpose, shall have declared by their votes in favor of issuing such bonds. \* \* \*"

We will digress from the discussion for the moment to refer to what was admitted and agreed upon in the statement of facts. At said election 2,524 voters participated; that of said number 2,054 were property tax paying voters. For the first proposition 1,222 property tax paying voters and 303 non tax paying voters. Against the first proposition there were 820 property tax paying voters and 149 non property tax paying voters. For the second proposition there were 1,223 property tax paying voters and 311 non property tax paying voters. Against the second proposition there were 826 property tax paying voters and 151 non property tax paying voters. So it will be seen that the total vote cast for the first proposition is 1,525 and

against it 969. The total vote for the second proposition is 1,534, as against it 977.

In support of both propositions it is agreed, and the figures so show, that more than 60 per cent. of the total votes cast were in favor of them. It is also agreed and so shown that in each instance there was practically a majority of 400 of the property tax paying voters voting in favor of the bonds and a majority of two to one of the non tax paying voters in each instance voted in favor of the bonds.

The constitutional inhibition is against any one of the subdivisions referred to in section 26, art. 10, becoming indebted in excess of the income and revenue, etc., and against allowing any indebtedness, including existing indebtedness, in the aggregate exceeding 5 per centum of the valuation of the taxable property therein, etc., without the assent of three-fifths of the voters of such subdivision voting at an election for such purpose.

[4] The statute referred to by counsel (section 1625, Rev. Laws 1910, supra) provides that "the bonds (referring to those issued by the county for the construction of a courthouse, etc.) shall not be issued until \* \* \* a majority of the qualified property tax paying voters voting at any general election, or special election called by the board of county commissioners for the purpose, shall have declared by their votes in favor of issuing such bonds." It will be noted that both the constitutional and statutory requirements have been complied with in the submission of the measure now under consideration. This brings us directly to the contention of counsel for plaintiffs in error who seek to obviate or rather nullify the effect of the vote as cast, and the conclusion reached by counsel is arrived at in the contention "that the Constitution fixes the number required and that the statute fixes the qualification of those that vote at the election on that proposition. That so far as the statute attempts to modify the Constitution and require only a majority is void but otherwise is valid and binding." In other words, as contended, the constitutional majority of 60 per cent. must be read into the statute, but the remaining part of the statute, including the fixing of the qualification of the voters, is valid. If we understand counsel's meaning, it amounts to this: That we must hold that the 60 per cent. referred to in the Constitution must be interpolated into or rather substituted for the word "majority" in the statute and have it read, in lieu of the way it reads now, "that the bonds shall not be issued until the question shall have first been submitted to the people of the county and sixty per cent. of the qualified property tax paying voters, voting at any general election, etc., shall be necessary to carry the measure."

Counsel for plaintiffs in error proceed, as we think erroneously, to argue that there is a conflict between the provisions of section

26, art. 10, of the Constitution and the statute (section 1625), and that to avoid the conflict, as they contend, the percentage of voters required by the constitutional provision should be substituted for the "majority" percentage required by the statute and have it read as we have herein indicated. We deem it unnecessary to repeat the objects aimed at and clearly expressed in section 26, art. 10, and to accomplish which requires the assent of three-fifths of the voters who vote thereon, as it is to say that the purposes requiring a three-fifths' assent as is mandatory in section 26, supra, are altogether different from the objects desired to be done as authorized by section 1625, Rev. Laws 1910. The former is for the purpose of incurring indebtedness in excess of the income and revenue, etc., while the latter (section 1625) provides that, "whenever the board of county commissioners of any county considers it to be to the best interest of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same, and to issue bonds in payment therefor: Provided, however, that the bonds shall not be issued until the question shall have first been submitted to the people of the county and a majority of the qualified property tax paying voters voting at \* \* \* election \* \* \* shall have declared by their votes in favor of issuing such bonds. \* \* \*" So it is apparent that the percentage of voters to accomplish the purposes expressed in the constitutional provision is another and different purpose from the power given the county commissioners to contract for the building or purchase of a courthouse and to issue bonds therefor, provided a percentage of a majority of the qualified property tax paying voters voting shall declare in favor of it, etc.

The Legislature, in section 1625, Rev. Laws 1910, has not undertaken to prescribe the qualification of the voter; that is, there is no inhibition against the right of any qualified voter under sections 1 and 4a of article 3 of the Constitution to vote, for the proposition is submitted to the people, as there is an inhibition against the bonds being issued unless a "majority" of property tax paying voters declare for such issuance. The power of the Legislature to restrict the right of suffrage against those whose rights come within the limitations of sections 1 and 4a of article 3 is denied; but, as in section 1625, the requirement that a majority of those voting on such a matter before such bonds can be issued shall be of the qualified property tax paying voters is not a limitation upon the right of suffrage, nor is it a reduction of the percentage of three-fifths or 60 per cent. required by section 26 of article 10 to assent to the indebtedness named therein, as it does mean that of the total vote cast it shall be made up of a majority of the qualified property tax paying voters voting on the matters submitted and which said majority

is included in the tabulation resulting in 60 per cent. as assenting. It is admitted in this record that 60 per cent. of the total votes cast were for the propositions submitted by the board of county commissioners, and that a large majority of the qualified property tax paying voters voting on such submission voted for the propositions carrying the measures by large majorities as hereinbefore tabulated, but it is the insistence of plaintiffs in error by learned counsel that before the bonds can be legally issued it is their conclusion asserted in their contention that "it is a prerequisite to the issuance of the bonds that the three-fifths percentage mentioned in section 26, art. 10, should be substituted for the word 'majority' mentioned in section 1625 of the statute, so as to require three-fifths of the qualified property tax paying voters voting before the measure can be declared as carried."

In support of their contention, they rely upon the case of *North et al. v. McMahan*, 26 Okl. 502, 110 Pac. 1115. They urge that it is the holding of the court in that case that the requirement of three-fifths percentage stated in section 26, art. 10, could be read into the statute in place of the "majority" there mentioned, and as the provisions of the statute were not in conflict with the Constitution were therefore valid. Just by what reasoning counsel have reached the conclusion they have in construing the court's meaning in the case of *North et al. v. McMahan* is not within our understanding. In that case the issue there was practically the issue here; the only difference being that the court was passing upon section 1468 of *Wilson's Rev. & Ann. St. 1903*, and the constitutional provision then as now existing, where we are now passing upon the same constitutional provision in connection with section 1625 of the *Rev. Laws 1910 (Harris & Day Code)*. The difference in section 1468 and section 1625 is that section 1468 says, "a majority of the qualified electors voting at any general election, etc.," whereas in section 1625, *supra*, it states, "a majority of the qualified property tax paying voters voting, etc." In other words, one statute said a "majority of the qualified electors," and a subsequent statute passed since the *North and McMahan Case* says, a "majority of the qualified property tax paying voters." On the same point here involved, Chief Justice Turner, in speaking for the court, said (26 Okl. loc. cit. page 508, 110 Pac. page 1117): "In short, said act (referring to section 1468), construed with section 26, *supra*, provides a complete procedure for a special referendum upon this subject, which in this case has been strictly complied with, leaving nothing further to be done to insure the validity of this bond issue, which we will hold valid, the same having been carried by the assent of three-fifths of the voters voting at said election, as required by article 10, § 26, of the Constitution, and not by a majority vote

of the qualified electors voting at said election, as required by said act, which is to said extent repugnant to said section, and to that extent must fall."

In the case at bar the act under consideration, construed with section 26, art. 10, of the Constitution, provides a complete procedure for a special referendum upon this subject and which in this case, as in the *North and McMahan Case*, has been strictly complied with. When the learned justice, in the excerpt from his opinion just quoted, said "as required by article 10, § 26, of the Constitution, and not by a majority vote of the qualified electors voting at said election, as required by said act, which is to said extent repugnant to said section, and to that extent must fall" cannot be understood as meaning that the percentage of "three-fifths" of the voters should be interpolated into the statute so as to make it read "three-fifths of the qualified property tax paying voters." In the opinion referred to, it speaks of the assent of three-fifths of the voters voting at said election, and not three-fifths of the qualified property tax paying voters, and, in our judgment, no such meaning can be given to the opinion of the court in that case, as counsel contend for. In that case, the point decided there in this connection is that, if the Legislature in section 1468 intended to reduce the percentage of voters necessary to give assent to the adoption of the bond issue there under consideration to a majority of the voters, such reduction was invalid. The opinion of the court referred to does not mean, nor does it hold, that the constitutional requirement of three-fifths of the voters giving their assent means that it should be three-fifths of the property tax paying voters. As we have stated, the opinion in the *North and McMahan Case* makes the point very clear, and on that matter the adverse position was the percentage could be reduced as is stated in section 1468, and if a majority of qualified electors voted it was all that was necessary, and Mr. Justice Turner, speaking for the court, decided against such a contention.

We do not agree with the learned counsel's contention in treating of the matter under consideration when they insist, as they do on page 9 of their brief, "that taking the statute (section 1625) and the Constitution together there must therefore be three-fifths of the qualified property tax paying voters voting at the election in favor of the proposition before the bonds can be issued."

In the case at bar the sole question for us to determine, and which we are determining on this point, is (1) that it is not required or authorized either by the Constitution or the statute that there must be 60 per cent. of the qualified property tax paying voters, voting at such an election as a condition precedent to the valid issuance of the bonds referred to in the propositions submitted by the board of county commissioners of Marshall county.

Counsel for plaintiffs in error conclude

their brief, and which is but a repetition of their contention, in this language: "Our contention, therefore, is that the statute, as is seen in section 1625 of the Revised Laws of 1910, should have read into it the provision of the Constitution requiring 'three-fifths' of the voters instead of a 'majority,' but otherwise the statute is valid and should stand. And the Constitution and the statute read together would require 'three-fifths of the qualified property tax paying voters' before the bonds could be issued or the indebtedness incurred."

To adopt this view would be in opposition to every well-known rule of construction and have us reach a conclusion in the face of the meaning clearly stated in both the organic and statutory law of this state. We are not called upon to make a constitutional provision fit a statute or so patch it as to make it subvert individual opinion, or should we, by construction, mar the harmony of organic law or quibble over a statutory provision not in conflict therewith. The construction given the constitutional provisions of this state on this subject render unnecessary a further consideration of the authorities cited by plaintiffs in error.

In the construction of a courthouse all of the people, and especially all of the voters, are interested, and the Constitution guarantees to the voter the right of a vote, and for this purpose, whether they be of the fortunate class who own property or of the unfortunate class who do not own property, his vote in the ballot box is as potent as though he were a Croesus and it should be counted as cast.

The conclusion we have reached being decisive of the case, it is unnecessary for this opinion to be extended by noticing other matters that are subordinate to the one discussed and which is held to control. We therefore hold that the judgment of the district court of Marshall county is affirmed, and that the defendants in error should be no longer inhibited in performing the duties imposed upon them and sought to be enjoined and delayed by the action brought in this matter. All the Justices concur.

**SPAULDING et al. v. YARBROUGH.**  
(No. 5096.)

(Supreme Court of Oklahoma. May 5, 1914.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 781\*) — DISMISSAL — WANT OF ACTUAL CONTROVERSY.**

Where, prior to the determination of a proceeding in error in this court, it is made to appear by defendant in error that the controversy has been settled and determined, and the showing thereof, which has been duly served, is undenied by plaintiff in error, the proceeding will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Jennie Yarbrough against Josie C. Spaulding and T. M. Leslie. Judgment for plaintiff, and defendants bring error. Dismissed.

Bailey, Wyand & Moon, of Muskogee, for plaintiffs in error. George C. Beldleman and Merwine & Newhouse, all of Okmulgee, for defendant in error.

**RUSSELL, J.** This case was filed in this court on May 8, 1913, and presents error from the district court of Muskogee county. Since the plaintiffs in error filed their appeal in this court, the controversies involved appear to have been fully settled, as is shown by a certified copy of deed to the land involved, properly executed, by Jennie L. Yarbrough (joined by W. L. Yarbrough), plaintiff below, who asserted claims to said land; the said deed being to Josie C. Spaulding as grantee. This land was the sole matter at issue. The motion to dismiss this appeal made by the attorneys of defendant in error, setting forth the execution of said deed on the 24th day of December, 1913, and also upon affidavit of George C. Beldleman, one of the attorneys of the defendant in error, alleging that he served the motion to dismiss this appeal, and to which this affidavit is attached, on the plaintiffs in error in said action on the 7th day of April, 1914, by depositing in the post office at Okmulgee, Okla., a true copy of said motion, addressed to Bailey & Wyand, attorneys for plaintiffs in error, addressed to them at Muskogee, Okla., with postage prepaid. This affidavit and motion to dismiss the appeal was filed in this court on April 8, 1914. Up to this time there has been made no answer or counter showing. The controversy having thus been determined, the rule announced by this court in *Smith v. Boatman*, 29 Okl. 818, 120 Pac. 599, is applicable.

The motion to dismiss the appeal is sustained. All the Justices concur.

**MCWHORTER v. BRADY et al.**  
(Supreme Court of Oklahoma. Nov. 18, 1913.  
Rehearing Denied May 12, 1914.)

*(Syllabus by the Court.)*

**1. LIS PENDENS (§ 1\*)—NATURE.**

The doctrine of lis pendens under the common law was based on the theory of public policy, while under the statute it is treated as an element of the law of notice.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**2. LIS PENDENS (§§ 5, 9\*)—ESSENTIAL ELEMENTS.**

It is essential to the existence of a valid and effective lis pendens that three elements be present, viz: First, the property must be of a character to be subject to the rule; second, the court must have jurisdiction both of the persons and the res; third, the property

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

or res invoked must be sufficiently described in the pleadings.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 12, 20, 21; Dec. Dig. §§ 5, 9.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4183-4185; vol. 8, p. 7708.]

**3. LIS PENDENS (§ 9\*)—NOTICE—PLEADINGS—SUFFICIENCY.**

Record examined and *held* under the circumstances of the case the property was sufficiently described, and that the law relating to *lis pendens* was substantially complied with.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 20, 21; Dec. Dig. § 9.\*]

**4. HOMESTEAD (§ 118\*)—RIGHT TO ALIENATE—HUSBAND AND WIFE.**

A homestead, the title to which is in the husband, cannot be sold or otherwise alienated by the husband without the wife joining in the conveyance, unless the wife has voluntarily abandoned the husband or, for any cause, has taken up her residence out of the state for a period of one year or more. A deed to a homestead executed by a husband without such abandonment or removal of residence on the part of the wife is void.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

**5. HOMESTEAD (§ 117\*)—CONVEYANCE BY HUSBAND—VALIDITY.**

Where in a divorce case a decree had been denied both parties, but the wife had been enjoined from interfering with the husband's possession of the homestead, she was not thereby divested of her right or title to and in the homestead, but was yet the legal wife of the husband, and any attempt by the latter to sell the homestead without the wife's consent or without her joining in the conveyance is void.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 191-202; Dec. Dig. § 117.\*]

**6. HOMESTEAD (§ 118\*)—DEED BY TRUSTEE—TITLE CONVEYED.**

Facts examined, and *held*, that plaintiff in error has no title or color of title in and to a homestead attempted to be conveyed by the husband without being joined in the conveyance by the wife.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 192, 195, 203-209, 216, 217; Dec. Dig. § 118.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Beckham County; John J. Carney, Judge.

Action by Ellen Brady and others against R. S. McWhorter to recover possession of real estate. Judgment for plaintiffs, and defendant brings error. Affirmed.

Geo. L. Zink and J. H. Cline, both of Hobart, for plaintiff in error. Jno. B. Harrison, of Oklahoma City, and Arthur Leach, of Sayre, for defendants in error.

**ROBERTSON, C.** This is an action in the nature of ejectment by Ellen Brady and Elmer Brady, Johanna Brady, Adda Lillian Brady, and Bunyon Francis Brady, minors, against R. S. McWhorter to recover possession of certain described real estate in Beckham county, Okl. It appears from the record that J. H. Brady and Ellen Brady were husband and wife; that the land involved in this controversy was a government home-

stead which had been filed upon and proved up by Brady. On July 3, 1908, Ellen Brady brought suit in the district court of Beckham county against J. H. Brady for divorce on the grounds of habitual drunkenness and cruel and inhuman treatment, and therein asked for the custody of their four minor children, and for an equitable division of their property, including the homestead, and also sought to enjoin her husband from selling or disposing of any of their property until the termination of the suit. The husband, J. H. Brady, was duly served with summons on the 8th day of July, 1908, and return thereof was made and filed on the same day. On July 10, 1908, two days later, the husband attempted to sell and convey the homestead by warranty deed to R. S. McWhorter, the plaintiff in error herein. It appears from the record that the wife had no knowledge of this conveyance, except the constructive knowledge that the recorded deed would give her, and it also affirmatively appears that she did not join her husband in the execution of the deed to McWhorter. The action for divorce was tried January 29, 1909, and the wife was given a decree of separation, the custody of the minor children, and the possession of the homestead, that being all the land owned by the parties at the time. In said divorce decree, the husband, J. H. Brady, was perpetually enjoined and barred of any and all right of possession to the homestead, until the further order of the court. On July 29, 1909, the plaintiff in error, being in possession of the land by tenant and refusing to give possession, was made defendant in this suit for possession by Ellen Brady. The plaintiff in error answered by general denial and cross-petition. Prior to the trial, it was made to appear to the court that the minor children of Ellen and J. H. Brady had an interest in the tract of land, whereupon the court ordered them made parties to the action and appointed a guardian ad litem for them, who appeared and filed a general denial for them. The cause was tried in February, 1911, and resulted in a judgment in favor of the plaintiff and her minor children for the possession of the land in controversy, until the further order of the court.

In addition to the above facts, it is also gathered from the record that the land in controversy, prior to statehood, was situated in Greer county; that, by virtue of the provisions of the Constitution creating Beckham county, the tract after statehood was situated in said Beckham county; that the said J. H. Brady made final proof and received his final receipt covering said tract of land on the 15th day of March, 1905, said final receipt being recorded in Greer county on April 1, 1906, and the patent from the United States covering said tract of land was issued to the said Brady on October 10, 1905, the patent

also being recorded in Greer county on the 6th day of April, 1906. It is also disclosed by the record that the relations between Brady and his wife were anything but amicable; that they frequently quarreled; and also that they had separated several times, one separation occurring in the summer of 1906, when the wife left her husband on account of his cruel treatment. The evidence shows that thereafter she returned to the husband, and, as an inducement to secure her return he offered to, and did, deed her on April 10, 1906, the north half of the homestead. This deed was recorded in Greer county, Okl., on August 2, 1906. On the same day the wife made, executed, and delivered to him her warranty deed, conveying thereby the south half of the same tract of land, which deed was also recorded in Greer county, Okl. Shortly after this exchange of deeds, the parties separated again. This was the final separation. On April 3, 1906, Brady brought suit against his wife for divorce in the district court of Greer county; on May 3d, 1907, the wife appeared and filed her answer and cross-petition. Brady charged his wife, in the petition for divorce, with abandonment; the answer in the cross-petition by the wife charged cruelty and habitual intoxication; the cause was tried before the district court of Greer county on May 15, 1907, and both parties were denied a divorce. On the 16th day of May 1907, the next day after the decree had been entered in the divorce case as last aforesaid, J. H. Brady, the husband, commenced an action in the district court of Greer county against the plaintiff, Ellen Brady, his wife, the object and purpose of which was to cancel the warranty deed he had theretofore executed to her, conveying the north half of the homestead; personal service of summons was had on the plaintiff, and on the same day the district court issued a restraining order against Ellen Brady, the wife, restraining her from selling or disposing of the north half of said tract of land until the action to cancel the deed could be heard and determined, and also restraining her from interfering with the possession of J. H. Brady, her husband, in the cultivation of a crop on said land. Default was made by Ellen Brady in this cause, and on August 18, 1907, a judgment was entered against her and in favor of her husband, perpetually restraining Ellen Brady from interfering with her husband, J. H. Brady, in and to the whole of said land, and canceling the deed from the husband to the wife and divesting the title from the said Ellen Brady and vesting the same in the husband and father, J. H. Brady, as trustee for the minor children of said marriage. No appeal was ever taken from this decree by either party.

From the judgment against McWhorter in favor of Ellen Brady, as entered by the district court of Beckham county in February, 1911, giving her the possession of the land, the defendant, McWhorter, appeals, and as-

signs as error "that the judgment and decision of the court below is not sustained by sufficient evidence and is contrary to law." Under this assignment of error, several questions are raised by plaintiff in error in his brief, the first of which is that the description of the premises in the petition of Ellen Brady for divorce was insufficient to constitute *lis pendens*, and that therefore plaintiff in error had no legal notice of the pending divorce suit and is an innocent purchaser, etc.

The paragraph in the divorce petition which deals with the description of the land reads as follows: "The plaintiff has a homestead of 160 acres of land situated near Erick in Beckham county, Okl., of the value of about \$3,500; that final proof has been made on said tract, that said homestead was filed upon, improved and put in cultivation by the joint efforts and labor of plaintiff and defendant."

The sections of our statute dealing with the subject are 4732 and 4733, Rev. Laws 1910, the first of which reads as follows:

"Sec. 4732. When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition.

"Sec. 4733. When any part of real property, the subject-matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the office of the register of deeds of such other county or counties, before it shall operate therein as notice, so as to charge third persons, as provided in the preceding section. It shall operate as such notice, without record, in the county where it is rendered."

[1] The doctrine of *lis pendens* under the common law was based on the theory of public policy, while under our statute it appears to be treated as an element of the law of notice.

[2] It has been said (25 Cyc. 1451) "that it is essential to the existence of a valid and effective *lis pendens* that three elements be present: (1) The property must be of a character to be subject to the rule; (2) the court must have jurisdiction both of the person and the res; (3) and the property or res invoked must be sufficiently described in the pleadings."

[3] There is no question concerning the first and second elements above named. Let us examine as to the third. In 25 Cyc. 1462, it is said: "A purchaser or mortgagee or other person who would otherwise be affected by the rule of *lis pendens* is not affected by the pendency of an action unless



the pleadings therein at the date of the purchase or the acquisition or rights describe the property as to which the rule is sought to be applied so as to enable the purchaser or other third person to ascertain its identity. The property is sufficiently described, it would seem, although not described by metes and bounds, if described with reasonable certainty, *that is, if enough is alleged to enable a person upon reasonable inquiry to identify the property and ascertain the object of the suit.*" (Italics ours.)

It is earnestly contended by plaintiff in error in his brief that the statute is no broader than the common-law rule, and that the averments of the petition must be so definite that any one on reading it can learn what property was intended to be made the subject of recovery. With this contention we cannot fully agree, for that the statutory rule governing *lis pendens* is broader and more comprehensive than the common-law rule, in that the statutory *lis pendens*, partaking, as it does, of the nature and doctrine of notice, makes notice the channel or means through, or by which, the real object and purpose of *lis pendens* is attained. We are free to say that the description of the land in this petition is exceedingly vague, and ordinarily would be held insufficient in the matter of notice, yet the object and purpose of the statute must be kept constantly in mind and under the facts and circumstances of this case, if we can say that the plaintiff in error did, in fact, have notice of the situation and of the status of the land at the time he purchased the same, we must sustain the judgment of the trial court. The statute makes a pending suit constructive notice and requires intending purchasers to exercise a reasonable care and diligence in ascertaining the nature of a pending suit. This requirement is everywhere recognized, and abstracters are required to examine the records in the district clerk's office in order to ascertain whether the land for which they are making an abstract of title is involved in any pending actions, and to so certify if such be the case. Had plaintiff in error complied with the requirements of the statute, or exercised a reasonable degree of care in the premises, he would have found that on July 3, 1908, Ellen Brady had filed her petition in the district court of Beckham county against J. H. Brady, asking for a divorce and the custody of their minor children, also the possession of their homestead situated near Erick in said county, which homestead had been filed upon, improved, and deeded by the joint efforts of said Ellen and J. H. Brady. He would also have found that the summons in said divorce case had been served on J. H. Brady, and return thereof made and filed in the action on July 8, 1908, two whole days before he purchased the land.

McWhorter in his testimony (C-M, p. 46)

also shows that he had, prior to the purchase, been apprised of the status of the land, or at least was in possession of such facts and circumstances as would give a prudent man notice of the condition of the title. He says that he had never seen Brady before; that Brady came to his house one night and the next day the trade was made; that Brady told him he was a married man and had four children; that Brady showed him a decree signed by Judge Irwin, which decree was introduced in evidence and is in the record, and which shows that Brady had been in a lawsuit in old Greer county with his wife over the identical piece of land; that he had deeded one 80 to his wife, but that this deed had been canceled for failure of consideration, and that the court had finally decreed the title to said tract in J. H. Brady, as trustee for the minor children of Brady and his wife. In this decree, which McWhorter saw and examined prior to the purchase, the land was properly described, and said decree further showed Ellen Brady was the wife of J. H. Brady, and that the Union Central Life Insurance Company had a mortgage thereon, signed by both Brady and his wife. It is further shown (C-M, pp. 66, 67) by the record that McWhorter saw and examined the final receipt from the Mangum land office and the patent from the General Land Office at Washington, D. C., all of which showed the land to be the homestead of Brady.

The description of the land in Mrs. Brady's petition, standing alone, in our opinion, was not as full and complete as it should have been, yet, in the light of the foregoing facts, it was, in our opinion, sufficient to apprise the purchaser of its status and to enable him to identify the same and to ascertain the object of the suit. The failure of McWhorter to examine the records of the district court of Beckham county, and the actual knowledge he possessed prior to the purchase, the decree, and other muniments of the title which he admits he examined, together with his failure to use or exercise any degree of diligence, especially that degree required by law, leads us to say that the law relating to *lis pendens* was substantially complied with, and that plaintiff in error's contention to the contrary cannot be sustained.

[4] It is next contended by plaintiff in error that the deed to the land was good with J. H. Brady's signature alone, and that the wife's signature thereto was unnecessary.

Section 1145, Rev. Laws, 1910, which was in force at the time this cause was tried, reads as follows: "Where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one year, or from any cause takes up her residence out of the state, he may convey, mortgage or make any contract relating thereto without being joined therein by her; and where the title to the homestead is in the

wife, and the husband voluntarily abandons her, or from any cause takes up his residence out of the state for a period of one year, she may convey, mortgage or make any contract relating thereto without being joined therein by him." It is thus seen that, before a deed to a homestead signed by one spouse only constitutes a good conveyance, the abandonment must be voluntary. In the case at bar, the evidence shows the contrary to be true. This was an issue in the trial below, duly submitted to the court by the parties by the evidence, which was conflicting. The court resolved the question in favor of the wife's contention, and in this there was no mistake. This court will not examine the evidence, where issues of fact are involved, further than to ascertain if there be any evidence reasonably tending to support the finding of the trial court or jury. If such there be, the finding of the court or the verdict of the jury will be conclusive on appeal.

It is next urged that Ellen Brady had no right to a decree of divorce as entered in the district court of Beckham county, for that the district court of Greer county some years prior to the rendering of the last named judgment had denied both parties a divorce on the same grounds set up in the petition for divorce in Beckham county, and that the last action in Beckham county required an examination of the identical facts upon which the district court of Greer county denied the divorce, and that therefore the questions raised were *res adjudicata*. To this contention, it is sufficient to say that the record fails to show that such are the facts; the record does not show affirmatively or otherwise that the same facts examined by the district court of Greer county formed the basis of the divorce action in Beckham county, or whether the district court of Beckham county examined and considered the same facts as were examined and considered by the district court of Greer county or whether that issue was within the pleadings of the Greer county case. No copy of the pleadings in the last-named case were pleaded or proved in this case, and it is impossible for us to say what the real issues were in the Greer county case, although it seems to be admitted that the charge on the part of the plaintiff was abandonment, and on the part of Mrs. Brady was cruel and inhuman treatment and habitual intoxication. Yet we know that under the general head of cruel and inhuman treatment the pleader could set out in the Beckham county case issues and facts wholly different and occurring subsequently to those tried in the Greer county case, although they might properly be classed under the same general name. Before this plea, *i. e.*, *res adjudicata* as urged here can be sustained in this particular, it should affirmatively appear of record that the issues and facts upon which the former judgment was rendered are the same issues and facts and were properly submitted to and

considered by the court by the pleadings in the latter action, and were the same issues and facts upon which the latter judgment was based. This record is silent on the subject, and the presumption follows that the issues were other and different from those of the former action.

[5] Yet whether those facts were the same or not and whether the issues were the same and were within the pleadings in both cases it is a matter of no consequence, so far as this case is concerned, and it is unnecessary to decide that question, and we therefore decline to do so, because Ellen Brady up to the time of the Beckham county divorce case was the legal wife of J. H. Brady, and as such had a homestead interest in the land in controversy (provided of course the title to the same was in Brady, but of which see post), and the deed from Brady to McWhorter prior to their divorce would not be valid without her signature. This fact cannot be gainsaid. No argument is required to establish the correctness of this proposition.

[6] Finally it is urged by plaintiff in error that the decree of the district court of Greer county canceled the deed from J. H. Brady to his wife and also perpetually enjoined her from interfering in any way with his right of possession. It will be remembered that prior to the Greer county divorce case the parties had separated, and that Brady deeded one 80 acres of the farm to his wife, and she in turn deeded the other 80 acres to him. After the decree of divorce had been denied both parties by the Greer county district court, Brady brought suit to cancel the deed he had made to his wife, on the grounds of no consideration, etc. The court granted the prayer of his petition and a default judgment was entered against the wife, but the court, instead of vesting the title in Brady, vested it in him as trustee for the use and benefit of the minor children of the couple. From this decree no appeal was ever taken, and the same, so far as this case is concerned, became final. This being true, Ellen Brady occupied the position of wife to J. H. Brady, and the restraining order preventing her from interfering with her husband's possession did not alter her relation in that respect or divest her of the homestead title to the land that she, by virtue of such relation, possessed. Even though the Greer county decree should be construed to vest the entire legal title of the land in J. H. Brady, still she, as his legal wife, would yet possess a homestead interest in and to the land in question; it being the only land possessed by them or either of them. On the other hand, it is contended by plaintiff in error that, while the Greer county decree vested the entire title of the land in J. H. Brady, the husband, and that such part of said decree is valid, yet that part which vests the title in him as trustee for the use and benefit of his minor children is void. This is indeed an inconsistent contention. If the decree is void

as to the children, we cannot see why it is not void as to Brady. The decree cannot be attacked by McWhorter in this action in this manner; nor need we decide whether it might not in a proper case by the proper parties be modified, altered, or annulled. So long as Brady and his wife were satisfied with it and did not appeal therefrom or question it in any manner, surely McWhorter, Brady's grantee, cannot in this proceeding do so.

As we view it, McWhorter has no title or color of title in and to this land. In order to fully understand his position, it becomes necessary to examine the decree of the Greer county district court upon which he bases his title. It reads as follows:

"Journal Entry.

This cause coming on to be heard this 16th day of August as a regular court day within the August term of said court, and the defendant though having been personally served more than forty days prior to the date set for hearing as shown by the sheriff's return, and having been called in open court to answer, plead or demur, and not appearing either in person or by attorney, and the plaintiff appearing in person and by attorney, and having introduced testimony and the court having heard all the evidence and being fully advised in the premises, finds that the deed to the S. E.  $\frac{1}{4}$  of section 10, township 8 north, of range 26, west I. M., made, executed and delivered by said plaintiff to said defendant was without consideration and void. Wherefore, it is hereby ordered, adjudged and decreed that the said deed be set aside and that the title to said land be, and the same is hereby vested in J. H. Brady as trustee for and in behalf of the minor children of said marriage (italics ours) and that the said defendant be perpetually restrained from interfering with the possession of the said plaintiff in and to said land.

"C. F. Irwin, Judge.

"Filed Nov. 6, 1907. E. M. Hegler, Clerk, by J. W. Sproat, Deputy."

It is thus seen that Brady had no title in himself but held the land simply as trustee for his minor children.

Aside from the question of his pendens and the failure of Brady to give McWhorter a deed in which he was joined by his wife, it being found that her abandonment was involuntary and occasioned by the wrongful conduct of Brady, and either of which questions would render the transfer void, it is evident that Brady had no interest in the land which he could convey, the title being in his minor children.

We fail to detect any error in the judgment of the trial court, and the same should therefore be affirmed.

PER CURIAM. Adopted in whole.

TWEEDY v. STATE. (No. A-2001.)  
(Criminal Court of Appeals of Oklahoma. May 16, 1914.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

On the trial of an accused charged with the unlawful possession of intoxicating liquor with intent to sell the same, proof that such accused possessed, within the jurisdiction of the court trying the case, 60 kegs of whisky, 50 casks of beer, and 27 gallons of whisky at one time, together with the proof of the payment of the wholesale liquor dealer's tax required by the United States government, is amply sufficient to sustain a verdict of guilty, and especially so when there is no defense offered.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

2. INDICTMENT AND INFORMATION (§ 173\*)—VARIANCE—DESIGNATION OF ACCUSED.

When an information charges a crime against John Tweedy, and the proof shows that the crime was committed by J. M. Tweedy, and shows further that John Tweedy and J. M. Tweedy are one and the same person, all the safeguards of the law have been observed, and a verdict of guilty is properly returned by the jury and sustained by the trial court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 539; Dec. Dig. § 173.\*]

Appeal from County Court, Pawnee County; Geo. E. Merritt, Judge.

John Tweedy was convicted of having unlawful possession of intoxicating liquor with intent to sell the same and appeals. Affirmed.

Orton & McNeill, of Pawnee, for plaintiff in error. O. J. Davenport Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, John Tweedy, was convicted at the March, 1913, term of the county court of Pawnee county on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$500 and imprisonment in the county jail for a period of 120 days.

[1] All the proof introduced at the trial was introduced by the state, and tended to show that on the 22d day of February, 1913, the accused signed a receipt for 50 casks of beer, weighing 12,500 pounds, 27 gallons of whisky, weighing 1,300 pounds, and 60 kegs of whisky, weighing 6,000 pounds, being a total of 19,850 pounds of intoxicating liquor. The liquor was all in one freight car, which was signed for as aforesaid on the 22d day of February, 1913, and the seal broken by the railway agent at the direction of accused. On the morning of the 23d following the car was empty. The state further showed that the accused had paid the United States government the special license required of wholesale liquor dealers, his place of business having been designated as Keystone, Okl.

Section 6, c. 70, Session Laws of 1911, requires railroads to keep a record of the

amount and kind of intoxicating liquors received, to whom it is shipped and by whom it is received, the date when received and when delivered. The statute further provides that the books in which this record is kept shall constitute prima facie evidence of the facts therein stated, and shall be admissible in any court of this state having jurisdiction to or in any manner clothed with power to enforce the prohibitory laws.

[2] It appears that the shipment of whisky in this case was made to John Tweedy, and was signed for by J. M. Tweedy. The information was filed by the county attorney against John Tweedy. In the trial court John Tweedy filed a motion for continuance, and, among other things, says: "Comes now the defendant and moves the court to quash the information in the above-entitled cause for the reason that said information is too indefinite and uncertain in the following facts, to wit: (1) That said information does not state a place definite and certain enough to inform the said defendant to prepare for trial, as said information is indefinite and uncertain, and that it does not state where the said defendant had possession of said whisky and beer except in Pawnee county, but as to what particular place or locality said defendant had possession of said intoxicating liquor is not stated, and for that reason is not definite and certain enough to enable said defendant to prepare for trial. \* \* \* He signs the motion "J. M. Tweedy," and is identified as the person on trial. J. M. Tweedy and John Tweedy are further shown in the trial to be one and the same person. One witness who had known the accused 20 years testified that his name was John Tweedy and his initials were "J. M." There can be no doubt that the accused, John Tweedy, and J. M. Tweedy are one and the same person. Neither is there any doubt that the accused was in possession of 60 kegs of whisky, 50 casks of beer, and 27 gallons of whisky, as charged in the information and proved at the trial, with intent to sell or dispose of same contrary to law.

There is absolutely no merit in this appeal. If one can go about this state paying a special revenue tax, as required by the United States from liquor dealers, and be in possession of one car load of liquor at one time without intending to violate the law, then the prohibitory law of the state amounts to nothing. It is asking entirely too much of a conscientious jury to demand that it return a verdict of not guilty in such cases, when there is absolutely no denial of the facts in any particular on the part of the accused, and it is requesting too much of this court for counsel for accused to urge a reversal under such conditions. When there is any reasonable construction of the proof that will permit the trial jury or court to reasonably conclude that there was no purpose or intent on the part of an accused to violate the law,

zeal of counsel in urging such a conclusion is commendable, but, when the facts are such as are disclosed by this record, they are entitled to very little consideration by the juries and the courts of Oklahoma.

The maximum fine provided by law was imposed by the jury in this case. So far as we are able to discover from the record, the only criticism that the law-abiding public could in any way make of the verdict of the jury is that it did not impose the maximum jail sentence as well. The proof overwhelmingly establishes the fact that the accused was a wholesale liquor dealer. The jury did its duty in finding him guilty and fixing his punishment, and this court will likewise do its duty by affirming the judgment.

The judgment is affirmed. Mandate ordered forthwith.

DOYLE, J., concurs. FURMAN, J., absent, and not participating.

MYRICK v. STATE. (No. A-2038.)  
(Criminal Court of Appeals of Oklahoma.  
May 18, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1182\*)—APPEAL—AFFIRMANCE.

Where a defendant appeals from a judgment of conviction, and no briefs are filed, or argument presented, this court will make an examination of the record proper, and, if no prejudicial error is apparent, will affirm the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Appeal from County Court, Choctaw County; W. T. Glenn, Judge.

Walter Myrick was convicted of carrying a pistol, and appeals. Affirmed.

Warren & Rogers, of Hugo, for plaintiff in error. The Attorney General, for the State.

DOYLE, J. Plaintiff in error was convicted in the county court of Choctaw county upon an information which charged a violation of section 2546 of the Penal Code. On May 2, 1913, in accordance with the verdict of the jury, he was by the court sentenced to be confined in the county jail for a period of 60 days. To reverse the judgment, an appeal was taken.

No briefs have been filed, and, when the case was called for final submission, no appearance was made on behalf of plaintiff in error. Thereupon the Attorney General moved to affirm the judgment for failure to prosecute the appeal.

We have examined the record proper, and have discovered no error which will warrant a reversal of the judgment. The motion to affirm the judgment is therefore sustained.

ARMSTRONG, P. J., and FURMAN, J., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**TRONIER v. STATE.** (No. A-2002.)  
(Criminal Court of Appeals of Oklahoma.  
May 16, 1914.)

(Syllabus by the Court.)

**CRIMINAL LAW** (§ 1160\*)—**APPEAL**—**VERDICT**—**EVIDENCE.**

When the jury find a verdict of guilty, which is approved by the trial court, and there is evidence in the record to sustain the verdict, it will not be set aside, in the absence of prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

Appeal from County Court, Pittsburg County; B. P. Hammond, Judge.

Otto Tronier was convicted of a violation of the prohibition law, and appeals. Affirmed.

Andrews & Day, of McAlester, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**DOYLE, J.** Plaintiff in error was tried and convicted in the county court of Pittsburg county, on an information which charged that Otto Tronier did on or about the 14th day of December, 1912, unlawfully have in his possession and under his control certain intoxicating liquors, to wit, gin, with the intent then and there to sell said liquor. March 20, 1913, he was sentenced in accordance with the verdict of the jury to be confined in the county jail for 30 days and to pay a fine of \$50. To reverse this judgment an appeal was taken.

The only question presented arises upon the sufficiency of the evidence to sustain the verdict. The proof on the part of the prosecution was the testimony of the sheriff of Pittsburg county, who testified that on the date alleged the defendant was conducting a place at the rear end of a butcher shop; there was a pool table there, and a counter, and a cigar case on the counter; that he peeped through a crack in the wall, and saw the defendant behind the counter, and three or four men in front of the counter drinking whisky, which was poured out of a bottle into glasses on the counter; that he then went in and asked the defendant if he was running a saloon; that he went behind the counter and found a quart bottle partly filled with gin, and some whisky in one of the glasses. This was all the evidence in the case. There was no testimony offered on the part of the defendant.

As it was said in *Vanderburg v. State*, 6 Okl. Cr. 485, 120 Pac. 301, these predisposing facts and circumstances are clearly sufficient to prove the unlawful intent. The jury had a right to take into consideration that the liquor was found practically exposed for sale in the defendant's place of business, and this evidence is undisputed. We think the evidence presented every indication that the defendant was engaged in running a joint.

When the jury find a verdict of guilty, which is approved by the trial court in overruling a motion for a new trial, and there is evidence in the record which sustains the verdict, it will not be set aside, in the absence of prejudicial error.

Finding no error in the record, the judgment of the lower court is affirmed.

**ARMSTRONG, P. J., and FURMAN, J.,** concur.

**FORTE v. PEOPLE.** (No. 8138.)

(Supreme Court of Colorado. May 4, 1914.)

**1. HOMICIDE** (§ 253\*)—**EVIDENCE.**

In a prosecution for uxoricide, circumstantial evidence held to sustain a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.\*]

**2. CRIMINAL LAW** (§ 822\*)—**TRIAL**—**INSTRUCTIONS**—**REVIEW.**

In determining the correctness of instructions on alibi, they must be considered as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

**3. JURY** (§ 103\*)—**QUALIFICATIONS.**

Where a juror on his voir dire stated that he had formed and expressed an opinion which would require evidence to remove, but, if accepted, he would disregard his opinion and try the case on the merits and the instructions of the court, whereupon defendant's counsel passed him for cause, he was not disqualified.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 444, 456, 460, 461-479, 497; Dec. Dig. § 103.\*]

Error to District Court, Pueblo County; C. S. Essex, Judge.

Peter Forte was convicted of murder, and he brings error. Affirmed.

Thomas R. Hoffmire, of Pueblo, and Bert Martin, of Denver, for plaintiff in error. Fred Farrar, Atty. Gen., and Frank C. West, Asst. Atty. Gen., for the People.

**GABBERT, J.** [1] Plaintiff in error was convicted of murder in the first degree, and sentenced to imprisonment for life. The victim was his wife. That she was murdered is beyond question, but, as the conviction was had on circumstantial evidence, it is urged on his behalf that the testimony to establish the circumstances pointing to his guilt and relied upon by the people was insufficient to support a verdict of guilty. The evidence on the part of the people is to the effect that deceased was at the home of her mother in the city of Pueblo on the afternoon of September 18, 1912; that she left for her home, which was in another part of the city, and where she resided with her husband, about 5 o'clock p. m., leaving one of her children with her mother and taking the other, a baby about 18 months old; that she was dressed in a blue serge suit and wore a ring which belonged to her sister; that during the eve-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ning the husband and wife were heard quarrelling, at their home, by neighbors living across the street, which continued for at least half an hour during which the plaintiff in error was heard cursing his wife, but, as such quarrels were of frequent occurrence, little attention was given the matter. Mrs. Olson, the mother of the deceased, was to be married the next day, and, pursuant to an arrangement with her daughter, was to spend the night of the 18th at the Forte home, and Mrs. Forte was to assist her the next day in buying clothes. Mrs. Olson was down town the night of the 18th with her fiancé, in whose company she went to a picture show. Later they went to a restaurant, and from there to a ranch belonging to her intended husband, located about one mile from the end of the street car line. About 1 o'clock the morning of the 19th she arrived at the Forte home, escorted by her fiancé. She observed a light in the house, and, after calling at the front door and receiving no answer, went to the back door and entered the house. Neither Forte nor his wife was at home. She found the baby asleep, and the dress the deceased had worn the day before hanging across the foot of the bed and her everyday dress in the kitchen. The bed was stripped of covering, except the sheets, one of which was on the middle of the bed in a wad. About an hour later Forte came in. Mrs. Olson stated that "he was wringing wet with sweat and white." She asked him where he had been, and he answered, at the Central Block, and, when asked what for, replied, to see Bessie (the deceased). Mrs. Olson then said, what did she go there for, as she knew I was coming here. Forte said, to see a real estate man, and that, while he was eating supper, he heard an automobile in the alley; that she went out; and that he would have killed her if he had known she was going in the automobile. Mrs. Olson further stated that Forte wanted to call a policeman or call in the neighbors, to which she objected, as at that time her suspicions were not aroused, and she thought Bessie had gone to her (the mother's) home for the night. Mrs. Olson and Forte remained up all night, and in the morning she took the baby to her home; Forte saying that he would get a lay-off and come down to her house, which he did about 10 o'clock that morning.

It appears from the testimony that Forte was a section hand in the employ of a railroad company, and on the 18th of September was engaged with a section crew in clearing up a wreck which had occurred at a distance of about three-fifths of a mile from his residence and that the crew, in order to remove the wreck, had dug two "dead man" holes, designated in the record as the north and south holes. Both were of considerable length and depth. They had served their purpose, and were to be filled, and there is some conflict in the testimony whether any dirt had been

thrown into the south end of the north hole the afternoon of the 18th. There is testimony, however, that when the crew went to work the morning of the 19th there was about two feet of dirt in that part of the north hole. Forte reported for work that morning, and was requested by the foreman to go to another point and assist in putting in a crossing. He objected, saying he was expecting a telegram or message and wanted to remain where he was, and at once went to work filling up the south end of the north hole, shoveling dirt rapidly. He said nothing about his wife or children at that time. He worked for half an hour or an hour, when the hole at the south end, according to the testimony of some of the witnesses, was filled level with the surface; while others state the dirt was about four feet deep at that point, and that there was no dirt in the north end of the hole at all. Forte quit work at this time, saying his wife had left him the night before, and that he wanted to go home and see about the children. He then went to the foreman and made the same statement about his wife leaving him, and that he had to go and take care of the children, and said he would be back in a few days. Witnesses also state that he did not receive any telegram or message while at work, and said nothing more to them on the subject. Several weeks prior to this time Forte had commenced a divorce proceeding against his wife, one object of which was to secure possession of a considerable sum of money which he claimed he had given his wife. She filed a cross-complaint, in which she asked for a divorce. The proceedings were pending at the time of her disappearance, and Mrs. Olson testifies that she loaned her money on the 18th to assist her in paying the expenses of the divorce proceeding, which it was her intention to prosecute. On Friday, the 20th, Mrs. Olson, in company with Forte, visited the Forte home. She stated that she was familiar with all the wearing apparel of her daughter; that she looked over the house and found that all the wearing apparel was there that her daughter had, which included her dresses, underclothes, shoes, and hats. The same day Forte was at the home of Mrs. Olson, when he accidentally dropped the ring deceased was wearing the day of her disappearance. It rolled under a table. He looked around to see if this was observed, and as quickly as possible recovered the ring and replaced it in his pocket. Two or three days later Forte was arrested for the murder of his wife, and taken to the office of the district attorney, who asked him what had become of his wife's ring. He denied having any ring, but finally drew it out of his pocket, wrapped in a handkerchief. When asked where he found it, he said under a table at his house after his wife had gone. At another time he stated that he found the ring tied in a handkerchief on the dresser at his house. About the middle of the week fol-

lowing the disappearance of deceased, Mrs. Olson again visited the Forte home, at which time she took the sheets from the bed, the under one of which had spots on it. About this date the brother and brother-in-law of deceased, at the suggestion of the foreman of the section crew, visited the holes to which we have referred, and Sunday night following again went to the north hole and dug at the south end, with the result that at a depth of five or six feet they found the body of deceased. The body was practically nude, having on only a short jacket or waist and a short dressing sacque. The ankles were tied with a cord, a rope made out of cotton cloth was around the neck, a cloth over the face, and one witness says the hair was done up, or was not down. The physician who examined the body testified that the hair was braided down the back, and that there was a rope around the neck, made out of cloth rolled together, the ends of which were tied with a string; that the tongue was protruding, and there was a bloody serous fluid which had stained the rope; that the nose was pressed flat on the face, as if it had been held down by something, and that, in his judgment, it was an ante mortem condition; that he examined the body for bruises and wounds, and could not find any injuries of that kind, and was of the opinion that the victim came to her death by suffocation, due to strangulation by means of the use of the rope. The doctor further testified that he had examined the cloth found over the face; that it was saturated with a bloody serous fluid from the body of a human being and of the kind that would ooze from the mucous membranes, such as the throat and nose; that it was not from an incision, but of a character which would result from pressing. He also stated that he analyzed one of the spots on the sheet taken from the bed by Mrs. Olson, and obtained the same results. There was also considerable testimony introduced relating to threats made by Forte against his wife, to the effect that he had beaten and threatened to kill her; that about two weeks prior to her death he picked up an ax and said he had a notion to split her head with it; that at another time he said he would cut her head off and put her in a hole, and that nobody would know anything about it; and that he frequently called her vile names. The testimony of the mother and a sister of deceased fixed her weight at about 110 or 115 pounds. The doctor stated that she might have weighed as much as 145 or 150 pounds; but at the time he viewed the body it was very much swollen.

We think this evidence, though circumstantial, was ample to justify the jury in reaching the conclusion that the accused was guilty as charged, beyond a reasonable doubt. He instituted an action against his wife for divorce, one object of which was to recover a considerable sum of money which he claim-

ed was his and in her possession. She had filed a cross-complaint, and on the day she disappeared was evidently intending to take steps to secure a divorce. He and deceased were quarreling the evening of the 18th at their home. Such quarrels were of frequent occurrence. He had often threatened to take the life of his wife. At 2 a. m. the morning of the 19th he returned home, pale, dripping with perspiration, and agitated. He knew that the north hole had served its purpose and was to be filled. He stated to Mrs. Olson that his wife had gone to a real estate office the evening of the 18th to see a real estate man. He also intimated that his wife had run away, leaving in an automobile. These statements were evidently fabrications, when it is considered that all the clothing of deceased was in the house. The morning of the 19th he left the house, as he said, to secure a lay-off. Instead, he went to work at the south end of the north hole, shoveling dirt into that part of the excavation, working rapidly. At that time there was some dirt in that end of the hole, when there was none the day before—the exact condition which would exist if he had thrown the body into that part of the hole the previous night and covered it with dirt. He objected to working at any other point, giving as his excuse that he expected a message. When the south end of the hole was filled, or dirt to the depth of several feet had been thrown in, he stated for the first time that his wife had left him, and that he wanted to go home and see about his children. Afterwards the body was found in the end of the hole which he assisted so vigorously to fill, and, when filled to such extent as would prevent discovery of the body by other members of the crew, left the place without saying anything about the message he expected. These acts, in connection with his objection to working at another point, would be the course he would pursue if he had murdered his wife and placed the body in the hole the night before, and covered it with dirt sufficient to temporarily hide it from view. He had possession of his wife's ring she wore the day she disappeared. When he dropped it at the home of Mrs. Olson, he appeared concerned about whether it had been noticed. When arrested, he denied having the ring, but finally produced it, and made conflicting statements as to where he found it. The body, when found, was nude. None of the clothing of deceased was missing. She had been strangled. The spots upon the sheet were blood spots of a character which would ooze from the throat or nose of a person killed by strangulation. These facts and circumstances clearly point to the fact that some time after deceased arrived home on the 18th, and before Mrs. Olson arrived at the house, defendant strangled the deceased and carried, or in some way conveyed, her body to the hole where it was afterwards found. They are consistent with

defendant's guilt, and inconsistent with any reasonable hypothesis of his innocence, and sufficient to justify the jury in determining that he was guilty as charged, beyond a reasonable doubt, although no eyewitness saw the crime committed.

On behalf of the defendant, evidence was introduced to the effect that Bessie was seen on the street down town the evening of the 18th between 9 and 10 o'clock, and that defendant was down town that evening from 8:30 to 10:30, and was looking for his wife. Defendant testified that he was down town that evening trying to find his wife; that he thought he saw her near a picture show; that his wife told him before leaving the house that she was going to the Central Block to meet her mother; that he went there and remained about half an hour; that he afterwards visited several saloons, naming them; that later he went to a picture show; that he boarded a car about midnight, and reached home at 12:30; that his wife was not there, and he returned to the street car line, thinking she might be on the last car, and came back to his house; that Mrs. Olson was there, and, on looking in the dresser, he found that \$75, a diamond pin, a ring, and a watch were gone. He denied that the sheets introduced in evidence belonged to him.

It was the province of the jury to pass on the credibility of the witnesses who made these statements. They did not believe them and the record fully supports this conclusion.

[2] It is next urged that the instructions on the question of alibi deprived the defendant of the application of the rule of reasonable doubt. The instructions on this subject must be considered as a whole, and, when so read, it is clear the objection is not tenable. The same question was raised in the recent case of *Foster v. People*, 139 Pac. 10, where, in considering instructions quite similar, it was held to be without merit.

[3] In support of the motion for a new trial, the defendant presented affidavits stating that one of the jurors had expressed an opinion and belief that the defendant was guilty, prior to his examination on his voir dire. The questions and answers of the juror touching his qualifications were not preserved. Counsel for defendant stated in his affidavit that the juror, when examined, said he had not formed or expressed an opinion regarding the case or the guilt or innocence of the defendant. On the part of the people the affidavits of the district attorney, the juror, and other jurors who sat with him in this case, were submitted, in which it was stated, in substance, that the juror said he had formed and expressed an opinion which would require evidence to remove, but, if accepted, he would disregard his opinion and try the case upon the merits and the instructions of the court. They further stated that counsel for plaintiff passed the juror for

cause. From these statements on behalf of the prosecution it does not appear the juror was disqualified.

The court determined the question at issue in favor of the people. The affidavits on their behalf support this finding, and we will not disturb it on review. *Smith v. People*, 39 Colo. 202, 88 Pac. 1072; *Johnson v. People*, 33 Colo. 224, 80 Pac. 133, 106 Am. St. Rep. 85.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

#### NICHOLS v. KATRES. (No. 8276.)

(Supreme Court of Colorado. May 4, 1914.)

##### 1. APPEAL AND ERROR (§ 781\*)—REVIEW—MOOT QUESTION—SETTLEMENT.

Where the parties have formally settled a controversy in a personal injury action, the appellate court cannot grant either party any relief, and the writ of error will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

##### 2. ATTORNEY AND CLIENT (§ 190\*)—LIEN—DISMISSAL OF APPEAL.

The appellate court will not determine the question of whether attorneys are entitled to a lien until the trial court has passed on the question, so that, where plaintiff and defendant have settled the case, the fact that plaintiff's attorneys claim a lien is not sufficient to prevent a dismissal of defendant's writ of error.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

En Banc. Error to District Court, El Paso County; J. E. Little, Judge.

Action by Steve Katres against Charles Hersey Nichols. Judgment for plaintiff, and defendant brings error. Writ dismissed.

W. E. Clark, of Denver, for plaintiff in error. Orr, Robinett & Mason, of Colorado Springs, for defendant in error.

GARRIGUES, J. Plaintiff in the court below, Katres, obtained a judgment against Nichols in the sum of \$4,250 damages on account of injuries sustained from being run over by an automobile. The law firm of Orr, Robinett & Mason were plaintiff's attorneys, and before the trial filed notice of a claim for attorneys' lien for their services on any judgment that might be obtained. Nichols brings the case here on error and asks for a supersedeas, and defendant in error has filed a motion to dismiss the writ and proceeding for the reason the judgment sought to be superseded has been settled. Plaintiff in error, in resisting the motion to dismiss, has set out in full as an exhibit the contract of settlement and release he made with Katres. This instrument, dated February 19, 1914,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



recites in substance that Katres, being desirous of terminating the litigation and securing an adjustment and settlement of the case, has, in consideration of \$1,525, agreed upon a settlement and release with Nichols. It states that \$250 of this money has been deposited with the Central Savings Bank & Trust Company of Denver to pay Katres' doctor and hospital bills; that \$525 has been paid to him directly in money, and provides that the remaining \$750 is to be paid to Orr, Robinett & Mason, unless they can be settled with for less, in which event, whatever is saved out of the \$750 shall be paid to Katres; that, if the attorneys who filed the lien refuse to accept the \$750, it shall be paid into the registry of the court. The agreement recites: "I, the undersigned, agree to and do release said Charles Hersey Nichols from any and all claim or demand which I now have, or which I may hereafter have, and which has or may hereafter accrue to me because of injuries received by me on August 23, 1913, and because of which injuries the action herein first above stated was instituted." Orr, Robinett & Mason refused to accept the \$750, or any part thereof.

[1] There is nothing for us to review on account of the settlement. It is no longer a case of actual controversy involving substantial rights between litigants, and presents now only moot questions of law in which we have no concern. The case no longer is one of any practical importance. The parties have settled it, and we can grant neither any relief. *Floyd v. Cochran*, 24 Colo. 489, 52 Pac. 676; *Knowles v. Harrington*, 45 Colo. 346, 101 Pac. 403; *Burns v. National Co.*, 47 Colo. 557, 108 Pac. 330; *Hawthorne v. Hendrie*, 50 Colo. 346, 116 Pac. 122; *Lane v. Lyon*, 140 Pac. 197 (Jan. term, 1914).

[2] The only question remaining over which a dispute or legal controversy might arise is the attorneys' lien, its amount and enforcement, which controversy must be settled in the first instance in the lower court. Nichols, having settled the case with Katres, cannot now prosecute the writ of error for the purpose of defeating an alleged attorneys' lien which is all there is left in the case.

The motion to dismiss the writ of error will be sustained.

Writ dismissed.

#### MITCHELL v. CROWL. (No. 7992.)

(Supreme Court of Colorado. May 4, 1914.)

#### 1. FRAUD (§ 64\*) — DAMAGES — QUESTION FOR JURY.

Where defendant fraudulently exaggerated the value of property which he transferred in exchange for plaintiff's property, the price at which it was agreed defendant's property should be accepted is competent evidence of its value, if it had been as represented, and sufficient to carry the case to the jury upon that question.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.\*]

#### 2. EXECUTION (§ 433\*) — BODY EXECUTION — SUFFICIENCY OF VERDICT.

In an action for damages for fraudulent misrepresentations made in effecting an exchange of property, where the court instructed that, in event of a verdict for plaintiff, the jury, should they find that defendant was guilty of either fraud or willful deceit, should so state in the verdict, a verdict, reciting that the "defendant is guilty of fraud and willful deceit," warrants a body execution under Rev. St. 1908, §§ 3024 and 3025, providing that in tort actions, if the verdict is in favor of the plaintiff and shall state defendant was guilty of fraud or willful deceit, plaintiff may have execution against the body of the defendant, for the verdict, when taken in connection with the entire record, shows that the jury found defendant was guilty of fraud in the original transaction, and cannot be construed as having reference to the defense of the suit.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1232-1236; Dec. Dig. § 433.\*]

#### 3. ACTION (§ 27\*) — TORT ACTIONS — WHAT ARE.

An action to recover damages for false and fraudulent representations made in effecting an exchange of property is a tort action.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

Error to District Court, El Paso County; J. W. Sheafor, Judge.

Action by W. H. Crowl against W. S. Mitchell. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error as plaintiff, brought suit against plaintiff in error to recover damages on the ground of fraud and deceit practiced by defendant concerning real estate received by the plaintiff from defendant in exchange for property belonging to the plaintiff. The properties involved, and concerning which the false representations were charged to have been made, are mentioned in the record as the Corona Street Property in Colorado Springs, and the Holly ranch in Prowers county. The evidence established that plaintiff was a resident of Cherryvale, Kan., at which point the trade was made; that he had never seen the properties he received in exchange for his property; that he had previously been in Colorado Springs, at which time defendant showed him a residence in that city on North Nevada avenue, and represented that the Corona street house was as good as the North Nevada house, and was in as good condition as that property; that defendant represented the Corona street property was worth \$6,500, and was rented for \$45 per month; that in fact it was only rented for \$15 per month; that it was an old house which had been moved, was very much out of repair, and was not worth to exceed \$3,000; that defendant represented it was incumbered by a deed of trust for the sum of \$2,500, drawing interest at 6 per cent. when in fact the rate of interest was 7 per cent. With respect to the ranch, the testimony established that defendant represented it to be worth \$14,000; that from one year's crop of alfalfa grown thereon he had received \$23.15 per acre for his half, when in

fact he had received but little over \$7 per acre; that in fact its actual value was from \$8,000 to \$12,000; that defendant represented it was incumbered in the sum of \$8,000, drawing interest at the rate of 6 per cent. when in fact half of that amount drew 8 per cent. It appears from the testimony that the agreed price for the properties, as the basis upon which the trade was consummated, was the respective sums which defendant represented them to be worth. The court instructed the jury to the effect that if they found for the plaintiff he would be entitled to recover the difference between the value of the property as it actually was on the day of the exchange and what its market value would have been on that day if it had been as represented by the defendant. The court also instructed the jury that if they returned a verdict for plaintiff, then they should further consider whether or not the defendant, in making the representations regarding the property of which plaintiff complained, was guilty either of fraud or willful deceit, and that if they should find from the testimony that in making such representations the defendant was guilty of either fraud or willful deceit, they should so state in their verdict. The jury rendered a verdict for plaintiff in the sum of \$4,250, and also stated in their verdict, "We further find that the said defendant is also guilty of fraud and willful deceit in the matter." On this verdict judgment was rendered in favor of plaintiff for the damages assessed, and also that plaintiff have execution against the body of the defendant, under which he should be committed to the county jail not exceeding six months, provided the judgment was not paid. The defendant brings the case here for review on error, and the foregoing statement is sufficient to present the two questions urged in his behalf: (1) That there was no testimony tending to prove what the properties would have been worth had they been as represented; (2) that the verdict did not justify the court in rendering a body judgment.

P. M. Kistler, of Colorado Springs, for plaintiff in error. Chinn & Strickler and Vanatta & Dolph, all of Colorado Springs, for defendant in error.

GABBERT, J. (after stating the facts as above). [1] In an action by the vendee to recover damages based upon false and fraudulent representations respecting property purchased, the agreed price therefor is competent, but not conclusive, evidence of its value if it had been as represented by the vendor, and is sufficient to submit the case to a jury upon that question. *Long v. Davis*, 136 Iowa, 734, 114 N. W. 197; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Houghton v. Carpenter*, 40 Vt. 588; 20 Cyc. 146; 14 A. & E. Ency. 188.

[2, 3] It is urged that because the verdict relating to the fraud and deceit of defendant was in the present tense, it is impossible to tell what the jury had in mind on this subject; that they may have referred to his conduct in defending the action or in giving testimony, or in his dealings with the plaintiff subsequent to the trade. In other words, the verdict did not contain that statement which the statute requires as a condition precedent to vest the court with authority to award a body execution. The statute (sections 3024, 3025, R. S. 1908) provides, in substance, that in actions founded upon tort, if the verdict is in favor of plaintiff, and shall state that in committing the tort complained of, the defendant was guilty of either malice, fraud, or willful deceit, the plaintiff may have an execution against the body of the defendant. The action was in tort. The court instructed the jury that if they found for plaintiff, and should further find that defendant was guilty of either fraud or willful deceit, they should so state in their verdict. In these circumstances, it is clear the jury meant by their verdict that defendant was guilty of fraud and willful deceit, respecting the representations of which plaintiff complained, in making the false statements he did with respect to the property which plaintiff received. When the language of a verdict in connection with the record conveys the clear intention of the jury, it is sufficient.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

#### CITY OF COLORADO SPRINGS v. STARK. (No. 7926.)

(Supreme Court of Colorado. May 4, 1914.)

##### 1. EMINENT DOMAIN (§ 101\*)—COMPENSATION—CHANGE IN STREET.

A city is not liable in damages to an abutting owner for injuries resulting from reasonable and ordinary or usual change of the street, made in a careful and skillful manner, for the benefit of the public.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

##### 2. EMINENT DOMAIN (§ 106\*)—COMPENSATION—EXTRAORDINARY USE OF STREET—CONSTRUCTION OF SUBWAY.

Authorizing a railroad company to build a subway at the crossing of two streets to avoid congestion of traffic, whereby the grade is changed, and ingress and egress to contiguous lots is impeded, is an extraordinary use of the street for the benefit of the public, for which the city is liable under Const. art. 2, § 15, and this though the railroad company does the work.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 282-289; Dec. Dig. § 106.\*]

Error to District Court, El Paso County; James Owen, Judge.

Action by E. R. Stark against the City of Colorado Springs. From a judgment for plaintiff, defendant brings error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

C. L. McKesson, Henry C. Hall, City Atty., and J. L. Bennett, Asst. City Atty., for plaintiff in error. Clarence M. Hawkins and John R. Smith, for defendant in error.

BAILEY, J. On February 15th, 1912, E. R. Stark, defendant in error, filed an amended complaint in the district court of El Paso county, against the City of Colorado Springs, plaintiff in error, alleging damages to his property abutting on Pike's Peak Avenue in that city, caused by the construction of a subway in such avenue, under the tracks of the Atchison, Topeka & Santa Fé Railway Company, hereinafter called the company. The facts are undisputed. Pike's Peak Avenue is one of the main thoroughfares of the City of Colorado Springs, extending from the business district east to the corporate limits, and was crossed by the tracks of the company at the time its road was constructed through the city. The crossing is near the company's passenger depot, which is situated approximately 200 feet south thereof and on the west side of the right of way. Because of increased business of the company and the nearness of its depot to the crossing, Pike's Peak Avenue, which is crossed by the railroad there at grade, was at that point closed to traffic a large part of the time. In the spring of 1909 the city passed an ordinance providing for the vacation of a portion of Pike's Peak Avenue and another street and authorizing the company to construct a subway at the crossing. The property involved consists of three contiguous lots on the north side of Pike's Peak Avenue, north of the subway, adjacent to the company's right of way and on the west side thereof. The subway, as constructed by the company under and by virtue of the ordinance, was 50 feet wide, in the center of Pike's Peak Avenue, beginning at a point 250 feet west of the west line of its right of way, passing under the tracks with a clearance of about 12 feet and having a grade of approximately eight per cent. This left portions of the street about 45 feet wide on each side of the excavation, which were graded and paved at from three to four and one-half feet higher than the established grade along the south line of the lots, that is, graded practically on a level from where the subway begins to dip to the railroad tracks. A bridge 38 feet wide was constructed over the east end of the subway, next to the west side of and parallel with the tracks, also a cement wall 75 feet long and 6 feet high, extending north from the inner side of the bridge, along the right of way and nearly paralleling the east side of plaintiff's property, and across the sidewalk running east and west in front thereof, on Pike's Peak Avenue. Thus the lots were about four feet lower than the newly established street grade, and from two to twelve feet higher than the subway grade. Free and easy access to them from one side, by

the sidewalk which had theretofore extended east across the tracks, was made impossible, and ingress and egress were substantially impeded. For the damage thus occasioned plaintiff sued the city.

The city demurred to the complaint generally, and specifically for the reason that the company was a necessary party. The demurrer was overruled, and the defendant relies for a defense on the ground that the company alone is liable. At the close of plaintiff's evidence the city moved for nonsuit, because the evidence was insufficient to sustain a verdict against the defendant; for the further reason that the city did, or omitted to do, no act for which it was liable to the plaintiff; and that the evidence showed that the company alone was liable for the damage which plaintiff had sustained. This motion was overruled and exceptions reserved. The jury returned a verdict for plaintiff for \$4,000. A motion for a new trial was overruled. Judgment was entered upon the verdict, to review which the defendant brings the case here.

Counsel agree that a single question is presented for determination. Is the city liable to the defendant in error for injury to his property resulting from the construction of the subway of Pike's Peak Avenue by the company?

[1, 2] Section 15 of article 2 of the constitution provides that "private property shall not be taken or damaged, for public or private use, without just compensation." All of our decisions involving a construction of this provision in the class of cases under consideration are in harmony. The difficulty arises in fixing liability in individual cases. The facts disclosed are closely analogous to those in *Pueblo v. Strait*, 20 Colo. 13, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273. The only ground upon which counsel for plaintiff in error challenge that authority is that the question of liability of the company was not there raised. It is not apparent how that can materially affect the rule as to the city's liability. The general principles announced in that decision have been approved and followed. *Denver v. Bonesteel*, 30 Colo. 109, 69 Pac. 595; *Shutt Inv. Co. v. Pueblo*, 11 Colo. App. 439, 54 Pac. 644; *Lelper v. Denver*, 36 Colo. 110, 35 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101, 10 Ann. Cas. 847; *Harrison v. Tramway Company*, 54 Colo. 593, 131 Pac. 409, 44 L. R. A. (N. S.) 1164. The rule is stated in the *Strait* case, citing *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6, and other authorities, to the effect that for an injury resulting from reasonable or ordinary change and improvement of a street for the benefit of the public, if made in a careful and skillful manner, no recovery can be had by the injured property owner; but that such rule does not apply where the municipal authorities have made an unusual change in the street, or put it, or allowed it to be put, to an extraordi-

nary or unanticipated use. It was held in that case that the building of a viaduct in a street by the city, whereby ingress and egress to abutting property was adversely affected, is such an extraordinary use of the street as could not have been anticipated at the time of dedication, and that the abutting property owner could recover for injury to his property on that account. This rule is equally applicable to subways, and the facts disclosed by this record clearly bring the case within the announced rule. The subway was, and could only have been, constructed upon the authority of the city; it was an improvement primarily for the benefit of the public, and since it was not an ordinary and usual use of the street the city is liable for damages occasioned by its construction. Such liability, under the facts disclosed by this record, has been affirmatively declared again and again in this jurisdiction, and the judgment before us must therefore be affirmed. The municipality cannot shift or evade liability by procuring or permitting another to do the work. Whether the company is also liable is a matter of no concern here. Cases from other jurisdictions, under different constitutional, statutory and charter provisions have no application.

To support the contention that the city is not liable, counsel rely upon *City of Denver v. Bayer*, supra, followed in *Idaho Springs v. Woodward*, 10 Colo. 104, 14 Pac. 49, and *Idaho Springs v. Filteau*, 10 Colo. 105, 14 Pac. 48; *Sorensen v. Town of Greeley*, 10 Colo. 369, 15 Pac. 803; *Denver & R. G. Ry. Co. v. Bourne*, 11 Colo. 59, 16 Pac. 839. A careful examination of these cases discloses that, contrary to those on which this decision is based, the injuries for which recovery was sought grew out of damage to private property for private benefit. The distinction is noted and emphasized in the *Bayer* case in the following language:

"But the construction of an ordinary railroad is not, as we have found, an improvement of the street for the convenience and benefit of the local public; it is a private enterprise, for private profit."

These decisions are based upon the broad and equitable principle that those who reap the benefits of improvements must bear the burden of compensating for any loss occasioned in securing them. They depend upon the proposition that where the use inures primarily to the profit and advantage of individuals, or to private or quasi public corporations, just compensation for injury thereby occasioned must be made to the abutting property owner by those so benefited. In the case at bar the improvement was in the broadest sense of a public character, which could not have been reasonably anticipated; it was primarily for the safety, benefit and convenience of the public, and the city is in the first instance, under

the well-settled rule in this jurisdiction, clearly and unquestionably liable for damage to private property occasioned by its construction, on the highly equitable and wholesome principle that since the benefit is general the cost incurred to obtain it should be generally distributed. This doctrine is pertinently stated in *Pueblo v. Strait*, supra, 20 Colo. at page 21, 36 Pac. at page 792, 24 L. R. A. 392, 46 Am. St. Rep. 273, as follows:

"The rule is certainly more reasonable and just which requires compensation to be made by the municipality out of the common fund, for an injury occasioned by an improvement for the public convenience, than to require the individual to suffer the entire loss."

In *Harrison v. Tramway Company*, supra, 54 Colo. at page 598, 131 Pac. at page 411, 44 L. R. A. (N. S.) 1164, the general rule of liability or non-liability of municipalities to abutting property owners for changes and improvements made in streets is succinctly and lucidly stated in this language:

"Moreover, it is certain from our decisions that a municipality in this state may use or authorize its streets to be used for all ordinary and necessary uses to which city streets are usually subjected, and to such further local uses and means of conveyance as the law-making power may have authorized for the streets and thoroughfares of the entire city, and that incidental injuries arising from a careful exercise of those rights are *damnum absque injuria*, but as to extraordinary or unusual uses or unreasonable changes in the street, no such immunity exists."

Judgment affirmed.

GABBERT and WHITE, JJ., concur.

#### STRATTON'S ESTATE v. FINNERTY. (No. 7999.)

(Supreme Court of Colorado. May 4, 1914.)

EXECUTORS AND ADMINISTRATORS (§ 256\*)—CLAIMS AGAINST ESTATE—APPEAL—HARMLESS ERROR.

Though the statute prohibits an execution to issue upon a judgment rendered on a claim against an estate, a judgment will not be reversed because it authorized the issuance of execution, but will be amended on appeal by striking out the provision awarding execution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.\*]

En Banc. Error to District Court, El Paso County; J. W. Sheafor, Judge.

Proceeding by Michael Finnerty against the Estate of Winfield Scott Stratton, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

Chinn & Strickler, of Colorado Springs, for plaintiff in error. Schuyler & Schuyler, Edward C. Stimson, Julius C. Gunter, and Henry E. Lutz, all of Denver (Page M. Brereton, of Denver, of counsel), for defendant in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

GABBERT, J. Finnerty filed a claim in the county court of El Paso county against the estate of W. S. Stratton, deceased, in the sum of \$32,500, for services rendered as a broker in negotiating a sale of notes secured by mortgages held by and belonging to Stratton on the Brown Palace Hotel and other property in the city of Denver and the decree foreclosing these mortgages. A jury in the county court returned a verdict for the estate. From a judgment accordingly, the claimant appealed to the district court, where trial was had with the same result. Claimant then brought the case here for review on error, and the judgment was reversed, and the cause remanded for a new trial. *Finnerty v. Stratton*, 58 Colo. 17, 123 Pac. 667. The retrial resulted in a verdict and judgment for claimant in the sum of \$3,550, and the estate has brought the case here for review on error.

The judgment rendered concluded by authorizing the issuance of an execution. The statute inhibits an execution to issue upon a judgment rendered on a claim filed against an estate, but the violation of this inhibition does not justify the reversal of the judgment. Counsel for plaintiff in error concede that the attention of the trial court was not called to this matter, and we shall therefore amend the judgment by striking the part awarding the execution.

It appears to us the other errors assigned are clearly without merit, or were considered and determined adverse to the contention on behalf of the estate when the case was here before. We are satisfied from the record, as a whole, that claimant is entitled to the sum awarded by the jury, and, even if the record is not free from error, it is manifest the estate was not thereby prejudiced, and that to further litigate could not possibly result in a judgment more favorable to the estate than the one rendered.

The judgment of the district court, as amended, is affirmed.

Judgment affirmed.

MUSSER, J., not participating.

# PHIPPS et al. v. CITY AND COUNTY OF DENVER. (No. 6936.)

(Supreme Court of Colorado. May 4, 1914.)

## 1. MUNICIPAL CORPORATIONS (§ 506\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—REVISION BY COURT.

Rev. St. 1908, § 6593, provides that when the commissioners authorized to apportion assessments upon property benefited by a public improvement have made such assessments, they shall make return thereof in writing to the court. Section 6594 provides that any person interested may file objections to the report. Section 6595 provides, upon demand, for jury trials, etc. Section 6596 that the trial shall be conducted as other civil actions, etc. Section 6597 that the court may, at any time before final judgment for good cause shown,

change, annul, or confirm the report of the commissioners, or may order a new appraisal and assessment. *Held*, that these sections should be construed together and effect given to all, and hence upon objections being filed to a report raising the questions as to the lands benefited and the amount of the assessments, the court has the right, and it is its duty, there being no demand for a jury, to pass upon such objections, and may alter or annul such assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1177; Dec. Dig. § 506.\*]

## 2. MUNICIPAL CORPORATIONS (§ 506\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—REVISION BY COURT.

Rev. St. 1908, § 6592, provides that, in the opening of an alley, the benefits shall be paid by the owners of the property in the block abutting on the proposed alley. Commissioners appointed to assess such benefits did not assess the four corner lots. *Held*, that, as the commissioners acted under a misapprehension of the law, the court could modify their report so as to assess such lots.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1177; Dec. Dig. § 506.\*]

## 3. MUNICIPAL CORPORATIONS (§ 501\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—REVISION BY COURT.

The commissioners appointed to assess benefits for the opening of an alley did not assess the outside corner lots of the block, but assessed all the benefits to the inside owners. Such inside owners filed objections to the report. *Held*, that though the owners of the corner lots filed no objections to the report, the court had jurisdiction to consider the assessments as to such lots, as the objections filed by the inside owners went to the whole report.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1173; Dec. Dig. § 501.\*]

## 4. MUNICIPAL CORPORATIONS (§ 466\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—APPORTIONMENT OF BENEFITS.

Rev. St. 1908, § 6592, providing that, in the opening of an alley, the benefits shall be paid by the owners of the property abutting the proposed alley, is not unconstitutional as imposing assessments out of proportion to the possible benefits, since under the statute, the assessments must be apportioned among the several owners in the ratio that each is specially benefited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1109; Dec. Dig. § 466.\*]

## 5. MUNICIPAL CORPORATIONS (§ 466\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

While under Rev. St. 1908, § 6592, providing that, in the opening of an alley, the benefits shall be paid by the owners of the property abutting on such alley, and each lot should be assessed, they should not be all assessed equally, but according to the special benefits received.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1109; Dec. Dig. § 466.\*]

En Banc. Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Proceedings by the City and County of Denver to condemn land for a proposed alley. From an order of the court sustaining certain exceptions to the report of the commissioners, Maria A. Phipps and others appeal. Reversed.

Edward L. Shannon and Robert Given, both of Denver, for appellants. I. N. Stevens, J. A. Marsh, G. A. Luxford, and A. T. Monson, all of Denver, for appellee.

HILL, J. This action was by the city and county of Denver to acquire, by right of eminent domain, a tract of land for an alley 16 feet in width off of the rear ends of the two rows of lots situate between Broadway and Lincoln streets and Tenth and Eleventh avenues, in the city and county of Denver; also, to have the special benefits assessed to the abutting owners, etc. The appellant Phipps owns the corner at Eleventh and Lincoln, being 43 feet facing on Lincoln, and 133 feet along Eleventh avenue. The appellant Dean owns the corner at Eleventh and Broadway, being 43 feet facing on Broadway, and 133 feet along Eleventh avenue. The appellant Hinkley owns the corner at Tenth and Lincoln, being 110 feet facing on Lincoln, by 133 feet deep along Tenth avenue. The commission appointed for the purpose assessed the damages for each tract taken at a specified sum. It found that no damage would result to any remaining property by reason of the taking. It also found that certain land in the block would be specially benefited by the opening of the alley, and assessed against these owners the total amount of the damages awarded by reason of the taking. The assessments as benefits were against the owners of all the land remaining in the block abutting on the proposed alley, except that portion of each corner 43 feet wide facing on the proposed alley. There was no assessment by the commission as benefits against any of the four corners of this depth. Certain landowners filed objections to this report, protesting against the benefits assessed against them, to the amount awarded for the land taken, and to the report as a whole, alleging that the awards for the land to be taken and the benefits had not been calculated upon actual value and benefits, but had been mathematically adjusted so that those alleged to have been more damaged than benefited must be paid by those alleged to have been more benefited than damaged, and that it appears from the report that the object sought to be consummated was to compel certain landowners owning the inside portion of the block to pay the owners of the outside portions any excess in value over benefits which the commission concluded to allow. Default was entered against certain respondent landowners who failed to appear. Thereafter the court heard evidence pertaining to the objections, sustained some, rejected some, made certain findings of fact, and amended the report of the commission by decreasing the assessment of benefits against the inside lots, and assessed as special benefits against the corners owned by Dean, Phipps, and Hinkley the same amount per lineal foot facing

on the alley as against the other abutting owners in the block. This made the special benefits to each tract the same amount as the damages for the portion taken. Decree was entered accordingly, from which these appellants have appealed.

Numerous errors are assigned; many need not be considered, as they pertain to the lands of owners who are not complaining, and which alleged errors in no manner affect the rights of these claimants.

It is claimed that the court is not clothed with authority to hear and determine the issues raised by the objectors pertaining to the amount of damages awarded or benefits assessed; that such questions must be determined by the commission, or, if desired, by objectors, by a jury. The first portion of this contention is not before us. The record discloses that the damages for the land taken were fixed by the commission; that no objections were made thereto, and that this portion of the report was approved by the court. The commission also found and reported that no damage would result to any remaining property by reason of the taking. There was no objection to this finding, which was likewise approved. Section 15 of article 2 of our Constitution provides: "That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law." In *Tripp v. Overocker*, 7 Colo. 72, 1 Pac. 695, it was held that this requirement of the Constitution is imperative. We have no criticism to offer pertaining to this holding. It is sufficient to call attention that both of these facts were determined by a commission; that no objections were made thereto, and that their action in this respect was approved by the court.

It is next claimed that section 6592, Revised Statutes 1908, violates section 15, article 2, of the Constitution. It is urged that, because the assessment of benefits authorized by this section are fixed at a similar amount as the damages assessed for the land taken, the appellants receive nothing for the land taken. While it is true that this section fixes the territory which is to be held as being specially benefited by the opening of an alley, and provides that the cost of the improvement shall be assessed to the owners thereof, for reasons hereafter stated, it does not necessarily follow that the benefits to each owner are to be fixed at a similar amount as the damages assessed for the land taken; that depends upon whether they are the same when they are both fixed in the manner provided by law. This question of an improvement district was under consideration in *Alexander v. Denver*, 51 Colo. 140, 116 Pac. 342. It was decided adversely

to appellants' contention. For the reasons in the opinion stated, it is unnecessary to reiterate them here.

[1] It is conceded that the assessments of benefits against the remainder of the lands of the appellants occasioned by the opening of the alley was by the court, and that in this respect the court enlarged the district which the commission found would be benefited. The right of the court to do either is challenged. The case of *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688, and other Illinois cases are relied upon to support this contention. This case holds that the subject of what land should or should not be assessed benefits is not a question for a jury; but, in commenting upon this question, at page 681 of 151 Ill., at page 693 of 38 N. E., the court said: "It is unavoidable, under the system prescribed by the Legislature, that a very large discretion is committed to the commissioners authorized to apportion the assessment upon the the property benefited. This discretionary power they exercise in determining, not only what the benefits to the property affected are, but also in determining what property is benefited by the proposed local improvement. The exercise of the power to determine what property shall, or shall not, be included in the assessment is not made the subject of review by trial by jury. The court may undoubtedly supervise, upon proper objection, the exercise of the power by the commissioners, and, indeed, as we have already seen (section 33, art. 9, c. 24, R. S.), the court is given power, at any time before final judgment, to modify, alter, change, and annul or recast any assessment and to take all such proceedings and make all such orders as may be necessary to make a true and just assessment according to the principles of the act. And in cases of fraud, corruption, oppression, or departure from the principles governing in like cases, it would be the duty of the court to set it aside, or to cause the same to be so changed as to make a just and true assessment. This, however, is to the court, and with which the jury have nothing to do."

We think like powers as stated by the Illinois court were intended to be vested in our district courts. Section 6593, R. S., provides that when the commissioners shall have viewed the property and assessed the value, damages, and benefits, they shall make return of such assessments, in writing to the court, etc., giving certain notices to owners, etc. Section 6594 provides that any person interested in any real estate to be affected by such assessment of value, damages, or benefits may appear within a time to be fixed by the court, etc., and file objections to the report. Section 6595 provides upon demand for jury trials, etc. Section 6596, that the trial shall be conducted in like manner as in other civil actions, etc. Section 6597 provides that the court, before which any such proceeding may be pending,

may, at any time before final judgment for good cause shown, modify, alter, change, annul or confirm the report of the commissioners or may order a new appraisal and assessment as to any or all of the real estate thereby affected by the same commission or another. These sections must be construed together, and, when thus done, and effect is given to all of them, we are of opinion that our district courts are possessed with like authority as that pointed out by the Illinois court, and when the Legislature, as in this case, has fixed the boundaries of the district, the court has the right, and should amend the report of the commission to comply therewith, or refer it to that or another commission for that purpose. Other Illinois cases, and those from other states which pertain to improvement districts created by boards of public works, park commissions, or councils of cities, etc., are not in point. In such cases those boards or the city council approving their action, became a quasi court for the purpose of determining these questions. There are usually certain restrictions placed upon them by the action of a certain per cent. of the property owners by appeal to the court, etc.

In the case at bar objections were filed to the report of the commission. They include the question of the lands benefited by the improvement and the amounts to be assessed therefor. No demand was made for a jury trial. Under such circumstances it is the duty of the court to consider and pass upon all the questions covered by the objections. Whether it was justified in modifying, altering, or changing the report of the commission as authorized by section 6597, *supra*, is another question that could only be determined when the objections to the report filed for this purpose were considered.

[2] Many authorities are cited as to the effect of the report of such a commission when objections are filed thereto, the weight to be given it as evidence, and what facts must be disclosed before the court is justified in setting it aside, but they all agree that in case the commissioners have acted under a misapprehension of the law, the court is justified in changing their report to comply therewith. Section 6592, R. S., provides "that, in the opening of an alley, the benefits shall be paid by the owners of the property in said block abutting on the proposed alley." The report of the commission is in conflict with this section, inasmuch as it failed to assess any benefits against the four corners of this block 43 feet in depth, where they face this alley. If this act is constitutional (which is challenged and will be considered later), it is self-evident that the court was justified in changing the report of the commission in this respect. *P. & A. V. R. Co. v. Rudd*, 5 Colo. 270; *State v. District Court*, 80 Minn. 293, 83 N. W. 183; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688; *Virginia & Truckee R. Co. v. John Henry*, 8 Nev. 165;

15 Cyc. 906; *In re Brooklyn EL R. Co.*, 80 Hun, 355, 30 N. Y. Supp. 131; *In re Chapin*, 84 Hun, 490, 32 N. Y. Supp. 361.

[3] We cannot agree with counsel for appellants that because they filed no objections to the report of the commission, the court was without jurisdiction to consider the question of benefits to their lands adjoining the proposed alley. The objections filed to the report by other landowners, in addition to the question of the damages for their land taken, and the special benefits to the residue and other matters, were directed against the entire report and specially covered the question of benefits to the lands of the appellants. The fifth objection, among other things, included the allegation that it clearly appeared from the report and award that the purpose and object sought to be consummated was to compel the owners of inside portions of the block to pay the owners of outside portions any excess in value over benefits which the commission concluded to allow. This it was alleged was unlawful, etc. It was further alleged that this method was not calculated upon actual values and benefits, but was thus mathematically adjusted so that those alleged to have been more damaged than benefited must be paid by those alleged to have been more benefited than damaged. The record discloses that appellants were notified of the objections, and appeared, cross-examined witnesses, had their own witnesses sworn, examined, and tried the very questions which they now say the court had no right to go into. We are of opinion that the proceedings were sufficiently regular, including the objections to vest the court with jurisdiction to go into these questions, and that the appellants ought not now be heard to complain concerning their consideration. *Scheerer & Co. v. Hutton*, 7 Cal. App. 524, 94 Pac. 849.

[4] It is claimed that section 6592, R. S., in so far as it provides that benefits shall be assessed only against owners of property abutting on the proposed alley, is unconstitutional, for the reason that no one's property shall be assessed for more than its share of benefits arising from any public improvement. With this principle we agree, but it is for some tribunal to determine the benefits as well as the district to be benefited. It is claimed that if the opening of this alley is a public improvement for public use and of public benefit, there must be benefits accruing to the city at large; otherwise that the opening of the alley could not be considered a public improvement, nor this proceeding maintained; that as the benefits should be assessed wherever benefits are received, the city at large receives benefits from any public improvement, and should pay its share therefor. It is claimed that there is no more reason why the abutting property owners should pay for the opening of an alley than that the abutting property owners only should pay for the opening of a street; that

both are public improvements, and both involve the condemnation of private land for public use; that inasmuch as in the opening of a street the commissioners are authorized to assess against the city the amount of benefits to the public generally, and the remainder against the owner or owners of property specially benefited, there is no reason why such limitation and restriction should be placed upon the opening of any alley as provided in this section, for which reason it requires an unjust assessment, for if the city be prohibited, as the statute provides, from paying its share of the benefits to the public generally, it follows that the abutting property owners are required to make up this amount by submitting to a larger assessment than is properly their share, and that in this respect it violates section 15 of article 2 of the Constitution. If this line of reasoning were controlling, it could be answered by calling attention to the fact that conditions pertaining to the use of a public street and an alley are not altogether the same. Generally speaking, an alley is primarily for the use and benefit of the owners of the lots abutting thereon, and for which reason, as well as its location, is not of the same benefit to the public generally as is a street. *Paul v. City of Detroit*, 32 Mich. 108; 28 Cyc. 833; 2 Cyc. 133; *Face v. Ionia*, 90 Mich. 104, 51 N. W. 184; *Bagley v. People*, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192; *Beecher v. People*, 38 Mich. 289, 31 Am. Rep. 316.

The authorities cited by the appellants, pertaining to their damages for the land taken and the right to assess or tax the residue a certain amount as benefits to pay for the improvements, were evidently considered in *Alexander v. Denver*, 51 Colo. 140, 116 Pac. 342, where we recognized there was some conflict of authority upon this question. The district to be benefited by a public improvement is always a question of opinion, and its boundaries to some extent must be arbitrarily fixed. It is for some tribunal to draw the line. In *Londoner v. Denver*, 52 Colo. 15, 119 Pac. 156, we held that a park is a special benefit to the locality where it is established, and that its costs to the extent of the benefit may be assessed against the property specially benefited, and in such case, where a district has been regularly established and held to be specially benefited, that the only constitutional right of the property holder is to be heard upon the apportionment of the tax. In *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682, affirmed by the Supreme Court of the United States in 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, it was said: "The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself." Our Legislature in its wisdom has seen fit to fix the boundaries of the district as being specially benefited by



the opening of an alley, by providing that the benefits shall be paid by the owners of the property in the block abutting on the proposed alley. In the fixing of this amount, this proviso, as stated elsewhere in the section, must be construed to mean that it shall be apportioned among the several owners in the ratio that each is specially benefited upon account of the improvement, and when this is done we are not convinced that, either by mistake or intention, the Legislature has imposed a contribution unsupported by any public benefit, or out of all proportion to the possible benefit. In such case, with the above exceptions, it is for the Legislature to determine, and we do not think the act vulnerable to the constitutional objection urged. *Alexander v. Denver*, 51 Colo. 140, 116 Pac. 342; *Londoner v. Denver*, 52 Colo. 15, 119 Pac. 156; *Hamilton on Special Assessments*, § 171; *Minor v. Sheriff*, 43 La. Ann. 337, 9 South. 49; *Bauman v. Ross*, 187 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 Sup. Ct. 668, 28 L. Ed. 569; *Davidson v. New Orleans*, 98 U. S. 97, 24 L. Ed. 616; *Providence Bank v. Billings*, 4 Pet. 517, 7 L. Ed. 939; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

[5] We are unable to approve that portion of the decree which makes the assessment equal against all the owners of properties abutting on the proposed alley, regardless of the difference in the special benefits to be received. In our opinion the statute is not susceptible of this construction, and, while the section means that the special benefits shall be paid by the owners of the property in the block abutting on the proposed alley, we do not think it was intended that the special benefits to be derived by each owner should be disregarded in fixing the assessment; that all should bear some portion of the burden was unquestionably intended, but to hold that the owners should bear the burden equally in proportion to their frontage would be to disregard the question of special benefits to each tract. If thus intended, it would relieve the commission or court from making an assessment upon account of special benefits, as it would simply be a matter of mathematical calculation, which is certainly not authorized by the section. If it thus read, it would then require a consideration of the constitutional question so ably urged by attorneys for the appellants involving that class of cases. That it was never thus intended is apparent, not only from the language used, but the extreme injustice it might work in certain cases. For instance, one landowner might own a lot 200 feet in depth, with a frontage upon the alley of 50 feet; another might own a lot 10 feet in depth, with a frontage upon the alley of 20 feet. The assessment against the one might be fair and equitable, in proportion to the amount of special benefits received,

yet when applied to the other might be greatly in excess of the entire value of the residue of the property owned by him. This principle, to a certain extent, applies to the owner of a corner lot who, before the improvement, has access to his property from two sides, and is usually burdened with improvements therefor, while the owner of an inside lot before the improvement has access thereto only from its front, and his street improvements are usually limited accordingly. The inconvenience to the owner of the corner for want of an alley upon account of his surroundings must be less than that of his neighbor with his inside lot; for the same reason the alley must, of necessity, be of greater benefit to the inside lot owner than to his neighbor on the corner.

We cannot agree that the evidence sustains the conclusion that the owner of the corner lot is benefited to the same extent as the owner of the inside lot upon account of the opening of the alley. That the owner of the corner lot is benefited to some extent is not only contemplated by the statute, which says the benefit must be assessed against all frontage, etc., but we think must be conceded for reasons, among others, that it gives him access to his property from three sides, and the very fact of the existence of an alley in a block, if it is owned by different people, must, to a certain extent, be of some benefit to the owners of all property in the block, and we think is a special benefit to the owner of lands facing thereon, left after that for the improvement is taken. These owners the statute says shall be assessed therefor. Not only is their land benefited in the way of ingress and egress, but in the question of light, air, and other conveniences where buildings are constructed, or for such prospective use in case they are vacant. We are of opinion this section means that in assessing these benefits all these matters shall be taken into consideration with a view of arriving, as nearly as possible, at a correct apportionment of the entire amount of the cost of the improvement between the several tracts of land facing thereon, all of which are specially benefited thereby. As to what this apportionment should be between the owner of the corner lot or lots and his neighbor in the center of the block, and as to where the line or lines should be drawn or distinction made as to the difference in the burden to be borne, we do not think it is proper for us to now determine. That a distinction must be made in these respects, and the line or lines be drawn somewhere, is readily apparent in order that a just and equitable distribution of the burden be made, but that can only be done when evidence is taken and considered for that purpose under a correct conception of the law.

Inasmuch as the commission adopted an erroneous conclusion one way, and the court likewise went to the extreme the other, it

makes it impossible for us to accept either, for which reason the judgment, in so far as it affects the appellants on the question of benefits, is reversed, and the cause remanded for the appointment of another commission and for a new trial upon that question only in harmony with the views herein expressed.

Reversed.

**LOUDEN IRRIGATING CANAL & RESERVOIR CO. et al. v. TOWN OF BERTHOUD. (No. 7854.)**

(Supreme Court of Colorado. May 4, 1914.)

**1. JUDGMENT (§ 89\*) — DECREE — FINDINGS — STIPULATION.**

Where a decree establishing water rights followed the findings of the referee, it was immaterial that a stipulation for the entry of the decree was not signed by a party to the proceeding with due notice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 147; Dec. Dig. § 89.\*]

**2. APPEAL AND ERROR (§ 223\*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.**

An objection to a decree establishing water rights not presented to the district court cannot be urged on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338-1342, 1344; Dec. Dig. § 223.\*]

Appeal from District Court, Boulder County; Harry P. Gamble, Judge.

Proceedings for the adjudication of priorities to the use of water in Water District No. 4, in which the Town of Berthoud filed a statement of claim. From a decree adjudicating the rights of the parties, the Loudon Irrigating Canal & Reservoir Company and others appeal. Affirmed.

L. R. Rhodes and N. C. Farnsworth, both of Ft. Collins, and John H. Simpson, of Loveland, for appellants, Fred W. Stow, of Ft. Collins, P. D. Nelson, of Berthoud, and Homer S. Stephens, of Ft. Collins, for appellee.

SCOTT, J. In 1904 proceedings were instituted in the district court of Boulder county under the General Adjudication Statutes of the state of Colorado for the purpose of adjudicating priorities of rights to the use of water in water district No. 4. Afterward the town of Berthoud, the appellee herein, filed its statement of claim in said proceedings. The court appointed T. M. Robinson as referee to take testimony generally and report his findings and proposed decree to the district court.

The referee proceeded to take testimony and afterward filed his findings and proposed decree. Subsequently the city filed a supplemental statement. On the 4th day of March, 1907, it being made to appear to the court that the Big Line Ditch Company, claimant of an irrigation ditch, had not received notice of the pendency of the proceeding to adjudicate the priority rights of said ditch,

and desiring to offer evidence in said matter to establish its priority of right to the use of water for its said ditch, and that the referee theretofore appointed, T. M. Robinson, was at that time a nonresident of the state of Colorado, an order was entered to re-refer the case to Christian A. Bennett as referee, to hear evidence, and to report his findings in the entire proceeding both upon the evidence theretofore produced and to be produced thereafter, and to propose any additional or supplemental decree to that proposed by the former referee. Referee Bennett reported his findings and proposed decree to the district court on the 30th day of April, 1909. The final date for the consideration and hearing upon any exceptions and objections to be filed to such referee's report was set for the 18th day of March, 1912, at which time all parties interested who had filed exceptions and objections to the proposed decree appeared before the court where such exceptions were heard, and on that day all such exceptions and objections were overruled, and a decree entered by the district court confirming the findings and proposed decree of the last-named referee. The court, in the decree and at the time, fixed the 1st day of April, 1912, as the date and time for making formal exceptions to the decree entered by the court on the said 18th day of March, 1912.

The statement of the city shows that it commenced the construction of its pipe line November 1, 1886; that the pipe line derives its supply of water from the Big Thompson creek, through the Handy ditch; that the water is conducted through said ditch and a lateral thereof into a reservoir, and from thence by a pipe line to the city; that from April to September water is drawn from said reservoir to supply the city; that from September to March in each year water is stored in the reservoir and conveyed by pipe line to the main pipe line, and through which it is conveyed to the city; that said city has an appropriation for filling said reservoir of nine cubic feet per second of time for said purposes through said pipe line. The supplemental statement shows an enlargement and extension of the city's pipe lines, and alleges that its system of waterworks, including reservoirs, pipe lines, and filter plant, is owned by the city, and prays for an additional finding respecting the enlargement, and for a decree awarding it the priorities and appropriations necessary for the use and enjoyment thereof.

Prior to the entering of the said decree, all interested parties disclosed by the record, and including the appellants, with the exception of the Big Thompson Ditch & Manufacturing Company, filed their joint stipulation and agreement that the decree proposed by the referee should be entered as the decree of the court.

This stipulation was filed on the 30th day

of April, 1909, and, omitting the signatures, is as follows:

"It is further stipulated and agreed by the town of Berthoud that it will, on or before January 1, 1920, build and construct, from the head of the present pipe line to a convenient point on the Big Thompson river, a pipe line or water main of sufficient size and strength to economically carry and deliver to said town of Berthoud such water as is necessary to supply its needs for domestic and municipal purposes: Provided, however, that the failure to build said pipe line or water main shall in no case work a forfeiture or in any wise affect the three feet of water hereinafter decreed, and the only penalty to attach to such failure shall be the loss of the right to use the six feet additional water also hereinafter mentioned, which shall terminate on January 1, 1920.

"It is further stipulated and agreed that the case now pending in the district court of Boulder county on the petition of the town of Berthoud for the transfer of nine cubic feet of water from priority No. 1, ditch No. 1, to the headgate of the Handy ditch, shall be dismissed, at petitioner's costs, upon the entering of the decree as herein stipulated, to wit."

On the 1st day of April, 1912, the date fixed for making formal exceptions to the decree theretofore entered in the said proceedings, the appellants herein, appearing for the first time, filed with the district court certain exceptions and protest to that portion of the decree concerning the right and appropriations of the said city.

The protest and exceptions were supported by affidavits, and, in so far as important to consider, are as follows:

"That, after T. M. Robinson, as referee, had made his report, the town of Berthoud began proceedings in the district court of Boulder county to transfer nine cubic feet of water from the Big Thompson ditch No. 1, which had priority No. 1, on the Big Thompson river to the headgate of the Handy ditch, to be used by the town of Berthoud for the purpose of operating its waterworks; but the said town of Berthoud made no filing with the said T. M. Robinson of such evidence or claim.

"That on or about the 1st day of June, 1909, and while said transfer suit was pending, and while Christian A. Bennett was acting as referee in the matter of priorities, it was represented to protestants that the town of Berthoud would abandon that transfer suit and, in lieu of its rights to water from the Big Thompson No. 1, agree to the following stipulation [which stipulation being the same as above set out].

"That, at the time these protestants signed said stipulation, they were led to believe the town of Berthoud was the owner of nine cubic feet of water of appropriation No. 1 from the Big Thompson river, being Big Thompson ditch No. 1. And this was the

water that the town of Berthoud was seeking to transfer. That these protestants signed said stipulation believing that the town of Berthoud was the owner of this particular nine feet of water.

"That, after these protestants had signed said stipulation, and the same had been filed with the referee, Bennett, the town of Berthoud dismissed its suit to transfer the said nine feet of water from priority No. 1, Big Thompson ditch No. 1, and state that the town of Berthoud was not the owner of said nine feet of water, but simply had an option thereon to purchase from one Stevens, and that, after it had secured the stipulation to be filed with the referee, Bennett, it abandoned its option, and that since the time of the abandonment of its option the town has had no appropriation of water, or owned any appropriation of water, except the appropriation set out in the statement of claim filed by it before the referee, T. M. Robinson.

"That the decree proposed by the referee, Bennett (being the decree which was afterwards signed by the court), has no foundation, in fact was not based upon any appropriation of water from the Big Thompson river, and that it had no other basis other than the stipulation above set out. That there is no statement on file of this matter upon which to base the decree as it applies to the town of Berthoud. That there is no evidence to support it. That it is not based upon any priority or appropriation made from the Big Thompson river, either by the town of Berthoud nor any one else, to which it has succeeded. That it is an arbitrary and unwarranted decree, having no foundation in fact.

"That this court has no jurisdiction to grant any such decree. That it cannot amend a decree, unless it is based on some actual appropriation made from the river.

"That, even if said stipulation had been obtained properly, and in good faith, it would not have conferred upon the court or the referee any jurisdiction to make such a decree antedating all priorities from the Big Thompson river. That same would be a fraud upon all other appropriators and a fraud upon the state."

The decree entered by the court upon the stipulation as before stated, and to which these exceptions and objections were made, is as follows: "It is therefore ordered, adjudged, and decreed by the court that the town of Berthoud shall have the perpetual right to take from the Big Thompson river three cubic feet of water per second of time as priority No. 1 for domestic purposes as against all of the users of water from said river, except as against the city of Loveland, which city shall have equal priority with said town of Berthoud at all times for domestic purposes, to be temporarily diverted and carried by means of the Handy ditch, during the irrigation season only, until a pipe line shall be constructed from said river to said reservoir

and terminus of the present pipe line at all seasons of the year. Until said pipe line is constructed, at such times during the irrigation season as there is not sufficient water for the needs of said town by reason of loss from seepage and evaporation in said Handy ditch, additional water not exceeding six cubic feet per second of time may be temporarily diverted into said Handy ditch when required, in amount sufficient to supply the needs of said town, and no more, and no portion thereof shall be taken or used by any other water consumer from said Handy ditch. After January 1, 1920, and prior thereto, if said pipe line shall be extended to said river, the right to use said additional six cubic feet of water per second of time aforesaid shall cease and determine. And that the proper officers enjoined with the duty of distribution of water in said water district shall at all times be governed by this decree in the distribution of water to said town of Berthoud."

The said exceptions and objections were overruled by the court, and from which action this appeal was taken.

Whether the appellants or any of them presented objections to the making and entering of the proposed decree does not appear; but it is not suggested that they did not have due notice thereof, or that they were not present, and no exceptions or objections appear to have been made or preserved at the time. Nor is error assigned for any such reason.

The objections and exceptions presented here, and the overruling of which is here assigned as error, were first presented on the 1st day of April, 1912, after the decree had been entered on the 18th day of March, 1912.

[1] The stipulation for the entering of the proposed findings and decree was on file with the court for about three years before the decree was entered. It can make no difference that the appellant, the Big Thompson Ditch & Manufacturing Company, did not sign the stipulation, for it was a party to the proceeding with due notice.

[2] Beside, the record nowhere discloses that this party has any rights or interests affected by the decree. Neither does the record disclose any specific injury or damage to any one of the appellants by reason of the decree in favor of the appellee, nor that such question was presented to the district court for determination, nor does it appear that the question of fraud in obtaining signatures to the stipulation was made an issue upon the hearing. Indeed the judgment was not only entered without objection, but with the express consent of two of the three parties appealing.

Counsel for appellants broadly contend that the decree is not warranted by any statute of the state, and that it was entirely beyond the power and jurisdiction of the court to enter it. But no tangible questions in this regard

were presented for the consideration of the trial court nor here.

The court, in that part of its decree not herein quoted, expressly preserved the rights of all parties to the appropriation and use of the waters of the stream for irrigation purposes as theretofore adjudicated.

The exceptions and objections so presented after the decree was entered are based upon the alleged misapprehension under which the stipulation was signed. But the judgment must be said to rest primarily upon the findings of the referee, and not upon the stipulation, which must be held to be no more than the consent of parties to the entry of such judgment. The findings of the referee are not questioned on this appeal, and therefore cannot be disturbed by this court in this proceeding.

Counsel contend that the referee and the court seem to have proceeded on the theory that appropriations of water for domestic purposes made at any period takes precedence over all appropriations for other purposes, and assert that this is not the law. If so, it was the duty of appellants to have raised the question before judgment was rendered, and they cannot be permitted to do so afterward.

In this state of the record there does not appear to be any question for the determination of this court properly here on appeal.

Judgment is affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

#### LANE v. LANE. (No. 8050.)

(Supreme Court of Colorado. May 4, 1914.)

##### 1. BILLS AND NOTES (§ 209\*)—TRANSFER.

Independent of Rev. St. 1908, § 4512, if the rights of creditors are not involved, a note may be transferred by way of gift or for value by delivery without indorsement, so as to vest at least the transferor's title in the transferee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423, 425-427, 497, 498, 501; Dec. Dig. § 209.\*]

##### 2. BILLS AND NOTES (§ 523\*)—TRANSFER—EVIDENCE.

Evidence held to show a parol transfer and delivery of notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.\*]

##### 3. EXECUTORS AND ADMINISTRATORS (§ 450\*)—ACTIONS AGAINST ADMINISTRATOR—SUFFICIENCY OF EVIDENCE.

In an action against an administratrix by an heir to compel defendant to turn over to plaintiff one-half in value of certain notes claimed to belong to the estate, the mortgages securing the notes on which were written assignments of the mortgages to testator's widow, the administratrix, were admissible to identify the notes as the notes which were transferred by decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1858-1866; Dec. Dig. § 450.\*]

**4. EVIDENCE (§ 577½\*)—EVIDENCE IN ANOTHER COURT.**

The testimony of a defendant administratrix in the county court when she was cited and examined under Rev. St. 1908, § 7253, authorizing an administrator suspected of disposing of money, etc., of the decedent to be cited and examined, is admissible in evidence in the district court under section 7267, as amended by Laws 1911, p. 678, providing that, when defendant had previously been required to testify under the provisions of section 7253, the testimony, so far as it relates to the estate concerning which a suit is brought, and is relevant, may be read in behalf of such defendant.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2410; Dec. Dig. § 577½.\*]

Error to District Court, Fremont County; Charles A. Wilkin, Judge.

Action by Lucile Lane against Beulah Lane. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Taylor, of Canon City, for plaintiff in error. D. W. Ross, of Canon City, for defendant in error.

MUSSER, C. J. The plaintiff in error, daughter of H. W. Lane, deceased, brought an action in the district court against the defendant in error, who is the widow of Mr. Lane and the administratrix of his estate. It was alleged in the complaint that the widow had failed and refused to inventory certain promissory notes, and that her action in that behalf was an effort on her part to convert the same to her own use. It was also alleged that the notes belonged to the estate; that there was no unsettled debts against it; and that the plaintiff was entitled to a half interest in the notes as an heir of the deceased. The prayer was that the defendant be required to turn over to plaintiff one-half in value of the notes, and, if she failed to do so, that plaintiff have a money judgment against the defendant for the one-half. Several defenses were set up in the answer, among which was one denying that H. W. Lane was the owner of the notes at the time of his death, and another that he had assigned and transferred the notes for a valuable consideration to the defendant before his death. The court found that Mr. Lane did not own the notes at the time of his death. It appears from the record that the defendant, as administratrix, had been cited to appear before the county court in which the estate was in process of administration, and had appeared and submitted to an examination touching the notes in controversy under section 7253, Rev. St. 1908.

[1] It does not appear from the abstract what the result of the matter was in the county court. The jurisdiction of the district court, or the right of the plaintiff to bring the action there, is not raised, and for that reason is not determined. It is conceded that there was no written assignment of the notes, nor assignment thereof by indorse-

ment, but there was evidence to show that the notes were payable to Mr. Lane and were transferred by him by parol assignment and actual delivery to the defendant about two days before his death. This evidence was not contradicted in any way, and it was ample to sustain the finding of the court that the notes were not owned by Mr. Lane at his death. It is provided in section 4512, Rev. St., that, where the holder of such an instrument transfers it for value without indorsement, the transfer vests in the transferee such title as the transferor had. Independent of the statute, it may be said, generally, when no right of a creditor is involved that an instrument like a note may be transferred as a donation or for value by delivery without indorsement so as to vest in the transferee such title, at least, as the transferor had. *Conner v. Root*, 11 Colo. 183, 17 Pac. 773; *Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103; *Bromfield Bank v. McKinley*, 53 Colo. 279, 125 Pac. 493; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887.

[2] It appears from the uncontradicted evidence of one witness that he was called in to see Mr. Lane two days before the latter's death. Mr. Lane was very sick and in bed. Four envelopes, each containing all the papers pertaining to one of four loans made by Mr. Lane, such as the note and mortgage securing it, were given to the witness, and he was informed that the sick man wished to transfer them to his wife. The witness, for the purpose of making the transfer, wrote on each mortgage an assignment thereof to the wife, and Mr. Lane signed this written assignment on each mortgage. This was done to carry out the intent of the sick man to transfer all of the papers to the wife. The assignments were put in evidence. It is claimed that this was error because, as it is said, an assignment of a mortgage does not carry with it the note. This witness gave sufficient testimony to show a parol transfer of the notes and delivery thereof. He was not certain that the particular notes mentioned in the complaint, and which were also at the trial, were the notes that he saw on the day the transfer was made and which were mentioned in the mortgages; but the notes mentioned in the complaint, which were the notes shown the witness, were such notes as were described in the mortgages.

[3] The mortgages, on which were written the assignments, were admissible for the purpose of identifying the notes mentioned in the complaint as the notes that were transferred by the deceased, if for no other purpose. Besides this, the witness testified that Mr. Lane desired to transfer all the papers, notes, mortgages, abstracts, and insurance policies to his wife, and the witness wrote the assignments on the mortgages in order, as he said, to carry out that desire, believing that the expressed intent of the sick man

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would be thus accomplished. The trial was to the court.

[4] Under all these circumstances, there was no error in admitting the mortgages with the assignments thereon. The testimony of the widow in the county court, when she was cited and examined under section 7253, Rev. St., written out by the stenographer, was admitted in evidence. It is strenuously urged that this was error. This testimony seems to be of the kind that is expressly made admissible by the seventh subdivision of an act amending section 7267, Rev. St. 1908, found on page 678, Sess. Laws 1911. Some objection is made in the brief that this testimony was not sufficiently identified by the stenographer. That specific objection was not raised at the trial. Besides, had this testimony been excluded, or if it is now disregarded, it would be found of necessity from the evidence of the other witness mentioned above, and which was uncontradicted, that the notes were transferred to Mrs. Lane by delivery before the death of her husband. As we are unable to find any prejudicial error, the judgment is affirmed.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

#### DUSSART et al. v. M. ABDO MERCANTILE CO. (No. 8,060.)

(Supreme Court of Colorado. May 4, 1914.)

##### 1. APPEAL AND ERROR (§ 966\*)—REVIEW—CONTINUANCE.

Where the denial of a continuance requested on the ground of surprise was well within the discretion of the trial court, its action cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.\*]

##### 2. TAXATION (§ 761\*)—TAX SALE—TAX DEEDS.

A tax deed is void upon its face where it shows that the land was sold to the county for unpaid taxes on the first day of the treasurer's sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.\*]

##### 3. TAXATION (§ 765\*)—TAX TITLES—TAX DEEDS—VALIDITY.

A tax deed issued under Laws of 1901, § 184, p. 331, requiring execution by the treasurer in his official capacity and attestation by his official seal is void upon its face when not attested by the county treasurer's official seal.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1523-1527; Dec. Dig. § 765.\*]

##### 4. ADVERSE POSSESSION (§ 79\*)—"COLOR OF TITLE"—WHAT CONSTITUTES.

Possession under a tax deed, void on its face, coupled with payment of taxes, will not set the seven-year statute of limitations in motion, particularly as the certificate of sale upon which the deed was issued described the property, which was located in Romero's addition to the town of Aguilar, as lot 9, block 10, town or city of Romero's, though there was no city by that name in the county, and the description did not show whether the land was in Aguilar or another city of the county, for such a deed can afford no basis for a claim under

color of title in good faith, as color of title must be such title as, tested by itself, would appear to be good.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1264-1273; vol. 8, p. 7606.]

##### 5. ADVERSE POSSESSION (§ 84\*)—COLOR OF TITLE—CLAIM IN GOOD FAITH.

But the claim under color of title must be made in good faith, and is not available under such deed, which shows on its face fatal defects and irregularities.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. § 84.\*]

Error to District Court, Las Animas County; A. Watson McHendrie, Judge.

Action by Catherine Dussart and others against the M. Abdo Mercantile Company, a corporation. There was a judgment for three of the plaintiffs and for defendant against all others, and Catherine Dussart and others, the unsuccessful plaintiffs, bring error. Reversed.

McGlashan & Gow, of Trinidad, and W. G. Hines, for plaintiffs in error. McChesney & McChesney, of Trinidad, for defendant in error.

SCOTT, J. This is an action to cancel a tax deed and to quiet title in the plaintiffs below, to the premises involved. Louis Dussart died on the 4th day of July, 1896, intestate, and at the time of his death was the owner and in possession of lot 9, block 10, in Romero's addition to the town of Aguilar in Las Animas county. He left as his heirs, a wife and six children, all of whom were the plaintiffs below in this case. The defendant claims under a tax deed dated January 29, 1902, based upon a sale of the premises to the county on the 23d day of March, 1896, for taxes due for the year 1894, recorded February 24, 1902, and under the seven-year statute of limitation, as being in open, notorious, continuous and actual possession of the lots involved for a period of more than seven years prior to the commencement of this action under claim and color of title made in good faith, and the payment of all the subsequent taxes legally assessed against said lot. The cause was tried partially upon an agreed statement of facts, in which it is agreed, in addition to what has been said, that three of the plaintiffs were at the time of the execution of the tax deed, minors, and did not attain their majority in time to come within the statute of limitations so pleaded; that in 1894 the property was assessed at the value of \$5, and the tax levied was 12 cents; that the certificate, based upon which the deed was executed, described the premises as lot 9, block 10, of the town or city of Romero's; that no valid affidavit of publishing and posting the notice of tax sale was filed with the county clerk and treasurer; that the said tax certificate was assigned by the county treasurer to A. I. Lindsey and Fred

Rustedt, and that the tax deed described the property as lot 9, block 10 in Romeroe's addition to Aguilar, Las Animas county, Colo.; that the property was afterward by mesne conveyances, conveyed to the defendant in error. It is further stipulated that the said tax deed is void on its face, in that the property therein purporting to be conveyed was sold to the county of Las Animas on the first day of the treasurer's sale, and that said deed is not attested by the official seal of the county treasurer of Las Animas county; and that all subsequent taxes were paid by the defendant and its grantors when due. It was admitted during the trial that it was the custom of the county assessor in the year 1894 to assess the property in Romeroe's addition to the town of Aguilar as being a certain lot and block, Romeroe's, and that it was intended thereby to mean Romeroe's addition to Aguilar. But the plaintiffs' rights are not controlled by a custom of county officials. They are entitled to their rights under the law. The court found that the tax deed was void upon its face, and that the defendant and its predecessors claimed the title under the tax deed, having been in the actual, open, and notorious possession of said lot under claim and color of title made in good faith, and have paid all taxes legally assessed and levied thereon for a period of seven years immediately preceding the commencement of the action, that the seven-year statute of limitation cannot and does not apply to the three plaintiffs, who were minors at the time, and the judgment, in so far as these three of the plaintiffs are concerned, canceled and annulled said tax deed, and quieted title in a one-twelfth interest in said premises in and to each of the three defendant minors, and adjudged the defendant to be the owner in fee simple of the remaining three-fourths interest, and quieted title in the defendant for such interest in the premises. This judgment is before us for review.

While there are many apparent valid objections to the validity of the tax deed, we will consider only the following: (a) That the deed is not attested by the official seal of the county treasurer of Las Animas county. (b) That the property was assessed and described in the certificate of tax sale as follows: Lot 9, block 10, Romeroe's, while in the deed the premises are described as lot 9, block 10 in Romeroe's addition to the town of Aguilar, etc., which latter is the correct description of the premises.

[1] Upon the hearing A. I. Lindsey, one of the grantees of the deed, testified for the defendant, and to the effect that he erected a building on the premises in the year 1903. Counsel for plaintiffs contended that this testimony was a surprise, and for such reason moved the court for a continuance to permit them to prove that this building was not erected, and that Lindsey did not take possession of the premises, until 1905, which, if true, would take the case out of the seven-

year statute of limitations. This motion was overruled, and is assigned by the plaintiffs as one of the errors in the case. It would seem to be well within the discretion of the court to overrule that motion, and, as presented here, we cannot hold it to be error.

[2] The deed upon its face shows that the property was sold to the county on the first day of the treasurer's sale. Under the repeated decisions of this court, as well as by the admission of parties, this deed was clearly void upon its face for such reason alone.

[3] It is also agreed that the deed is void upon its face for the additional reason that it is not attested by the county treasurer's official seal. The deed in question was issued under a statute (section 184, p. 331, Laws of 1901) requiring its execution by the treasurer in his official capacity, and attestation by his official seal, and not "official or private," as required under the former statute.

In *Empire Co. v. Bender*, 49 Colo. 522, 113 Pac. 494, it was said: "Under the statute in force at the time of the execution of such an instrument, it was a prerequisite that the deed should be signed by the treasurer in his official capacity and attested by his official or private seal, and acknowledged, before some officer authorized to take acknowledgments of deeds; and, when substantially thus executed and recorded in the proper records of title to real estate, it vested all the right, title, interest, and estate of the former owner in and to the lands conveyed. Until the deed was thus executed, namely, signed by the treasurer in his official capacity, attested by his private or official seal, and acknowledged, it was no deed. *Mills' Ann. St. §§ 3901 and 3902.*" In that case, *Sayre v. Sage*, 47 Colo. 559, 108 Pac. 160, was quoted with approval wherein it was said: "The treasurer, in executing such deed, acts under a naked statutory power, and, in order that it shall be valid, it must comply substantially with the provisions of the statute prescribing its form. That it must be attested by the official or private seal of the treasurer is a positive requirement of the statute, and is as necessary to its validity as any other. Without one or the other of the seals specified, it is void."

The law of 1901 required attestation by the official seal alone; and, in the absence of this, or of any seal at all, the deed in controversy was void upon its face for that reason alone.

It will be seen that the tax deed relied on in this case under authority of *Empire Co. v. Bender*, supra, by reason of the absence of the seal of the county treasurer, *was no deed at all*. It does not come within the rule of *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244, and authorities cited as resting on that case. It is not regularly executed as provided by the statute. The last case cited, as does *Sayre v. Sage*, supra, holds that the attachment of the seal is vital to the validity

of a tax deed for the reason that it is vital to the manner and form of the execution of the instrument. If, therefore, it is no deed at all, it follows that such an instrument cannot give color of title.

In an exhaustive review of the authorities it was held, in the case of *Matthews v. Blake*, 16 Wyo. 116, 92 Pac. 242, quoting *Black on Tax Titles*: "Where the statute directs the execution of a deed by a public officer, and requires it to be executed in a particular manner, and to be witnessed or acknowledged before a particular officer, the witnessing or acknowledging of the deed in that manner is a part of its execution, and without such witnessing or acknowledgment is void upon its face. The rule is stated in *Black on Tax Titles*, § 208, as follows: 'A rule of primary importance is that the execution of a tax deed must conform strictly to the statute; that is, any directions which the law may give in regard to its signature, seal, witnesses, or acknowledgment must be duly complied with, or the conveyance will be invalidated. Thus, if the act requires that tax deeds shall be authenticated by the addition of the seal of the county, and this be omitted, the deed will be void, nor will it even be admissible to show color of title under the special limitation of the revenue act.'"

[4] It may be stated as a general and well-established rule of law that, in order to give color of title, the instrument or conveyance must at least be good in point of form, profess to convey the title, and be properly and duly executed.

Under a statute requiring the seal of the county be attached, as in this state, it was expressly held in *Sutton v. Stone*, 4 Neb. 319, that if the seal of the county be omitted in its authentication, the deed is not only void, but that it is not admissible even to show color of title. In *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327, a case where a tax deed recited the sale as being on a day not authorized by law, the deed was held not admissible in evidence to support adverse possession under a statute of limitations. *Armstrong v. Hufty*, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080. In *Day v. Day*, 59 Miss. 318, the sole question was the omission of the seal of the county treasurer, and it was there held that the instrument was not a deed, and therefore not admissible in evidence for any purpose.

The reason for the rule is well stated in *Keller v. Hawk*, 19 Okl. 407, 91 Pac. 778, as follows: "We believe that the Legislature did not intend that time should breathe life and force into an instrument from the face of which it could be seen that it was absolutely void. The law was intended to protect purchasers at tax sales and their grantees from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which, under the law, persons dealing with the title are bound to know."

We must hold, therefore, that the deed in this case, by reason of the absence of the seal of the county treasurer, was not prima facie evidence of title, and in the language of *Empire Co. v. Bender*, supra, it was no deed.

The clearest definition of the term "claim and color of title in good faith" we have been able to find is that given in *Irving v. Brownell*, 11 Ill. 403, where it is said: "By the words 'claim and color of title made in good faith' must therefore be understood such a title as, tested by itself, would appear to be good, not a paramount title, capable of resisting all others, but such an one as would authorize the recovery of the land when unattacked, as no better title was shown; that is, a prima facie title. Such a title, connected with seven years' actual possession and payment of taxes, becomes invincible. The auditor's deed offered in evidence in this case, as has already been shown, was not such a title as, unaccompanied with other proof, did not afford prima facie evidence of title, and it was not therefore admissible in evidence for the purpose of showing claim and color of title under the act of 1839."

[5] But this claim under "color of title," must be made in good faith, and is not available where the title is accepted with knowledge of its invalidity.

In *Irving v. Brownell*, supra, speaking upon this point, the court said: "We are bound to give these words some meaning, and they will have none if the same construction is to be put upon the act as if they were not in it. It is manifest that the Legislature only intended to protect those who had been in possession of land, and paying taxes upon it, under the belief that they had a good title. \* \* \* If he knew that he was not acquiring such a title, or if the circumstances should be such that a reasonable man might know that the title he was obtaining was wholly defective, then it would not be a title acquired in good faith, and consequently, not entitled to the protection of the act of 1839."

The certificate of sale to the county purchased by Lindsey and Rustedt, and upon which the deed was issued, described the premises therein alleged to be sold as lot 9, block 10, town or city of Romero's. The property was so assessed and described upon the tax roll. This appeared on the face of the certificate. It is not claimed that there is any such city or town in Las Animas county as Romero's. The deed described the premises as being in Romero's addition to the town of Aguilar. The description upon the tax rolls and in the certificate of sale may have applied equally as well to the town of Trinidad as Aguilar. The description in the certificate and upon the rolls was of no existing premises at all. This was apparent on the face of the certificate, and the purchasers were in this case presumed to know the law, and the fact that there was no such



town or city as Romeroe's must have been apparent. Beside, it appears that one of the purchasers was a lawyer. Reliance in good faith upon the purchase of such a certificate as entitling the purchasers to a deed for premises not therein described is inconceivable.

One who takes a conveyance of a tax title can claim no benefit from it if he had actual knowledge of facts which render it invalid, or if the records show on their face fatal defects or irregularities. 37 Cyc. 1485; Am. & Eng. Enc. vol. 1, 868, and authorities cited. In *Bowman v. Wettig*, 39 Ill. 416, the holder of a certificate of tax sale obtained a tax deed prior to the expiration of the two years required by the statute, and the court said: "The question is, Can a party holding such certificate, when he accepts a deed to which he knows he is not entitled under the law, be considered as acquiring the color of title, which such deed, if he was entitled to it, would give him, in good faith \* \* \*? We have no hesitancy in answering this question in the negative. The deed was made and accepted in fraud of the law. The appellant knew, when he accepted this deed, that he was not entitled to it, and therefore, cannot use it as color of title made in good faith."

In *Silford v. Stratton*, 54 Colo. 248, 130 Pac. 327, this court quoted with approval the following language from *Hardin v. Gouveneur*, 69 Ill. 140: "But color and claim may be made in good or in bad faith. The good or bad faith is not a result of color or claim. The faith, whether good or bad, depends upon the purpose with which the deed is obtained, and the reliance placed upon the claim and the color. A party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, cannot render it availing, because of the want of good faith."

The facts in this case force the conclusion that there was an absence of that good faith required by the statute.

The judgment is reversed.

MUSSER, C. J., and GARRIGUES, J., concur.

**TOWN OF SUGAR CITY et al. v. BOARD OF COM'RS OF CROWLEY COUNTY.** (No. 8100.)

(Supreme Court of Colorado. May 4, 1914.)

**1. COUNTIES (§ 29\*)—COUNTY SEAT ELECTION—CONTEST—AMENDMENT TO COMPLAINT.**

A complaint, attacking the result of an election establishing a county seat on the ground that illegal votes were counted, which was filed under Rev. St. 1908, §§ 2308-2319, cannot be amended so as to insert a list of illegal voters, as required by section 2312, for that section is mandatory, and a strict compliance is necessary in order to give the court jurisdiction of the proceeding, and to allow amendments would

indirectly extend the time for bringing such contest.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 29; Dec. Dig. § 29.\*]

**2. PLEADING (§ 230\*)—AMENDMENT—ALLOWANCE.**

The right to amend in special proceedings is purely statutory, and, where the statute does not specifically authorize, amendments of a substantial nature cannot be made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 592; Dec. Dig. § 230.\*]

**3. ELECTIONS (§ 288\*)—REVIEW—DISCRETION.**

Where an amendment to the complaint in an election contest was not proposed until three weeks after answer was filed, and practically one month after the contest was begun, its denial was not an abuse of discretion.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 280-283; Dec. Dig. § 288.\*]

**4. COUNTIES (§ 26\*)—COUNTY SEAT—STATUTES—REPEAL—IMPLICATION.**

Const. art. 14, § 2, provides that the General Assembly shall have no power to remove county seats, but removal shall be provided for by law, and that no county seat shall be removed unless a majority of the qualified electors voting on the proposition shall vote therefor; no person being entitled to vote on such proposition who shall not have resided in the county 6 months and in the election precinct 90 days preceding the election. Article 5, § 25, prohibits the passage of local laws locating or changing county seats. Act of 1881 (Laws 1881, p. 103), enacted after the adoption of the Constitution, provides that, whenever the county commissioners shall order an election on the question of the location of the county seat, it shall be their duty to provide special registers, who shall make a special registration of the voters who have resided in the county 6 months and in the precinct 90 days prior to the election, and that special ballot boxes shall be kept. *Held* that, the act of 1881 being passed under the authority of the Constitution, it not only abrogated Rev. St. 1868, c. 20, § 42, relating to the removal of county seats, but Laws 1881, p. 57, providing for permanent location of county seats by a vote of the majority of the legal voters, and hence only those voters who have resided within the county for the prescribed period may vote on the question of the location of the county seat.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 26.\*]

**5. STATUTES (§ 211\*)—CONSTRUCTION—TITLE.**

While the title of a legislative act may be considered by the courts as an aid to its interpretation, there is no occasion to resort to the title when the body of the act leaves no doubt as to its purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.\*]

**6. COUNTIES (§ 26\*)—COUNTY SEATS—ELECTIONS—STATUTES—VALIDITY.**

Act of 1881 (Laws 1881, p. 103), requiring 6 months' residence in the county and 90 days in the precinct to entitle persons to vote on the question of the location of county seats, is not, in view of Const. art. 7, § 1, reserving to the Legislature the right to determine the length of residence required in the county or precinct as a qualification for voting, and article 14, § 2, requiring six months' residence in the county and 90 days in the precinct as a condition to voting on the question of removal of county seats, unconstitutional because requiring a longer residence in the county and precinct than is necessary to qualify electors to vote at general elections.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 26.\*]

**7. STATUTES (§ 120\*)—SUBJECT OF ACT—TITLE.**

Act of 1881 (Laws 1881, p. 103), entitled "An act to regulate elections for the removal of county seats," and providing not only for elections for the removal, but for elections for the location of county seats, is not unconstitutional, in that its subject is not sufficiently expressed, for the title is broad and comprehensive enough to include elections for the removal of county seats, whether temporarily or permanently located, and the question of the permanent location of a county seat involves or may involve a question of removal.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168-172; Dec. Dig. § 120.\*]

En Banc. Error to District Court, Crowley County; J. E. Rizer, Judge.

Election contest by the Town of Sugar City and another against the Board of County Commissioners of the County of Crowley. There was a judgment for defendant, and plaintiffs, contestants, bring error. Affirmed.

Thomas & Thomas, of Denver, for plaintiffs in error. H. A. Hicks, of Denver, and I. H. Stanley and Perry Behymer, both of Ordway (Charles Roach, of Denver, of counsel), for defendant in error.

BAILEY, J. The general assembly created the County of Crowley in 1911 and temporarily established its county seat at the town of Ordway, and provided that the county seat should remain there until a permanent county seat was selected and established as provided by law.

The board of county commissioners called and caused to be held, at a general election for state and county officers on November 5th, 1912, a special election for the purpose of permanently locating the county seat. Acting under the law of 1881 (Laws 1881, p. 103), separate registers and judges of this election were appointed and separate ballot boxes therefor provided. The judges were required, and actually did, permit to be registered and to vote upon that question only such persons as were by the terms of the act of 1881 entitled to vote, namely, such electors as had resided within the state of Colorado one year, in the county six months and in the precinct ninety days.

As a result of the election, the board of canvassers, on the 8th day of November, 1912, returned that the town of Ordway had received a majority of twenty-seven of all votes cast upon that question. On the 18th day of November next thereafter, the tenth day after the official canvass, plaintiffs in error filed in the district court their statement of contest, thereby undertaking to overturn such election. On the 27th day of that month the defendant in error filed its answer, consisting of five separate defenses and pleas, and one counterclaim. On the 16th of December following, the answer of defendant in error having raised the sufficiency of such statement of contest, because of its failure to set forth a list of names of alleged illegal

voters, plaintiffs in error asked leave to amend, and tendered and requested to have made a part of their original contest statement a list of such alleged illegal voters, which leave the court denied. It is to be noted that the filing of the application to amend was three weeks after the filing of the answer of defendant in error, and lacked but two days of being a full month after the filing of the original statement of contest.

[1] There are two main questions in this case, incidentally involving some minor ones: First. Should plaintiffs in error have been allowed to file an amendment to the third paragraph of the complaint, by inserting therein or adding thereto the names of those persons who it is claimed were illegal voters? Second. Was the election to locate the county seat held under the provisions of the proper statute, or was the election void because of the residential qualifications required to entitle persons to vote upon that question?

The act providing for election contests of this character is not only special, but furnishes a complete system of procedure within itself, summary in its nature. Sections 2308-2319, R. S. 1908. Under the plain terms of section 2308 and those immediately following, it is manifest that the contestors were without right to amend their statement of contest by supplying the very thing which was essential in the first instance to state a ground of contest and give the court jurisdiction. The allegation in the statement of contest to which the amendment was offered reads:

"Third.—That sufficient illegal votes were received, and counted, for the town of Ordway, as the location of the permanent county seat of the County of Crowley, at said election, in each of the several voting precincts of the said County of Crowley, to change the result of said election."

Section 2312, R. S. 1908, reads in part as follows:

"When the reception of illegal or the rejection of legal votes is alleged as the cause of the contest, a list of the number of persons who so voted, or offered to vote, shall be set forth in the statement of contestor."

This provision is mandatory and must be strictly construed. The language of the statute in this particular, as well as in all other fundamental features, is not subject to amendment under the liberal provisions of the code of civil procedure. In *Schwarz v. County Court*, 14 Colo., page 44, 23 Pac. 84, it was held that in order to give the court jurisdiction the contest statement must contain the list required by section 2312, and the opinion therein contains the following:

"The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature; and it is a general rule that a strict observ-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases. The act under which these contests were instituted not having been complied with in the particular mentioned, the statements filed as the basis of the proceedings are radically defective. *Sedg. St. & Const. Law*, 299; *Dorsey v. Barry*, 24 Cal. 449; *Casgrave v. Howland*, Id. 457; *Norwood v. Kenfield* [30 Cal. 398], *supra*; *Loomis v. Jackson*, 6 W. Va. 613; *Buckley v. Lowry*, 2 Mich. 418.

"The act is not only special in character, but it furnishes a complete system of procedure within itself. It requires that such contests shall be tried and determined by the county judge of the county in which the contests arise. It provides for a written statement as the basis of the proceedings, and designates what it shall contain, and the officer with whom it shall be filed. It designates the officer by whom the summons shall be issued, and provides the time and manner of making up the issues. Provision is also made for fixing the time of trial, and for the form of judgment to be entered, etc. As we have seen, the jurisdiction of the court, under such a statute, depends entirely upon the terms of the act, and consequently, before contestants can invoke such jurisdiction, facts must be stated by them which bring the cases within the purview of the act. In these statements, while the board of registration is charged with fraudulently permitting the names of those not entitled to vote to be registered, the gravamen of complaint in each case is that sufficient illegal votes were received and counted for the contestee to change the result of the election; and, unless this can be maintained as a cause of contest, contestants must fail; and yet no attempt has been made to comply with that portion of the act requiring a list of the number of persons who so voted, with the precinct or ward where such votes were cast, to be set forth in the statement. It is reasonable to conclude that the legislature in enacting this requirement had in view the fact that by previous legislation the utmost care had been exercised to provide for the casting of the ballots and the integrity of the count; and it is certainly not unreasonable to require those who desire to contest the right of a person to an office to which he has been declared duly elected by the tribunal provided by law to determine that question, to state with reasonable certainty and precision the cause upon which they rely to overthrow such result. We cannot say that the provision of the statute of 1885, under consideration, is unreasonable, and, if it were, relief must be looked for from the legislature, and not from the courts.

"The court below should have sustained the pleas to its jurisdiction based upon the failure to include in the statements the lists required by the statute. *Faribault v. Hulett*, 10 Minn. 38 (Gil. 15); *High, Extr. Rem.* § 781; *Keller v. Chapman*, 84 Cal. 635; *Garret-*

*son v. County of Santa Barbara*, 61 Cal. 54; *Quimbo Appo v. People*, 20 N. Y. 531."

Under this rule, upon principle and reason, obviously a contestor should not be permitted to make such an amendment, long after the time in which a contest might be instituted, the effect of which would be to extend the time allowed by statute within which such an action can be begun, a thing which the legislature could never have contemplated, since the proceedings are special and summary. In the case of *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234, it is definitely ruled that amendments such as the one here proposed are not permissible under our statute. Speaking to this point in that case this court said:

"In *McCrary on Elections*, § 396, it is said that an amendment in proper cases should be allowed. Where it is proper, it should be seasonably applied for and under sufficient showing. Id. §§ 407, 408. And if it would work a continuance or a considerable delay, it should not be granted.

"Upon the other hand, where, as in Colorado, the procedure is governed by a special act which does not provide for amendments, and in which the proceedings are not assimilated to some practice that does so provide, it has been expressly held that it was beyond the power of the court to permit amendments to be made. *Ford v. Wright*, 13 Minn. 518 (Gil. 480); *Bull v. Southwick*, 2 N. M. 321, 362, et seq.; *Vigil v. Pradt*, 4 N. M. (Johns.) 375 [20 Pac. 795]; 6 Am. & Eng. Ency. of Law, 407.

"In the case of *Schwarz v. County Court*, 14 Colo. 44 [23 Pac. 84], because not necessary to the determination of that case, this court expressly declined to decide the point. But as it held that the act furnished a complete system of procedure within itself, this case gives countenance to the doctrine that, in special proceedings, the right to amend depends upon the provisions of the act itself. Additional recognition is found in the decisions of this court under the eminent domain act, which prescribes a complete system of procedure for the taking or damaging of private property. Under that act it has been decided that the code provisions on the subject of amendments to pleadings are inapplicable.' *Knoth v. Barclay*, 8 Colo. 300 [6 Pac. 924]; *Tripp v. Overocker*, 7 Colo. 72 [1 Pac. 695]; *Colo. Cent. R. Co. v. Allen*, 13 Colo. 229, 242 [22 Pac. 605]. \* \* \*

"Upon principle, and in the light of these authorities, we are of opinion that where the statute itself provides for amendments, but does not define their scope, those relating to formal matters, or which are made for the purpose of perfecting and completing causes of contest comprehended within the original statement, may, upon a proper showing and if applied for within a reasonable time, be permitted; but in the absence of such a permissive statute, not even amendments of this nature can be made, and, un-

less there is a provision expressly so providing, no new cause of action or contest can be set up by way of amendment."

[2, 3] There is nothing whatever in our contest statute providing for amendments of any sort. Since there is no such provision, clearly, under the rule as announced in the Le Bert Case, supra, no amendments, certainly none of substance, should be allowed. This court clearly recognizes the rule that the right to amend in special proceedings is purely statutory, and where the statute does not specifically so provide amendments of a substantial nature cannot be made. Moreover, in view of the fact that the amendment was not proposed until some three weeks after answer filed, and practically one month after the contest was begun, even were the holding otherwise as to the right to amend, still in the instant case it certainly cannot be said that there was an abuse of discretion in refusing to allow it.

[4, 5] Was the election held under the proper statute? The determination of this question depends upon a consideration of various constitutional provisions and statutes relating thereto. At the time of the adoption of the constitution the following territorial statutes upon the subject under consideration were in force:

"It is further provided that the people may locate permanently the county seat in any part of the county, by a vote of the majority of the legal voters in each county according to law." Section 1165, R. S. 1908; Session Laws 1861, p. 57.

"Whenever any county shall be organized hereafter, the qualified voters thereof are hereby empowered to select the place of their county seat by a vote at the first election held in the county for the choice of county officers. For that purpose each voter may designate in his ballot the place of his choice for the county seat; and when the votes are canvassed the place having a majority of all the votes polled shall be the county seat. \* \* \*" Section 1166, R. S. 1908; Session Laws 1861, p. 151.

These sections contain the law then in existence for the locating of county seats. The legislature of 1861 also passed an act on the question of removing or changing a county seat, which reads as follows:

"Whenever the legal voters of any county are desirous of changing their county seat at any time, upon petition being presented to the county commissioners, signed by a majority of them, to be ascertained by said commissioners, it shall be the duty of such commissioners to require the sheriff in giving the notice for the next county election, to notify said voters to designate upon their ballots, at said election, the place of their choice; and if upon canvassing the votes polled or given it shall appear that any one place has a majority of all the votes polled, such place shall be the county seat. \* \* \*" Section 42, c. 20, R. S. 1868.

Section 2 of article 14 of the constitution of the state, under the title "Counties," provides as follows:

"The general assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law, and no county seat shall be removed unless a majority of the qualified electors of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in four years, and no person shall vote on such proposition who shall not have resided in the county six months and in the election precinct ninety days next preceding such election."

Section 25 of article 5 provides, among other things:

"The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; \* \* \* locating or changing county seats."

In 1881 the state legislature passed the following law:

"An Act to Regulate Elections for the Removal of County Seats. \* \* \*

"Section 1. That whenever an election shall be ordered by the board of county commissioners of any county to ascertain the sense of the legal voters of such county upon the question of removal or location of the county seat of such county, it shall be the duty of such board of county commissioners to appoint special judges and registers of such elections, and to provide a special ballot box in each voting precinct, in which shall be deposited all the ballots cast at such election in such precinct on the question of location or removal of the county seat.

"Sec. 2. It shall be the duty of the judges and registers so appointed to make a special registration of the voters of each precinct, who have resided in the county at least six months, and in such precinct at least ninety days, prior to the day designated for holding such election, which day shall be the day designated by law for holding a general election and no other.

"Sec. 3. The election shall be held at the same places at which the general election is ordered to be held, but the vote for or against removal or location of the county seat shall be by a special ballot, separate and distinct from the general ticket voted at said election, which ballot shall be deposited in the special ballot box, provided for in section 1st (one) of this act, and no vote shall be counted for or against said removal or location which is not deposited in such special ballot box as herein provided.

"Sec. 4. No county seat shall be removed until the expiration of thirty days after the canvass of the votes had by the county canvassers upon the question of location or removal, nor until the board of county commissioners of such county shall have made and entered of record on their journal an order directing such removal, which order the said

board shall make within thirty (30) days after the county canvass is completed, unless enjoined or restrained from so doing by an order of the district court of said county or the judge thereof, or by the supreme court.

"Sec. 5. All laws now in force relating to elections shall apply to elections held upon the question of removal or location of county seats, except that the question of location of such county seat shall be contested in the district court of said county in the first instance, but may be removed to the district court of any other county under the provisions of the code relating to change of the place of trial, and shall be also subject to appeal or writ of error to the supreme court: Provided, that not less than two-thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state.

"Sec. 6. All laws governing contests of elections shall be held applicable to contests of county seat elections, except that the board of county commissioners of the county shall in all cases be the contestee and that the contest shall be conducted in the district court of the proper county. Such district court or the judge thereof in vacation may appoint a referee to take testimony in relation to the grounds of contest alleged by the contestor, which referee may sit to take evidence in any precinct of his county."

Session Laws 1881, page 103.

The contention on the part of plaintiffs in error, contestors, is that every legal voter, that is, every elector of Crowley County qualified to vote at a general election, was entitled to vote upon the question of locating the county seat, under the provisions of the territorial statutes, and that since the election was restricted or limited to that portion of the legal or qualified voters who had resided in the county six months and in the precinct ninety days, the constitutional and statutory rights of qualified electors were denied, and the integrity of the election so affected as to render it illegal and void. On the other hand, it is contended that by the law of 1881 it was undertaken to legislate fully upon the subject, not only of the removal, but of the location of county seats, and that it provides a complete system for the regulation of elections upon both propositions, and that all prior conflicting legislative enactments were thereby repealed by implication.

At various times since the enactment of the law of 1881 there has been new legislation amendatory of the act of 1881, upon the question of removing or changing a county seat, heretofore quoted in this opinion and contained in the Revised Statutes of 1868 as section 42, chapter 20, which relates solely to the change of county seats. This occurred in 1885 (Laws 1885, p. 163), again in 1891 (Laws 1891, p. 117), and also in 1911 (Laws 1911, p. 263). But none of these subsequent enactments in the least change or modify the law of 1881 so far as it relates to the permanent

location of county seats. Now, if this law provides for the regulation of elections both for the change and for the permanent location of county seats, the election was properly held, but if the territorial statute, providing for the manner of the permanent location of county seats, is in force, at which election all electors qualified to vote at general elections can vote, then the election was improperly conducted and the result cannot be upheld.

We are thoroughly satisfied that the legislature intended by the provisions of this act to provide for the conduct of elections both as to the permanent location and the removal of county seats. The constitutional provisions quoted are still in force. By section 2 of article 14 of the constitution the people withheld authority from the general assembly to remove county seats and precluded any one from voting on that question who had not resided in the county six months and the precinct ninety days. By section 25 of article 5 the people prohibited the general assembly from passing any local or special law affecting, among other things, the location or change of county seats. Obviously it was pursuant to these constitutional amendments that the general assembly adopted the act of 1881. It is general in its terms, is not open to the objection of being either local or special, and is its first expression upon the subject of location and removal of county seats after the limitations and inhibitions fixed by the constitution. It was the plain intention of the legislature to establish by this act a uniform procedure regulating all elections concerning county seats, in harmony with constitutional provisions. The act is essentially different in many respects from all former legislation upon this subject. It requires the appointment of special judges and registers of election and the use of separate ballot boxes; provides for six months residence in the county and ninety days residence in the precinct as a qualification to vote upon such question; and contains new and additional matter in that it for the first time provides for contest of election upon the question of either removal or location of county seats, and designates the court which shall have jurisdiction to hear and determine such contests. Since the act is inconsistent with and repugnant to former legislation upon this subject, although it contains no repealing clause, it is well settled that, notwithstanding such omission, so much of former legislation as is in conflict with the later provisions is impliedly repealed. In support of this proposition we quote from Sedgwick, in his work upon the construction of statutory and constitutional law, under the heading "Repeals By Implication," page 104, as follows:

"But, on the other hand, it is equally well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so

in terms; and even if the subsequent statute be not repugnant, in all its provisions, to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act."

And again at the same page:

"It has been repeatedly declared that every statute is, by implication, a repeal of all prior statutes, so far as it is contrary and repugnant thereto, and that without any repealing clause."

Our own court, in *Edwards v. D. & R. G. R. Co.*, 13 Colo. 59, 21 Pac. 1011, spoke upon the same subject as follows:

"The fact that the latter statute does not in words refer to the earlier, but on the contrary purports to amend a different chapter, does not take away the repugnancy or alter the consequences arising therefrom. It is not absolutely necessary under the constitution that a repealing statute shall, either in its title or body, mention the statute repealed. *Cooley, Const. Lim. 183.*"

In *District of Columbia v. Hutton*, 143 U. S. 18, 12 Sup. Ct. 369, 36 L. Ed. 60, it is said:

"We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this court in *United States v. Tynen*, 11 Wall. 88, 92 [20 L. Ed. 153], it is this: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.'"

The above case is cited with approval and followed in a later case, *Henrietta Mining & Milling Co. v. Gardner*, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637, in which is found the following statement quoted from *Henderson's Tobacco*, 11 Wall. 657, 20 L. Ed. 235:

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter act are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law."

The supreme court of Michigan, in *Maynard v. Wesselius*, 117 Mich. 477, 76 N. W. 69, has stated the same rule in the following language, quoting from *State v. Mayor*, etc., 40 N. J. Law, 257:

"Every statute must be considered according to what appears to have been the in-

tention of the legislature, and even though two statutes, relating to the same subject-matter, are not in terms repugnant or inconsistent, if the latter statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act.' This statement is only the reiteration of the general rule laid down by text-writers and the courts generally."

The words location and removal are not only used disjunctively throughout the act, but are employed in such a manner as to indicate conclusively that the legislature had clearly in mind both the subject of removal and the subject of location of county seats. While it may be admitted that the title of a legislative act is often taken into consideration by the courts as an aid to the interpretation thereof, it is elementary that where there is no doubt as to the purpose of the act there is no room for interpretation, and as the body of this act is expressed in clear and unambiguous terms, there is no occasion to resort to the title to aid in its interpretation. Had the act been so worded as to render it in the least doubtful or inconsistent, or if ambiguity could be discovered in it, then resort might be had to its title to afford aid in determining its meaning. But since the real object of the statute is definite and certain, we need not go beyond the body of the act to seek information as to the legislative intent.

Upon the proposition that in aid of the interpretation of the statute its title should be resorted to only in cases of uncertainty or ambiguity in the body of the act itself, numerous authorities might be cited, from which we select the following:

"The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. (Citing cases.) The ambiguity must be in the context and not in the title to render the latter of any avail.' *United States v. Oregon, etc., Railroad*, 164 U. S. 526, 541 [17 Sup. Ct. 165, 41 L. Ed. 541]." *Cornell v. Coyne*, 192 U. S. 418, 430, 24 Sup. Ct. 383, 386 (48 L. Ed. 504).

"In determining the meaning of a statute, courts will endeavor to ascertain the intention of the legislature in framing it. Although the title of the act will have its due share of consideration in the effort to determine the legislative intent, yet such title is not conclusive upon the subject of such intention. The intention of the legislature may be ascertained by considering the whole act, and construing one part by another, and one clause with reference to its connection with other clauses." *South Park Commissioners v. First National Bank*, 177 Ill. 234, 238, 52 N. E. 365, 366.

"But the modern doctrine is that when the language of the statute is ambiguous, the courts can resort to the title as aid in giving

such act its true meaning, but that this cannot be done when the language used is clear and unambiguous." *State v. Patterson*, 134 N. C. 612, 614, 47 S. E. 808, 809.

[8] It is contended by plaintiffs in error that constitutional and statutory rights and privileges are infringed by the act of 1881, because a longer residence in the county and precinct is prescribed to entitle one to vote at such elections than is prescribed to qualify electors to vote at general elections. The answer to this is that the constitution itself specifically reserves to the legislature the right to determine the length of residence in the county, city, town, ward or precinct which may be required as a qualification for voting, and it is impossible to conceive how a regulation on that subject could violate any constitutional right. The fact is that section 2 of article 14 of the constitution provides that no person shall vote upon the proposition of removal of a county seat unless he shall have resided in the county six months and in the precinct ninety days prior to the election at which such proposition is submitted. Section 1 of article 7 of the constitution specifically reserves to the legislature the right to determine the length of residence required in the county or precinct as a qualification for voting. It therefore was purely a question for the legislature as to whether the same rule should be adopted as to residence in the case of an election to locate a county seat, as the constitution had already adopted in the case of an election upon the question of removal of a county seat. The length of residence required in the latter case was definitely fixed by the constitution, and the legislature was left free to determine the qualifications of voters at an election upon the question of the location of a county seat. Unquestionably, since there is no specific constitutional inhibition, and the statute is general applying alike to all similarly situated, the legislature had the power and authority to enact it. *Mayor, etc., v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208. It was a question of legislative policy pure and simple, with which the courts have nothing whatever to do. It may not, however, be amiss to suggest that many of the reasons which exist for requiring long residential qualifications to entitle electors to vote upon the question of removal of county seats are equally applicable upon the question of voting to locate county seats.

[7] Incidentally it is urged that the act is unconstitutional, in that its subject is not sufficiently expressed in its title, which reads: "An Act to Regulate Elections for the Removal of County Seats." There seems no room to fairly doubt that the act was designed to provide both for elections for the change or removal and the permanent location of county seats. The title is broad and comprehensive enough to include elections for the removal of county seats whether tem-

porarily or permanently established. The question of the permanent location of a county seat involves, or may involve, the question of removal, as much as does the question of the change of a county seat, and indeed both involve, or may involve, the question of retention of a county seat. In short, the real purpose of the act is to provide for the regulation of elections for the selection of county seats. If the title had been more specific and had referred to elections for the removal of county seats already permanently established, there might be force in this contention. But as the title stands it applies as well, considered from a practical standpoint, to the regulation of an election where the question of the removal of a county seat temporarily located is submitted, which is an election upon the question of the permanent location of a county seat, as to an election for the removal of a county seat already permanently located. The act by its title is confined to a single subject, namely, that of the selection or designation of county seats, and the very fact that the title is broad and comprehensive in and of itself alone largely removes it from the constitutional objection urged, because any matter which may fairly be said to be germane to the main subject may be properly embraced in the act. It seems clear, upon a survey of the whole matter, that no member of the legislature could possibly have been misled or deceived by the language of this title, nor could any citizen of ordinary prudence be led astray by the fact that the title was not as definite and certain as exacting and critical counsel now insist that it should have been, which are among the chief evils intended to be met and overcome by this constitutional provision.

In the case of *Golden Canal Company v. Bright*, 8 Colo. 144, at page 149, 6 Pac. 142, at page 144, the following language upon this subject is used:

"The constitutional inhibition must receive a reasonable construction. It is enough if the bill treats of but one general subject, and that subject is expressed in the title; to require that each subdivision of the subject, each and every of the 'ends and means necessary or convenient for the accomplishment of the object', must be specifically mentioned in the title, would greatly impede and embarrass legitimate legislation. Judge Cooley asserts that it would 'actually render legislation impossible.' Cooley, *Const. Lim.* 144."

And in the case of *Board of County Commissioners of El Paso County v. Board of County Commissioners of Teller County*, 32 Colo. 310, 76 Pac. 368, this court reiterates upon this question a like doctrine in the following language:

"The constitutional inhibition invoked only requires that the title to an act clearly express its subject, and not its provisions or the details by which its object is to be accomplished. *People ex rel. Crowell v. Lawrence*, 41 N. Y. 137. Its mandate is observed if the

legislation in the body of a statute is germane to the general subject expressed in the title of the act in which it appears. The test in this respect is, whether such legislation is relevant or appropriate to such subject. In re Breene, 14 Colo. 401 [24 Pac. 3]; In re Pratt, 19 Colo. 138 [34 Pac. 680]; Edwards v. R. R. Co., 13 Colo. 59 [21 Pac. 1011]; Mollie Gibson C. M. & M. Co. v. Sharp, 23 Colo. 259 [47 Pac. 266]."

We reach the conclusion, therefore, that there was no error in refusing leave to contestants to amend, as purposed; also that the election was held under the proper statute and that the result must be upheld. The trial court having reached a like conclusion, the judgment is affirmed.

Judgment affirmed.

WHITE, J., not participating.

### HURLEY v. YOUNG MEN'S CHRISTIAN ASS'N OF PHOENIX. (No. 1337.)

(Supreme Court of Arizona. May 16, 1914.)

#### 1. SUBSCRIPTIONS (§ 8\*)—FRAUD.

Where the execution of a subscription contract is induced by a fraudulent representation of fact, the contract is not binding on the subscriber, but the fraud must relate to the subject-matter of the contract.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. § 9; Dec. Dig. § 8.\*]

#### 2. EVIDENCE (§ 444\*)—PAROL EVIDENCE—SUBSCRIPTION CONTRACTS—CONDITIONS.

One who in writing subscribes to a fund to provide a building and site for a Y. M. C. A. in consideration of subscriptions of others, provided a specified sum is subscribed, is bound on his subscription on the performance of the specified condition, and he cannot, by parol, show other conditions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

Appeal from Superior Court, Maricopa County; Frank O. Smith, Judge.

Action by the Young Men's Christian Association of Phoenix, Ariz., against P. T. Hurley. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee, a corporation, commenced this action to enforce the payment of a subscription contract executed and delivered by the appellant to a voluntary association of citizens acting for the purpose of soliciting such subscriptions, and by such association the contract was delivered to and became the property of the appellee. The following is the subscription contract in question:

"Young Men's Christian Association Building Fund.

\$500.00 Phoenix, Arizona, April 4, 1907.

"For the purpose of providing a building and site for the Young Men's Christian Association of Phoenix, and in consideration of the subscriptions of others, provided at least

\$60,000.00 be subscribed, I promise to pay to the treasurer of the building fund, at the Phoenix National Bank, five hundred (\$500.00) dollars payable as follows: One-fourth May 10th, 1907, one-fourth November 10, 1907, one-fourth May 10th, 1908.

"Or will pay in full on.....

"[Signed] P. T. Hurley."

The appellant did not pay any of the sums mentioned. The voluntary association organized the proposed corporation, the Young Men's Christian Association of Phoenix, the appellee, to which the property in all the subscription contracts was delivered. The subscription contracts, thus procured and delivered, exceeded in the aggregate \$60,000. The appellee, through its agents, purchased a full city block for a consideration of \$32,000, and selected a site for the proposed building from about a third part of the block purchased, and sold other parts of the block for an aggregate sum of \$33,000.00, and donated to the city a part of the block for the purpose of a public park, with the right of a reversion to the appellee in case of nonuser by the city. In 1909 the association commenced the erection of a suitable building upon the site selected for that purpose, and completed the building in due course of time at an expenditure of \$100,000. The appellant resisted payment for the reasons as set forth in his answer, because the persons soliciting the subscription for the benefit of the appellee "stated and represented to this defendant, and it was then and there made a condition of such subscription by the parties thereto: "(1) That the proposed site to which said subscription had reference should be immediately selected, and should be an entire city block of ground, and the proposed building should be immediately erected thereon with suitable lawns and playgrounds about the same; (2) that the association which should own and control said site and building should be composed of subscribers to the said fund, and should be nonsectarian in character, and its privileges open to and for the benefit of all persons who might be believers in the Christian religion without discrimination as to sect, and especially to and for the benefit of his children defendant; (3) that the purposes of said association were to furnish, own, control, and manage a site and building for the Young Men's Christian Association of Phoenix and for no other purpose. This defendant shows that, believing and relying upon said representations and upon said conditions, without any information or knowledge that the same were in any respect false or untrue, or that said persons soliciting said subscription or their successors would not in good faith carry out the terms and conditions of said subscription contract upon their part, this defendant made and delivered said subscription contract to said voluntary association."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The defendant alleges that "said representations so made as aforesaid were false and untrue, and that the said associated persons and their successors, the plaintiff corporation, have so violated the terms of, and refused to perform the conditions of such subscription on their part that this defendant was \* \* \* fully discharged and released for all obligations thereunder, and immediately upon learning that said representations were false, and that said corporation had refused and intended to refuse to perform the conditions of said contract as aforesaid on their part, this defendant refused and still does refuse to pay anything whatsoever upon the said subscription contract."

The defendant alleges that the association, and as its successor, the corporation, at about the time the subscription contract was made, shortly thereafter did purchase an entire city block of ground in the city of Phoenix as a site for the proposed Young Men's Christian Association Building, and after a delay of more than two years commenced the erection of said building upon one corner of said block, upon ground less than one-fourth of the total area of said block, and the said building is not surrounded with or connected with lawns and playgrounds; that after long delays the building was completed, and the remainder of the said block, about three-fourths thereof, was sold by plaintiff, as sites for large buildings in no way connected with or used for the Young Men's Christian Association's purposes, and large buildings erected thereon; that the plaintiff and said voluntary association intended to, and did, sell off large portions of the tract of land purchased by them with the fund subscribed for the site for said Young Men's Christian Association Building, and did donate and give away other portions of such site contrary to the purposes for which said corporation was formed, and for which the said subscription was solicited and made by this defendant as aforesaid.

The delay in the selection of the site for the building, and the commencement of the erection of the building is alleged to have been caused by no act or neglect of defendant, but on information and belief it is alleged such delay was occasioned and deliberately brought about by and at the request of the plaintiff corporation and its controlling officers.

As a breach of the second alleged condition of the subscription contract, defendant alleges that certain of the subscribers to the said fund, including the persons soliciting the subscriptions, organized the plaintiff corporation, and turned over to it the subscriptions of this defendant and others of like tenor, and therefore did so provide, in the articles of incorporation of said association and the by-laws thereof adopted, that no person or persons other than those in good standing as members of evangelical churches might be

or could become active members of said association, or hold office therein, or control the management and affairs of said corporation and the building to be erected by it; that by reason of such provision, and the fact existing that this defendant and his children, being members of a church other than an evangelical church, thereby deprived this defendant and his children, for whose benefit said subscription was made, of all the right to active membership in said association, and of all right to vote in the management and control of said corporation and of its buildings and property and the election of its officers, and by reason of the violation of the said condition of the subscription contract such contract became void and of no effect.

The third condition inducing the defendant to enter into the subscription contract, as alleged, is alleged to have been violated in the manner following: " \* \* \* Instead of confining the said association and corporation to the purpose for which this defendant's subscription was solicited and made, \* \* \* immediately after said subscription had been obtained, commenced, and for two years continued to carry on, the business of speculating in real estate and the soliciting and taking of money from persons owning property in the said city of Phoenix in return for the influence of said association and corporation in the locating of public buildings on and near the property of said persons and on the property purchased by the said plaintiff corporation, and did succeed in inducing the location of the United States post office and courthouse, otherwise known as the Federal Building, on the said corporation's property, to the great enhancement in value of the surrounding property owned by the persons who \* \* \* had paid the said corporation for its influence in obtaining said location, and greatly to the loss and damage of other sections of the said city of Phoenix, in which and near which this defendant owned property, and where he and many other subscribers to said Young Men's Christian Association fund were desirous of having said Federal Building located, and where it might or would have been located except for the acts of said corporation."

Defendant further alleges that at a time prior to the date when the site for the said building was purchased and located, or the building commenced thereon, this defendant notified the said corporation plaintiff of his refusal to pay his said subscription and the reasons therefor, and this defendant specifically denies that such site was purchased and said building commenced or erected with reliance upon the subscription of this defendant.

The plaintiff demurred and moved to strike certain parts of the second amended answer. The demurrer was overruled. The motion was granted; part of said answer, referring to the breach of the third condition of the subscription contract, inducing its execution

and delivery by defendant, was ordered stricken. The cause was tried to a jury, which returned a verdict for the plaintiff. Judgment was rendered thereon. A new trial was refused, and this appeal is prosecuted from the order refusing a new trial and from the final judgment.

Appellant assigns as error the order granting the motion to strike, the order denying motion of defendant for judgment at the close of plaintiff's evidence in chief, in rejecting evidence, in refusing instructions requested by defendant, in giving instructions, and in overruling defendant's motion for a new trial.

Armstrong & Lewis and Alexander & Christy, all of Phoenix, for appellant. Kibbey, Bennett & Bennett and B. E. Marks, all of Phoenix, for appellee.

CUNNINGHAM, J. (after stating the facts as above). The defendant admits the execution and the delivery of the written instrument sued upon, and admits that the subscription contracts procured aggregated \$80,000, admits that the corporation for whose benefit and use the subscription contracts were solicited, procured, executed, and delivered was organized, and it acquired the building site and erected the contemplated building thereon, and the building thereon has been appropriated to the purposes of the Young Men's Christian Association of Phoenix. Defendant admits: That he has not paid the sums mentioned in and by the terms of the contract he undertook to pay, and admits that demand for payment has been made, and that he has refused payment. Defendant in his answer has thereby confessed the cause of action, and seeks to avoid liability, for the reasons other conditions than expressed in the written contract were agreed to between himself and the person soliciting his contract, and such other conditions were falsely made for the purpose of inducing defendant to enter into the contract, and such conditions were not kept on the part of the plaintiff, nor were they, when made, intended to be kept. That such conditions largely influenced the defendant to make and deliver the contract sued upon, because he believed such other conditions would be faithfully kept and performed as agreed; therefore, defendant was induced to and did execute and deliver said contract.

Do the matters set forth in defendant's answer constitute a defense? Are they sufficient to avoid the written undertaking? Can a party to a written contract defend upon the grounds that he was induced to execute the contract by reason of verbal conditions agreed upon, but not expressed in the instrument when executed and delivered by him?

[1] The general rule is that: "If the execution of a contract to give a subscription is induced by a fraudulent representation of

fact, it is not binding upon the subscriber; the fraud affords a defense. It is essential, however, that the fraud should relate to the subject-matter of the contract." 37 Cyc. 493.

[2] Defendant's undertaking was that he would pay the specified sum of money upon the performance by the other party of a single condition named in the contract, viz, provided that at least \$80,000 be subscribed by others for the purpose mentioned. By the terms of the written instrument, the performance of that condition is made the sole consideration for his promise to pay the money. In his answer defendant does not complain that that condition has not been performed. That particular condition is the subject-matter of the contract. The alleged false and fraudulent representations complained of in the answer relate to matters quite distinct from the condition expressed in their contract, made the subject-matter of this action, with reference to which false and fraudulent representations and conditions the parties made no contract whatever.

"A false or fraudulent representation, to afford grounds of relief against a contract which the parties have entered into, must relate to the subject-matter of that contract." *Blair v. Buttolph*, 72 Iowa, 81, 33 N. W. 349, citing *Noel v. Horton*, 50 Iowa, 687.

It appears from the answer that defendant made some other agreements with the persons soliciting his subscription, by which agreements he undertook to promise to pay a like sum in consideration of the performance of certain conditions, and those conditions have not been performed. Under such circumstances the consideration for such contract and promise has failed, through the failure to perform the conditions agreed upon. That is not this case; defendant admits or does not deny that the condition expressed in the written contract as the consideration of his undertaking has been performed as agreed. Such is the contract here involved, and all other contracts, so far as this action is concerned, are wholly immaterial.

Another reason exists why the matters pleaded cannot be of avail to defendant as a defense to the action: By the terms of the written instrument the performance of the condition to procure the subscription of at least \$80,000 from others, for the purpose of providing a building and site for the use and benefit of the Young Men's Christian Association of Phoenix, was made the sole condition and consideration of defendant's promise to pay the money. In his answer in question he alleges that he was induced in part to enter into the agreement by another promise or other representations entirely different and distinct from the condition appearing in the contract made and delivered, and that that promise or condition has been broken.

This presents the identical question considered by the court in *Blair v. Buttolph*, 72

Iowa, 81, 83 N. W. 349. In that case the court says: " \* \* Defendant alleges that part of the consideration of the contract in suit was the verbal promise and agreement of the corporation to which it was given that it would construct and complete its line of railroad from Iowa Falls to Forest City \* \* \* within one year after the date fixed in the contract for the completion of the road to Iowa Falls; and that said company had not only failed to perform its undertaking in that respect, but had entirely abandoned the project of building the road between those points. We think it very clear that, under familiar and well-settled rules of law, the defendant cannot avail himself of the matters thus pleaded as a defense. His undertaking was that he would pay the specified sum of money upon the performance by the other party of a single condition named in the contract. By the terms of the written instrument, the performance of that condition is made the sole consideration for his promise to pay the money. In the paragraphs of the answer in question he alleges that he was induced in part to enter into the agreement by another promise, entirely different and distinct from that, and that that promise has been broken. But when the parties, by their writing, made the completion of the railroad to Iowa Falls within the specified time the condition upon which his liability to pay the money should accrue, they definitely fixed that as the condition of the contract, and the conclusive presumption is that all other conditions were excluded. When, by the express terms of the written agreement, a particular condition is made the consideration for the undertaking, it is no more competent to contradict or vary its terms by parol evidence, as to the consideration by which it is supported, than as to its other conditions. *Gelpcke v. Blake*, 19 Iowa, 268; *Courtwright v. Strickler*, 37 Iowa, 382." *Blair v. Buttolph*, 72 Iowa, 31, 33 N. W. 349.

"It is the general rule that parol evidence is not admissible to show that a subscription was not to be payable except on other conditions than those embodied in the written contract." 37 Cyc. 504, citing *Blair v. Buttolph*, supra; *Farmington First Free-Will Baptist Parish v. Perham*, 84 Me. 563, 24 Atl. 958; *Gerner v. Church*, 43 Neb. 690, 62 N. W. 51; *Blodgett v. Merrill*, 20 Vt. 509. See, also, *Thompkins v. Dinnie*, 21 N. D. 309, 180 N. W. 935.

It follows as a consequence that the court should properly have instructed the jury to return a verdict for plaintiff, as the defendant would have no right to recover under the pleadings and evidence produced. The rulings of the court, if erroneous as abstract propositions of law, could not prejudice the appellant, no issue of fact existed for trial, and the questions raised on the trial were at

most questions the discussion of which could in no manner affect the rights of the parties.

We find no reversible error in the record, and the judgment must be affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

#### LOUNT et al. v. YOUNG MEN'S CHRISTIAN ASS'N OF PHOENIX. (No. 1388.)

(Supreme Court of Arizona. May 16, 1914.)

Appeal from Superior Court, Maricopa County; Frank O. Smith, Judge.

Action by the Young Men's Christian Association of Phoenix against W. B. Lount and another, copartners doing business under the name of S. D. Lount & Son. From a judgment for plaintiff, defendants appeal. Affirmed.

Armstrong & Lewis and Alexander & Christy, all of Phoenix, for appellants. Kibbey, Bennett & Bennett and B. E. Marks, all of Phoenix, for appellee.

CUNNINGHAM, J. The pleadings and the contract sued upon are, in all essential particulars, the same as appear in the case of *Hurley v. Young Men's Christian Association*, 140 Pac. 816, just decided, and the rules of law therein recognized control this cause, also.

The judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

#### WOOSTER v. SCORSE. (No. 1375.) †

(Supreme Court of Arizona. May 14, 1914.)

##### 1. APPEAL AND ERROR (§ 173\*)—GROUNDS OF DEFENSE—PRESENTATION IN LOWER COURT.

Where, in an action on a promissory note, defendant pleaded the statute of limitations, and plaintiff pleaded in reply to avoid the bar of the statute, a writing signed by defendant, as well as other written acknowledgments by defendant of the justness of plaintiff's claim, defendant cannot urge on appeal the question of whether the action is properly brought upon the original obligation, as continued by the acknowledgment of the indebtedness, or upon the substituted promise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

##### 2. APPEAL AND ERROR (§ 907\*)—FINDINGS—EVIDENCE TO SUPPORT—PRESUMPTIONS.

Where all the evidence was not in the record, it must be presumed by the Supreme Court that the evidence was sufficient to sustain a finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

##### 3. LIMITATION OF ACTIONS (§ 195\*)—ACKNOWLEDGMENT OF DEBT—PROOF OF ACKNOWLEDGMENT.

While the question whether certain writings were sufficient, as an acknowledgment of the debt sued for, to remove the bar of the statute of limitations, is a question of law for the court, evidence showing the writings contained must be given to enable it to determine that question.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\*]

##### 4. LIMITATION OF ACTIONS (§ 148\*)—ACKNOWLEDGMENT OF DEBT.

The written acknowledgment of a debt need not be a formal acknowledgment or promise, in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 23, 1914.

order to remove the bar of the statute of limitations; it being sufficient if it shows that the promisor regards the indebtedness as subsisting.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597-603; Dec. Dig. § 148.\*]

**5. LIMITATION OF ACTIONS (§ 5\*)—AVAILABILITY OF DEFENSE.**

While the statute of limitations is as meritorious a defense as any other, the court will not go out of its way to give the benefit of the statute to a debtor seeking to take advantage of his creditor's leniency, in order to defeat the collection of a just debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 13-15; Dec. Dig. § 5.\*]

Appeal from Superior Court, Navajo County; Frank O. Smith, Judge.

Action by Will Wooster against William Scorse. From a judgment for plaintiff, defendant appeals. Affirmed.

Thorwald Larson, of Holbrook, for appellant. Isaac Barth, of Albuquerque, N. M., for appellee.

FRANKLIN, C. J. On the 18th day of August, 1905, at Navajo county, Ariz., the defendant and appellant made and delivered to the plaintiff and appellee his promissory note for the sum of \$1,000, payable one year from date, with annual interest at 10 per cent., and secured the same by mortgage on certain lots in the town of Holbrook, Ariz. The debt not having been paid, this action to foreclose the mortgage was begun on the 14th day of December, 1910.

The case was tried to the court without a jury, and the court, having made and filed its findings of fact and conclusions of law, rendered judgment for the plaintiff, with a foreclosure of the mortgage.

The defendant interposed the statute of limitations both by demurrer and as an affirmative defense in the answer; the plea of the statute of limitations being based on the provisions of paragraph 2954 of the Revised Statutes of Arizona, providing that actions for debt, where the indebtedness is evidenced by or founded upon any contract in writing, executed within this territory, shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward. The indebtedness is not denied.

By way of reply and in avoidance of the bar of the statute, as being an acknowledgment of the justness of the claim in suit, the plaintiff pleaded in *hac verba* a writing signed by defendant, and dated February 13, 1909. The plaintiff further alleged that at divers and sundry times and places after said debt became due defendant acknowledged the justness of plaintiff's claim in writing signed by defendant. It was not sought to make this allegation more definite and certain in particulars, nor was the plaintiff's said reply otherwise assailed.

The appellant has, with much care and evidence of research elaborated in his brief in what manner and at what time and under what circumstances a relief from the bar of the statute of limitations should be pleaded, involving, as it does, the character and kind of acknowledgment, whether made before or after the bar is complete, and whether general or conditional.

[1] In fine, whether the action is properly upon the original obligation as continuing by reason of the acknowledgment, or is properly upon the substituted promise. But, upon the record made by the appellant in the lower court, and as here presented, we think he is not in a position to urge such matters for our consideration.

As we consider the question of the statute of limitations decisive of this appeal, we must confine ourselves to this question of the statute of limitations as presented by the record. The transcript of the reporter's notes is short. We quote the material part:

"The Court: Let the record show this case is called for trial at this time.

"Mr. Barth: By agreement of counsel, we are going to introduce into evidence the original note, the original mortgage, and the letter which is on file, and, in addition thereto, a letter written on the 31st.

"The Court: All admitted, and same to be marked 'A,' 'B,' and 'C.'

"Mr. Barth: That will be all of the plaintiff's case.

"Mr. Barth introduces another letter to which Mr. Larson objects, asking that it be held for identification pending Mr. Wooster's arrival.

"Argument by Mr. Larson.

"The Court: This case is for trial at this time upon the complaint, second amended answer, and reply, joined upon these issues.

"Mr. Larson: I think I will agree that that letter may go in as evidence in order to save time. I should prefer to have Mr. Wooster examine it, but I will agree to have it admitted.

"The Court: Letter will be admitted and marked 'D.'

"Mr. Barth: That is our case.

"The Court: Let the record show that plaintiff rests.

"Defendant offers no evidence.

"Mr. Larson: Then we submit the case to the court." From the evidence the court, among others, made this finding: "The said note would have become barred by the statute of limitations on the 18th day of August, 1910, and that during the year 1909, and prior to the said 18th day of August, 1910, the defendant, in a writing and in writings signed by the said defendant, duly acknowledged the justness of the claim of the said plaintiff, upon which this action is based."

It will be noticed from the foregoing that in addition to the note and mortgage, three letters were introduced in evidence and mark-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ed as exhibits. The introduction of these letters was not objected to, but the letters were received in evidence by the express agreement of the defendant. Pursuant to paragraph 1256, Revised Statutes of Arizona 1913, the appellant filed a notice with the clerk of the superior court specifying the papers or portions of the record which he desired necessary to present the question involved on such appeal. There were three letters introduced and marked as exhibits in the case, but appellant's notice specified only one, to wit, Letter of Will Wooster to William Scorse, dated January 31, 1910, and this letter is the only one presented in the record. This letter reads as follows: "Holbrook, Arizona, Jan. 31, 1910. Wm. Scorse, Taylor, Ariz.—Dear Sir: Answering yours 5th, I want to see you and have an understanding with you about an extension of time. I am not going to make a partial payment and then have you foreclose the mortgage for the balance. Yours truly, Will Wooster."

Whether the foregoing letter in itself is a sufficient acknowledgement of the justness of the claim so as to avoid the bar of the statute it is not necessary to determine. Even if it is not, either of the other writings introduced may have been amply sufficient to sustain the finding of the court that prior to the 18th day of August, 1910, the defendant, in a writing and in writings signed by the said defendant, duly acknowledged the justness of the claim of the said plaintiff, upon which this action is based.

[2] All of the evidence not being in the record, we must presume that it was sufficient to sustain the finding. A writing was set out in plaintiff's reply, but from the record presented we have no means of knowing whether it is one of the writings introduced in evidence. It is not otherwise identified than as being on file, and is not incorporated in the record. The three letters were received in evidence by agreement, and whether any one of the letters was the same as the one set out in the pleading the record fails to advise us.

"Not having all the evidence before us, the presumption is that the evidence presented to the lower court was sufficient to sustain the findings of the court." *Williams v. Jones*, 10 Ariz. 72, 85 Pac. 400. See, also, *Daniel v. Gallagher*, 11 Ariz. 151, 89 Pac. 412; *Title Guaranty, etc., Co. v. Nichols*, 12 Ariz. 405, 100 Pac. 825; *Phoenix Railway Co. v. Landis*, 13 Ariz. 80, 108 Pac. 247; *Sanford v. Ainsa*, 13 Ariz. 287, 114 Pac. 560; *Holmes v. Bennett*, 14 Ariz. 298, 127 Pac. 753.

[3] True, the question in this case—whether the writings in evidence were sufficient to remove the bar of the statute of limitations—is one of law for the court, but, as a basis for determining this question of law, there must, of necessity, be evidence submit-

ted showing what such writings contain. There were three such writings, and but one is identified and incorporated in the record.

[4] "The statute does not prescribe any form in which the acknowledgement or promise shall be made. Whether these writings constitute a sufficient 'acknowledgment or promise' is therefore a question of law. The imperative thing is that it shall be 'contained in some writing, signed by the party to be charged thereby.' The expression 'contained in some writing' clearly indicates that it is not essential that the acknowledgment or promise should be formal, such as that 'I hereby acknowledge,' or 'hereby promise.' It is sufficient if it shows that the writer regards or treats the indebtedness as subsisting. \* \* \*" *Concannon v. Smith*, 134 Cal. 20, 66 Pac. 42; *Senninger v. Rowley*, 138 Iowa, 617, 116 N. W. 695, 18 L. R. A. (N. S.) 223; *Dern v. Olsen*, 18 Idaho, 358, 110 Pac. 184, Ann. Cas. 1912A, 1.

[5] The statute of limitations furnishes a defense as meritorious as any other. However, as well observed in the case of *Senninger v. Rowley*, supra: "The defense of the statute of limitations is not to be condemned in any case to which it is clearly and fairly applicable, but a court should not and will not go out of its way to give its benefit to a man who seeks to take advantage of the leniency of his creditor to defeat the collection of a just debt which he admits has never been paid."

Upon the record in this case, the judgment must be affirmed, and it is so ordered.

CUNNINGHAM and ROSS, JJ., concur.

#### BOARD OF SUP'RS OF YAVAPAI COUNTY et al. v. HAWKINS. (No. 1391.)

(Supreme Court of Arizona. May 16, 1914.)

##### 1. COUNTIES (§ 173\*)—ISSUANCE OF BONDS—STATUTORY AUTHORITY.

A county may not issue bonds unless the power is specifically conferred, or necessarily, implied from the law governing the powers of counties.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 261, 262, 266, 267, 275, 276; Dec. Dig. § 173.\*]

##### 2. COUNTIES (§ 175\*)—BONDS—"FUNDING" OF DEBT.

Where bonds of a county are issued as the original evidence of indebtedness contracted by it, the bonds are not a funding of a debt as ordinarily understood.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 263; Dec. Dig. § 175.\*]

##### 3. COUNTIES (§ 174\*)—ERECTION OF PUBLIC BUILDINGS—BONDS—STATUTORY AUTHORITY.

Under Civ. Code 1913, pars. 5266-5285, governing county and municipal indebtedness, and authorizing by vote of electors an indebtedness in excess of four per cent. of the value of the property in the county, providing that, if the county shall desire to fund an indebtedness by the issuance of bonds, bonds may be issued for

public buildings, a county whose indebtedness does not exceed 4 per cent. of the assessed valuation of the property thereof may issue, if authorized at an election called for the purpose, bonds for the construction of a courthouse where the former indebtedness and the indebtedness created by the bonds will not in the aggregate exceed 4 per cent. of the assessed valuation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 264, 265; Dec. Dig. § 174.\*]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

Action by John J. Hawkins against the Board of Supervisors of Yavapai County and others, members of the said board, and another, clerk thereof. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

G. P. Bullard, Atty. Gen., Leslie O. Hardy, Asst. Atty. Gen., and P. W. O'Sullivan, Co. Atty., and J. H. Morgan, Deputy Co. Atty., both of Prescott, for appellants. H. H. Linney and Richard Lamson, both of Prescott (Daniel E. Parks, of Prescott, of counsel, amicus curiæ), for appellee.

ROSS, J. This action was commenced by the appellee as plaintiff, January 23, 1914, against the board of supervisors of Yavapai county for the purpose of restraining such board from calling an election to be held upon the question of authorizing the county to create an indebtedness by an issue of the bonds of the county to the amount of \$250,000 for the purpose of raising a fund for the construction and furnishing of a county courthouse. Upon the face of the complaint it appears that the present indebtedness of Yavapai county does not exceed 4 per centum of the assessed valuation of the property of the county, and if such bonds are issued then the entire indebtedness, including the present indebtedness, together with the indebtedness created by the issue of said bonds, in the aggregate would not exceed 4 per centum of the assessed valuation of the property of the county. It is not shown by the pleadings, nor is it contended by the appellee, that the method pursued for obtaining the assent of the taxpayers and electors is not in all respects in conformity to the provision of chapter 2, tit. 52, Civil Code 1913, providing for the creation of indebtedness by counties and the issue of bonds therefor. It is alleged that if said election is held such election will cost the county \$3,000, and the election thus held will be void, and any bonds issued pursuant to the result of such election will be wholly void, for the reason such election is not authorized by law and the county cannot thereby be authorized by such election to create an indebtedness of the county and evidence the same by issuing bonds of the county, except when the indebtedness thereby created will exceed 4 per centum of the assessed valuation of property of the county. As a taxpayer, the plaintiff prays that the board

be enjoined from ordering or calling such election. The defendants demurred to the complaint upon the grounds that the facts stated are insufficient to constitute a cause of action. The court overruled the demurrer, and, defendants declining to answer further, judgment was rendered for plaintiff in accordance with the prayer of his complaint. From the judgment defendants have appealed and assign as error the ruling of the court upon the demurrer, and in rendering judgment for the plaintiff.

[1] As stated in appellants' brief: The general rule is that a county may not issue bonds unless the power is specifically conferred by law, or unless the power is necessarily implied from the law relating to the powers of counties. The general statement of the law is conceded by appellee to be correct; indeed, it may not be controverted, for such a proposition finds support perhaps without dissent in the adjudicated cases. See the following cases: *Francis v. Howard County* (C. C.) 60 Fed. 44-56; *Police Jury of Parish v. Britton*, 82 U. S. (15 Wall.) 566, 21 L. Ed. 251; *Clalbourne County v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 987, 30 L. Ed. 885; *Duke v. Williamsburg County*, 21 S. C. 414; *Colburn v. Chattanooga Western Ry. Co.*, 94 Tenn. (10 Pickle) 43, 28 S. W. 298; *Robertson v. Breedlove*, 61 Tex. 316; *Nolan County v. State*, 33 Tex. 182, 17 S. W. 823; *Ball v. Presidio County*, 38 Tex. 60, 29 S. W. 1042.

[2, 3] This power, then, as affecting the question before us, is to be determined by a review of chapter 2 of title 52, Civil Code 1913, to ascertain if the authority of the county to create an indebtedness and issue its bonds as evidence thereof is specifically granted by the law, or is necessarily implied therefrom. If such power is specifically granted by the law, or is necessarily implied therefrom, then the judgment of the lower court is erroneous and must be disaffirmed. A solution of the question depends upon the construction given to the chapter named.

The history of chapter 2, tit. 52, supra, affords light in its construction. It appears first as chapter 29, First Session of the Legislature (Laws 1912, c. 29), and was entitled "An act enabling counties, school districts, cities, towns, and other municipal corporations to become indebted in an amount exceeding four per centum of the taxable property therein, \* \* \*" and consisted of 19 sections, 18 of which were devoted to providing the modus operandi by which such corporations when indebted in excess of 4 per centum might issue bonds or other evidence of indebtedness, increasing that indebtedness, and one of the essentials prescribed is that an election must first be held to obtain the approval of the qualified property

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taxpayers within such corporation. The last section (19) bears upon the same subject-matter, but by its terms is expressly made to apply to counties, school districts, cities, towns, and other municipal corporations whose indebtedness does not exceed 4 per centum. Section 19, as passed by the First Session, reads as follows: "Nothing in this act contained shall be construed to prevent any county, school district, city, town, or other municipal corporation from creating an indebtedness not exceeding four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation; provided, that if such county, school district, city, town, or other municipal corporation shall desire to fund such indebtedness by the issuance of bonds therefor, said bonds shall be issued in all respects in conformity with the provisions of this act; and, provided, further, that it will not be necessary to hold the election required to be held herein."

If the proceeding of the board of supervisors of Yavapai county depended for its legality upon section 19, as passed by the First Session, the power sought to be exercised possibly would be involved in doubt. Whether the expression "creating an indebtedness," as used in this section, was intended by the Legislature to mean a floating indebtedness arising in the ordinary transactions of the municipality, or whether it was used in the sense in which it is employed in sections 8 and 6 (R. S. 1913, §§ 5268, 5271) to mean a determination to incur the proposed liability, is unimportant here. We speak of funding floating or outstanding debts by issuing bonds in lieu thereof; but when bonds are issued as the first and original evidence of an indebtedness contracted it is not "a funding of the debt," as that expression is ordinarily used. When it is considered that chapter 2 throughout treats of the creation of indebtedness by municipalities and the method and manner of evidencing such indebtedness as it is incurred, it may be that it was intended that the expression "that if such county \* \* \* shall desire to fund such indebtedness by the issuance of bonds therefor" should be construed to mean that bonds could be issued as the original or first evidence of the liability incurred and not the funding of a floating or outstanding debt. This view finds support from the fact that the Legislature has provided for a loan commission authorized and empowered to fund and refund the funded and outstanding indebtedness of counties and other municipalities. Title 52, c. 1, R. S. 1913.

But authority for the proposed action of the board of supervisors of Yavapai county is not left to chapter 2, tit. 52, as passed by the First Session. The third Special Session of the Legislature amended section 19 (R. S. 1913, § 5285) by adding thereto another proviso. The amendment is as follows:

"Provided, that bonds may be issued under the provisions of this chapter, for the construction and reconstruction of roads, bridges and highways; for the construction of public buildings, and for any other lawful or necessary purpose. The enumeration of the above-mentioned purposes shall not be deemed as restrictive of the right to issue bonds for other purposes, but rather in furtherance thereof. In case any county in the state of Arizona shall have called or held an election for the issuance of bonds, as herein provided, prior to the becoming effective of the provisions of this section, said election shall be and is hereby deemed to have been called and held pursuant to the provisions of this chapter, and the bonds that may be hereafter issued pursuant to such election, shall be in all respects as valid and legal as though the provisions of this section had been in force at the time of said election."

No plainer or more liberal language could be employed. There is a general grant of right and power to issue bonds (not to fund indebtedness) under the provisions of this chapter. The last proviso, in effect, adopts and makes applicable to municipalities whose indebtedness does not exceed 4 per centum, all the preceding provisions of the chapter affecting or concerning municipalities whose indebtedness does exceed 4 per centum of the taxable property therein. This proviso is not only the last in place, but last in time of enactment and in direct, positive, and unambiguous language empowers the municipalities named to issue bonds "for the construction of public buildings and for other lawful and necessary purpose" under the provisions of this chapter. It places its finger, so to speak, directly upon "public buildings," and having said that the funds for the erection of such building may be raised by issuing bonds under the provisions of chapter 2, applying the maxim "expressio unius est exclusio alterius," it may be doubted if funds for that purpose can be raised in any other manner.

The construction and reconstruction of roads, bridges, and highways and the construction of public buildings generally involve large expenditures, and the Legislature has very properly lodged the power in the legally qualified taxpayers to say by their vote whether they care to assume the obligations before they are contracted. The ultimate burden of discharging the indebtedness falls on the taxpayer, and that is sufficient reason why his assent should be obtained directly, if possible, before the debt is contracted. We cannot but think that the last proviso was inserted by the Legislature for the express purpose of securing the personal assent of the taxpayer by his vote before bonds could be issued against his property for the construction of roads, bridges, highways, and public buildings. The last sentence of section 19, Id. (R. S. 1913, § 5283), while a "validating"

statute, is not confined to any class of counties, but reaches all the counties of the state. If, at the time it was enacted, doubt existed as to the legality of an election in counties owing less than four per centum of their taxable property, it was the evident purpose to set at rest such doubt as to elections already held or pending by the curative statute, and by the same token it must be that the Legislature intended to expunge any doubt as to the legality of future elections held "for the issuance of bonds, as herein provided" "In \* \* \* any county in the state of Arizona," for it is said, if "prior to the becoming effective of the provisions of this section" an election has been called or held as provided by chapter 2, the bonds issued thereunder shall "be as valid and legal as though the provisions of this section had been in force at the time of said election." By this language the Legislature asserts its belief (and therefore its intention) that had section 5285, Id., in its completeness existed all the time, no validating legislation would have been necessary to legalize an election held in any county of the state for the purpose of issuing bonds. The curative feature of section 5285 was not necessary for counties whose indebtedness exceeded the 4 per centum limit, if they had "held an election for the issuance of bonds, as herein provided." The validating or curative statute had in view the other class of counties, those owing less than 4 per centum of their taxable property, and from its language we are informed that the Legislature intended that since section 5285 in its completed form was enacted any county in the state was authorized to issue bonds under the provisions of chapter 2, as amended by the Third Special Session.

It follows, from what we have said, that, in municipalities where the indebtedness is less than 4 per centum, additional indebtedness may be created for the construction of public buildings in the manner and by compliance with the provisions of chapter 2, tit. 52, R. S. 1913. In other words, the procedure provided in said chapter whenever it is attempted to increase the aggregate amount of the indebtedness of the municipalities named, so as to exceed four per centum of the taxable property therein, must be followed where it is attempted to increase the indebtedness of municipalities whose indebtedness is less than 4 per centum.

Judgment reversed, and cause remanded, with direction to sustain the demurrer and dismiss the complaint.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. I concur in the result and order made by the majority of the court. I will state my reasons separately, which are as follows:

Chapter 2 of title 52, Civil Code 1913, prescribes the form and manner by which a county or other designated municipality may

authorize the creation of a bonded or funded indebtedness in excess of 4 per cent. of the valuation of the taxable property within such municipality. The plan or system by which the indebtedness must be authorized and created and evidenced by an election to authorize its creation, the form of and sale of the bonds is prescribed in detail by paragraphs 5286 to 5284 of chapter 2, tit. 52, both inclusive. The municipality affected, which is already indebted to the constitutional limit of 4 per centum of the value of the taxable property, may in the manner prescribed, by pledging future taxes, raise a fund to meet a useful, desired, or necessary purpose. Paragraph 5285, Civil Code 1913, being the closing paragraph of chapter 2, is expressive of the legislative construction in some measure placed upon the chapter. It provides: "Nothing in this chapter contained shall be construed to prevent any county, school district, city, town or other municipal corporation from creating an indebtedness not exceeding four per centum of the value of the taxable property in such county, school district, city, town, or other municipal corporation; provided, that if such county, school district, city, town, or other municipal corporation shall desire to fund such indebtedness by the issuance of bonds therefor, said bonds shall be issued in all respects in conformity with the provisions of this chapter, and, provided, further, that it will not be necessary to hold the election required to be held herein; provided, that bonds may be issued under the provisions of this chapter, for the construction and reconstruction of roads, bridges and highways; for the construction of public buildings, and for any other lawful or necessary purpose. \* \* \*" Chapter 2 then, in the intention of the Legislature, shall not be construed to prevent the creation of any legal indebtedness, which with the existing indebtedness will in the aggregate amount to a sum not in excess of 4 per centum of the value of the taxable property of such municipality affected. However, if such municipality desires to incur such indebtedness by the issuance of bonds therefor, then such bonds "shall be issued in all respects in conformity with the provisions of this chapter."

Under the general powers of the board of supervisors given in paragraph 2418, Civil Code 1913, the board, by subdivision 9 of said paragraph, is given power to erect and furnish a courthouse, jail, hospital, and such other buildings as may be necessary. Paragraph 5285, Civil Code 1913, as construed by the Legislature, preserves these general powers of the boards of supervisors in all respects to create a public indebtedness, not in excess of 4 per cent. of the taxable property within their county, when the indebtedness created is of the ordinary class, payable by county warrant on demands examined and allowed by the board. The board must determine the necessity of creating the indebtedness; but if the question of the creation



of such indebtedness is favorably determined, and the county or other municipality shall desire that such indebtedness shall become a bonded indebtedness when created, then the bonds shall be issued in all respects in conformity with the provisions of chapter 2 of title 52; provided that it will not be necessary to hold the election required to be held by paragraph 5267. There exists no question of the authority of the board of supervisors to create the indebtedness of the county of Yavapai in question, the present indebtedness together with the indebtedness proposed in the aggregate not exceeding 4 per centum of the value of the taxable property; but how shall the desire of the county to create such indebtedness by the issuance of bonds be determined? If the board of supervisors as representatives of the county order, of its own volition, the issuance of such bonds, then the order may be considered an expression of the desire of the county, in that respect, speaking through its governing board. The governing board has not made the order in the present case, but it has passed an ordinance upon the subject requiring an expression of the desire of the county upon the question of the issuance of such bonds to be ascertained through an election to be held upon the presentation to the board of an initiative petition signed by not less than 15 per cent. of the qualified electors of the county. No general law upon this subject controlling, subdivision 23 of paragraph 2418, Civil Code Ariz. 1913, empowering boards of supervisors "to do and perform all other acts and things which may be necessary to the full discharge of the duties of the chief legislative authority of the county government, \* \* \*" would, with section 8 of part 1, art. 4, state Constitution, give the board full power to enact such ordinance for such purpose. The authority to pass the ordinance and issue the order for the election for the purpose mentioned is not questioned except upon the grounds of the power of the board to create the indebtedness in the form of bonds. I have held that such power exists when bonds are desired by the county for that purpose. The purpose of the election in question is to determine if the county desires to fund the indebtedness by the issuance of bonds for the purpose of erecting and furnishing a courthouse for the county. If the election is held as provided by the county ordinance, and the result is in favor of the issuance of the bonds, and the board orders the indebtedness created in conformity with the provisions of chapter 2, tit. 52, then the liability, when the bonds are issued and sold, is contracted in pursuance to law and is valid under paragraph 2431, Civil Code Ariz. 1913.

The facts stated in the complaint are not sufficient to constitute a cause of action, for the reason the facts show that the board of supervisors are acting fully within the

law, as expressed by the legislative power, and by an ordinance of their own.

For these reasons I concur in the order made.

In re HARRIS.†  
HARRIS v. LYON.  
(No. 1365.)

(Supreme Court of Arizona. May 14, 1914.)

1. PARENT AND CHILD (§ 8\*)—DUTY OF PARENT—CARE OF CHILD.

A parent is required to care for his child during the time it is unable to care for itself, and is entitled to use the child's estate for that purpose only in exceptional cases.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-62; Dec. Dig. § 3.\*]

2. PARENT AND CHILD (§ 14\*)—PERSONS IN LOCO PARENTIS—STEPFATHER.

While a stepfather was under no natural or legal obligation to care for a minor stepchild, the assumption of that duty by the stepfather carried with it the resulting legal responsibilities.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 152-159; Dec. Dig. § 14.\*]

3. PARENT AND CHILD (§ 14\*)—SUPPORT OF CHILD—RECOVERY BY PARENT.

A parent or one in loco parentis, such as a stepfather, who advances money to support the child, cannot, years thereafter, recover such expenditures as upon an implied contract by the child to repay them.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 152-159; Dec. Dig. § 14.\*]

4. GUARDIAN AND WARD (§ 157\*)—SETTLEMENT—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In proceedings for the settlement of the account of a guardian, who was the ward's stepfather, evidence held to show that the guardian expected no remuneration from the child for expenditures made for her support, etc.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 511-513; Dec. Dig. § 157.\*]

5. PARENT AND CHILD (§ 14\*)—SUPPORT OF CHILD.

The intention of one in loco parentis, such as a stepfather, to require repayment of amounts advanced for the maintenance, etc., of a stepchild must be shown in order to entitle the stepfather to repayment, as otherwise the maintenance will be deemed gratuitous.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 152-159; Dec. Dig. § 14.\*]

6. HOMESTEAD (§ 142\*)—SALE FOR DEBTS—TIME OF CONTRACTING.

Under Rev. St. § 2296 (U. S. Comp. St. 1901, p. 1398), providing that no land acquired under the chapter, which relates to the entry of public land as a homestead, shall in any event become liable for debts contracted prior to the issuing of the patent, the land cannot be sold for debts of the heir of an entryman contracted before issuance of patent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271-280; Dec. Dig. § 142.\*]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

In the matter of the guardianship of the person and estate of Emma J. Harris, a minor. From an order of allowance and settlement of the account of the guardian, William H. Lyon and Emma J. Harris, by her

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 23, 1914.

guardian ad litem, appeal. Reversed, with directions.

Mrs. Mary A. Wupperman, of Yuma, for appellant. Thos. D. Molloy, of Yuma, for appellee.

ROSS, J. Appeal from an order of allowance and settlement of guardian's account and from an order authorizing and directing the guardian to sell real estate of the ward. In 1906 the appellee married May Harris, the mother of Emma J. Harris who was then about 10 years old. The mother, May Harris Lyon, died June or July 17, 1907, leaving no estate. From that time on Emma Harris lived with her grandmother, Mrs. Lena White, who was the mother of May Harris Lyon. The appellee, stepfather to Emma, was a party to an arrangement that she should live with her grandmother, he to furnish her housing, clothing, food, and medical attention and generally to provide for them. While perhaps there was no definite agreement in terms to such an arrangement, the subsequent conduct was along those lines. The appellee made provision for the grandmother and minor in this manner from June 17, 1907, until March 11, 1912, simply as the stepfather to Emma. On the last-mentioned date he secured letters of guardianship of both the person and estate of the minor, but continued the arrangements, with slight interruptions, as to her care and keep as before. The estate of which he was appointed guardian consists of 160 acres of land in Yuma county, filed upon by May Harris under the federal homestead law October 28, 1903, before her marriage to appellee. After the death of entrywoman, appellee continued to improve and cultivate the land to comply with the homestead act, and in course of time made final proof. The final receipt was issued by the government March 10, 1913, and in June, 1913, a patent was issued to the heirs of entrywoman. The appellee prefaced his account against the minor, Emma Harris, as follows: "That since the death of the mother of said minor, May Lyons, on June 17, 1907, affiant has, out of his own funds, cared for and maintained said minor, she not having any estate or income whatsoever, except her prospective interest in said land (homestead) which until this time has always been uncertain, remote, and practically valueless. That in such care and maintenance affiant has expended the following sums." The statement shows an expenditure from June 17, 1907, to April 1, 1913, for care and maintenance of \$5,300, and moneys paid out improving and cultivating homestead, final proof, fees, commissions, and attorney's fees, court costs, in the sum of \$680, two-thirds of which is charged to minor, and \$20 paid clerk of court, making \$473.33, or all told \$5,773.33. This account of appellee was contested by the guardian ad litem as being: (1) Excessive and fraudulent; (2) on the

ground that all advances for the care and maintenance of Emma were made by appellee voluntarily; and (3) that appellee was the stepfather of Emma, and as such exercised all the rights of a natural parent, and thereby assumed all the duties and obligations of a natural parent; (4) that the account of guardian was barred by the three-year statute of limitation; and (5) that all items charged against the minor before letters of guardianship were issued should be disallowed for the reason that the minor is not liable for any expenditures made by her stepfather prior to his appointment as guardian. The court overruled the legal questions raised by guardian ad litem, heard evidence in support of and against the account, and rendered judgment allowing the account of appellee for care and maintenance in the sum of \$2,780, or \$40 per month from June 17, 1907, to April 1, 1913, and for improving and preserving the homestead the sum of \$585, or a total sum of \$3,365. Both parties appeal from this judgment, appellee contending that allowance is too small, and appellant that it was far too much.

[1] The law imposes upon the parent the duty of caring for his child during the period of its inability to care for itself, and only in exceptional cases may he use the estate of the latter for that purpose. In this case the minor, Emma Harris, after her mother's death, was left without parents and without any available or tangible estate. She was but 10 years old and of delicate constitution. The appellee, either because of his being the husband of her mother and therefore the child's stepfather, or out of sympathy for her in her helpless condition, or both, without any legal obligation to do so, undertook to care for her out of his own means. Without letters of guardianship, he provided for her and her grandmother, furnishing them the ordinary and necessary comforts of life from June 17, 1907, until March 11, 1912.

[2] While appellee was under no natural, and therefore no legal, obligation to care for the minor child, the assumption of that duty by him carried with it legal responsibilities.

As is said in the note to National Valley Bank v. Hancock, 57 L. R. A. 729 (100 Va. 101, 40 S. E. 611, 93 Am. St. Rep. 933): "The universal rule is that a stepfather, as such, is not under obligation to support the children of his wife by a former husband, but that, if he takes the children into his family or under his care in such a way that he places himself in loco parentis, he assumes an obligation to support them, and acquires a correlative right to their services."

In Sharp v. Cropsey, 11 Barb. (N. Y.) 224, it is said: "The stepfather is not bound to support his stepchildren, nor the latter to render him any services; but if he maintains them, or they labor for him, they will be deemed to have dealt with each other in

the character of parent and child, and not as strangers, without obligation on the part of the father to pay for his children's services, or on the part of the children to remunerate their father for their support." See *National Valley Bank v. Hancock*, supra, and *Bartley v. Richtmyer*, 58 Am. Dec. 338 (4 N. Y. 38), for collection of cases on this point.

[3] The record shows that the appellee claimed the right to the custody of Emma from the time of her mother's death, and that he first placed her with one of his own blood relatives; that she was left with her grandmother in obedience to a request of his wife before her death; that the grandmother's position was that of housekeeper, largely subject to the orders and directions of the appellee; that he furnished the house for them to live in, much of the time retaining a room for his personal use; that he exercised the parental rights of controlling and supervising the conduct, education, and employment of Emma, and at one time corporeally chastised her for disobedience. Practically the only surrender made by appellee was in the matter of Emma's religious training, in which he deferred to the expressed wishes of his deceased wife and the wishes of the grandmother. The rights, powers, and duties claimed and exercised by him over the child were such as only a parent could lawfully claim and exercise. Indeed, in his petition to the court for authority to sell the homestead, dated and sworn to by appellee March 12, 1913, he describes Emma as follows: "That said minor is the only daughter of one May Lyon, now deceased, and the *stepdaughter of her guardian, William H. Lyon.*" The law will not permit a parent or one in loco parentis, years after he has made advances to the child for its support, to recover his expenditures as upon an implied contract. Here the duty was voluntarily assumed, and voluntarily the obligation was discharged. Moreover, it fairly appears that appellee never expected to be remunerated when he first took charge of the child and for quite a while thereafter, for in his first account against his ward, dated March 17, 1913, he states that he "has, out of his own funds, cared for and maintained said minor, she not having any estate or income whatsoever, except her prospective interest in land, which *until this time* has always been *uncertain, remote, and practically valueless.*" Indeed, the thought of repayment of his outlays for the child seems to have germinated coincidentally with or shortly before she secured title to the homestead, theretofore considered "uncertain, remote and practically valueless," but, as shown by the inventory and appraisement, of the real value of \$85 per acre.

[4] That the appellee kept no books of account between himself and the child and had no record of the items, nor the dates when furnished, and in making up his account

was compelled to resort to the memory and books of the various tradespeople with whom he had had accounts, are strong circumstances indicating an absence of intention at the time to ask for reimbursement. That for a long time he expected no remuneration is shown by his own testimony in which he said: "A. When Emma's mother first died there wasn't any property except that piece of land on the Mesa, and I didn't think it was worth anything at all, and lots of times I called in Ap John and didn't think about getting a receipt. I paid him and kept no record of it. I paid very little attention to it because I didn't think there was anything in the Mesa land. Q. When did you first have any assurance you would get anything out of the Mesa land? A. I first began to believe that the property might be of value in 1900 or 1910. Q. As to getting the title, when did you begin to have hopes of getting title to it? A. About a year ago."

[5] The intention or purpose to require repayment is essential (In re Tucker, 74 Mo. App. 331, 337); otherwise the support will be considered voluntary and gratuitous.

The appellee relies upon In re Besondy, 32 Minn. 385, 20 N. W. 366, 50 Am. Rep. 579, to support his contention that he is entitled to reimbursement. In this case the stepchild's estate consisted of \$1,188.40 cash, and it was expressly arranged between the stepfather and mother that the child should live with them and be supported as one of the family, and that the estate money should be applied and used in payment therefor. The court said: "The arrangement made by the stepfather, though invalid as a contract, is sufficient to rebut the presumption that he took the child into his family to support in loco parentis, and on account of his tender years he could render no service in return for such support. \* \* \* And a stepfather is, of course, not bound to maintain the children of his wife by a former husband. But if he voluntarily assumes the parental relation and receives them into his family under circumstances such as to raise a presumption that he has undertaken to support them gratuitously, he cannot afterwards claim compensation for their support." The account was allowed, because, the court said, "It is quite clear that they [mother and stepfather] furnished such support under the circumstances with the expectation of being reimbursed out of his [the child's] income, and not as a gratuity." The decision turned on the intention formed at the time the support was given, and the added fact that the infant was at the time the owner and possessor of an estate in cash available for his present care and maintenance.

To the same point appellee cites In re Beisel's Estate, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819, and says: "In view of the fact that we have the same statute on guardian and ward as the state of California, we re-

gard, and urge upon this court, the case of Beisel as the most persuasive authority." In this case the mother was allowed for the maintenance of her minor children for over five years before she was appointed their guardian. However, their estate, consisting of \$4,007 and some realty, was in the possession and control of the mother during all that time. The court said: "Appellant contends that there was no warrant for an allowance by way of credit to Mrs. Sherrer for maintenance of the minor children during the time when there were no letters of guardianship upon their estates. But she is charged in equity as a quasi guardian or trustee of their estates, and the accounting must be deemed in the nature of an accounting in equity, and determined upon equitable principles. The court finds in substance that the action of Mrs. Sherrer, as the mother of the children, was bona fide; and it had jurisdiction to allow reasonable and proper credits to her for their maintenance and for expenditures incurred on their account. A guardian de facto, who is not a guardian de jure, will be held to account in equity only upon equitable principles, and will be allowed for all proper disbursements for the benefit of the ward. *Peale's Adm'r v. Thurmond*, 77 Va. 756. 'The rule is that where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose which appear upon investigation to have been reasonable and proper.' *Schouler*, Dom. Rel. § 238. Where the income is insufficient for the maintenance and education of a child, equity will break into the principal. *Barlow v. Grant*, 1 Vern. 255; *Bridge v. Brown*, 2 Younge & O., c. 181; *Ex parte Green*, 1 Jac. & W. 253; *Newport v. Cook*, 2 Ashm. [Pa.] 332; *Osborne v. Van Horn*, 2 Fla. 360. A mother will be allowed in equity for the past maintenance of her children, from the death of the father, out of the estate of the children, though she has a separate estate. *Wilkes v. Rogers*, 6 Johns. [N. Y.] 567, 589, 593; *Glad-ding v. Follett*, 2 Dem. Sur. [N. Y.] 68; *Aynsworth v. Pratchett*, 13 Ves. 320; *In re Besondy*, 32 Minn. 385, 20 N. W. 366 [50 Am. Rep. 579]; *Osborne v. Van Horn*, 2 Fla. 360. The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance. *Alston v. Alston*, 34 Ala. 27." In the *Beisel* Case and cases cited therein it will be observed that an estate existed at the time support was given the minor, and that the relation of trustee and cestui que trust was present. Take the criterion given in the *Alston* Case, supra, and endeavor ever so hard, it cannot be applied to the present case. Upon the death of the entrywoman, May Harris Lyon, the surviving child, Emma

Harris, had only an inchoate right in the homestead, and neither this remote interest, nor the perfected title, under the law, could be subjected to the payment of any debt contracted for support, or on any other account, before title was obtained. No court of chancery would have done the futile thing of entering an order authorizing the appellee to maintain and support the minor child, Emma Harris, with the hope or expectation of being remunerated out of the homestead.

Under the peculiar facts of this case we are satisfied that the trial court committed error in allowing and settling the appellee's accounts for the care and maintenance of Emma Harris prior to letters of guardianship.

[8] The petition for authority to sell the homestead represents that the land is unproductive, and that it is necessary that the same be sold in order to realize money with which to pay off the appellee's allowed claim of \$3,365 and to care for the future education and support of the minor. The order appealed from directing the sale of the homestead is based upon the reasons assigned in the petition. This order involves the question as to whether the homestead may be subjected to the payment of debts contracted by the minor, before patent was issued to the heirs of the original entrywoman. If not, the order authorizing the sale for that purpose is in error. The entrywoman, May Harris, filed on the land in October, 1903. She became the wife of appellee in 1906, and died in 1907, before the required residence, improvement, and cultivation were complete, and before she was entitled to a patent. The appellee, after the death of entrywoman, performed the necessary acts of improvement and cultivation, made final proof, and in June, 1913, a patent to the land was issued to the heirs of the deceased entrywoman under the provisions of sections 2291 and 2292, R. S. U. S. (U. S. Comp. St. 1901, pp. 1390, 1394). Section 2296, Id. (page 1398) provides that: "No lands required under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The courts have many times passed upon this section, holding that the antecedent debts of the entryman cannot be collected out of the homestead against the will and consent of the entryman. *Sprinkle v. West*, 62 Wash. 587, 114 Pac. 430, 34 L. R. A. (N. S.) 404, Ann. Cas. 1912D, 281; *Sorrels v. Self*, 43 Ark. 451; *Towner v. Rodogab*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936. While the right of the heir to claim the same exemption from debts contracted by him prior to the issuance of patent has not been before the courts so often, there is the same uniformity in the decisions to the effect that the heir takes the land free from his antecedent debts.

In *Coleman v. McCormick*, 37 Minn. 179, 33

N. W. 556, the original entrywoman devised the land to her brother, to whom patent was issued. The question was as to whether a debt contracted by patentee before the patent was issued to him as such devisee under the provisions of section 2291, R. S. U. S., could be enforced as against the land. That court said: "The statute provides specifically for the acquisition of a patent by the homestead settler, or, in case of his death, by his widow, or, she having died, by his heirs or devisee, or, in case the entry is by a widow, then, upon her death, by her heirs or devisee. Bearing in mind the specific provision thus made, empowering these different classes of persons to secure the title under this law, it is difficult to construe the unqualified language of the exemption as being applicable to one of the specified classes, but not to the others. It is, of course, effectual as to the original homestead settler. There would seem, too, to be no doubt of its applicability, where the widow of the settler, or, she dying, his minor children, the members of his family, perfect the title in themselves, so that they would hold the land free from liability for any prior debts which they might have contracted. Such cases are clearly within the beneficent purpose of the homestead law, and within the terms of the section declaring the exemption. It may be said that the law was not framed for the \* \* \* remote heirs of the homestead settler, not members of his family, and not dependent upon him for support, nor for the benefit of devisees not of kin to the testator, and that therefore the exemption does not attend the title acquired by such persons. But it is impossible by any process of judicial construction to determine that the exemption, which in terms is applicable to heirs and devisees without distinction, was intended to apply only in favor of certain heirs or devisees, and was not applicable as to others. The statute affords no indication that any distinction is to be made, nor anything by which a court could be guided in declaring what patentees under this law are within the exemption, and what are not. Such distinctions can only be made arbitrarily, and this would not be construction, but legislation." Gould v. Tucker, 20 S. D. 226, 105 N. W. 624.

It follows that the court erred in ordering the Emma Harris homestead interest to be sold to pay debts contracted by her prior to the issuance of the patent.

On a new trial, the court should disallow the appellee's claim for care and maintenance and money laid out in cultivating and improving land, attorneys, and in fact all expenditures prior to his appointment as guardian. The appellee should be allowed all necessary expenditures since his appointment as guardian that have been made for the support of his ward or the protection of her

rights in homestead. Should another order authorizing the guardian to sell her homestead interest be made, it should be made to appear that such sale is necessary in order to secure ready means for the support and education of the ward and the payment of the guardian's account for necessary expenditures for her support incurred since the issuance of patent to homestead.

Judgment is reversed, with directions to proceed in accordance with this opinion.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

#### BROWN v. BROWN. (No. 748.)

(Supreme Court of Wyoming. May 15, 1914.)

DIVORCE (§ 195\*)—APPEAL—ORDER FOR FEES—FAILURE TO COMPLY—REMEDY.

Where a husband sued out a writ of error to review a judgment against him in divorce, and the Supreme Court entered an order requiring him to pay a specified sum to his wife's attorneys for preparing her defense, with which he failed to comply, such failure amounted to a civil contempt, and her remedy was to move to dismiss the proceedings in error, and not to punish him for contempt.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 581; Dec. Dig. § 195.\*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action between Robert E. Brown and Ethel Brown. Judgment having been rendered in favor of the latter, the former brought error. On order to show cause why plaintiff in error should not be punished for contempt for failure to comply with an order requiring him to pay attorney's fees amounting to \$250, allowed the attorneys for defendant in error for preparing a brief and representing her in the Supreme Court. Order authorizing a motion to dismiss the proceedings in error in case the order for fees was not complied with within a specified time.

Camplin & O'Marr, of Sheridan, for plaintiff in error. Enterline & La Fleiche, of Sheridan, for defendant in error.

SCOTT, C. J. This case was formerly before this court on an application by the defendant in error for an allowance of attorney's fees for preparing her brief and representing her in this court. 135 Pac. 801. Upon consideration we allowed attorney's fees in the sum of \$250 for that purpose. The case is now here upon a showing by affidavits that plaintiff in error has failed to comply with such order and an application for an order citing him before this court to show cause, if any there be, why he should not be punished as for contempt in failing to comply with such order. We think it unnecessary to review the affidavits in support and the counter affidavits in opposition submitted upon the hearing of this application, other than to say that it sufficiently appears therefrom

that the order has not been complied with, and no good reason is shown for the failure of plaintiff in that respect. We think the allowance for attorney's fees was reasonable in amount, and it will be observed that the plaintiff in error is the one who is in default. The defendant in error seeks no affirmative relief in the proceeding in error in this court as to the judgment. Upon the showing when the allowance was made and upon the hearing here she was and is without means to pay a reasonable attorney's fee for the services of her attorneys in preparing and filing a brief and appearing in this court on her behalf to properly defend such judgment. No brief has been filed in her behalf in this court, while plaintiff's brief has been on file for a year.

While the method of enforcing its orders by citation and punishment as for contempt may, in a proper case, be resorted to in this court, yet upon the facts here there is, in our judgment, a more effective remedy. The plaintiff in error is guilty, if at all, of a civil but not a criminal contempt. He has failed without excuse to comply with the order of this court, and by his petition in error is seeking affirmative relief at the hands of this court. It is elementary that such conduct is not favored. One cannot refuse to obey the lawful order of a court and expect relief at the hands of the court. This rule is a salutary one, and has been often applied by the courts. *Casteel v. Casteel*, 38 Ark. 477; *Peel v. Peel*, 50 Iowa, 521; *McClung v. McClung*, 40 Mich. 498; *Waters v. Waters*, 49 Mo. 385; *Zimmerman v. Zimmerman*, 7 Mont. 114, 14 Pac. 685; *Walker v. Walker*, 82 N. Y. 260; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38. The motion for a citation to issue as prayed is refused, but this court is of the opinion that if the order remains uncomplied with on June 1st next, to wit, June 1, 1914, then a showing to that effect will support a motion to dismiss the proceedings in error.

POTTER and BEARD, JJ., concur.

STATE ex rel. MITCHELL IRR. DIST. v. PARSHALL, State Engineer, et al.  
(No. 789.)

(Supreme Court of Wyoming. May 15, 1914.)

WATERS AND WATER COURSES (§ 83\*)—ACTIONS TO DETERMINE AND ESTABLISH RIGHTS—JURISDICTION.

Under Const. art. 8, § 2, providing that there shall be constituted a board of control, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution, etc., whose decisions shall be reviewable by the courts, etc., the board had jurisdiction, and it was its duty, upon an application being made to adjudicate water rights, to determine under the law whether such applicant had a water right, since until such was done

there was nothing from which the applicant could appeal.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

Petition for mandamus by the State of Wyoming, on relation of the Mitchell Irrigation District, against A. J. Parshall, State Engineer, and others. Demurrer to petition and alternative writ overruled.

Clark & Clark, of Cheyenne, for plaintiff.  
D. A. Preston, Atty. Gen., for defendants.

SCOTT, C. J. The relator filed its petition in this court praying the issuance of a writ of mandamus directed to and requiring the Board of Control to pass upon its proofs and fix its priority to the use of waters of the North Platte river for irrigation purposes. An alternative writ was issued, to which petition and writ the defendants filed their demurrer alleging as grounds thereof that neither the petition nor writ state facts sufficient to constitute a cause of action in favor of the plaintiff or to warrant the relief prayed. The demurrer was argued and submitted and is now before the court for its decision. In considering the question the facts alleged in the petition must be taken and deemed to be true and are as follows:

"Comes now the Mitchell Irrigation District, a corporation, the above-named relator, and respectfully shows unto the court:

"(1) That on June 20, 1890, the Mitchell Irrigation & Canal Company, a corporation, commenced the surveys for a line of ditch which it proposed to construct from a point on the south bank of the North Platte river in section 10, township 23 north, range 60 west, in the county of Laramie, territory of Wyoming, in an easterly course, crossing the boundary line between the territory of Wyoming and the state of Nebraska at a point about 400 feet distant from the headgate of said ditch and running a distance of many miles into the state of Nebraska.

"(2) That on June 20, 1890, the said Mitchell Irrigation & Canal Company caused a notice, signed by its president, to be posted upon a board at the proposed point of diversion of said ditch; said notice being that the said Mitchell Irrigation & Canal Company claimed an appropriation from the North Platte river through said ditch to the extent of 224 cubic feet per second, and setting forth the size of said ditch.

"(3) That on June 25, 1890, the said Mitchell Irrigation & Canal Company caused a copy of said notice, verified by the affidavit of its president, to be filed in the office of the county clerk and ex officio register of deeds of the county of Laramie, territory of Wyoming, and on the same day caused to be filed in said office a statement of claim for said ditch, verified by its president, in which statement was set forth the name of the stream,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

the name of the ditch, the names and post office addresses of the owners, the location of the headgate, the dimensions of the ditch, its capacity, the date of commencement of work and of the actual appropriation of the water therethrough, and the number of acres of land lying thereunder and to be irrigated therefrom.

"(3) That the said surveys were completed with diligence, and on August 18, 1890, the actual work of excavation of said ditch was commenced and continued without intermission until July 18, 1891, when said ditch was completed and water was carried there-through and applied to the irrigation of the lands lying thereunder. That several thousand acres of land lying under said ditch were reduced to cultivation in 1891, and the area of such land was increased yearly thereafter until the year 1898, when approximately 13,500 acres were under cultivation from said ditch; all of said lands being situate within the state of Nebraska, and said ditch irrigating no lands within the state of Wyoming.

"(4) That on March 27, 1906, by an order duly entered, the Board of Control of the State of Wyoming directed that a general adjudication of all rights of appropriation from the North Platte river be had and that the superintendent of water division No. 1, in which said stream lay, should give proper notices and take all proofs of appropriation. That on May 9, 1906, the superintendent of water division No. 1, forwarded by registered mail to all appropriators from the North Platte river, including the Mitchell Irrigation & Canal Company, a notice setting forth the date when the state engineer would begin the examination of the stream and ditches diverting water therefrom, the date when the said superintendent would begin the taking of testimony, and the date when the said taking of testimony would close. That prior to May 15, 1906, the said superintendent caused to be published in two issues of a newspaper published in each county through which said North Platte river runs a notice that the measurement of ditches would commence June 15, 1906, that the superintendent would commence to take proofs of appropriation on June 23, 1906, and travel up the river taking such proofs until September 20, 1906, on which day proofs would be closed, and that proofs would be open to inspection at certain designated places on September 25, September 27, September 29, October 4, and October 8, 1906.

"(5) That at the time and place so designated for the commencement of the taking of said proofs of appropriation, the officers of the relator, the relator having theretofore acquired all of the right and title of said Mitchell Irrigation & Canal Company in and to said ditch and the water appropriation therefor, appeared before the said superintendent and filed with said superintendent

a proof of appropriation on behalf of relator, certified by the affidavit of a director of relator, claiming a right to the use of the waters of said North Platte river, with a priority dating from June 20, 1890, through said ditch, therein designated the Mitchell Canal, for the irrigation of certain lands within the state of Nebraska and lying under said ditch.

"(6) That on November 1, 1907, the said superintendent caused to be published in the Guernsey Gazette, a newspaper of general circulation in said Laramie county and published at Guernsey in said county, a notice that certain persons, including this relator, had filed proofs of appropriation from the North Platte river which would be opened to inspection on November 8, 1907, that contests must be filed within 15 days thereafter, and that if no contests should be filed the said proofs of appropriation would be submitted to the Board of Control with the recommendation that final certificates be issued thereon.

"(7) That no contest was filed against the said proof of appropriation of this relator.

"(8) That on April 18, 1912, the superintendent of water division No. 1 transmitted the said proof of appropriation of this relator to the Board of Control for its action, and that the said Board of Control refused to consider said proof, and on the 4th day of December, 1912, entered the following order with respect thereto: 'In re Petition of the Mitchell Canal Company for Adjudication of Their Right to the Use of Water from North Platte River in the State of Nebraska. In Water Division No. 1. Order. This matter coming on for hearing before the Board of Control on the 20th day of November, 1912, upon the report of Frank S. Knittle, superintendent of water division No. 1, transmitting to the board the proof of appropriation of the Mitchell Irrigation District, and it appearing that the Mitchell Canal, the canal covered by said proof, diverts water in Wyoming for the irrigation of lands in the state of Nebraska, and that no lands are irrigated therefrom in the state of Wyoming, and the Attorney General having advised the board that the Board of Control is without jurisdiction to enter any decree respecting said canal, it is hereby ordered that the Board of Control take no action upon said proof.'

"(9) That relator has no remedy in the premises at law.

"(10) That this action is instituted in this court in the first instance for the following reasons: This matter having been referred by the Board of Control to the Attorney General for an opinion as to the jurisdiction of the Board of Control to adjudicate a right of the character here claimed, where a ditch diverts water in Wyoming for the irrigation of lands in another state, and the Attorney General being doubtful as to the existence of such jurisdiction he so advised the board in

order that the question of jurisdiction might be judicially ascertained, if possible, before the board should take any action; the board now has or soon will have before it several more proofs involving the same question and is desirous of having a judicial determination, by the highest court of the state, as to whether it has jurisdiction to determine the validity of such appropriations. In the case of the proof of appropriation of the relator, neither any other appropriator nor the Board of Control dispute or contest any of the facts upon which an appropriation is claimed, and the only questions involved are those of law: First, what tribunal has jurisdiction to adjudicate the right of relator? and, second, as a matter of law, is such an appropriation valid? The first question must be settled before the second can be considered, and, as a determination of the first question will affect the rights of no person or corporation, but will merely establish the matter of practice, it is necessary that such a determination be had as soon as possible and that it be final.

"Wherefore, relator respectfully prays that a writ issue requiring and directing the defendants, as the Board of Control, to proceed with the determination of the right of relator to an appropriation from the North Platte river through the Mitchell Canal, as claimed in its said proof of appropriation."

The only question which this court need here consider is whether the Board of Control has jurisdiction to consider the question of relator's priority, if any, upon the facts pleaded, for in our view whether any other tribunal could adjust relator's claim to a water right is not germane here, and as to the further interrogatory as to whether his appropriation is valid as propounded in the second question it is one which is to be primarily determined by the Board of Control if such board be clothed with the power so to do. Sections 1, 2, and 3 of article 8 of the Constitution of this state are as follows:

"Section 1. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

"Sec. 2. There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.

"Sec. 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

It will be observed that the powers con-

ferred upon the board remain dormant until the manner of their execution is prescribed by law. In considering such powers and the exercise thereof, the provision of the Constitution and the lawful regulations enacted in pursuance of such provision must be considered together. Such construction is not, however, required in this proceeding. Upon an application to adjudicate a water right, it is the duty of the board in the first instance to determine under the law whether the applicant has a water right, and the board's finding on that question may properly be made the basis of an appeal to the district court of the county wherein the water of the state is appropriated. Here there is nothing to appeal from, and that is the complaint of the company. Such company may or may not on its proofs and showing or on the facts alleged be entitled to the claimed water right. To determine that question, an application as it appears from the allegation of the petition has been properly made and presented to the board; and we think the board has jurisdiction to determine the fact whether or not upon the evidence so produced a water right recognized or allowed by our laws has been shown. To refuse to act in such a case is equivalent to a denial of the right of appeal to the courts of the state as provided by the Constitution in order that the questions involved may take the usual course at the instance of the party aggrieved. We are of the opinion that the board has power to act under the provisions of the Constitution and within the statutory regulations with reference to adjudications of water rights. This court in this proceeding can go no further than to determine whether the board shall act at all, and is not concerned as to what conclusion the board may reach. It follows that the board has jurisdiction to and should act upon the proofs. Whether a right for the use shown by the proofs was or could have been lawfully acquired is not now before the court. This is conceded by counsel.

The demurrer to the petition and writ is overruled.

POTTER and BEARD, JJ., concur.

#### GILLESPIE v. WHEATLAND INDUSTRIAL CO. (No. 779.)

(Supreme Court of Wyoming. May 15, 1914.)

NEGLIGENCE (§ 29\*)—LANDOWNERS—LIABILITY.

An owner of uninclosed land is not liable for the death of trespassing cattle which strayed on his property and fell into an open ditch, for, while the owner of the cattle is not liable for their trespass because the land was uninclosed, that does not make the entry of the cattle rightful, nor cast on the landowner the duty of exercising care for their safety.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 41; Dec. Dig. § 29.\*]



Error to District Court, Laramie County; Roderick N. Matson, Judge.

Action by Alexander B. Gillespie against the Wheatland Industrial Company, a corporation. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Frank E. Anderson, of Laramie, for plaintiff in error. Clark & Clark, of Cheyenne, for defendant in error.

**BEARD, J.** In this action the plaintiff in error, who was plaintiff below, sought to recover damages for the loss of certain cattle which fell into a ditch and were killed. So far as necessary to understand the question presented here, the facts as stated in the petition are: That the defendant owned, operated, and constructed a certain reservoir and irrigation works. That it constructed a spillway in the reservoir for the purpose of carrying off the surplus waters accumulating therein, and that great quantities of water from said spillway flowed across a certain section of land, causing a deep ditch to be washed out across said land, which ditch was unsafe and dangerous to live stock crossing the range at or near said reservoir and spillway. That defendant knowingly, willfully, carelessly, and negligently maintained said ditch in a dangerous condition, and failed and refused to fence or guard it in any manner, although aware of its dangerous condition. That certain cattle of plaintiff were caused by a snowstorm to travel toward said unguarded ditch, fell therein, and were killed by reason of defendant's negligence in not properly fencing and guarding said ditch. The defendant, among other defenses pleaded in its answer, admitted the ownership and control of the reservoir, and that water flowed therefrom through said spillway, and that the water therefrom caused a ditch to be formed across the land described in the petition, alleged the necessity for the spillway, and then alleged that at the time said ditch was created the land upon which it was situated was and still is the property of the Swan Land & Cattle Company, Limited, a corporation, and at all times mentioned the defendant had been in lawful possession of the same as lessee; that said cattle of plaintiff were upon said premises without the consent of the owner thereof, or of the defendant, and were trespassing thereon at the time they were alleged to have fallen into said ditch. To that defense, the plaintiff demurred, and the demurrer being overruled, he elected to stand thereon, and judgment was entered dismissing the petition, and against plaintiff, for costs. He brings the case here on error.

The sole question presented is whether or not the owner or person in lawful possession of uninclosed lands is liable in damages to the owner of live stock killed or injured by straying thereon from the public range, if the owner or person lawfully in possession of

such premises caused or permits them to be in an unsafe or dangerous condition for live stock so straying thereon.

The gist of the argument of counsel for plaintiff is that the cattle were not unlawfully on the premises, and hence were not trespassing thereon. This argument is based upon the holding that the owner of live stock running at large upon the range is not liable for damages done by such stock straying upon the uninclosed lands of another. But the reason for such nonliability is, not because they are not trespassing, but because no duty rests upon the owner to keep his stock off uninclosed land, and he is not guilty of negligence in failing to do so, or in permitting them to run at large, and, being guilty of neither a willful trespass nor negligence in the care of his stock, he is not answerable in damages, and for the further reason that the landowner has the right to exclude such stock from his premises by fencing against them, or otherwise preventing them from coming or being thereon, and, if he neglects to do so, he takes the risk of trespass by animals lawfully running at large. Such stock were not rightfully upon such uninclosed land in the sense that the owner had the right to run and graze them there, for, if they were, then the landowner would have no lawful right to exclude or remove them therefrom. On the other hand, as a general rule, the owner of uninclosed lands is under no duty to make or keep them in safe condition for stock straying thereon. In *Wilt v. Coughlin* (Mo. App.) 161 S. W. 888, it was held: "The law is well settled in this and many other jurisdictions that the owner of uninclosed land is under no obligation to make it safe for pasturage, and, if stock stray upon it and sustain injuries by falling in a well or other excavation, there is no liability resting on the landowner for such loss"—citing *Hughes v. Railroad*, 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 596; *Peek v. Western Union Tel. Co.*, 159 Mo. App. 148, 140 S. W. 638; *Overholt v. Vleths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557; *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668; *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764; *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478. To which we add, Ill. Cent. R. R. Co. v. *Carraher*, 47 Ill. 333; *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557, 59 L. R. A. 771, 94 Am. St. Rep. 818. The present case differs from *Ditch Co. v. Morrow*, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955. In that case the stock belonged to the owner of the land through which the defendant's ditch extended, and were rightfully on the premises. Counsel for plaintiff cites *Haughy v. Hart*, 62 Iowa, 96, 17 S. W. 189, 49 Am. Rep. 138; *Jones & Norris v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575; *Young v. Harvey*, 16 Ind. 314; and *Nobleville Gas & Imp. Co. v. Teter*, 1 Ind. App. 322, 27 N. E. 635. In the Iowa case the excavation was alleged to have

been made "immediately adjacent to a highway." In the Arkansas case the pit was also close to the highway, and cotton seed and corn had been left by the appellants scattered in the neighborhood of it. In the case in 16 Ind. the court said: "We think any reasonable man of ordinary understanding and extent of observation of the ways of life would say that the probability of injury to others, under the circumstances, from leaving the well in question in the condition it was, was not only strong, but that it amounted almost to a certainty—a probability as strong as would arise from an unguarded cellar on a street in the city." And in the Nobleville Case the excavation was in the street. Those cases point out the exceptions to the general rule and the particular circumstances and state of facts which will render the landowner liable. No such conditions are alleged in this case as would bring it within the rule as announced in either of those cases. The demurrer was properly overruled, and the judgment of the district court is affirmed.

Affirmed.

SCOTT, C. J., and POTTER, J., concur.

NICKERSON et al. v. WINSLOW, County Attorney. (No. 765.)

(Supreme Court of Wyoming. May 15, 1914.)

Petition for rehearing. Denied.

For former opinion, see 138 Pac. 184.

BEARD, J. Counsel for plaintiffs in error has filed a petition for a rehearing in this case; the opinion having been handed down February 3, 1914, and appearing in 138 Pac. 184. It was argued at great length in the original brief filed in the case, and is reargued in the brief in support of the petition for rehearing, that the court erred in its construction of the act of February 17, 1911, in holding that it did not apply to officers elected at the general election in November, 1912. It is insisted that it was the intention of the Legislature to make the change applicable to those officers, although the act was not to take effect until December 31, 1912, after such election; that the act could not have taken effect at any other time or upon its passage. In that respect we differ from counsel. The act could have become the law at once governing the salaries of officers elected thereafter, and the Legislature must be presumed to have known that it would not affect the salaries of those then in office or who had been elected prior to the taking effect of the act, during the term for which they had been elected. Or it could have been said that the act should not affect the salaries of such officers during such terms. It is insisted by counsel that the only reason for postponing the taking effect of the act until December 31, 1912, was to have it occur at the end of the terms of those then in office. But we take judicial notice that at the same session of the 1911 Legislature, and prior to the act of February 17th, it created six new counties in the state, and, if they proceeded at once under the law to organize, their county officers, including an assessor, could not be elected until the general election in November, 1912, and the first separate assessment of both the new and the parent counties would

be made in 1913, after the officers in both the old and the new counties had been elected; and, until such assessment, the class to which either would belong could not be officially ascertained without at least great difficulty, so that there appears to have been a substantial reason for postponing the taking effect of the act. But, whether or not that was the reason, or what the reason therefor may have been, the Legislature, in plain and positive terms, did postpone the taking effect of the act until December 31, 1912.

A rehearing is denied.

Rehearing denied.

SCOTT, C. J., and POTTER, J., concur.

PHILLIPS v. BISHOP et al. (No. 18,713.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 68\*)—PERSONAL PROPERTY.

Modern courts have shown a tendency to depart from the old rule that there can be no specific performance of a contract except for the conveyance of real estate, and where there has been part performance, and especially where the services rendered are of a peculiar character which the parties never intended to be measured by pecuniary standards, the courts recognize no distinction between personal property and real property, and will grant relief in either case where there are no circumstances or conditions which render the claim inequitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 199; Dec. Dig. § 68.\*]

2. SPECIFIC PERFORMANCE (§ 121\*)—CONTRACT AS TO PERSONALTY—EVIDENCE.

In this case the testimony is held sufficient to sustain a finding that a written contract was made for the benefit of the plaintiff when she was two years old between her father and childless neighbors, husband and wife, by which she was to be received into their family as their child, reared and cared for by them, and was to receive at their death all their property; that she had fully performed her part of the contract; that the husband died intestate; that the wife afterwards died, having willed her personal property to the defendants, and therefore a decree for specific performance of the contract against the devisees and heirs at law is affirmed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

3. TRIAL (§ 84\*)—OBJECTIONS TO EVIDENCE—LOST INSTRUMENT.

Where one who was in possession of a written contract testified to its loss, and there was no objection to testimony as to the contents of the writing on the ground that a sufficient foundation had not been laid, the only objection being that the same was incompetent, the objection was properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.\*]

Appeal from District Court, Jackson County.

Action by Mary Bishop Phillips against Nancy Bishop and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Waters & Waters, of Topeka, for appellants. Crane & Woodburn Bros. and Charles Hayden, all of Holton, for appellee.

PORTER, J. The plaintiff is the daughter of Samuel and Permella Slater. In 1872, when she was two years old her mother died. H. P. Bishop and Catherine Bishop, his wife, were living at Holton at the time; they were about 40 years of age and had no children. They entered into a written contract with the father of the plaintiff by the terms of which they were to take the plaintiff as their own child, educate and provide for her, and at their death she was to have all their property; she was to take the name of Bishop, and it was agreed that her father, brothers, and sisters were not to disclose their identity until she was grown. She lived with the Bishops as their child, and never knew that she was not their daughter until she was past 19 years of age. Soon after this she was married under the name of Bishop. H. P. Bishop died intestate in 1892. His widow, Catherine Bishop, some time thereafter conveyed to plaintiff the home, consisting of two lots in Holton and the household goods. Catherine Bishop died in 1911, being at the time the owner of considerable personal property, consisting of moneys, notes, bonds, and mortgages. She had made a will, devising all her property to the defendants, who are her relatives. The will was probated, and an administrator of her estate appointed by the probate court. Plaintiff brought this action for specific performance of the contract.

In addition to a general denial the answer alleged that there never had been any contract to make the plaintiff the legal heir of the Bishops, but that she was taken by them to be raised as their child; that the Bishops had expended large sums of money in educating her and in providing her a home; that when she learned that she was not their daughter, she lost affection for them and became disaffected; that she married against their advice. The court found that the contract made by her father for her benefit was fully carried out by the plaintiff, and decreed specific performance.

The principal error complained of is that the court erred in permitting the plaintiff's father to testify to the contents of the written contract without a sufficient foundation for secondary evidence. The plaintiff testified that she had read the contract, and had possession of it when she was 19 years old. She also testified: "I put it in my desk; my furniture was shipped to Texas and it was lost in it; never saw furniture again; it was in draw; have not seen the contract since. I got it from my mother, Mrs. Bishop."

[3] Among the cases cited is *C. K. & N. Ry. Co. v. Brown*, 44 Kan. 384, 24 Pac. 497. In that case it was stated in the opinion that no evidence had been offered tending to show that the writings had been lost or destroyed, or that any search had ever been made for them. The evidence here shows the loss of the contract, and, moreover, a loss under

such circumstances that it would seem to have been useless to make any search. We think the same rule should apply as where a paper is shown to have been lost in the mails. In such a case it has been held that proof of the loss is sufficient to let in secondary evidence. *Shaw v. Pershing*, 57 Mo. 416. However, it appears that no objection was made to the testimony on the ground that a sufficient foundation had not been laid, nor was plaintiff cross-examined on the subject. Her statement that the contract was lost when the furniture was shipped to Texas seems not to have been questioned on the trial. The only objection to the testimony as to the contents of the writing was that it was incompetent. The objection was properly overruled.

[1] It is insisted that because Catherine Bishop left nothing but personal property, the suit cannot be maintained; that plaintiff had an adequate remedy at law to recover the value of the property. Modern courts have shown a tendency to depart from the old rule that there can be no specific performance of a contract except for the conveyance of real estate, and have enforced contracts of this character relating to personal property. Where there has been part performance, and especially where the services rendered are of a peculiar character, which the parties never intended to be measured by pecuniary standards, the courts recognize no distinction between personal property and real property and will grant relief in either case. See cases cited in the opinion in *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229, where the facts were very similar to those in the present case, and where specific performance was decreed involving property both real and personal. The opinion cites *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270, in which specific performance was granted covering all the property subject to testamentary disposition at the time of the death of the person who agreed to devise to the plaintiff.

[2] We think the testimony was sufficient to sustain the finding of the court that the contract was made substantially as claimed; that the plaintiff had fully complied with its terms, and was entitled to specific performance.

The judgment is affirmed. All the Justices concurring.

PARISH v. VAN ARSDALE-OSBORNE  
BROKERAGE CO. et al.  
(No. 18,559.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

I. ATTACHMENT (§ 164\*)—LEVY—REQUISITES.  
It is not necessary to a valid attachment that the officer shall make a manual seizure of personal property, but it is deemed sufficient

if he assumes control and exercises dominion over it.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 464-479; Dec. Dig. § 164.\*]

**2. ATTACHMENT (§ 345\*)—WRONGFUL ATTACHMENT—ACTION ON BOND—DEFENSE—LEVY.**

An owner of property advertised that it would be sold at public auction at a certain time, and on the day of sale the sheriff appeared at the place of sale where the property was assembled, with an order of attachment sued out by the plaintiff. After stating his purpose, and under an arrangement with the sheriff, the defendant owner gave a forthcoming bond, in which it was recited that the property had been seized under the order of attachment and was bound by it, and thereupon the property was released and the sale proceeded. The attachment was subsequently vacated on the ground that the defendant was not indebted to the plaintiff, and in an action on the attachment bond it is held that, as between the plaintiff and the defendant, there was a valid levy of the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1241-1247; Dec. Dig. § 345.\*]

**3. ATTACHMENT (§ 351\*)—WRONGFUL ATTACHMENT—ACTION ON BOND—DAMAGES RECOVERABLE.**

The expenses necessarily incurred in procuring the dissolution of an order of attachment wrongfully issued and a release of the property unlawfully seized, including attorney's fees and the cost of depositions, may be recovered by the owner on the attachment bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1290-1303; Dec. Dig. § 351.\*]

**4. ATTACHMENT (§ 351\*)—WRONGFUL ATTACHMENT—ACTION ON BOND—DAMAGES RECOVERABLE.**

The depreciation in the value of property and of the prices received, which proximately resulted from the unlawful attachment of the property at the sale, is an element of damages which may be recovered by the owner.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1290-1303; Dec. Dig. § 351.\*]

Appeal from District Court, Woodson County.

Action by H. C. Parish against the Van Arsdale-Osborne Brokerage Company and others. From judgment for plaintiff, defendants appeal. Affirmed.

S. C. Holmes, of Yates Center, Geo. Gardner, of Wichita, and T. A. Nofztger, of Anthony, for appellants. Lamb & Hogueland, of Yates Center, for appellee.

JOHNSTON, C. J. This was an action upon an attachment bond to recover the damages sustained by reason of an unlawful attachment. The appellant the Van Arsdale-Osborne Brokerage Company caused an attachment to be issued against the property of the appellee, H. C. Parish, having previously given an attachment bond in the sum of \$200 signed by C. G. Ricker as surety. The appellee had previously advertised a public sale of his personal property at his residence, and on the day of the sale, and when a part of those who attended the sale had assembled, the sheriff appeared with the order of attachment which, it is alleged, was levied upon appellee's property. Instead of

taking manual possession of the property or removing it from appellee's place, the sheriff arranged with appellee that the following bond should be given: "State of Kansas, Woodson County—ss.: Whereas, Van Arsdale-Osborne Bro. Co., has commenced a civil action against H. C. Parish in the district court within and for said county and state; and whereas, an order of attachment has been issued in said action, and the property of the said H. C. Parish has been attached, and is now bound therefor, which property the sheriff of said county now returns to the said H. C. Parish, defendant in said action: Now we, the undersigned, residents of said county, bind ourselves, to said plaintiff, in the sum of two hundred and no-100 dollars (being double the appraised value of said property) that said property or its appraised value in money shall be forthcoming to answer the judgment of said court in said action." This bond was signed by the appellee and another, was approved by the sheriff, and the sale proceeded, but there is testimony to the effect that the attachment proceedings became known to persons who attended the sale and others who contemplated attending it, with the result that the property was sold for much less than its value and what it would have sold for if the attachment proceedings had not been instituted. The trial resulted in a verdict in favor of appellee in the sum of \$200, and special findings were made to the effect that the damages awarded consisted of \$50 as attorney's fees in the attachment proceeding, \$5 for the taking of depositions in that proceeding, and \$145 for other injuries sustained which arose from the wrongful attachment.

[1, 2] It is contended that there was no actual levy of the attachment, and that consequently there can be no recourse upon the attachment bond for any damages that may have resulted from the action of the sheriff. The return of the sheriff, which included the forthcoming bond executed by the appellee and accepted by the sheriff, and which was set forth in appellee's petition, and not denied by appellant, recited that appellee's property was seized and held under the order of attachment and that the property was returned to appellee when the bond was given. It is not necessary to a valid levy that the officer should even touch the property or make a manual seizure of it. It is enough if he assumes control of it and exercises dominion over it. *Throop v. Maiden*, 52 Kan. 258, 34 Pac. 801; 4 Cyc. 591. The sheriff, who was acting at the instance of the appellant, in effect says that he assumed control over the property prior to the execution of the bond by appellee. The recitals show that dominion over the property was exercised by the officer acting in behalf of the attaching plaintiff, and it was

acknowledged by the owner of the property. Other questions might arise if the rights of a bona fide purchaser or a subsequent attaching creditor were involved, but the only parties to this controversy are the appellant, who caused the attachment to be issued, and the appellee, who owned the attached property, and as between them there is little room for controversy. There was no verified denial of the facts relating to the attachment which were stated in the return of the sheriff and in the bond, which were made a part of appellee's petition, neither does it appear from the record that the question of the sufficiency of the bond was raised in the trial court. It cannot be held, therefore, that the order of attachment was not levied.

[3] There is complaint of the allowance of attorney's fees and the item for taking depositions as damages. The expense incurred in defending against an attachment wrongfully sued out may be allowed as damages in an action brought upon the attachment bond. In *Sanford v. Willetts*, 29 Kan. 647, it was held that the expense incurred and the value of the time expended in obtaining a release of property wrongfully attached constitute actual damages which are recoverable. In *Tyler v. Safford*, 31 Kan. 608, 3 Pac. 333, it was ruled that attorney's fees necessarily paid to free property from an unlawful attachment might be allowed, that the employment of nonresident attorneys was permissible, and that their traveling expenses between their home and the place of trial was a proper element of damages. It is argued, however, that the \$50 item for attorney's fees, as well as the \$5 item paid to obtain a deposition, should not be allowed because they were not incurred in obtaining a dissolution of the order of attachment, but were rather used upon the trial of the main case in which the order was issued. No preliminary motion was made to dissolve the attachment, but the question of whether there was a debt which was justly due was tested on the final trial, and it was then determined that there was no indebtedness, and consequently an order was made vacating and setting aside the attachment. To obtain the attachment the appellant made an affidavit that it had a claim against the appellee for a certain amount which was justly due. In order to establish that there was no basis for this claim, and the appellee was not indebted to the appellant in any amount, a trial of the merits was necessary. There might have been a preliminary motion to dissolve the attachment on the ground that the averments of the affidavit were not true, and that there was no indebtedness, but the same proof would have been necessary on that motion as on the final trial that was had. Just such a trial as was had was necessary to get rid of the illegal attachment and to free the property from the apparent lien; and, as the fees in

question were expended in accomplishing this purpose, they were proper elements of damages. As was said in *Schwartzberg v. Bank*, 84 Kan. 581, 115 Pac. 110: "The decision of the court in the attachment action, finding in favor of the plaintiff herein and dissolving the attachment, is conclusive proof that the attachment was unlawful. *Hoge v. Norton*, 22 Kan. 374. The plaintiff then had the right to proceed further and prove the nature of the wrongful acts and the extent of his damages therefrom." 84 Kan. 585, 115 Pac. 111.

[4] It is further contended that the allowances made because of depreciation in the price of the animals and articles disposed of at the sale which was interrupted by the attachment are not proper elements of damage. It appears that appellee had advertised a sale of his personal property. About the time for the sale to begin, and when a large number of persons had assembled to attend the sale, the sheriff appeared with his attachment order. A bond was taken, as has been stated, under section 200 of the Civil Code, providing that the property or its value should be forthcoming to answer the judgment in the action. According to the testimony the sale was delayed for a few hours, and the effect of the attachment became a subject of discussion among the bidders present, and there was a fear that something was wrong about the sale. The news of the attachment deterred at least one man from going to the sale who desired to purchase some of the property that was offered at the sale. Considerable testimony was offered tending to show that the property, with the exception of one or two items, brought much less than its value. Of course property does not always sell for its value at an auction sale, but the testimony is that there was an exceptional slump at this sale, and that horses, cows, hogs, hay, feed, and implements worth about \$1,400 was sold for \$800. It is contended that there was evidence tending to show a depreciation of \$600, and there appears to be enough to justify the award of \$145 made by the jury. The bond upon which the action was brought stipulated that appellee should be paid "all damages which he may sustain by reason of said attachment if it be wrongfully obtained." That attachment was wrongfully obtained, and if the depreciation was the immediate result of the wrongful attachment, the appellee was entitled to recover it. Here there was no loss of property, nor any special injury to the property itself, but the contention is that the unlawful attachment not only interfered with the sale, but threw doubt and discredit on it so as to cause depreciation and loss. It is well settled that injury to the credit, reputation, and business of a defendant in attachment is too remote and speculative to be recovered. *Dody v. Bank*, 82 Kan. 406, 108 Pac. 804. Here it is not an

injury to the credit of the owner that it involved, but it is an injury which affected the property itself. It is not difficult to understand that the seizure of the property by attachment might raise a doubt in the minds of the purchasers as to the risk of buying, and that it would operate to depress the prices paid. If the property had been held by the sheriff for several days, instead of several minutes, the depreciation in the value of the property during the time it was held could have been recovered, and it would seem that the depreciation resulting from the seizure and holding of the animals and articles even for a short time can be regarded as the direct and proximate result of the wrongful attachment. It is not unreasonable to infer that the property could have been sold for its value if it had not been attached, as the testimony is that under normal conditions property is usually sold for its value at such sales in that community. As the loss appears to have resulted directly and proximately from the illegal seizure, it is, we think, a proper element of damages. *Nixon v. First State Bank of Hamlin* (Tex. Civ. App.) 127 S. W. 882; 4 Cyc. 880. The court is inclined to take a liberal view of the damages recoverable where property is wrongfully seized, and to allow for any depreciation or loss which is susceptible of measurement and is the immediate result of a wrongful attachment. In an attachment case it was held that a party whose property was wrongfully seized may recover, not only the loss sustained, but also the gains prevented by the wrongful act. A herd of cattle wrongfully attached were placed in an inferior pasture, and were not given proper feed and care, with the result that they did not make the ordinary gains in weight and value, and it was held that the gains so prevented were open to measurement and might be recovered. *Hoge v. Norton*, 22 Kan. 374. Other cases in which the same liberal view was taken in regard to the allowances of damages are *Sanford v. Willetts*, 29 Kan. 647; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; *Enlow v. Hawkins*, 71 Kan. 633, 81 Pac. 189; *Gas Co. v. Bailey*, 77 Kan. 296, 94 Pac. 258.

There were some objections to rulings made during the trial, but in none of them do we find any substantial error.

The judgment of the district court will be affirmed. All the Justices concurring.

LITTLE v. LIGGETT. (No. 18,843.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

EVIDENCE (§ 461\*)—PAROL—APPLICATION FOR LOAN.

The doctrine of the case of *Babcock v. DeFord*, 14 Kan. 408, permitting an ambiguous and incomplete contract to be explained and

supplemented by parol evidence, and the doctrine of *Stroupe v. Hewitt*, 90 Kan. 200, 113 Pac. 562, permitting the introduction of parol evidence to show that a contract was not to take effect until the ascertainment of some fact, applied to an application for a loan containing a notation with respect to the commission for securing the loan, in a suit for the commission.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.\*]

Appeal from District Court, Sedgwick County.

Action by William C. Little against J. S. Liggett. From judgment for defendant, plaintiff appeals. Affirmed.

Adams & Adams, Kos Harris, and V. Harris, all of Wichita, for appellant. Dale & Amidon, Jean Madalene, and B. F. Hegler, all of Wichita, for appellee.

BURCH, J. The action in the district court was one to recover a commission for obtaining a loan which the proposed borrower declined to accept.

Little was president of the Wichita Loan & Trust Company. Liggett owned vacant lots in Wichita upon which he desired to erect a three-story fireproof business building, to be constructed and equipped according to modern design and method. Preliminary estimates indicated that a building such as he had in mind could be erected for \$55,000. His resources were such that, if the building cost more, he could not undertake its construction, and at those figures he would need a loan of \$40,000. The situation was discussed with Little, who took an application to his company for the loan. It was orally agreed, however, that, if the cost of the building, when definitely ascertained, should exceed the preliminary estimate, no loan should be made, and, if none were made, no commission should be paid. At that time formal plans and specifications had not been prepared. When this was done and bids for the construction of the building were solicited, the bids ranged from \$65,000 to \$79,000. In the meantime the loan and trust company presented the application to a New Hampshire banking company, which agreed to make the loan. Liggett declined to take the loan, and Little, as assignor of the loan and trust company, sued for a commission. He was defeated by proof of the oral agreement, and appeals.

The application for the loan was made on a blank form provided by the loan and trust company. Under the caption, "Application for City Loan," appeared the following: "I, the undersigned, John S. Liggett, of Wichita (post office), county of Sedgwick, state of Kans. do hereby appoint W. L. & T. Co. my agent to procure a loan for me of forty thousand dollars, for term of five years, at 5½ per cent. per annum, \$1,000 com. 150.00 cash, 300.00 one year, 550.00 two years, interest to be paid semi-annually, principal and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

interest payable at such place as the lender may direct, and secured by first mortgage of approved form on real estate hereinafter described." Following this matter appeared the usual series of questions and answers covering many subjects supposedly pertinent to applications for loans on city property. The printed form of application which was used contemplated an agreement to accept the loan applied for and an agreement to pay for services in procuring it, in case it should not be accepted; but, because the proper blanks were not filled, those engagements were eliminated.

The plaintiff argues that the written application constituted a contract which so clearly and definitely expressed all the results of the negotiations of the parties that it could not be explained or supplemented by parol evidence.

The court interprets the instrument as an application to be presented to investors as the basis for negotiating a loan. It is uncertain and ambiguous. Thus the provision, "1000 com. 150.00 cash, 300.00 one year, 550.00 two years," might well relate to the terms of the loan, in the midst of which it is found, and not to the terms of the agency. The instrument is also incomplete. There is no express promise to accept a loan if one were obtained or to pay for services in obtaining a loan, although the paper contained matter drawing the attention of the parties to those subjects. While the law might attach such obligations to the application, the instrument itself does not declare them. The result is that extrinsic evidence was proper to show with certainty the full and true intention of the parties. The parol evidence produced did not contradict anything that was written. Authority to negotiate a loan, the amount of commission, and the terms of payment were not disputed, but they were supplemented by conditions which were agreed to contemporaneously with the things set down in the application, and which were not proper to be inserted in the application, considering the use to be made of it.

Thus far the application has been regarded as taking effect at the time it was signed, and the opinion of the court, delivered by Mr. Justice Brewer, in the early case of *Babcock v. Deford*, 14 Kan. 408, is decisive of the controversy. The doctrine of this case has been approved and applied in many subsequent decisions. The distinction between such cases and cases like *Thisler v. Mackey*, 65 Kan. 464, 70 Pac. 334, in which the defense was that the express and unconditional promise to pay contained in a promissory note was conditional, is obvious. The evidence and special findings of the jury are open to another interpretation, however, equally conclusive against the plaintiff.

The defendant testified in substance that, when the subject of a loan was discussed with the plaintiff, he had nothing but a pre-

liminary estimate of the cost of the contemplated building; that this estimate was not made by an architect but was simply a lump guess and was unsatisfactory; that he intended to have building plans made; that he could then tell whether or not he could build for so much money as he could afford; that he did not care to go to any expense, so far as a loan was concerned, until he could see whether he was going to build; that all this was talked over with the plaintiff; and that, yielding to the solicitation of the plaintiff, he signed the application on that basis. From this testimony the jury made the following findings:

"Was the application for the \$40,000 loan conditioned that the same would build the contemplated building on the lots in question? Ans. Yes.

"Did the defendant employ the Wichita Loan & Trust Company to procure the loan for him of \$40,000.00 at 5½ per cent. interest on the real estate owned by defendant? Ans. Yes, provided that building could be constructed for \$55,000.

"Did the defendant agree to pay the Wichita Loan & Trust Company \$1,000 commission for procuring a loan for him of \$40,000, bearing 5½ per cent. interest at 5 years? Ans. Yes, provided building contemplated was constructed."

Since the application and the agency which it created were conditioned upon the definite ascertainment of the cost of the building, the decision in the case of *Stroupe v. Hewitt*, 90 Kan. 200, 133 Pac. 562, applies.

"A contract cannot be varied until there is a contract, and there is none until it takes effect. Evidence that a writing purporting to be an agreement is not to take effect until the happening of some event or the ascertainment of some fact may be received, not to contradict the writing, but to show when it took effect, or that it never took effect." 90 Kan. 203, 133 Pac. 563.

This ends the case. The controlling facts were those found specially by the jury, and the findings are unaffected by any of the assignments of error other than that the parol evidence on which they were based was not admissible.

The judgment of the district court is affirmed. All the Justices concur.

STATE v. JOHNSON. (No. 19,198.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. HOMICIDE (§ 139\*)—INFORMATION—SUFFICIENCY.

An information which, instead of following some approved form, charged that the defendant feloniously, willfully, deliberately, premeditatedly, and with malice aforethought made an assault upon the deceased with intent feloniously, willfully, deliberately, premeditatedly, and with malice aforethought to kill and murder

him, and did then and there with a loaded gun feloniously, willfully, premeditatedly, and with malice aforethought shoot and inflict on him a mortal wound of which he instantly died, is held to contain all the essential elements of murder in the first degree, including deliberation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 232-235; Dec. Dig. § 139.\*]

**2. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.**

The sole defense was insanity, and the defendant introduced the evidence of a large number of witnesses on that subject. After correctly charging as to the burden and degree of proof, the presumptions of innocence, sanity, and the natural consequences of one's acts, the court instructed: "It devolves upon the defendant, therefore, in the first instance, to raise the question. But a defendant in a criminal case is not required to prove his insanity by a preponderance of the evidence in order to avail himself of that defense, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls upon the state. And if upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case under the evidence, there should be a reasonable doubt as to whether the defendant was at the time of the shooting sane or insane, with respect to the particular act charged against him, he must be acquitted." *Held*, that in view of the correctness of other instructions and the fact that the defendant had introduced much evidence touching his claimed insanity no substantial prejudice resulted from the use of the language quoted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

**3. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—EFFECT OF CHARGE AS A WHOLE.**

The following was also given: "The jury should then first consider this question of insanity, this defense of insanity, and if you should say that it should prevail under these instructions, that is to say, if you believe from the evidence that, at the time of shooting, the defendant (was) laboring under such defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or, if he did not know it, that he did not know what he was doing was wrong, you should acquit him; but if you should believe that, under the instruction I have given you, he should be held responsible, you should then turn and determine more exactly the nature of the act itself," etc. *Held* that, in view of the entire charge, this portion was not so misleading as to cause the jury to lose sight of the rule that it was only necessary, in order for an acquittal, that they should have a reasonable doubt as to the sanity of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

Smith and West, JJ., dissenting.

Appeal from District Court, Saline County.

Swan Johnson was convicted of murder in the first degree, and appeals. Affirmed.

Burch & Litowich, of Salina, for appellant. Jno. S. Dawson, Atty. Gen., and Leonard W. Hamner and R. A. Lovitt, both of Salina, for the State.

WEST, J. The defendant was convicted of murder in the first degree. This appeal presents two questions. It is contended that the

information was bad for the reason that the killing was not alleged to have been done deliberately, and that the court erred in instructing the jury regarding the sole defense interposed—that of insanity.

[1] The information charged that the assault was made feloniously, willfully, deliberately, premeditatedly, and with malice aforethought to kill and murder, and that the shooting was done feloniously, willfully, premeditatedly, and with malice aforethought, giving a mortal wound, and that the defendant "in the manner aforesaid unlawfully, feloniously, willfully, premeditatedly, and with malice aforethought did kill and murder." It is urged that the statutory and settled ingredient of deliberation is absent from that portion of the charge applying to the actual killing and that this omission is fatal.

The common-law crime of murder is by our statute divided into murder in the first and murder in the second degree; the former being "every murder which shall be committed by means of poison or by lying in wait, or by any kind of willful, deliberate and premeditated killing. \* \* \* " "Deliberately" has been held to mean that the manner of the homicide was determined upon after examination and reflection; that the consequences, chances, and means were weighed carefully, considered, and estimated. "Premeditatedly" has been defined as meaning planned, contrived, or schemed beforehand. *Craft v. State*, 3 Kan. 450, 480, 481; *State v. McGaffin*, 36 Kan. 315, 319, 13 Pac. 560; *State v. Yarborough*, 39 Kan. 581, 587, 18 Pac. 474. While in some other states the two words have been deemed and held to be synonymous, it has long been determined here that "premeditatedly" has reference, as the literal meaning of the word implies, to having thought over the matter beforehand, and "deliberately" pertains more to the manner of committing the act, or to the fact that its commission was determined upon in cold blood. It might be possible for one having thought over the matter and concluded to kill another to come upon him suddenly and commit the homicide in the heat of passion so that it could be said to have been committed premeditatedly, but not deliberately. In *Smith v. State*, 1 Kan. 365, it was held that the indictment must charge that the killing was done deliberately and premeditatedly. It was said in the *Craft Case*: "It is not only necessary that the accused shall plan, contrive, and scheme, as to the means and manner of the commission of the deed, but that he shall consider different means of accomplishing the act. He must 'weigh' the modes of consummation which his premeditation suggests, and determine which is the most feasible." 3 Kan. page 483. The information, which contains one colon but not a period or semicolon, charges in one sentence that the defendant gave to the deceased a mortal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



wound of which he instantly died; that he did this unlawfully, feloniously, willfully, premeditatedly, and with malice aforethought by shooting him unlawfully, feloniously, willfully, premeditatedly, and with malice aforethought with a gun with which he had assaulted him feloniously, willfully, deliberately, premeditatedly, and with malice aforethought with intent to kill him feloniously, deliberately, premeditatedly, and with malice aforethought. Taking the story of the tragedy as divided and detailed by the information, it is to be observed that one occurrence, one weapon, one homicide, one intent, and one state of mind appear. Having with a deadly weapon assaulted the deceased with premeditation and deliberation intending premeditatedly and deliberately to kill him, and proceeding at once to inflict the mortal wound, it is practically impossible to escape the conclusion that the premeditation and deliberation characterized the entire transaction. In *State v. Brown*, 21 Kan. 43, page 48, the indictment charged a deliberate and premeditated assault by shooting, thereby inflicting a mortal wound, but did not anywhere allege that the assault or killing was done with a deliberate and premeditated purpose of killing, and it was held bad. It appears that premeditation and deliberation were both absent from the charge except as applying to the assault. It was said: "The first part of the indictment charges, substantially, that the defendant deliberately and premeditatedly committed an assault and battery upon Bledsoe by shooting him with a pistol loaded with gunpowder and balls; but it does not charge that the defendant at the time had any deliberate or premeditated intention, nor indeed any intention, of killing Bledsoe. It substantially charges that he deliberated upon and premeditated the shooting, the assault and battery, but it does not charge that he deliberated upon or premeditated the killing." In *State v. Stackhouse*, 24 Kan. 445, the indictment charged a deliberate and premeditated intent to kill and murder; that with this intent the defendant made a deliberate and premeditated assault with a gun, thereby giving to the deceased a mortal wound of which he died, and this was upheld as containing all the elements of the crime—"the assault, the killing, the intent to kill, and the deliberate and premeditated intent." The full form of the indictment does not appear, but the matter was not considered at much length; the decision being devoted mainly to other matters. In the *McGaffin Case*, 36 Kan. 315, page 319, 13 Pac. 560, page 562, it was objected that the information did not expressly allege malice aforethought or intent to kill, but the short form was held sufficient which charged that the defendant did then and there, unlawfully, feloniously, willfully, deliberately, and premeditatedly kill and murder one Harrison Sherman by shooting him with a loaded revolver, and it

was said: "The terms employed by the county attorney in charging the offense are the full equivalent of a statement that the killing was done intentionally and with malice aforethought, and therefore the omission of those identical terms from the charge does not render it subject to the objection that has been urged." The court cited *State v. Bridges*, 29 Kan. 138. There the information charged that the defendant with a deadly weapon did feloniously, willfully, intentionally, deliberately, premeditatedly, and with felonious intent and with malice aforethought kill and murder the deceased by inflicting a mortal wound with the aforesaid deadly weapon. This was held sufficient.

By following the language of the statute and one of the informations which have been approved in some of the former decisions, all question and danger of error could have been avoided; but a careful consideration and close examination of the charge on which the defendant was tried leads to the conclusion that it contained all the essential elements of the offense.

[2] The more serious matter relates to the instructions touching the defense of insanity. Without going into detail or citing decisions separately upon each point, it may be said that the law has long been thoroughly settled in this state that to convict one of murder whose sanity has in the progress of the trial been brought in question either by affirmative evidence on his part, or as a result of the state's evidence, the jury must believe beyond a reasonable doubt both his guilt and his sanity. In other words, if the evidence at the close of the trial leaves in the minds of the jury a reasonable doubt as to the defendant's sanity, he must be acquitted. The presumption of sanity, like the presumption of innocence, remains until something in the evidence raises a doubt concerning it. It is never true at any time or at any stage of the trial that, in order to acquit, the jury shall believe that the defendant was insane; nor is it true that at any point in the trial it devolves upon the defendant to produce evidence to create a doubt as to his own sanity. The instructions must all be considered together and not isolated portions alone. It goes without saying that, in a trial upon a charge of murder in the first degree, no chances should be taken with the instruction, and they should be carefully drawn so as to state clearly the principles of law applicable. With these premises and bearing in mind that the only defense made or attempted was that of insanity, the charge will be considered. The defendant requested an instruction which correctly stated the rule as approved in *State v. Arnold*, 79 Kan. 533, 534, 100 Pac. 64, which was refused. The jury were correctly instructed as to the presumption of innocence and in addition they were told that: "The defendant in a criminal case is never required to establish his innocence, for the sufficient rea-

son that the law presumes him innocent, and he has a right to rely upon this presumption in his favor, and before a conviction can be had the state must produce the evidence to establish his guilt, and this evidence must be sufficient to satisfy the minds of the jurors as reasonable men of the truth of the charge to the exclusion of all reasonable doubt. No mere preponderance of the evidence nor any weight of preponderating evidence is sufficient to establish the guilt of the accused unless it generates a full belief that the defendant has committed the crime charged in the information, to the exclusion of all reasonable doubt." Indeed, following this paragraph, they were told for the fifth time that the defendant's guilt must be established beyond a reasonable doubt—to the satisfaction of each juror. They were told that one is presumed to intend the natural and probable consequences of his acts, and that every person is presumed to be sane until the contrary appears. Then followed this language: "It devolves upon the defendant, therefore, in the first instance, to raise the question. But a defendant in a criminal case is not required to prove his insanity by a preponderance of the evidence in order to avail himself of that defense, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls upon the state. And if upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case under the evidence, there should be a reasonable doubt as to whether the defendant was at the time of the shooting sane or insane, with respect to the particular act charged against him, he must be acquitted." The words "together with all the legal presumptions applicable to the case under the evidence" are criticised as without significance and confusing, but they can hardly be given any other meaning than the presumptions already stated in the charge to which we have called attention. The words are taken literally from *State v. Crawford*, 11 Kan. 32, Syl. 1, and quoted with approval in *State v. Child*, 40 Kan. 482, 485, 20 Pac. 275, and, while better calculated to express a rule of law than to frame into an instruction, still we do not see any possibility that the jury could have been misled by their use here, and in *State v. Nixon*, 32 Kan. 205, 4 Pac. 159, a charge containing them was upheld. Complaint is also made of the statement that "it devolves upon the defendant, therefore, in the first instance, to raise the question." In the *Nixon* Case this language was used and assigned as error, but it was said (32 Kan. page 213, 4 Pac. page 165) that, as the defendant had in fact raised the question, it became immaterial that the court told the jury that it devolved upon him so to do, and to introduce "testimony fairly tending to prove the same," because such was in fact done, and no evidence was introduced by the prosecution tending to prove the in-

sanity, and the charge in these respects, while criticised, was not deemed materially prejudicial. Here the jury were told that the defendant was "not required to prove his insanity by a preponderance of the evidence in order to avail himself of that defense, but merely to create a reasonable doubt on this point, whereupon the burden of proving his sanity falls upon the state." It is forcibly asserted that it did not devolve upon the defendant to create a reasonable doubt on this point of his insanity and that it was material error thus to charge.

[3] It is likewise strenuously contended that it was fatally erroneous to charge in the twenty-seventh instruction that if the jury "should believe from the evidence that, at the time of the shooting, the defendant (was) laboring under such defect of reason," etc., they should acquit; "but if you should believe that, under the instructions I have given you, he should be held responsible, you should turn and determine more exactly the nature of the act itself," etc. These expressions, together with the ones last before referred to, are submitted as evidence that the true rule touching the obligations to prove, and the burden of the proof was lost sight of or reversed and the jury given to understand that in order to be acquitted the defendant must raise the question of his insanity, must introduce testimony fairly tending to prove the same, and that the jurors must believe that such proof had been adduced. The majority of the court, however, while regarding the portions of the charge under consideration taken by themselves as not free from grounds for criticism, are of the opinion that the whole charge considered together sufficiently informed the jury that the burden was upon the state to prove the guilt and sanity of the defendant beyond a reasonable doubt, and that, heeding every part as they are presumed to have done, they could not have been misled. From undisputed statements in the briefs and upon the argument, the manner of the killing and the conduct of the defendant as originally shown by the state, as well as the evidence touching insanity offered by the defendant, were such as to call attention to the sole defense, and a verdict of guilty could not have been reached without either finding the proof by the state sufficient beyond a reasonable doubt or by ignoring repeated admonitions of the court embraced in its instructions, which the jury cannot be presumed to have done and which the record does not show that they did. The fact that the defendant introduced the testimony of 14 witnesses to establish the defense of insanity leaves it clear that the expressions relative to his raising the question and introducing testimony tending to support the same could not have confused the jury, and, in view of repeated admonitions that they must find guilt beyond a reasonable doubt, the other phrases complained

of are not deemed to have left the triers in any doubt as to the rules governing their deliberations.

A certain ruling and instruction touching a hypothetical question are complained of, but we do not find that the defendant was prejudiced by either.

The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and BENSON, JJ., concurring.

WEST, J. (dissenting). When the charge was all read, the jury found themselves properly instructed as to presumptions, the burden of proof, and the question of sanity. But they also found themselves improperly told that in order for an acquittal it devolved upon the defendant, not "to prove his insanity by a preponderance of the evidence," "but to create a reasonable doubt on this point," whereupon the burden of proving his sanity (which never shifts) would fall upon the state. They were directed to consider this question, this defense of insanity, and were improperly instructed that if they should "believe from the evidence" that he was insane then they should acquit. But if they should "believe that, under the instructions I have given you, he should be held responsible," then they should proceed to consider the other matters—making "belief" precisely the same whether applied to guilt or to innocence. Only by ignoring or wresting these expressions from their natural and ordinary meaning and significance could the jury have failed to be led astray by them. A similar situation arose in *State v. Conway*, 55 Kan. 323, 40 Pac. 661. There the charge was burglary and larceny. The defense was an alibi. The court refused to instruct that the defendant was not required to prove this beyond a reasonable doubt, but that it was sufficient if the evidence upon that point raised a reasonable doubt, and charged that evidence of an alibi had been introduced, and, "if this is true, the defendant \* \* \* should be acquitted." This was held fatal, and it was said: "The burden of proof is upon the state, and is not shifted because of the attempt of the accused to prove an alibi; and if, by reason of the evidence relating to that question, the jury should doubt the guilt of the accused, he is entitled to an acquittal." 55 Kan. page 325, 40 Pac. page 662. Speaking of the instruction, it was said: "This instruction, in effect, required the jury to believe the proof of an alibi before they could acquit him. \* \* \* The evidence may be such as simply to raise a reasonable doubt of guilt, and in that event the defendant may be acquitted." Whether the insanity in this case was real or feigned, the state cannot afford to demand the defendant's punishment until his conviction shall have been accomplished in accordance with the settled

rules of criminal procedure, which rules form the right and shield of the meanest as well as the chiefest citizen.

The judgment should be reversed, not for technical reasons, but for failure to conserve the defendant's vital and substantial rights.

SMITH, J., joins in this dissent.

STATE v. SCHMIDT. (No. 19,247.)†  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§§ 196, 216, 219\*)  
—INFORMATION—SUFFICIENCY.

The act of 1911 (Laws 1911, c. 165) making persistent violation of the prohibitory law a felony being supplemental legislation, the procedure authorized by the general intoxicating liquor law governs, and an information for persistent violation need not state the kind of liquor sold or the name of the person to whom sold.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 215, 230-233, 237-239; Dec. Dig. §§ 196, 216, 219.\*]

2. CRIMINAL LAW (§ 195\*)—FORMER JEOPARDY—WHAT CONSTITUTES.

In criminal cases the ultimate test applied in determining the validity of a plea of former conviction or former acquittal is identity of offenses, and it is not necessarily decisive that the two offenses may have some material fact in common.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 382, 383; Dec. Dig. § 195.\*]

3. CRIMINAL LAW (§ 429\*)—FORMER CONVICTION—SUFFICIENCY OF EVIDENCE.

Where the record of a previous conviction relied on to support a charge of persistent violation discloses that the conviction was for violation of the prohibitory liquor law, the record is prima facie proof which warrants a finding of previous conviction, without introducing the complaint or information on which it was based.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1018, 1020; Dec. Dig. § 429.\*]

Appeal from District Court, Cowley County.

Art Schmidt was convicted of violating the prohibitory law, and appeals. Affirmed.

S. A. Smith, of Winfield, Ed J. Fleming, of Arkansas City, and S. B. Amidon, of Wichita, for appellant. J. S. Dawson, Atty. Gen., and O. P. Fuller, of Winfield, for the State.

BURCH, J. The defendant was convicted on the first, second, third, and fifth counts of an information charging him with persistent violation of the prohibitory liquor law, and appeals.

The first count of the information charged a sale of intoxicating liquor in July, 1913, a former conviction in the district court on December 30, 1905, and former convictions before L. H. Webb, a justice of the peace, on July 7, 1904, December 8, 1904, and April 18, 1905. The verdict and judgment rest on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 13, 1914.

proof of a sale in August, 1912, and proof of all the former convictions.

The second count charged a sale in July, 1913, and a former conviction in the district court on December 30, 1905. The verdict and judgment rest on proof of a sale in October, 1912, and proof of the former conviction.

The third count charged a sale in July, 1913, and a former conviction in the district court on December 30, 1905. The verdict and judgment rest on proof of a sale in July, 1913, and proof of the former conviction.

The fifth count charged the keeping of a nuisance in 1913, and a former conviction in the district court on December 30, 1905. The verdict and judgment rest on proof relating in time to July, 1913, and proof of the former conviction.

The law under which the defendant was convicted took effect on May 22, 1911, and the information was filed in October, 1913. A motion to quash the information was filed, on the ground that the kind or kinds of liquor sold and the name or names of the persons to whom the sales were made should have been stated. The motion was overruled.

[1] The information must be direct and certain regarding the offense charged. The general liquor law provides, however, that in all prosecutions under it, whether by indictment or otherwise, it shall not be necessary to state the kind of liquor sold or the name of the person to whom sold, and the persistent violator act expressly provides that it shall be construed as supplemental to existing legislation. Laws 1911, ch. 165, § 3. It is clear therefore that the Legislature intended that the procedure authorized by the general law should be followed, and not abrogated. The preliminary examination will give the defendant notice of the transactions furnishing the basis for the information, and the scope of the investigation at the trial will be limited accordingly.

In November, 1911, the defendant was prosecuted as a persistent violator of the prohibitory law, the former conviction charged being that of December 30, 1905. After a trial, he was acquitted. This acquittal was interposed as a bar to further prosecution upon the present information. The plea was overruled.

[2] The former prosecution related to acts committed in 1911, which, together with the conviction in 1905, it was alleged constituted the defendant a persistent violator. The present prosecution relates to acts committed subsequent to the former acquittal, which, together with the conviction in 1905, it is alleged constitute the defendant a persistent violator. The conviction in 1905 is the only element the two informations have in common. They relate to separate crimes. The issues are not identical. Neither offense includes the other offense. In each information an act which constitutes an indispensable element of the crime is necessary to con-

viction which is different from any act necessary to conviction under the other. All the evidence necessary to prove the first charge would not establish the second, and all the evidence necessary to prove the second charge would not establish the other. *State v. Patterson*, 66 Kan. 447, 452, 71 Pac. 800. The doctrine of *res judicata* does not apply in criminal cases to particular facts in issue, as, for example, to the conviction in 1905, as it frequently does in civil cases. 2 *Van Fleet*, Former Adjudication, § 594. In criminal cases the ultimate test applied in determining the validity of a plea of former conviction or former acquittal is identity of offenses, and it is not decisive that the two offenses may have some material fact in common.

"The two offenses are entirely distinct. One is not included in the other—is not a lesser degree of the other. The character of the testimony must be different in each. One fact—that is, 'shooting'—may be necessary for conviction under either charge. But something more is necessary in each than the mere fact of shooting. \* \* \* It was said by Lord Denman, in *Regina v. Butten*, 11 Ad. & Ellis, New Series, 946: 'The same act may be part of several offenses. The same blow may be the subject of inquiry in consecutive charges of murder and robbery. The acquittal on the first charge is no bar to a second inquiry, where both are charges of felonies; neither ought it to be, when the one charge is of felony, and the other of misdemeanor.'" *State v. Horne*, 16 Kan. 452, 454.

The convictions before the justice of the peace referred to in the first count of the information were proved as alleged. In those cases the defendant pleaded guilty to violations of the clubroom section of the prohibitory law, and it is said that the convictions were invalid, because that section of the law was repealed by a statute passed in 1901. This court has decided otherwise. In *re Manning*, 80 Kan. 68, 101 Pac. 464.

[3] It is said that the proof of the various former convictions was insufficient, because the complaints in the justice of the peace cases and the information in the district court case were not produced. The docket entries of the justice of the peace and the journal of the district court disclosed, not simply convictions, but convictions for violations of the prohibitory law, and, under section 2 of the act of 1911, those records were *prima facie* evidence of former convictions. The jury were properly instructed that they warranted a finding that the defendant was duly convicted of violations of the prohibitory law on the respective dates shown by such records.

When instructing the jury with reference to the matter of time, the court stated that it would be sufficient if the evidence proved the offenses to have been committed about the time claimed by the state prior to the filing of the complaint, and after May 22, 1911 (the

date on which the act of 1911 took effect). Of course, the state could not go further back than two years, except as to the fact of former conviction, but the inadvertent error was perfectly harmless, because the proof was, in fact, confined to the proper period.

Some further criticism of the proceedings are not deemed to be important, and an attack upon the act of 1911 is fully met by the decision in the case of *State v. Adams*, 89 Kan. 674, 182 Pac. 171.

The judgment of the district court is affirmed. All the Justices concurring.

### HARLAN v. LOOMIS (two cases).

(Nos. 18,852, 18,853.)

(Supreme Court of Kansas. May 9, 1914.)

(*Syllabus by the Court.*)

#### 1. PLEADING (§ 248\*)—AMENDMENT—SUBSTITUTION OF PARTY.

An amendment of a petition to correct the mistake of a pleader, which merely substitutes one party for another as plaintiff, does not change the cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.\*]

#### 2. LIMITATION OF ACTIONS (§ 125\*)—AMENDED PLEADING.

Such an amendment relates back to the institution of the action, and the statute of limitations stops running as to the substituted plaintiff when the action is begun rather than when the amendment is made.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 542; Dec. Dig. § 125.\*]

#### 3. LIMITATION OF ACTIONS (§ 28\*)—ACTION FOR RENTS—LIMITATIONS APPLICABLE.

An action to recover rents for land the possession of which is wrongfully withheld is founded on implied contract, and the three-year statute of limitations applies.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 184, 185, 142; Dec. Dig. § 28.\*]

Appeal from District Court, Lyon County.

Actions by Richard D. Harlan, as executor of the estate of Phineas Prouty, deceased, against Sanford Loomis. Judgment for plaintiff, and defendant appeals. Affirmed.

O. S. Samuel, L. B. Kellogg, and J. Harvey Frith, all of Emporia, for appellant. Hamer & Ganse, of Emporia, for appellee.

JOHNSTON, C. J. These actions were brought to recover rents for the use of a certain tract of land the possession of which had been the subject of earlier litigation. *Stouffer v. Harlan*, 68 Kan. 135, 74 Pac. 610, 64 L. R. A. 320, 104 Am. St. Rep. 396; *Stouffer v. Harlan*, 84 Kan. 307, 114 Pac. 385. The first of the actions now under consideration, in which James S. Harlan was named as plaintiff, was brought on August 14, 1909, to recover from Sanford Loomis the rentals of the land for the years 1906, 1907, and 1908 at the rate of \$500 for each year. Subse-

quently, it was discovered that a mistake had been made in naming James S. Harlan as plaintiff, and on an application made on June 1, 1911, the court permitted an amendment of the petition to be made by the substitution as plaintiff of Richard D. Harlan, who was the executor of the estate of Phineas Prouty, deceased, which estate owned the land for the use of which the action was brought. On July 17, 1911, a second action was brought by the appellee against appellant to recover for the use of the same land for the years 1909 and 1910 a rental of \$500 for each of those years. The cases were consolidated for the purposes of trial and it was determined, against the contention of appellant, that the causes of action for the rentals were not barred and that appellee was entitled to recover for the use of the land during the period it had been occupied by appellant a rental of \$330 for each year with interest at the rate of 6 per cent. per annum.

[1, 2] The principal contention on these appeals is that the right of recovery for the earlier years at least was barred by the statute of limitations. It is insisted that the commencement of the action in the name of James S. Harlan did not operate to toll the statute of limitations, and that when the amendment was made substituting appellee as plaintiff the three-year statute of limitations had run on the claims for rent set out in the original petition. There is no contention that the amendment substituting one party for another was improperly allowed, but it is contended that James S. Harlan was a stranger to the land occupied by appellant and to the controversy as to the rentals for its use, and that an action in his name did not arrest the running of the statute on the claims, and that the amendment substituting Richard D. Harlan, executor, as plaintiff, did not relate back to the commencement of the action. It appears that James S. Harlan had acted as agent and representative of the owner of the land and had been named as a party in the earlier suits respecting the possession of the land. Through a mistake of the pleader he was named as plaintiff instead of his brother, who was then the sole representative of the estate. Appellant could not have been misled as he had corresponded with James S. Harlan about the rent and had assumed that he was in control of it. Besides, the recovery sought throughout the litigation was the value of the use of the particular tract of land occupied by appellant for a definite period of years which was specified. The nature and purpose of the action was the same after as before the amendment. In *Service v. Bank*, 62 Kan. 857, page 862, 62 Pac. 670, page 671, it was held that an amendment which merely substitutes one party as plaintiff for another to correct a mistake does not change the cause of action and that the stat-

ute of limitations stops running as to the substituted plaintiff when the action was begun. It was there said that: "As the amendment did not introduce a new claim or cause of action, it is not to be deemed a change of the action itself; and, under the liberal provisions of our Code authorizing amendments, we think the amendment relates back to the beginning of the action, and that the statute of limitations did not run against the owner of the paper during the pendency of the proceeding." Other supporting authorities are *Weaver v. Young*, 37 Kan. 70, 14 Pac. 458; *Hucklebridge v. Railway Co.*, 66 Kan. 443, 71 Pac. 814; *Maurer v. Miller*, 77 Kan. 92, 93 Pac. 596, 127 Am. St. Rep. 408, 15 Ann. Cas. 663; *Cooley v. Gilliam*, 80 Kan. 278, 102 Pac. 1091; *Cunningham v. Patterson*, 89 Kan. 694, 132 Pac. 198.

[3] It is contended that the action brought by appellee is founded on tort, and therefore the two-year statute of limitations should be applied. The record discloses that the action was not for trespass to real estate, but was brought to recover rents, an action founded on implied contract, and therefore the three-year statute of limitations is applicable. *Gatton v. Tolley*, 22 Kan. 678; *Selbert v. Baxter*, 36 Kan. 189, 12 Pac. 934; *Mo. Pac. Ry. Co. v. Houseman*, 41 Kan. 300, 304, 21 Pac. 284.

There is nothing substantial in the claim that appellee should be regarded as having abandoned the land and estopped to assert the claims for its use by appellant.

The judgment of the district court is affirmed. All the Justices concurring.

#### MATKIN v. VICKERS. (No. 18,650.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

#### PUBLIC LANDS (§ 54\*) — SCHOOL LANDS — WAIVER OF FORFEITURE—WHO MAY COMPLAIN.

The doctrine of the case of *Baker v. Newland*, 25 Kan. 25, that the state may waive forfeiture of a certificate of purchase of school land, and third persons cannot complain of the waiver, extended to cover a case in which default was occasioned by misinformation given the certificate holder by the county treasurer as to when payment could be made, and the third person settled on the land before the state accepted payment of the delinquent installment.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 152-164, 166-169; Dec. Dig. § 54.\*]

Appeal from District Court, Seward County.

Action by R. F. Matkin against J. A. Vickers. Judgment for plaintiff, and defendant appeals. Affirmed.

S. W. Smith, of Glasco, H. A. Gaskill, of Liberal, and S. N. Hawkes, of Topeka, for appellant. V. H. Grinstead and F. S. Macy, both of Liberal, for appellee.

BURCH, J. The plaintiff was the holder of a certificate of purchase of the school land in controversy. An installment of the certificate was due on December 18, 1911, and under the statute failure to pay within ten months thereafter forfeited the plaintiff's right to the land. The plaintiff had contracted to sell the land to another, and, looking to a consummation of the transaction, the certificate of purchase was deposited in a bank at Liberal. Not having the certificate before him, and not remembering the precise date when the installment was due, the plaintiff, in March, 1912, went to the office of the county treasurer for information and was told by the treasurer that nothing would be due until fall. In August, 1912, the plaintiff again went to the office of the county treasurer with money to pay the installment, and for the purpose of doing so. He informed the treasurer of his intention and desire, and offered to make the payment required by the certificate. After an investigation of the record in the county clerk's office, the treasurer told him nothing would be due for two or three months, and, for this reason, only a formal tender of cash was not made. Within the time indicated by the treasurer, but after October 18th, the day the ten months' grace expired, the plaintiff paid the installment. The receipt was duly signed by the county treasurer and countersigned by the county clerk. On October 19th the defendant settled on the land. In an action of ejectment the plaintiff recovered, and the defendant appeals.

The plaintiff was prevented from making payment in time by the mistake of the county treasurer. The evidence does not disclose the cause of the mistake. It may have arisen from the manner in which the record was kept. On the trial of the case the treasurer testified that he examined the school land record in the county clerk's office, and, with the book before him, became of the opinion that nothing would be due for about two months. In any event the plaintiff was deceived by the misinformation given him by the agent of the state to receive his money.

For public reasons, the state itself could not be prejudiced or estopped to assert title because of the neglect or fault of its officer. It could, however, upon satisfaction of its just and equitable demands, waive the forfeiture even if it had been occasioned by the fault of the plaintiff, and a fortiori it could waive the forfeiture when not to do so would be to take advantage of a constructive fraud resulting from the act of its agent. When the state chooses to waive a forfeiture, even although it be one arising ipso facto upon failure to pay in time, third persons cannot complain. *Baker v. Newland*, 25 Kan. 25; *Mayse v. Belt*, 84 Kan. 211, 114 Pac. 232.

In the cases just cited the claims of third persons had not attached when the waiver

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

occurred. In this case the defendant did not by his settlement acquire a vested right to the land as against the state. It could still dispose of the land to another without injury in law to him, and it still had power to do the conscionable thing by the plaintiff.

Under the circumstances of this case, it is held that the state could and did waive, as against the defendant, the forfeiture of the plaintiff's certificate of purchase by the subsequent acceptance of his money according to the honest understanding of the treasurer, and of the plaintiff, who relied on the treasurer's advice, as to when the payment was due.

The general finding for the plaintiff requires that the evidence be interpreted favorably to him. Some minor questions are presented for consideration; but the foregoing disposes of the merits of the controversy.

The judgment of the district court is affirmed. All the Justices concurring.

**McLEAN et al. v. McLEAN et al.**

(No. 18,774.)

(Supreme Court of Kansas. May 9, 1914.)

*(Syllabus by the Court.)*

**1. DESCENT AND DISTRIBUTION (§ 4\*)—WHAT LAW GOVERNS.**

Upon the death of the owner, the descent of his real property, situated in this state, is governed solely by chapter 33 (sections 2935-2967) General Statutes of 1909.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 18; Dec. Dig. § 4.\*]

**2. BASTARDS (§ 13\*)—RECOGNITION—QUESTION OF FACT.**

Whether an illegitimate son has been so recognized as such by his father as to constitute a general and notorious recognition of that relation is a question of fact.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.\*]

Appeal from District Court, Cowley County.

Ejectment by Walter W. McLean and others against T. J. McLean and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Hackney & Lafferty and Jackson & Noble, all of Winfield, for appellants. Buckman & Bloss, of Winfield, and A. F. Sims, of Howard, for appellees.

**SMITH, J.** The following are the facts, so far as not controverted, of this case: The action is ejectment for the recovery of about four hundred acres of land lying in Cowley and Elk counties owned by one Hardin McLean at the time of his death in 1910. The appellees, plaintiffs, are an alleged bastard son of Hardin McLean, and those to whom this alleged son has conveyed undivided interests by deed since the death of the intestate; and the appellants, defendants, are those collateral relatives of McLean to whom

the land would descend under our statute of descents if the alleged bastard son is not qualified to inherit. The only issue in the case is that of the qualification of the alleged illegitimate to inherit by reason of recognition of him as a son by the putative father otherwise than in writing. The petition, after stating the names and addresses of the plaintiffs, is the usual petition in ejectment. The case was tried to a jury, and a general verdict returned for the appellees, plaintiffs, and judgment followed in accordance with the verdict in their favor. The appellee, Walter W. McLean, was born in Kentucky in 1877 and remained in that state for about 18 months thereafter, as did also his mother and the decedent, his putative father. When the boy was about 18 months old he was removed with his mother and her family to Tennessee, where they remained 6 or 8 years and then removed to Arkansas, where they resided until the mother's death, and where the son resided until after the death of decedent. Shortly after the removal of that family to Tennessee, the decedent moved to Kansas, where he remained about 10 years; he then returned to Kentucky for about 10 years, when he came to Kansas and resided here until about 2 years before his death, when he removed to Oklahoma, where he remained until a short time before his death, which occurred at Winfield, Kan. Walter W. McLean never heard of or from decedent until after the latter's death in December, 1910. The appellants, for the first defense to the petition admitted the death of Hardin McLean in December, 1910, and alleged that at the time of his death he was a resident in good faith of the county of Osage, in the state of Oklahoma, and further that at his death they were his sole heirs at law; that they inherited as such heirs all his property, and were the owners and in possession of the real property in controversy, and further denied all the allegations of the petition. In the second defense they alleged that the decedent was never married, and admitted his residence in Kentucky, and removal to Kansas as alleged in the petition. They further alleged that at the death of Hardin McLean one E. R. McLean, a resident of Osage county, Okl., was by the county court of Osage county, Okl., which court had sole jurisdiction in the premises, duly appointed administrator of the decedent's estate; that he at once duly qualified as such administrator, and took possession of all property belonging to the estate found in Oklahoma. They also pleaded the laws of Oklahoma, in force in that state, by which it is provided that: "Every illegitimate is heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." Rev. Laws 1910, § 8420. They further pleaded the laws of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the state of Kentucky, in force in 1877 and ever since, on the question of the inheritance of illegitimate children from the father. In a third defense they allege that the plaintiff, Walter W. McLean (whom they designate as Williford), is not the bastard child of the decedent, and that his coplaintiffs obtained whatever interest they now claim in the real estate in controversy by reason of advancements made to him by them in their joint efforts to perpetrate a fraud upon these defendants, and that all took their respective interests therein with full knowledge of such fraudulent claim. And, further, they alleged that they are the owners of the legal and equitable title and in possession of the land described in plaintiff's petition and that plaintiffs have no interest therein. The case was tried to a jury in the district court of Cowley county in December, 1912, verdict and judgment were for appellees, and a motion for new trial was overruled.

The appellants made numerous assignments of error, but in the argument in their brief they say that the case should be reversed upon the ground that the evidence fails to show such a general and notorious recognition as our statute requires to enable an illegitimate to inherit from the father. This is the principal question remaining in the case.

[1] The rights of the parties depend: First, on whether the laws of Kansas or of Kentucky or Oklahoma are to be applied. It is believed to be a universal rule that the descent of real property is governed by the law of the state or nation within which it is situated. 14 Cyc. 21. In accordance with the general rule we hold that the law of Kansas determines the descent of the property in dispute, and that it is entirely immaterial what the law of Kentucky or Oklahoma may be.

[2] Sections 2955 and 2956 of the General Statutes of 1909, relating to inheritance by illegitimate children, read:

"Illegitimate children inherit from the mother, and the mother from the children.

"They shall also inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing."

It only remains to be determined whether the plaintiff, Walter W. McLean, was the illegitimate son of the decedent, Hardin McLean, and whether Hardin McLean had recognized such relationship in such manner as to be called a general and notorious acknowledgment thereof. These are questions of fact for the determination of the jury under proper instructions as to what constitutes a general and notorious recognition of the relation of father and son on the part of the father. There is no claim of any recognition thereof in writing.

The law of the state of Iowa is essentially like our statute cited. Section 2466 of the Iowa Code of 1873 provides that illegitimate children "shall inherit from the father whenever the paternity is proven during the life of the father, or they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing."

Van Horn v. Van Horn, 107 Iowa, 247, 77 N. W. 486, 43 L. R. A. 136, and other cases are referred to by appellants to show that the evidence of recognition by decedent of the appellee as his son was not sufficient to make it general and notorious. The circumstances of each case are, of course, different, and the gist of the decisions is that the extent of recognition necessary to meet the statutory requirement depends, in some measure, upon the circumstances. Where frequent opportunities for such recognition are presented for a long period, more is required than where such opportunities are less in number or in a more limited time.

The first assignment of error urged by the appellants is that counsel were permitted to say to the jury in the opening statement that the deceased had been prosecuted for bastardy by the mother of the child, and adjudged to provide for its support; and that he did not testify on the trial. The opening statement at the beginning of a trial is designed to give the court and jury a general idea of the case, and what the party expects to prove. However much the party may fall short of what he says he expects to prove cannot be determined by the court at the time, and only good faith should be required on the part of the attorney. No evidence of prosecution for bastardy was formally produced by a production of a record thereof, but witnesses on the part of appellees and appellants referred to incidents at about the time of the bastardy proceeding, and there was evidence of the decedent paying money to the mother and of his complaining of the drain upon his resources in supporting the mother or child. There was sufficient to show that appellees had some ground for the statement. We think the court did not err in not withdrawing it from the jury.

Much of the appellant's brief is taken up in discussing the evidence of the numerous witnesses, and apparently balancing the evidence of witnesses who testified to acts and declarations of the decedent which admitted or recognized his parentage of Walter W. McLean with the statements of other acquaintances who had heard nothing in that respect, especially the evidence of close acquaintances after the decedent came to Kansas. The preponderance of the evidence and what it proves, if conflicting, are for the jury and the trial court. It is only for us to determine whether there was sufficient evidence to sustain their verdict and to jus-



tify the approval thereof by the court. It was claimed by the appellees, and we believe correctly, that there were 15 witnesses who testified to acts and declarations of the decedent indicating his paternity of the child, while the appellants claim that 7 witnesses, intimate friends of the decedent, never heard him mention the child in any way, nor did they know of any rumor or understanding in the neighborhood that the decedent had made such recognition. The latter evidence tends in no way to disprove the former, unless each refers to the same time, which does not appear.

It is especially urged that the court erred in permitting several witnesses to testify that there was a general rumor and understanding in the Kentucky neighborhood, among the neighbors and friends of the decedent, that he was the father of the child; also in permitting the witnesses for the defense to be asked, over appellant's objection, if such rumor and understanding did not exist in the neighborhood. It is urged that this is hearsay, but the fact, if it is a fact, that a rumor of this character prevailed in the neighborhood at about the time the birth occurred is some evidence that the decedent knew thereof. As said in the Iowa cases cited, the existence of such a rumor is a matter for consideration by the jury, and, especially if it is a general rumor and understanding, it is natural that the person, if falsely implicated therein, would take some pains to deny it or disprove it. Instead of denying the rumor the evidence shows that at the time the mother and child were about to be removed from the neighborhood in Kentucky to Tennessee, the decedent went to the gateway to the house where they were, and asserted that the child was as much his as hers, referring to the mother, and was about to force his way into the house to see the child or to prevent its being taken away; that he went there armed with a gun, and manifested an intention to carry out his purpose by force if necessary, but was dissuaded and induced to go away by a statement that a relative of the mother was in the house with a gun, and there would be trouble if he persisted in going into the house. At this time the evidence shows there was quite a large gathering of people, neighbors, and friends of the mother. It is said that the decedent talked with but two or three persons, but there is no evidence as to how many persons may have heard what he said, and naturally the people there would be informed of what he said and what transpired. He apparently made no effort at concealment of his purpose. This with the other evidence, we think, is sufficient to justify the finding of the jury that there was on his part a general and notorious recognition that the child was his own. The trial took place over 30 years after this event, and the lapse of time

might be considered in excusing either party from producing all of the evidence which may have at one time existed.

There is some criticism in appellant's brief of the instructions given by the court to the jury. The appellants requested the court to give a number of instructions to the jury, which request was refused, but the substance of most of them was embodied in the instructions given. We have examined all these objections and requests and think the jury was fully and fairly instructed by the court, and find no material error therein, nor in any of the trial errors assigned.

The judgment is affirmed. All the Justices concurring.

# BOARD OF COM'RS OF SHAWNEE COUNTY v. THOMAS. (No. 18,990.)

(Supreme Court of Kansas. May 9, 1914.)

## (Syllabus by the Court.)

### 1. CLERKS OF COURTS (§ 35\*)—COMPENSATION—FEES—ACCOUNTING.

Under the general statute relating to fees and salaries, the clerk of the district court of Shawnee county was entitled to a salary of \$3,000 per year out of the fees of his office and one-half of the excess of such fees above the salary. Gen. St. 1909, § 3663. By chapter 213 of the Laws of 1901 the clerk was authorized to pay the salaries of necessary deputies and assistants out of the fees of his office not exceeding \$2,000 in any year, all the balance of the excess fees remaining thereafter to be paid over to the county treasurer. The general statute, except as modified by the act of 1901, was in force during the official service of the defendant. Construing the provisions of these statutes together and in connection with the title of the act of 1901, it is held that the clerk's salary of \$3,000, together with the salaries of deputies and assistants not exceeding \$2,000 in any year, should be deducted from the whole amount of the fees. One-half of the remainder may be retained by the clerk and one-half should be paid by him to the county treasurer. By the general law the excess fees above the salary were divided between the clerk and the county. The special act does not prevent this division, but allows the deduction of the expense of office help in addition to the salary before the division is made.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 62; Dec. Dig. § 35.\*]

### 2. CLERKS OF COURTS (§ 29\*)—COMPENSATION—FEES—SPECIAL EXPENSES.

The expense of an audit of the books and accounts of the clerk for his benefit by accountants employed by him should not be included in the allowance provided by the act of 1901 for salaries of deputies and assistants.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 39; Dec. Dig. § 29.\*]

### 3. CLERKS OF COURTS (§ 35\*)—FEES WRONGFULLY RETAINED—RIGHT OF COUNTY TO INTEREST.

The county is entitled to interest upon balances of fees due from the clerk.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 62; Dec. Dig. § 35.\*]

### 4. SUBMISSION OF CONTROVERSY (§ 18\*)—AMBIGUITY IN AGREED STATEMENT—EVIDENCE.

An ambiguity appearing in the agreed statement of facts concerning a specified item, it is directed that the item shall be determined by the

district court upon evidence, or admissions of the parties.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. § 20; Dec. Dig. § 18.\*]

Appeal from District Court, Shawnee County.

Action by the Board of County Commissioners of the County of Shawnee against R. L. Thomas. From judgment for plaintiff, defendant appeals. Modified.

J. J. Schenck, A. M. Harvey, and J. E. Ad-dington, all of Topeka, for appellant. W. E. Atchison and E. R. Simon, both of Topeka, for appellee.

BENSON, J. The defendant was clerk of the district court of Shawnee county from January 14, 1907, to March 12, 1912, and this is an action to recover balances of the excess fees of that office alleged to be due to the county. The question to be determined is the disposition of the clerk's fees remaining after payment of his salary of \$3,000 per year. The material facts necessary to be considered in deciding the principal question in this case, contained in the agreed statement, are: "(1) The sum of \$671.50 heretofore paid out by defendant as clerk hire out of clerk's fees was moneys paid to L. G. Beal and W. R. Faulkner, accountants, for the purpose of making a complete audit of the books and accounts in the clerk's office for the benefit of Mr. Thomas, as clerk. (2) The clerk's fees collected by defendant over and above the sum of \$3,000 per year, during the defendant's incumbency of the office, and over and above clerk hire paid by him, excepting the said sum of \$671.50 referred to in paragraph numbered 1 of this statement, are \$13,794.89." Incidental questions arise respecting the allowance of interest and the item of \$671.50. The district court deducted that amount from the \$13,794.89 item, and gave judgment for the remainder, \$13,123.39, together with \$1,438.76 interest, amounting to \$14,572.15.

[1] The general statute fixing fees and salaries (Gen. Stat. 1909, § 3663) provides that the clerk of the district court in counties having a population of over 45,000 shall receive a salary of \$3,000 per year out of fees collected, and that one-half of the excess over that sum shall be paid to the county treasurer. This statute was in force in Shawnee county during the defendant's official service except as modified by the following act: "An act authorizing the sheriff and the clerk of the district court of Shawnee county to pay certain expenses of their offices out of certain fees earned and collected by said officers. Be it enacted by the Legislature of the State of Kansas: Section 1. That the sheriff and the clerk of the district court of Shawnee county are hereby authorized to apply to the payment of the salaries of their necessary deputies and assistants the excess

fees, if any there be, earned and collected by said officers, not exceeding for said sheriff's office the sum of three thousand dollars in any one year, and for said clerk's office not exceeding the sum of two thousand dollars in any one year; provided, that all the balance of such excess fees remaining thereafter shall be paid over by said officers to the county treasurer and become a part of the general revenue fund of said county." Laws 1901, c. 213, § 1. The provisions of the general statute will be referred to as the "general law," and the act of 1901 as the "special act."

It is argued for the plaintiff that the special act requires the clerk to pay to the county treasurer all the fees remaining in his hands after paying his salary of \$3,000, and the salaries of deputies and assistants not exceeding \$2,000 per year. The district court adopted this construction. The defendant contends that the only change made by the special act is to allow him to retain the salaries of the deputies and assistants out of the one-half otherwise due to the county under the general law, leaving one-half intact to the clerk. An argument advanced in his behalf is that, if the special act is construed as the plaintiff insists, it takes away a part of his compensation fixed by the general law, a subject not within the title; that the general law already gave him the right to deduct these expenses from the whole amount collected, provided the county received one-half of that amount, and therefore upon the plaintiff's theory the only change effected by the special act would be to require the payment of all of the remainder into the county treasury—a matter not suggested by the title.

Without discussing the proposed constructions, it is sufficient to say that the court adopts neither. Considering the general law, together with the title and provisions of the special act, it is concluded that the clerk's salary of \$3,000, together with the salaries of deputies and assistants not exceeding \$2,000 in any year, should be deducted from the whole amount of the fees. One-half of the remainder may be retained by the clerk and one-half should be paid by him to the county treasurer. By the general law the excess fees above the salary were divided between the clerk and the county. The special act, as we construe it, does not prevent this division, but allows the deduction of the expense of office help in addition to the salary before the division is made. So understanding the provisions of the special act, they are sufficiently indicated by the title.

It should be observed that before the passage of the special act the clerk was not reimbursed for the salaries of deputies and assistants. The expense was his. That act authorized the payment of this expense out of the whole amount of the fees just as his own salary was paid. This interpretation lifts

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the burden of the expense of providing office help from the clerk and places it upon the fund arising from fees before dividing that fund.

[3] The defendant objects to the allowance of interest on balances due to the county. Two grounds are stated for this objection, viz., that he had sufficient money on hand at all times to meet the claims, and that no demand was made for payment. In his affidavit, read on the motion for a new trial, it was stated that he had on hand and on deposit all moneys claimed by the county. Without considering whether the district court was bound in any event to reopen the case and hear further evidence upon the question of interest at the time the affidavit was presented, it is not perceived how the fact that the defendant had the money in his pocket or in a bank should affect his liability for interest. Neither does the fact that the county board did not demand the money excuse his default. His duty to pay did not rest upon the demand of any other officer or officers, but upon the mandate of the statute to pay the money to the county treasurer. In the absence of reports required by law, the county was not informed of the balances due from the clerk until the completion of its audit which the agreed statement shows was shortly before the action was commenced. The balances were due for successive periods beginning, as the statement shows, in December, 1907, and continuing for each year while he held the office. The assignment of error upon the allowance of interest cannot be sustained.

[2] The item of \$671.50, referred to in the agreed statement, was allowed to the defendant as clerk hire, and treated as part of the salaries of deputies and assistants. The plaintiff in a cross-appeal complains of this allowance, and with good reason. It cannot be supposed that the Legislature intended to include the expense of an audit of his own accounts made by the clerk for his own benefit, under the expression "salaries of necessary deputies and assistants." The assistants here referred to are of the same class, such as clerks in the office.

[4] The plaintiff also complains of a deduction in rendering judgment, of the same \$671.50 item from the amount of \$13,794.89 stipulated as the balance over and above the \$3,000 salary and clerk hire. The plaintiff insists that, even if the item was properly allowed as clerk hire, still it should not have been deducted; and if the allowance was erroneous it should have been added to the \$13,794.89 to make up the principal sum due to the county. An examination of the stipulation and an additional agreed statement of facts, contained in the abstract, leaves a doubt concerning the disposition made of this item in arriving at the amount of \$13,794.89. The language of the second paragraph of section 2 of the stipulation is am-

biguous in this respect. There can be no doubt or uncertainty about the fact, however. It will be determined by the district court upon evidence to be taken or admissions of the parties.

The judgment should be modified according to the views expressed in this opinion, and the cause is remanded for such modification. All the Justices concurring.

DAVIS v. SIM et al. (No. 18,371.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

NEW TRIAL (§ 100\*)—NEWLY DISCOVERED EVIDENCE.

In an action for damages from a flood, alleged to have been caused by the breaking of a dam, witnesses for the defendants testified that they saw the dam still standing after the time when the injury was done. The plaintiff produced no direct evidence to the contrary, but asked a new trial on the ground that he had subsequently discovered eyewitnesses who could contradict this testimony. *Held*, that the new evidence was not cumulative, and was of such importance that its effect should be passed upon by a jury, and that the diligence shown by the plaintiff was sufficient to entitle him to a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 201-204, 208, 209; Dec. Dig. § 100.\*]

Mason, J., dissenting.

Appeal from District Court, Sedgwick County.

Action by C. G. Davis against Coler L. Sim and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Stanley, Stanley & Hegler, of Wichita, for appellant. Kos. & V. Harris, H. C. Sluss, and Dale, Amidon & Madalene, all of Wichita, for appellees.

MASON, J. C. G. Davis sued Coler L. Sim and others for injuries to his property, caused by a flood which he alleged to have been occasioned by the giving way of a dam maintained by them, due to negligence in its construction. A verdict was rendered for the defendants, the special findings showing that the jury were of the opinion that the flood that caused the injury was not the result of the going out of the dam. Judgment was rendered in accordance with the verdict, and the plaintiff appeals.

A reversal is asked principally because of the overruling of a motion for a new trial on the ground of newly discovered evidence. The answer, in addition to a general denial, contained allegations that, if the plaintiff's premises were flooded, and if the dam went out, the cause thereof was a rain of such extraordinary volume that it could not reasonably have been anticipated. There was evidence for and against the proposition that the volume of the rainfall was unprecedented-

ed. There was also evidence on both sides of the question regarding the exercise of due care in the construction of the dam, and the jury may have thought that the defendants were negligent in this regard, but that the negligence was not the proximate cause of the plaintiff's injury. The plaintiff's property, where the damage was done, was situated four or five miles below the dam. The jury obviously concluded that the loss was not due to the breaking of the dam, for they found specially that the water was highest on the Davis land between 4 and 5 o'clock in the afternoon, and, in effect, that the dam did not go out until some time after that. One of the defendants and four other witnesses testified that they were at the dam just before dark (the date was May 31st), and that it had not then gone out. The plaintiff had no direct evidence on the subject, and his newly discovered evidence is that of three persons, who make affidavit that they saw the dam go out on the afternoon (of May 31, 1908) between 3 o'clock and half past 4. This evidence cannot be regarded as cumulative; for, while it was of the same character, and bore upon the same point, as that introduced by the opposing party, it was to the contrary effect. *Haughton v. Bilson*, 84 Kan. 129, 113 Pac. 400. The new evidence is so important that its weight is a matter that ought to be determined by the jury, assuming that due diligence was shown in procuring it. The testimony of the five witnesses for the defendants, as to the time the dam went out, if accepted as correct, was practically conclusive against the plaintiff. He was able to oppose it only by inferences. The three newly found witnesses offer directly contrary testimony, presenting an issue of veracity. If the jury should find their testimony persuasive, a verdict for the defendants might still be returned, but it would have to be based upon different grounds from those on which the first one rested.

The considerations upon which it must be decided whether the plaintiff showed sufficient diligence to entitle him to a new trial on the ground of the discovery of this evidence are somewhat complex. The new witnesses are Frank O. Hoff, his wife and daughter. The affidavits in support of the motion allege these facts: Hoff and his wife and their daughter were living near the dam at the time of the flood, as tenants of the defendants. When the plaintiff began looking up the evidence in his case, he knew that Hoff lived near the dam. He believed that Hoff might know something as to when the dam went out, and made search for him, finding him at Goddard, to which place he had moved.

The plaintiff asked him what he knew as to when the dam went out and matters connected therewith. Hoff refused to tell him. The plaintiff regarded Hoff as hostile to his

interests, but intended to subpoena him. Several months before the trial Hoff removed from the county, and the plaintiff did not know until the preliminary statement of counsel at the trial that the defendants claimed that the dam did not go out until after 5 o'clock. The trial began November 2d, and ended November 11, 1911. On November 5th, the plaintiff learned that Hoff had a sister living at Viola, and was told by her that Hoff was living near Cherryvale. He was unable to pursue the inquiry until after the verdict had been rendered. Immediately thereafter the plaintiff went to Cherryvale, but was unable to find Hoff or his residence. "After great difficulty and diligent search" (no particulars of which are given) the plaintiff found Hoff in a small town six miles north of Neodesha (the date is not stated). He then learned what Hoff and the other two witnesses could testify to.

The defendants filed affidavits tending to show that Hoff and his family connections were so well known in Goddard that an inquiry there would readily have disclosed his residence, and that Hoff had given a statement to the defendants shortly after the flood that is inconsistent with his present testimony. They also introduced oral evidence contradicting Hoff's affidavit as to what took place on the day of the flood. Witnesses for the defendants also testified orally as to what had been known concerning Hoff's residence.

The denial of the motion for a new trial means the final defeat of the plaintiff by the verdict of a jury who heard no evidence in his behalf upon a vital question in the case. The granting of the motion leaves the matter to be heard by a new jury in the light of all the evidence now procurable on both sides, and subjects the defendants only to the inconvenience of another trial, if their view of the facts is finally upheld. The court reaches the conclusion that sufficient diligence is shown to require the granting of the motion.

The jury found that the storm of May 31st was an extraordinary one, extending in its sweep over several townships. It is suggested that this finding compels a judgment for the defendants, irrespective of when the dam went out. The use of the term "extraordinary" in characterizing the storm is not conclusive. The test (as the court properly instructed) is whether reasonable diligence required it to be anticipated and guarded against.

Complaint is made of an instruction to the effect that, in building the dam, the defendants were not bound to take into consideration conditions further down the stream. It seems clear that no actual prejudice resulted, but the language may have been so broad as to be subject to misapprehension. It is hard to see how conditions below the dam could affect the pressure it would have to with-

stand, but, if such conditions could arise, they should doubtless be taken into account.

The judgment is reversed, and a new trial ordered.

JOHNSTON, C. J., and BURCH, SMITH, PORTER, BENSON, and WEST, JJ., concur.

MASON, J. (dissenting). I think the plaintiff had notice of the importance of Hoff's testimony when Hoff refused to tell him what he knew as to when the dam went out. I am inclined to believe that a reasonably diligent inquiry would have revealed Hoff's whereabouts before the trial. But at all events I think, under the circumstances, the plaintiff should have informed the court, before the case was submitted to the jury, of what he knew concerning Hoff, and should have asked time to produce him, especially when, on the third day after the trial was begun, and the sixth before it was ended, he saw and talked with Hoff's sister as to his residence. In allowing the case to go to the jury without saying anything about this feature of the matter, the plaintiff took his chance of winning with the evidence at hand.

I think the trial court's decision that due diligence was not shown should not be disturbed.

MANHATTAN WHOLESALE GROCERY  
CO. v. WESTCHESTER FIRE INS.  
CO. (Nos. 18,810-18,813.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. TRIAL (§ 345\*)—GENERAL VERDICT IN CONSOLIDATED ACTIONS—SEVERANCE AS TO PARTIES.

By stipulation between the parties, four separate actions on policies of insurance issued by different companies covering the same property were consolidated and tried as one case. The jury returned a verdict for the full amount of the loss, which the court apportioned among the several defendants. *Held*, that the stipulation, together with the acquiescence of the parties in the procedure, and their failure to request the court to require separate verdicts, constituted a waiver of any error that might be urged against the rendition of a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 816-820; Dec. Dig. § 345.\*]

2. INSURANCE (§ 675\*)—ACTION ON POLICY—ATTORNEY'S FEES—ALLOWANCE.

Attorney's fees in actions against insurance companies are, by statute (Gen. St. 1909, § 4263), allowed as part of the costs, and the court may hear evidence and allow the same after the return of the verdict.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1805, 1806; Dec. Dig. § 675.\*]

Appeal from District Court, Riley County.

Four actions consolidated by the Manhattan Wholesale Grocery Company, one against the Westchester Fire Insurance Company, a corporation, one against the Northwestern National Insurance Company, a corporation, one against the American Insurance Com-

pany, a corporation, and one against the Franklin Fire Insurance Company, a corporation. From judgments for plaintiff, defendants appeal. Affirmed.

Alvin R. Springer, of Manhattan, and Bruce Barnett, of Kansas City, Mo., for appellants. Jno. F. Hessin and Jno. C. Hessin, both of Manhattan, and F. L. Williams, of Clay Center, for appellee.

PORTER, J. Separate actions were brought on four policies of insurance issued by different insurance companies upon a wholesale stock of groceries. Each defendant relied upon the same defenses, and claimed that plaintiff entered into an agreement to arbitrate the amount of damages, and that an award was duly made which was binding. It was further alleged that the value and extent of the damage were not as claimed by the plaintiff.

In its reply plaintiff alleged that the award was not honestly and fairly made; that M. A. Potts, who was selected as arbitrator for the defendants, was biased and prejudiced in their favor; that he was and is known as a professional insurance appraiser, always working for the interests of the insurance company, without regard to the truth and facts connected with the adjustment of the loss; that the umpire appointed by the two appraisers was wholly under the domination and influence of Potts during the whole of the appraisal; that these two gave no heed to the actual loss or damage of the goods, and wholly ignored the appraiser chosen by the plaintiff, and, without his knowledge or consent, fraudulently and arbitrarily fixed the value of goods that were in stock and the amount of damage sustained, and that the appraiser appointed by the plaintiff refused to sign the report on account of the fraudulent conduct and arbitrary acts of the other appraiser and the umpire; that the plaintiff offered to select new appraisers and a new umpire and have the amount of loss and damage reappraised, but that defendants refused.

By stipulation, the four cases were consolidated and tried as one case. The jury returned a verdict for the full amount of the loss, which the court apportioned among the several defendants. From the judgments, the defendants have appealed.

[1] The first complaint is that the court erred in failing to require a separate verdict for each of the cases, and in dividing the liability represented by the gross verdict among the four defendant companies. It is to be observed that the consolidation was not made on an order of the court or in pursuance of any statutory authority, but solely upon a stipulation signed by all the parties, which provided not only that the cases should be consolidated, but that they should be tried as one case. The conduct of the

defendants throughout the trial shows that they acquiesced in the interpretation which the court gave to the stipulation. No objection seems to have been made to any of the procedure until the motion for a new trial. No ruling was asked during the trial, except in behalf of all the companies, nor was there any request by defendants that there should be separate verdicts returned. In the motion for a directed verdict there was a request that it should be returned in the amounts for which the defendants had offered to confess judgment, and in the various offers to confess judgment the total damages admitted by the defendants was divided among the respective companies in exactly the same proportion that the trial court divided the loss as found by the jury.

The plain language of the stipulation that the cases should be tried as one case was followed by the court, and we think the defendants' acquiescence in the procedure was a waiver of the right to object, and their failure to request the court to require separate verdicts waived any error that might be urged against the rendition of a general verdict.

One of the instructions is complained of, but we think that from a fair reading of it the jury would not understand that the exclusion of the plaintiff from the presence of the appraisers during the appraisal was of itself sufficient to overturn the award. The several matters which the court mentions as sufficient to sustain a finding that the award was not fairly and honestly made are stated in the conjunctive, and not in the disjunctive, form. Besides, the plaintiff had the right to be present at proper times, and to give assistance, and to offer evidence for the purpose of establishing the amount of the loss and damage. *Ross v. Insurance Co.*, 86 Kan. 145, 150, 119 Pac. 366, Ann. Cas. 1913B, 1045. The instructions, considered together and in connection with the evidence, fairly presented the issues, and left it for the jury to determine whether the conduct of Potts and the umpire was such as to prevent the making of a fair and honest appraisal. The complaint that improper evidence was admitted is not substantial. *O. W. Holt*, one of the members of the firm, testified that the inventory of July 17th, preceding the fire, was made under his direction, and that he believed it to be correct. It was some evidence as a basis for the purpose of determining the amount of stock at the time of the fire, when considered in connection with evidence of the record of sales made subsequent to July 17th.

We think there was sufficient evidence of unfairness and partiality on the part of the appraisers to authorize the court to submit the question to the jury and to sustain the verdict.

[2] It is insisted that the court erred in admitting evidence as to the value of the serv-

ices of attorneys for plaintiff in the prosecution of the case after the verdict, and after the jury was discharged, and after a motion for a new trial was passed upon and overruled. The contention is decided adversely to the defendants in the case of *Insurance Co. v. Corbett*, 69 Kan. 564, 77 Pac. 108. The cases relied upon involved attorney's fees in actions against railroads for damages by fire. These are not in point for the reason that, under the railroad statute, attorney's fees are allowed as part of the judgment. The attorney's fees in insurance cases are allowed as part of the costs. See, also, *Syndicate Co. v. Insurance Co.*, 85 Kan. 367, 116 Pac. 620. In that case, after an appeal had been taken, and at a subsequent term of court, the trial court reconsidered its ruling respecting attorney's fees, and allowed and taxed them as a part of the costs in the case, and the allowance was sustained.

We discover no error in the rulings of the court, and the judgments will be affirmed. All the Justices concurring.

#### BEE-HIVE MERCANTILE CO. v. INSURANCE CO. OF NORTH AMERICA et al.

(Nos. 18,804-18,809.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

#### TRIAL (§ 345\*)—VERDICT—CONSOLIDATION OF ACTIONS—GROSS JUDGMENT—WAIVER OF OBJECTIONS.

Where several actions against different insurance companies are by stipulation consolidated and tried as one action, without any demand for separate findings as to the value of the different classes of property insured, and a gross verdict is returned, upon which the court apportions the judgment among the different defendants according to the amounts of their separate policies, it is too late to object to the judgment on the ground that a gross verdict was returned, and that some of the policies insured property not covered by other policies.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 816-820; *Dec. Dig.* § 345.\*]

Appeal from District Court, Riley County.

Actions by the Bee-Hive Mercantile Company against the Insurance Company of North America and others, against the Firemen's Insurance Company of Newark, against the Spring Garden Insurance Company, against the Delaware Insurance Company of Philadelphia, against the Germania Fire Insurance Company of New York, and against the Prussian National Insurance Company. The cases were consolidated. Judgment for plaintiff in each case, and defendants appeal. **Affirmed.**

Alvin R. Springer, of Manhattan, and Bruce Barnett, of Kansas City, Mo., for appellants. Jno. E. Hessin and Jno. C. Hessin, both of Manhattan, and F. L. Williams, of Clay Center, for appellee.

PORTER, J. The facts in these cases are practically identical with those in the preced-

\*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series* & *Rep'r Index*

ing cases. The same fire destroyed property of the Bee-Hive Mercantile Company, and similar defenses were made to six separate actions against different insurance companies brought by the plaintiff herein. The defense of an award by appraisers was pleaded, but abandoned, at the trial. The only question raised by these appellants which is not decided and controlled by the decision in the former cases relates to the failure to have separate findings of the loss on the different classes of property insured. A gross verdict was returned by the jury, and the court apportioned the amounts among the different defendants according to the amounts of their policies. It seems, however, that one of the policies does not insure millinery, another covers showcases, but not fixtures generally. The policy which does not insure millinery is the only one which covers music boxes, phonographs, and records. Apparently no serious hardship results, for it appears that the company which was required to bear part of the loss on millinery is relieved of a part of its burden of the entire loss on music boxes. The four companies against whom loss on the fixtures were assessed in the judgments may have been injured to some extent by the fact that the one company which had insurance on showcases alone escaped some of its liability. If a request had been made, the court would doubtless have required the jury to determine the loss on each class of property separately; but no such request or demand was made by the defendants or by either of them.

The cases were not consolidated under any statutory provision, nor simply by order of the court, but because the parties themselves stipulated that the six cases should be consolidated and tried as one case. At all events, it is too late for the defendant now to raise the objection after having submitted the cases upon the stipulation that they should be consolidated and tried as one case, and after failure to request the court to require the jury to ascertain separately the value of the different classes of property. Doubtless, the defendants will have little difficulty in adjusting the slight differences between themselves.

In view of all the circumstances, we think the matter is not of sufficient consequence to justify a reversal and a new trial.

The judgments are affirmed. All the Justices concurring.

**ZUEGE v. NEBRASKA MORTGAGE CO.**  
et al. (No. 18,586.)

(Supreme Court of Kansas. May 9, 1914.)

*(Syllabus by the Court.)*

**1. MORTGAGES (§ 144\*)—TAX SALE—WHO MAY PURCHASE.**

Where one takes a deed to land which is incumbered by a mortgage but does not assume or agree to pay the mortgage, no personal

relation or obligation subsists between him and the holder of the mortgage, and he owes no duty to the holder of the mortgage to pay the taxes on the land and may thereafter acquire a tax deed to the land which will extinguish the rights of the mortgage holder therein if the land be not redeemed and no action be brought by the holder of the mortgage to set aside the tax deed within five years from the issuance thereof.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 285-289; Dec. Dig. § 144.\*]

*(Additional Syllabus by Editorial Staff.)*

**2. CONSTITUTIONAL LAW (§ 149\*)—IMPAIRMENT OF CONTRACT OBLIGATION—MORTGAGES—ACTION TO QUIET TITLE.**

Laws 1911, c. 232, § 1, providing that when a mortgage has been in default for more than 15 years, or the lien thereof ceases to exist, or when an action to enforce such mortgage is barred by limitations, the owner of the land may sue to quiet his title, does not impair the obligation of the mortgage contract.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 420, 480; Dec. Dig. § 149.\*]

Appeal from District Court, Cheyenne County.

Action by William Zuege against the Nebraska Mortgage Company and others. From judgment for plaintiff, defendants Charles E. Gibson and another appeal. Affirmed.

Dempster Scott, of Atwood, for appellants. E. E. Kite, of St. Francis, and Fred Robertson, of Topeka, for appellee.

SMITH, J. [1] Appellee brought this action April 12, 1911, to quiet his title to a quarter section of land in Cheyenne county. In his original petition he alleged that he had been in the open, notorious possession of the land for more than 15 years last past. In his amended petition this allegation was changed to 11 years last past. He claimed under a tax deed to the land, issued November 19, 1900, and also through a succession of conveyances made by Benson Plymate and wife by warranty deed; all being duly recorded. The appellants claim a lien on the land by virtue of a mortgage thereon executed by Plymate and wife on October 1, 1888, to secure a promissory note for \$500 due five years after that date, maturing October 1, 1893. The appellee owed no personal duty to the appellants or to the holder of the mortgage to pay the mortgage or to pay the accruing taxes. No personal relation subsisted between the parties.

It appears without controversy that, some time prior to the Plymates leaving the state, they conveyed the fee to the land to the Nebraska Mortgage Company, which corporation conveyed it to one Updike, who in turn conveyed it to appellee in June, 1906. The appellants contended that, appellees having obtained the legal title before they acquired their tax deed, the two titles merged, and it should be presumed that the appellee held possession under the title first acquired, and that the mortgage has not been extinguished

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the tax deed and should be foreclosed. It is said in *Rand v. Ft. S. W. & W. Ry. Co.*, 50 Kan. 114, 31 Pac. 683: "Merger is very largely a question of intention, and the court will always presume against it whenever it will operate to the disadvantage of a party." To the same effect is *Loan Association v. Insurance Co.*, 74 Kan. 272, 86 Pac. 142, in which it is said: "Where a mortgagee of real estate acquires the legal title to the mortgaged property, the mortgage will become merged in the larger estate, or not, as the mortgagee may desire or his interest require." The title by conveyance from the former owner and by the tax deed became merged, or not, according as appellee desired or his interest was best subserved; the former title was subject to the mortgage, the latter was not. Hence there was no merger.

The appellants' right to attack the tax deed was barred by limitation years before this action was brought. The tax deed was then the paramount title and extinguished all other titles as well as the lien of the mortgage. By the provisions of section 9483 of the General Statutes of 1909, no proceeding to defeat or avoid the sale could be maintained, except only where the taxes have been paid on the land redeemed as provided by law, unless the action be brought within five years after the recording of the tax deed. This proceeding on the part of the appellants was instituted upon the filing of their answer and cross-petition much more than five years after the tax deed was recorded; in fact, about nine years. There is no contention that the taxes had been paid prior to the sale or that the land had been redeemed.

[2] The action to quiet title was instituted under the provisions of chapter 232, Laws of 1911, and the appellants claim that the law is invalid for the reason that it affects the obligations of a contract. This contention has been expressly negatived in the case of *Shepard v. Gibson*, 88 Kan. 305, 128 Pac. 371, in which it is said: "In the enactment of chapter 232 of the Laws of 1911 the Legislature did not intend to take from a mortgagee any existing rights under the mortgage contract nor to deprive him of a remedy to enforce such rights, but its purpose was to give the owner of the land on which there is a mortgage that has long been in default and a cause of action thereon is barred by lapse of time the right to bring an action and have the present condition or status of the mortgage adjudicated, and the act therefore does not operate to impair the obligation of the mortgage contract."

As said in *Shepard v. Gibson*, supra, the only purpose of chapter 232 of the Laws of 1911 is to enable owners of land, upon which there is a mortgage long in default and the cause of action thereon barred by lapse of time, to bring an action to have the present status of the mortgage adjudicated.

The appellants had no rights in the premises which they could enforce at law, and the appellee had a right to have his title, whatever it might be, cleared of record by a judgment that the mortgage constituted no subsisting lien upon his land.

The judgment is affirmed. All the Justices concurring.

CITY OF ELLIS v. JACOBS, County Treasurer et al. (No. 19,201.)†  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 90\*)—ROAD DISTRICTS—MUNICIPAL CORPORATIONS.

All cities of the second and third class in this state are separate road districts.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 90.\*]

2. MUNICIPAL CORPORATIONS (§ 53\*)—TOWNSHIPS.

Every city in this state of less than 2,000 inhabitants is a part of the township within the boundaries of which it is located, unless it has the prescribed qualifications as to population and assessed valuation of real and personal property and has elected to become a separate township in accordance with the provisions of section 1513, Gen. St. 1909.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 141, 143; Dec. Dig. § 53.\*]

3. HIGHWAYS (§ 130\*)—TOWNSHIP ROAD TAX—DISPOSITION.

It is the duty of each county treasurer to pay to the treasurer of each city of the third class within the county of which he is treasurer all sums levied and collected upon the property in such city for township road tax.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. § 130.\*]

Original mandamus by the City of Ellis, Kansas, against Philip Jacobs, as Treasurer of Ellis County, Kansas, and others. Writ allowed.

E. C. Flood, of Ellis, for plaintiff. James T. Nolan, of Ellis, for defendants.

SMITH, J. The undisputed facts in this case are as follows: The city of Ellis is a city of the third class having a population of between 1,000 and 2,000 inhabitants. The city brought this action against the defendant Jacobs as county treasurer of Ellis county to compel him to pay over to the treasurer of the city of Ellis the road taxes levied against the property in the city for the year 1913. The amount of the tax for road purposes was one mill on the dollar on all property in Ellis township within which township the city of Ellis is located and including all the property within the corporate limits of the city as well as the property in the township outside of the city. The county clerk of Ellis county placed on the tax rolls of the county the tax so levied. The county treasurer had, at the beginning of the action, about \$600 taxes by him collected on property within the corporate limits of the city for such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 13, 1914.



township road tax of Ellis township. An alternative writ of mandamus was applied for in this court and was allowed. Both the township treasurer and the township clerk intervened as such officers and also as ex officio members of the board of highway commissioners of Ellis county.

[2] Section 1513 of the General Statutes of 1909 provides that cities of the third class shall be and remain a part of the corporate limits of the municipal townships in which they are located; provided, in substance, that such city shall become a separate township if it has the prescribed qualifications as to population and assessed valuation of real and personal property and the question of becoming a separate township shall have been submitted by the city council to the qualified voters of such city at a regular city election and two-thirds of the votes polled thereat shall have been in favor thereof. It is conceded that such vote has not been taken in the city of Ellis and that such city remains a part of the township.

[1] By section 15 of chapter 248, Laws of 1911, it is provided: "That each incorporated city of the second and third class shall constitute a separate road district. \* \* \*

It follows, then, that the city of Ellis is a separate road district but is still a part of Ellis township. Section 34, c. 248, of the Laws of 1911, provides: "That for the purpose of carrying out the provisions of this act the highway commissioners shall recommend to the county commissioners of each county in this state, on or before the first day of August of each year, a levy of not more than three mills on the dollar on all the property in such township, and it shall be the duty of the county clerk to place such levy on the tax rolls of said county; provided, that at least seventy-five per cent. of all moneys collected under the provisions of this section for road purposes from the taxable property in each township, shall be used to improve the rural route and township roads within such township. And it shall be the duty of the township trustee, highway commissioners and county engineer to see that this provision is complied with and that this percentage of the moneys collected shall be used, as nearly as practicable, upon such roads in the neighborhood of the property from which the tax is raised. \* \* \*

[3] Section 2173 of the General Statutes of 1909 provides: "That it shall be the duty of the county treasurer of each county in which there are one or more cities of the third class which are under the laws of this state separate road districts to pay to the treasurer of such city or cities all sums levied and collected upon the property in said respective cities for township road tax."

It thus appears that the tax was legally levied and if, as we believe, section 2173, *supra*, is applicable, the county treasurer was in duty bound to pay the portion of the

township road tax levied upon property within the corporate limits of the city to the city treasurer.

Yet the portion of section 34, c. 248, of the Laws of 1911, above quoted, requires that 75 per cent. of the same fund shall be used to improve the rural route and township roads within the township. Both provisions, evidently, cannot be applied. The city cannot use its funds to make improvements outside of its corporate limits, and, if the improvements are made by the township, no method is provided by which it can get the money from the city treasury to pay for them.

The city cannot use the entire fund for one purpose and the township officers 75 per cent. thereof for another purpose.

It is said on the part of the plaintiff that section 34, *supra*, was incorporated in House Bill No. 1008, as originally introduced, and that the clause read: "Provided that at least seventy-five per cent. of all moneys collected from the taxable property in each township, including cities of the third class, shall be used to improve the rural routes and township roads within such township." That thereafter the bill was amended by inserting, after the word "collected," the words "under the provisions of this section for road purposes," and by striking out the words "including cities of the third class." We have examined the House Journal and find that this contention is correct. As in section 15 of the act it was provided that each city of the second and third class should constitute a separate road district, and as under section 2173 of the General Statutes of 1909 it is made the duty of the county treasurer to pay to the city treasurer moneys collected on property within the city for township road tax, the amendment seems to have been made for the purpose of harmonizing the provisions of the sections by taking the tax levied upon property within the city from the 75 per cent. provision. Section 34 was not, however, amended to conform to the purpose here suggested.

But we are not left to inference as to the application of the money to which the city is entitled by the provisions of section 2173 of the General Statutes of 1909. Section 32 of chapter 248, Laws of 1911, reads: "That taxes assessed for the purpose of constructing and maintaining public roads and highways shall be paid in cash and collected as provided for in relation to other taxes. When so collected the county treasurer shall pay that proportion of the same which is to be used upon mail routes and township roads or upon city streets to the treasurer of the township or city from which said taxes are collected, to be used exclusively for such road purposes." A portion of section 15, *Id.*, which provides that cities of the third class shall be separate road districts, also provides as follows: "\* \* \* And the said corporate authorities of any such city are

authorized and empowered to use the road tax provided for in this act in paving, macadamizing or grading the streets and alleys in such city in any manner provided by ordinance or resolution of any such corporation; provided, such tax shall be applied first to the most public streets and macadamized or graded, and any such city shall have the power to pass any by-law or ordinance necessary to carry out fully the provisions of this act." This provision clearly indicates the legislative intent that section 2173 of the General Statutes of 1909, which has never been repealed, is in full force and effect; also, that the 75 per cent. provision does not apply to township road taxes levied and collected upon property within a city.

The parties to this action are officers of the county, township, and city, respectively, and, while the county treasurer has raised the question that the city was not entitled to the writ for the reason that no formal order has been obtained on the treasurer by the county clerk to pay the money to the city treasurer, he seems to have done so for the purpose of its bearing upon the adjudication of costs.

The real question is whether or not the money belongs to the city, and we have concluded that it does. All parties concerned want to have the law settled and should not and evidently do not desire to have the case determined on a technicality. The parties to the action, as public officers, have no personal interest in the questions involved, but in a fair and generous spirit, as such officers, are seeking to have the law settled. In so doing they should not be required to pay the costs of the proceeding. The city and township of Ellis are the real parties in interest.

The writ is allowed, and the costs are divided equally between the city and township. All the Justices concurring.

CHANDLER v. CHANDLER. (No. 18,831.)†  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. JUDGES (§ 16\*)—SPECIAL JUDGE—VALIDITY OF DECREE.

A judge from another district was by the parties agreed upon as judge pro tem. to try their case, and proceeded to hear and determine the same, being fully recognized as judge pro tem. No oath was taken, and it does not appear that the regular judge was absent or disqualified. *Held*, that such agreement by the parties was a proper and legal method of selecting a judge pro tem., and the decree rendered by him was valid.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 46, 53-59; Dec. Dig. § 16.\*]

2. JUDGES (§ 16\*)—SPECIAL JUDGE—SELECTION BY AGREEMENT—VALIDITY OF STATUTE.

The requirements of the Constitution (section 20, art. 3) that provision be made by law for the selection by the bar of a pro tem. judge when the regular judge is absent or disqualified,

does not preclude the Legislature from providing other methods of selection.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 46, 53-59; Dec. Dig. § 16.\*]

3. NEW TRIAL (§ 114\*)—GROUNDS—CHANGE OF JUDGE.

In cases occurring before chapter 243 of the Laws of 1913 took effect, a motion for new trial need not necessarily be granted by a judge who has succeeded the one who tried the case, unless such motion involves the examination and weighing of evidence and the credibility of witnesses.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 234-236; Dec. Dig. § 114.\*]

Appeal from District Court, Chase County.

Action by Alice Goldie Chandler against Levi L. Chandler. From an order refusing to set aside decree for defendant, plaintiff appeals. Affirmed.

Carr W. Taylor, of Hutchison, for appellant. Waters & Waters, of Topeka, for appellee.

WEST, J. On December 3, 1913, the parties by their counsel stipulated in writing that Hon. Robert Helzer, judge of the Thirty-Fifth judicial district, who had appeared on request of the parties, should try the cause as judge pro tem. and render judgment any day of the term the clerk desired. The journal entry recited that the cause came on for hearing and trial before Judge Helzer, as judge pro tem. by written consent and agreement of the parties, and continued in progress until the 5th of December; that both parties appeared in person and by their attorneys, and introduced their respective evidence and rested; that it was decreed that the parties be denied a divorce, and the plaintiff be given alimony and provide for the custody of the children. This journal entry was approved by the attorneys for both parties. Within three days a motion for new trial was filed. Long afterwards a verified amended motion to vacate and set aside the judgment was filed, setting up that Judge Meckel of the Chase district court was not disqualified, sick, or absent; that Judge Helzer had no jurisdiction to try any cause outside of his own judicial district; that he was not chosen judge pro tem. by the bar of Chase county, and did not take the oath of office; that he was not a judge pro tem. acting in the place of Judge Meckel, but merely tried the cause by virtue of an agreement of the parties; that the term of Judge Meckel expired January 13, 1913; and that therefore his successor, Judge Harris, should set aside the judgment and grant a new trial. On June 3, 1913, this motion was denied, the journal entry reciting that the judgment and decree "was rendered and entered by the agreement and consent of all the parties thereto." On February 27th a statement was filed by certain of the counsel that the attached stipulation had been misplaced by oversight, which stipulation recited that the trial might be had before Judge Helzer, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 13, 1914.

no party should raise any question caused by the expiration of the term of Judge Meckel.

[1] The sole question presented by the appeal is the validity of the decree rendered by Judge Heizer, the plaintiff contending that it is utterly void for want of jurisdiction. Counsel asserts with vigor and confidence that mere consent cannot confer jurisdiction of the subject-matter, and in this he is correct. He urges that this is a direct attack on the judgment, which can be made by appeal, and he is correct in this also. *Higby v. Ayres*, 14 Kan. 331, 338; *Earls v. Earls*, 27 Kan. 538; *Shaffer v. Brinkman*, 31 Kan. 124; *A., T. & S. F. R. Co. v. Keller*, 31 Kan. 439, 2 Pac. 771; *Fleeman v. Railway Co.*, 82 Kan. 575, 109 Pac. 287, 33 L. R. A. (N. S.) 733, 136 Am. St. Rep. 117, 20 Ann. Cas. 276; *Nason v. Patten*, 88 Kan. 472, 474, 129 Pac. 138.

[2] It is argued, further, that as the Constitution requires that provision be made by law for the selection by the bar of a pro tem. judge when the judge is absent or otherwise disqualified to sit (Const. § 20, art. 3), the Legislature went beyond its power in providing (Gen. St. 1909, § 2395) that the parties, or their attorneys, in any case may select a judge to sit in such case. But we are not ready to concede that this constitutional requirement precludes other methods of selecting a judge pro tem.

A very similar question was up in *State v. Durein*, 70 Kan. 13, 80 Pac. 987, and in *State v. Weiss*, 84 Kan. 165, 113 Pac. 388, 36 L. R. A. (N. S.) 73, wherein it was held that the prohibition of the manufacture and sale of intoxicating liquor for all but the excepted purposes was no bar to complete legislative prohibition.

In *re Norton*, 64 Kan. 842, 68 Pac. 689, 91 Am. St. Rep. 255, is cited, but that case decided that a court, to be legal, must be created either by the Constitution or by an act of the Legislature.

The language of the statute is peculiar. "A judge pro tem, of the district court may be selected in the following cases." Gen. Stat. 1909, § 2394. "Such selection shall be made by the members of the bar present. \* \* \* The parties, or their attorneys, in any case, may select a judge to sit in such case." Section 2395. Here the word "cases" seems to mean occasions and not lawsuits, and it is significant that the word "selection," and not "election" is used, in the statute and in the Constitution.

The exact question was considered in *Kansas Pac. Ry. Co. v. Reynolds*, 8 Kan. 623, 630, and it was there said: "Now this constitutional provision can affect this question only for one of two reasons—either because it restricts the power of the Legislature to dispose of a case pending in a court whose judge is disqualified to try it, or because in such a case it guarantees to a party litigant a trial in the same court before a judge pro tem. It is not in terms a denial of power. It does not purport to withhold or limit. Nor is it

couched in the form of a grant. The act required is an act of legislative power. It would pass to the Legislature under the general grant. Without it, unless restrained by some other clause of the Constitution, the Legislature could do just what it has done, and what it is authorized to do under this section. If, therefore, it neither grants power otherwise reserved, nor restricts power otherwise granted, why was it incorporated into the Constitution, and what function does it perform? It is directory in its nature. It calls the attention of the Legislature to a particular subject, and imposes a duty in that respect. It emphasizes the will of the people in reference to certain legislation; and, being such, we know no reason for construing an imposition of duty as a restriction of power."

In *Davis v. Wilson*, 11 Kan. 74, it was held that, when the regular judge had left before all the cases for trial had been reached and a judge pro tem. had been elected to dispose of the remaining cases and he had been of counsel and could not sit in one of them, it was proper to elect another judge pro tem. for that case, "the parties not being able to agree"; the necessary inference being that a selection by their agreement would have been sufficient.

In *City of Wellington v. Wellington Township*, 46 Kan. 213, 217, 26 Pac. 415, 417, the record recited that the trial was submitted to a judge pro tem. by and with the consent of all the parties, and it was said: "Now, this is one of the modes prescribed by statute for the selection of a pro tem. judge." Chapter 155 of the Laws of 1911, amending section 2898 of the General Statutes of 1909, provides that the judge pro tem. shall have the same power and authority as the regular judge "in respect to cases tried before him, or in which he may have been selected to act," and that there shall be filed with the clerk a certificate of the regular judge that he is physically incapacitated from holding the term, and the judge selected for the term shall receive a certain per diem, "but no such certificate shall be required where a judge pro tem. is selected to try or hear any particular case or proceeding." This indicates a legislative distinction between a regular selection for the purpose of holding out the term and a choice of one to try a given case, and we think that such distinction marks all the legislation on the subject, and accords with practical experience and necessity.

In *Higby v. Ayres*, 14 Kan. 331, the regular judge was engaged in the trial of a cause, and, there being no statutory disqualification to prevent his trying the case in question, the parties consented to its trial before another as judge pro tem. It was argued there as here that consent could not confer jurisdiction, but the court said that the authority of the judge pro tem. had been duly recognized by the parties to the cause, and by the officers of the court, and it was held that

he was a pro tem. judge de facto, and his acts binding, and could not be attacked in this court for the first time.

It was held by Brewer, J. in the case of *In re Watson*, Petitioner, 30 Kan. 753, 1 Pac. 775, that although the opinion and announcement of the decision were made outside the district by one who was no longer judge, yet as the parties had voluntarily proceeded to a hearing before him and accepted his decision as the action of the court, such acceptance was equivalent to a recognition of him as a judge pro tem. and precluded them from questioning his decision on the ground that he had not been selected and sworn as such.

In *Railway Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050, it appeared that the regular judge was disqualified, and the judge of another district was called upon to try the case, and was duly elected by the bar and presided at the trial with the acquiescence of the parties and officers, whose authority could not be questioned in this court for the first time. It was held to be a question of recognition rather than one of jurisdiction conferred by consent. The case is in point in respect to the claim here made that Judge Helzer could not sit outside his own district. The failure to take the oath did not avoid his acts. In *re Hewes*, 62 Kan. 288, 62 Pac. 673.

From a consideration of the constitutional and statutory provisions, together with the foregoing decisions and the practical necessities often arising in similar cases, we conclude and hold that the selection made by the agreement of the parties was a valid statutory method of choosing a pro tem. judge to try the case, and, such selection being followed by full recognition and acquiescence until long after the decision was rendered, the power of Judge Helzer to sit was and is beyond question.

[3] But it is contended that, as Judge Meckel's term expired long before the motion to vacate was filed, Judge Helzer's powers, if any, had ceased with the expiration of the term, and it became the duty of Judge Meckel's successor to grant the motion, and *Bass v. Swingley*, 42 Kan. 729, 22 Pac. 714, and *Insurance Co. v. Neff*, 48 Kan. 457, 23 Pac. 606, are cited. Counsel for plaintiff regards the motion as one to set aside the judgment and also to grant a new trial, and calls attention to the language in the journal entry that the court did "deny and overrule each of said motions." But if we are to assume that such was the intent and effect of the court's order, it does not follow that it was incumbent upon Judge Harris to grant a motion for new trial. In *Bass v. Swingley*, the point decided was that when the motion is based on the ground that the verdict is not sustained by sufficient evidence, it is the duty of the new judge to grant the mo-

tion because he could not know what the evidence was. In the *Neff Case* a new trial was granted, and this was affirmed and the *Swingley Case* referred to, but what was really involved in the motion does not clearly appear. In *Linker v. Railroad Co.*, 87 Kan. 186, 123 Pac. 745, the matter is placed on the ground stated in *Bass v. Swingley*. The point presented by the verified amended motion was the invalidity of the judgment arising out of the alleged lack of jurisdiction in Judge Helzer, and this involved no examination or weighing of evidence in the ordinary sense, or the credibility of witnesses, and one judge could act as well as another. The last Legislature provided that the motion shall not be granted for the reason of the change in judges when the evidence is available so that the new judge has the facts before him (Laws 1913, c. 243), and this, though not applicable here, indicates a purpose in line with the decision in the *Swingley Case*.

The only question sought to be raised by the appeal as stated by counsel for the plaintiff is the validity of the decree, and hence we need not discuss or determine the point suggested as to the effect upon the power of Judge Helzer the expiration of Judge Meckel's term had.

For the reasons already indicated we must regard the decree as valid and binding, and the order refusing to set aside is therefore affirmed. All the Justices concurring.

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WAIT v. MCKIBBEN. (No. 18,850.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. JUDGMENT (§ 199\*)—ACTION ON DISSOLUTION AGREEMENT—JUDGMENT NOTWITHSTANDING VERDICT.

In an action to recover on a partnership dissolution agreement, the defendant pleaded a mutual mistake by which a provision to turn over a mortgage on one of two tracts of land had been changed to one for turning over a mortgage on both tracts. The evidence showed and the jury found that the scrivener had made a mistake in drawing the contract from the agreed draft furnished by the parties, and that when it was signed the plaintiff knew of the change, but the defendant did not. The court had instructed that, in order for the plaintiff to recover, a mutual mistake must be shown. The defendant asked leave to amend by alleging a mistake on his part and fraud on the part of the plaintiff. This was refused, and the court rendered judgment against the defendant on the findings notwithstanding the general verdict. *Held*, error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

2. APPEAL AND ERROR (§ 959\*)—PARTNERSHIP (§ 120\*)—AMENDMENT—VARIANCE.

The matter of amending to conform to the proof being discretionary, the ruling in that respect will not be disturbed, but the difference between the allegations and the proof was technical rather than substantial, and the gen-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

eral verdict should have been allowed to stand regardless of any amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3831; Dec. Dig. § 959; Partnership, Cent. Dig. §§ 182, 183; Dec. Dig. § 120.\*]

Appeal from District Court, Ford County.

Action by L. E. Wait against Clay McKibben. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Chas. A. Baker and B. F. Milton, both of Dodge City, for appellant. Scates & Watkins and Madison & Van Riper, all of Dodge City, for appellee.

WEST, J. The parties agreed upon a dissolution of their real estate partnership. They had sold, or were about to sell, a half section and a quarter section of land at a profit of \$1,900, and expected to take a mortgage on one or both of the tracts, but it turned out that the half section was paid for in cash. The plaintiff dictated to their stenographer a draft of the agreement, which draft provided that the defendant was to turn and assign to the plaintiff an interest of \$1,900 in a mortgage on the half section or quarter section of land. This draft was given to an attorney to put in proper legal shape, but not to change its legal effect. In drawing the contract from this draft the attorney by mistake used the word "and," instead of "or," thereby making the contract provide that the mortgage was to cover both the half section and the quarter section. Upon his refusal to turn over a mortgage covering both tracts of land the plaintiff sued the defendant for the sum of \$1,900. The answer pleaded a mutual mistake. The verdict was for the defendant, and the jury found that the draft was given to the attorney to put into legal language; that he made the change from "or" to "and" by clerical mistake; that the defendant in executing the contract did not know of the change, but the plaintiff did; that the defendant had tendered a mortgage on the quarter section, which was refused; and that when the contract was signed both parties did not intend that the mortgage was to cover both tracts. The defendant asked leave to amend and allege a mistake on his part and fraud on the part of the plaintiff; the defendant having testified that before turning the draft over to the attorney he asked the plaintiff if that was their exact agreement, and was answered in the affirmative. The plaintiff moved for judgment on the special findings, and the court overruled the request for leave to amend, and granted the plaintiff's motion, and rendered judgment against the defendant for \$1,970, with interest and costs. The defendant appeals, and urges that he should have been permitted to amend for the reason that the mistake of the scrivener was really the mutual mistake of the parties, and hence the findings were consistent with the general verdict; also that under

the allegations and proof and the prayer for general relief reformation of the contract should have been decreed; further, that even if it was necessary to allege fraudulent concealment on the part of the plaintiff, a timely request so to amend was made and should have been granted.

[1, 2] The days of technicalities are past. The evidence and findings show clearly and conclusively that the contract signed was not the one agreed upon, and that the plaintiff executed the former with this knowledge, while the defendant signed in ignorance of the change. The difference between an ordinary mutual mistake and the situation here presented is not such as to justify punishing the defendant and rewarding the plaintiff. Both may well be satisfied if required to abide by the agreement they actually made. The motion to amend was informal, but should have been treated as one to meet the requirements of section 140 of the Civil Code, but the general rule is that such matters must be left to the discretion of the trial court, and the ruling need not be disturbed. Doty v. Shepard, 139 Pac. 1183. However, the court had the parties before it, the controversy had been fully litigated, and the facts were made plain by the verdict and findings of the jury, and it was error to hold the defendant to a contract he had not in fact made and give the plaintiff the benefit of a change known to but undisclosed by him. And in order to render the proper judgment no change in the pleadings was essential; the variance between the allegations of the answer and the proof being of form more than of substance. *Hopkinson v. Conley*, 75 Kan. 65, 67, et seq., 88 Pac. 549; *Sutter v. Harvester Co.*, 81 Kan. 452, 456, 106 Pac. 29; *Hornick v. U. P. Railroad Co.* 85 Kan. 568, 571, 572, 118 Pac. 60, 38 L. R. A. (N. S.) 826, Ann. Cas. 1913A, 206; *Pohl v. Fulton*, 86 Kan. 14, 119 Pac. 716, Ann. Cas. 1913B, 1014; *Malone v. Jones*, 91 Kan. 815, 189 Pac. 387. For a review of authorities see *Bear v. Outler*, 86 Kan. 66, 119 Pac. 713.

In *Hardy v. La Dow*, 72 Kan. 174, 83 Pac. 401, the allegation was that the contract was void for fraud, and its cancellation was sought. The court decided that by mistake it had failed to express the real intention of the parties, and proceeded to reform and enforce it, and this was held proper. Here we have the converse. A mutual mistake was alleged, and at least an inequitable advantage taken by one of the parties proved, and the court should have proceeded to reform and enforce the contract actually made. *Sutton v. Risser*, 104 Iowa, 631, 636, 74 N. W. 28; *Town of Essex v. Day*, 52 Conn. 483, 1 Atl. 620; 3 Pomeroy, Eq. Jur. § 1376.

"When reformation is sought on the ground of mutual mistake only, and it appears that the sale was as alleged in the complaint, and that the deed was accepted through a mis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

take on plaintiff's part, and the evidence received without objection also shows clearly and satisfactorily that the misdescription was inserted *either through mistake or fraud* on defendant's part, the deed should be reformed. *James v. Cutler*, 54 Wis. 172, Syl. 179, 10 N. W. 147, 150.

In the opinion last cited it was said: "The evidence was all received without any objection that it was not admissible under the allegations of the complaint. The court was therefore at liberty to grant any relief asked for in the complaint, whether the plaintiff was entitled to such relief on the ground of mutual mistake or on the ground of mistake on the part of the respondent and fraud on the part of the appellant."

It is suggested that, as the defendant is by the judgment permitted to keep his mortgage which is presumably worth its face, he loses nothing. But he has lost a case which he was entitled to win, and the costs incident thereto.

The judgment is reversed, with directions to enter judgment on the general verdict, in favor of the defendant. All the Justices concurring.

WOODS v. NICHOLAS et al. (No. 18,109.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. PLEADING (§ 229\*)—AMENDMENTS.

Amendments for the purpose of correcting mistakes or defects in pleadings that would promote justice and not substantially change the claims or defenses of parties should be liberally allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 591; Dec. Dig. § 229.\*]

2. PLEADING (§ 248\*)—AMENDED PETITION—CONSTRUCTION.

The averments of the amended petition examined, and held to state a cause of action for the deceit and fraud of the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.\*]

3. FRAUD (§ 11\*)—EXPRESSION OF OPINION.

A mere puffing statement by the seller as to the quality of an article sold or exchanged is generally regarded as an expression of opinion, and of itself does not constitute fraud as against the buyer.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

4. SALES (§ 41\*)—EXCEPTION OF RULE OF CAVEAT EMPTOR.

It is a general rule that if an article is sold for any and all purposes for which it is adapted, and not by a manufacturer or producer for a particular purpose, and it is open to inspection by the buyer, the rule of caveat emptor applies.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 84; Dec. Dig. § 41.\*]

Appeal from District Court, Seward County.

Action by O. E. Woods against G. L. Nicholas and L. W. Parker. From judgment for plaintiff, defendant Parker appeals. Affirmed.

V. H. Grinstead and Arthur C. Scates, both of Liberal, for appellant. J. P. Laughlin, of Osage City, and F. S. Macy, of Liberal, for appellee.

JOHNSTON, C. J. In an action brought by O. E. Woods he charged that L. W. Parker had deceived and defrauded him by selling and transferring to him two promissory notes executed in his favor by G. L. Nicholas, one for \$327.50 and another for \$300, due at different times, and representing that the notes were secured by a mortgage upon an engine and certain implements which were not otherwise incumbered when in fact there was a prior mortgage on the property in an amount about equal to its value. In 1907 Parker purchased the engine from Hart-Parr Company, and to secure the payment of the purchase price gave that company a mortgage thereon for \$1,500. He paid \$1,000 of that indebtedness, and later sold the engine and some plows to Nicholas who executed the two notes mentioned in favor of Parker, and he also executed a mortgage on the engine and plows to secure these notes, which contained a clause that the property was unincumbered. Shortly afterwards Parker transferred the Nicholas notes and the mortgage to Woods, representing that the notes were well secured by a first mortgage, when there was in existence a mortgage on the property given by Parker himself to secure an unpaid note of \$500. At the instance of Parker, Grage, who was his son-in-law, obtained this \$500 note, and later Parker, as the agent of Grage, foreclosed the first mortgage and absorbed the security which had been given to Woods. Woods began this action, basing it on the fraud and deceit of Parker, and named Nicholas, who was alleged to be insolvent, as a defendant in the case. Parker answered, admitting the existence of the unpaid note of \$500 and the prior mortgage which had been given to secure its payment, and he also alleged that Woods had turned over to him as part consideration for the notes an old worn-out automobile representing it to be as good as a new one, and he therefore asked for judgment against Woods for the sum of \$600.

[1] There is complaint that Woods was permitted to file an amended petition after the trial had been commenced, and also that the petition so amended failed to state a cause of action for fraud and deceit. No error was committed in either respect. Amendments for the purpose of correcting mistakes of any kind in pleadings which would be in furtherance of justice and would not substantially change the claims or defenses should be liberally granted. Code Civ. Proc. § 140 (Gen. St. 1909); *Rogers v. Hodgson*, 46 Kan. 276, 28 Pac. 732; *Deter v. Jackson*, 76 Kan. 568, 92 Pac. 546; *Malone v. Jones*, 91 Kan. 815, 139 Pac. 887; *Wait v. McKibben*, 140 Pac. 860.

[2] The amendment made by Woods only

amplified the averments of his original petition, which itself stated a right of recovery on the ground of fraud. While Woods set out the notes which had been transferred to him by Parker, indorsed as "without recourse," it was further stated that he was induced to take them by the representations of Parker that they were well secured by a first mortgage upon the property, whereas the mortgage given by himself was a lien on the property, and that he had been instrumental in having his son-in-law obtain and foreclose that mortgage. Plaintiff alleged and offered testimony to show that the representations so fraudulently made were relied on by him, and also that the maker of the notes was insolvent.

[3] On behalf of Parker it was claimed that error was committed in instructing the jury as to the representations made by Woods relating to the condition of the automobile given by Woods in exchange for the notes and mortgage. Parker claimed that he was entitled to set off the price of new tires purchased by him to replace the worn ones that were on the machine when he got it, and which he says were represented to be in good condition. The court advised the jury that if the plaintiff made false and fraudulent representations as to the condition of the automobile in certain respects, on which Parker relied, and that he did and could not discover such condition by an examination made with reasonable care and diligence, he would be entitled to recover the damages sustained, but added that under the admitted facts of the case Woods was not liable for the new tires which Parker had placed on his machine. The exclusion from consideration of the new tires is the part of the instruction of which complaint is made. The ruling was based on the fact that Parker had made an examination of the tires before the sale and exchange was effected. It appeared that he not only examined but commented upon the fact that the tires were badly worn and he noticed, too, that the rubber had been worn off so that the canvas was in sight. Woods was not a manufacturer or a dealer in automobiles, and it appears that he did not have any expert knowledge respecting them. When the condition of the tires was mentioned, Woods said, "Oh, pshaw, they are good for 2,000 miles." This was a mere puffing statement like those frequently made respecting the value of things offered for sale, which are generally regarded to be expressions of opinion, and which of themselves do not constitute fraud. 35 Cyc. 71. There was nothing approaching a warranty of the tires, nor were there any confidential relations between the parties, and as the information relating to the condition of the tires was available alike to both parties, and as the tires were actually inspected by Parker, it

cannot be said that he was defrauded in that respect.

[4] It is a general rule that if an article is sold for any and all purposes for which it is adapted, and not by a manufacturer or producer for a particular purpose, and is open to inspection by the buyer, the doctrine of caveat emptor applies. *Graffenstein v. Epstein & Co.*, 28 Kan. 443, 33 Am. Rep. 171; *Lukens v. Fretund*, 27 Kan. 664, 51 Am. Rep. 429; *Safe & Lock Co. v. Huston*, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53; *Kinkel v. Winne*, 67 Kan. 100, 72 Pac. 548, 62 L. R. A. 596; *Mechem on Sales*, § 1311. There are exceptions to this rule, but none of them are applicable to the facts in this case.

There was no good reason to complain of the rule relating to the measure of damages stated by the court. The jury were, in effect, told that if they found for Woods, they should allow him such part of the notes and interest as was lost through the false and fraudulent representations of Parker. The notes would have been worth their face value if they had been fully secured as Parker represented them to be, but without the securities they were worthless, and hence the difference between the amount of the notes and any allowance made because of the defects in the automobile was the measure of Woods' recovery.

The judgment of the district court will be affirmed. All the Justices concurring.

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STATE v. WALLACE et al. (No. 19,185.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 628, 855\*)—MISCONDUCT OF JUROR—INFORMATION—INDORSING NAMES OF WITNESSES.

The record in a conviction for the sale of liquor examined, and held to show no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1409-1411, 1413-1419, 2048-2053; Dec. Dig. §§ 628, 855.\*]

Appeal from District Court, Bourbon County.

Lee Wallace and others were charged with the sale of intoxicating liquors. Lee Wallace was convicted and appeals. Affirmed.

C. B. Griffith and H. A. Pritchard, both of Ft. Scott, for appellant. Jno. S. Dawson, Atty. Gen., and F. S. Jackson, of Topeka, for the State.

MASON, J. Lee Wallace was convicted of the sale of intoxicating liquor, and appeals.

When the case was called for trial, the county attorney was allowed to indorse upon the information the names of a number of additional witnesses, including that of the witness upon whose evidence the conviction was had. The defendant complains of this ruling, but it was within the discretion of the

court. The application for leave to indorse the names had been made two days before, no continuance was asked on account of it, and it does not appear that any prejudice resulted.

The witness referred to testified that at a certain time he had bought whisky of the defendant. The defendant did not testify. A motion for a new trial was filed on the ground that two witnesses had subsequently been discovered who would testify that at the time designated they had heard the witness referred to ask the defendant for some whisky and had heard the defendant tell him he had none. We do not think the affidavits to this effect required the granting of a new trial.

A new trial was also asked upon the ground that during the deliberations of the jurors one of them had said: "How are we going to square ourselves with the people in the face of so many witnesses, if we don't convict?" This is not such misconduct as to require a reversal.

On the hearing of the motion for a new trial, the county attorney, on request of the court, filed an affidavit stating that at the time he filed the information he had knowledge of the sale upon which the defendant was convicted. Whatever bearing the fact may have had upon the matter under consideration, there was nothing improper or prejudicial in its thus being made of record.

The judgment is affirmed. All the Justices concurring.

**RAWLINS COUNTY STATE BANK v. WALTERS.** (No. 18,849.)

(Supreme Court of Kansas. May 9, 1914.)

*(Syllabus by the Court.)*

**1. CHATTEL MORTGAGES (§ 227\*) — SALE BY MORTGAGEE—PAYMENT TO CREDITOR.**

A mortgagee cannot pursue the proceeds of a sale of mortgaged personal property, made by the mortgagor, and received and applied by his creditor in good faith in payment of a valid debt, where the person so receiving the proceeds has no knowledge of the mortgage and is not chargeable with any notice of its existence.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 476; Dec. Dig. § 227.\*]

**2. CHATTEL MORTGAGES (§ 227\*) — RECORD — NOTICE.**

In the situation stated above, the filing of the chattel mortgage in the proper office does not impart constructive notice to the creditor who receives and applies the proceeds of the sale, but has no lien upon or right to the mortgaged property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 476; Dec. Dig. § 227.\*]

Appeal from District Court, Rawlins County.

Action by the Rawlins County State Bank against Henry Walters. Judgment for defendant, and plaintiff appeals. Affirmed.

Fred Robertson, of Topeka, for appellant. Dempster Scott, of Atwood, for appellee.

**BENSON, J.** This is an action by a mortgagee to recover the proceeds of a sale of mortgaged personal property made by the mortgagor. The material facts found by the district court are that on October 16, 1907, John Herzog borrowed \$512 from the defendant for which he gave his promissory note secured by a mortgage upon horses and other personal property. On November 8, 1910, he borrowed \$162.75 from the plaintiff and secured the payment by his promissory note and a mortgage upon several horses including a certain sorrel horse. Both mortgages were promptly filed in the office of the register of deeds. On April 20, 1911, Herzog sold the sorrel horse to an unknown buyer for \$190, receiving a bank check for that amount. The defendant thereupon demanded and received the check from Herzog to apply on his note and mortgage and so applied it, without any notice of the plaintiff's mortgage other than that imparted by the record. The district court found that the defendant's mortgage did not contain a sufficient description of the sorrel horse in question, excluded the mortgage from evidence, and concluded as matter of law "that, inasmuch as the defendant applied the \$190 upon a pre-existing debt, he is entitled to recover in this action."

[1] The plaintiff contends that the conclusion of law was erroneous; that the identical fund arising from the sale of the mortgaged property having been traced to the defendant is subject to the lien of the mortgage. The law is otherwise. A mortgagee cannot pursue the proceeds of a sale of mortgaged personal property, made by the mortgagor, and received and applied by his creditor, in good faith, in payment of a valid debt, where the person so receiving the proceeds has no knowledge of the mortgage and is not chargeable with any notice of its existence. *Burnett v. Gustafson*, 54 Iowa, 86, 6 N. W. 132, 37 Am. Rep. 190; *Cobbey on Chattel Mortgages*, vol. 2, § 636.

[2] Section 5224 of the General Statutes of 1909 provides that a chattel mortgage shall be void as against creditors of the mortgagor and as against subsequent mortgagees and purchasers in good faith unless deposited in the office of the register of deeds. The creditors referred to in this statute are only those having some specific lien upon or interest in the mortgaged property; mere general creditors are not embraced in this designation. *Youngberg v. Walsh*, 72 Kan. 220, 83 Pac. 973. The record of a chattel mortgage imparts constructive notice to such persons only as would have been entitled to protection against the conveyance or mortgage in case it had not been recorded. *Greer v. Newland*, 70 Kan. 315, 78 Pac. 835, 70 L. R. A. 554, 109 Am. St. Rep. 424; 24 A. & E. Encycl. of L. (2d Ed.) 146.

The defendant's mortgage, having been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



held insufficient and excluded from evidence, need not be considered in the transaction; but the indebtedness remained, upon which the defendant as a mere general creditor of the mortgagor (in the plaintiff's mortgage) could rightfully ask and receive payment, in the absence of any fraud, collusion, or sinister purpose. This result follows necessarily from the principles decided by this court in the cases cited. See, also, *Drumm v. Bank*, 65 Kan. 746, 70 Pac. 874.

As the defendant received and applied the money in good faith upon a valid debt without knowledge of the plaintiff's mortgage, no liability is established against him.

The judgment is affirmed. All the Justices concurring.

**SCHRIBAR v. MAXWELL, et al.**  
(No. 18,643.)

(Supreme Court of Kansas. May 9, 1914.)

*(Syllabus by the Court.)*

**1. DEEDS (§ 211\*)—FRAUDULENT REPRESENTATIONS—SUFFICIENCY OF EVIDENCE.**

In an exchange of a farm for other property, it was found by the jury that false and fraudulent representations were made to the owner of the farm as to the character and value of the property exchanged for the farm and upon which its owner relied, and it is held that the testimony in the case is sufficient to uphold the findings of the jury.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 687-647; Dec. Dig. § 211.\*]

**2. NEW TRIAL (§ 140\*)—IMPERTINENT AFFIDAVITS—RIGHT TO STRIKE.**

The court is justified in striking from the record scandalous and impertinent affidavits offered in support of a motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 284-287, 289, 302, 306; Dec. Dig. § 140.\*]

**3. NEW TRIAL (§ 105\*)—GROUNDS—IMPEACHING EVIDENCE.**

Ordinarily a new trial will not be granted on account of new evidence which only goes to the general reputation of a witness for truth and veracity or which merely discredits him or impeaches his character.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 183, 221-223, 229; Dec. Dig. § 105.\*]

Appeal from District Court, Lyon County.

Action by Laura B. Schribar against John M. Maxwell and others. From judgment for plaintiff, the defendant named appeals. Affirmed.

H. B. Hughbanks, of Osage City, P. E. Gregory and A. B. Crum, both of Lyndon, and J. G. Waters, of Topeka, for appellant. Harry O. Glasser, H. G. McKeever, and D. M. Walker, all of Enid, Okl., for appellee.

**JOHNSTON, C. J.** This was an action brought by the appellee, Laura B. Schribar, to set aside a deed to a tract of land which she had made to the appellant, John M. Maxwell, and which it was alleged he fraudulently obtained from her. She owned 100 acres

of land in Kansas worth about \$3,500 and had given two mortgages thereon, one for \$700 and another for \$200. It was alleged that Maxwell induced her to convey to him, in exchange for a cash payment of \$100, a stock of goods which he represented to be of the value of \$1,600 and the transfer to her of an interest he had in a certain tract of government land in Oklahoma. She averred that he deceived her as to the location of the Oklahoma land and as to his ownership or interest in it, that he procured her to make an entry on a tract other than the one shown to her. She also alleged that she was unacquainted with the value of merchandise, and that she accepted the goods relying on his representations as to their character and value, and that his representations were falsely made with the intention of cheating her. In her amended petition she tendered the appellant the \$100 which he had paid to her, as well as the stock of goods received from him, and also a relinquishment of her rights in the government land on which he had led her to place a filing. Shortly after the transfer of the Lyon county land to him, he mortgaged it to Robert Craig for \$2,000, and she alleged that it was executed without consideration, and therefore asked that it be decreed to be a nullity. In his answer he denied the charges of fraud, and alleged that the land shown to her was that upon which the filing was made, and that she selected the goods out of a large stock on the basis of the invoice price of the same in compliance with the contract which they had made. He also alleged that he had assumed and paid a mortgage lien on the land of \$749 and another of \$205.35 and had also paid \$19.91 of taxes which was a lien on the land at the time it was transferred to him. The court found that the Craig mortgage was a valid and subsisting lien upon the land conveyed to appellant, and a decree of foreclosure was entered. The only question submitted to the jury was whether the appellant made the alleged false and fraudulent representations in respect to the goods and land given to appellee in exchange for the Lyon county land, and whether appellee believed and relied on these representations when the conveyance was executed. All other questions were reserved by the court for its own decision. In answer to special questions, the jury found that appellant knowingly made false representations in respect to the Oklahoma land and the stock of goods, and that appellee relied on these representations, that he had no interest in the Oklahoma land which he undertook to trade to her, and that it had no value, that she had no independent knowledge of merchandise, and that the merchandise which was turned in to her as of the value of \$1,600 was only worth one-fourth of that sum.

[1] The contention of appellant that the

testimony was insufficient to support the findings of the jury cannot be sustained. There was testimony tending to prove that the representations were made to deceive the appellee, that they were untrue, and that appellee relying on and believing them conveyed her land to appellant. According to the findings, her land was worth about \$3,500, while all she received for it was the cash payment of \$100 and property worth about \$400.

Complaint is made that a judgment canceling the conveyance was entered without requiring appellee to tender and turn back what she had received from appellant in exchange for the land. In the amended petition the appellee expressly tendered back all that appellant had given her in the proposed exchange. In her testimony given at the trial she stated that she was prepared to restore all that she had received, saying that the goods were still in her possession and in the same boxes in which they were packed and shipped to her. The record does not disclose what orders were made in respect to the tender or the restoration of the property which appellee had received, but it appears that appellant has secured the sum of \$2,000 by mortgaging appellee's farm, an amount much in excess of the money and property received from appellant. Out of the \$2,000 which he obtained by mortgaging her land, he paid the mortgage liens which she had given upon the land and also a lien for taxes, all together amounting to about \$1,000, leaving in his hands an excess of \$1,000 to meet any order that the court may make in adjusting the foreclosure branch of this proceeding. That part of the case has not been brought up upon this appeal, but it may be assumed that the court will make an order in the final judgment adjusting the rights of all the parties and give proper credits to the appellant for the money and property received by appellee in the transaction.

[2, 3] No error was committed in striking out the affidavits offered on the motion for a new trial. They were largely made up of scandalous matter relating to the moral character of appellee which had no bearing upon the issues in the case and which the court rightly concluded were unfit to be upon the records of the court. Some of the matter in the affidavits was impeaching in character, but the general rule is that new trials are not granted on account of new evidence which only goes to the general reputation of a witness for truth and veracity or which merely discredits a witness or impeaches his character. *Parker v. Bates*, 29 Kan. 597; *State v. Smith*, 35 Kan. 618, 11 Pac. 908; *Lee v. Birmingham*, 39 Kan. 320, 18 Pac. 218; *State v. Stickney*, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284.

The judgment of the district court will be affirmed. All the Justices concurring.

# STATE v. THOM. (No. 19,164.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

## PROSTITUTION (§ 3\*)—WHITE SLAVERY—INDICTMENT.

The information examined, and held not to charge an offense under the so-called "white slave" act.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 8; Dec. Dig. § 3.\*]

### Appeal from District Court, Allen County.

Nellie Thom was convicted of violating the White Slave Act (Laws 1913, c. 179, § 1), and she appeals. Reversed.

F. J. Oyler, of Iola, for appellant. Jno. S. Dawson, Atty. Gen., and Chas. H. Apt and Frank R. Forrest, both of Iola, for the State.

SMITH, J. The appellant was charged in and tried upon an information containing two counts, which, omitting the title and verification, are as follows:

#### "First Count.

"I, Frank R. Forrest, county attorney of Allen county, in the state of Kansas, in the name and by the authority of the state of Kansas, come now and give the court to understand and be informed that on or about the ——— day of June, A. D. 1913, at Iola, in said county of Allen and state of Kansas, one Nellie E. Thom did then and there unlawfully, feloniously persuade, induce, and entice a female person, viz., Nellie Luther, a female under eighteen (18) years, to wit, of the age of fifteen (15) years, to commit fornication with one Harry Dalton, a male person, by having her, the said Nellie Luther, to hold unlawful, illicit sexual intercourse with the said Harry Dalton at the instance, knowledge, and connivance of the said Nellie E. Thom, the said Nellie Luther and the said Harry Dalton each being at the time single and unmarried, said acts of illicit and unlawful sexual intercourse between the said Nellie Luther and Harry Dalton occurring and taking place at sundry times and places in the city of Iola, Allen county, Kan., commencing May 30, 1913, and continuing thereafter at divers and sundry times and places in said city, county, and state, until June 19, 1913, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Kansas.

#### "Second Count.

"I, Frank R. Forrest, county attorney of Allen county, Kan., in the name and by the authority of the state of Kansas, come now and give the court to understand and be informed that on or about the ——— day of June, 1913, at Iola, in said county and state, one Nellie E. Thom did then and there unlawfully, feloniously aid and abet one Harry Dalton in carnally knowing a female under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the age of eighteen (18) years, to wit, Nellie Luther, of the age of fifteen (15) years, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Kansas."

She was convicted on the first count, and acquitted on the second, and appeals from the judgment. The prosecution was based upon section 1, c. 179, of the Laws of 1913, commonly known as the white slave law, which reads: "Any person who shall knowingly persuade, induce, entice or procure, or assist, in persuading, inducing, enticing or procuring any female person, for the purpose of prostitution, fornication or concubinage to enter or remain in any house of prostitution, or any place where prostitution, fornication or concubinage is practiced, permitted or allowed, or who shall, by any means, whatever, detain any female person, for the purpose of prostitution, fornication or concubinage in any such house or place, or who shall persuade, induce, entice or procure, or assist in persuading, inducing, enticing or procuring any female person for the purpose of prostitution, fornication or concubinage, to leave the state or to go from one place to another within this state, for the purpose of prostitution, fornication or concubinage shall be deemed guilty of a felony, and on conviction thereof shall be punished by confinement in the state penitentiary at hard labor for not less than one year, nor more than five years: Provided, no conviction shall be had on the uncorroborated testimony of the woman."

The appellant in due time presented a motion to quash the information and each count therein for the following reasons:

"First. Because said information, nor either count therein, does not state facts sufficient to constitute any offense against the laws of the state of Kansas.

"Second. Because said information, and each and every count thereof, is indefinite and uncertain as to times and places where the pretended offense or offenses were committed.

"Third. Because the second count is in conflict with the first count of the information as to the date alleged, and does not describe in what way or manner the defendant aided and abetted in the commission of the pretended offense."

The motion should have been sustained as to the first count. There are three felonies defined in section 1, supra, to wit: First, "any person who shall knowingly persuade, induce, entice or procure, or assist, in persuading, inducing, enticing or procuring any female person, for the purpose of prostitution, fornication or concubinage to enter or remain in any house of prostitution, or any place where prostitution, fornication, or concubinage is practiced, permitted or allowed"; second, "or shall, by any means whatever, detain any female person, for the purpose of prostitution, fornication or concubinage in any such house or place"; third, "or shall

persuade, induce, entice or procure, or assist in persuading, inducing, enticing or procuring any female person for the purpose of prostitution, fornication or concubinage, to leave the state or to go from one place to another within this state, for the purpose of prostitution, fornication or concubinage."

It will be seen that the first count of the information charged neither of the essential ingredients above specified. Stripped of its verbiage, the only charge in the first count of the information is: "That on or about the ——— day of June, A. D. 1913, at Iola, in said county of Allen and state of Kansas, one Nellie E. Thom did then and there unlawfully, feloniously persuade, induce, and entice a female person, viz., Nellie Luther, a female under eighteen (18) years, to wit, of the age of fifteen (15) years, to commit fornication with one Harry Dalton, a male person, by having her, the said Nellie Luther, to hold unlawful, illicit sexual intercourse with the said Harry Dalton at the instance, knowledge, and connivance of the said Nellie E. Thom." This is practically the same offense that is charged in the second count of the information and of which the appellant was acquitted.

The count failed to charge that appellant persuaded or in any way assisted in procuring the girl to enter a house of prostitution or other place for any purpose; also failed to charge that appellant detained the girl at any house or place for any purpose, or that she persuaded or in any way had anything to do with the girl's leaving the state or going from one place to another in the state for the purpose of prostitution.

The count did state facts sufficient to constitute the offense of abetting a statutory rape, but, as that was specifically charged in the second count, on which there was an acquittal, it may be ignored in the present discussion.

The judgment is reversed. All the Justices concurring.

# RANDOLPH LUMBER CO. v. WESTERN SILO CO. (No. 18,835.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

## PRINCIPAL AND AGENT (§ 88\*)—COMMISSION—LIABILITY OF PRINCIPAL.

Evidence that a salesman of a manufacturing company employed a local agent to make sales on stated terms, and that sales made by the person so employed were reported and filled, justifies a finding that the company is liable for commissions according to the agreement.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 215; Dec. Dig. § 88.\*]

Appeal from District Court, Riley County.

Action by the Randolph Lumber Company against the Western Silo Company. Judgment for defendant, and plaintiff appeals. Reversed and new trial ordered.

Alvin R. Springer, of Manhattan, and F. L. Williams, of Clay Center, for appellant. John E. Hessin and Jno. C. Hessin, both of Manhattan, for appellee.

MASON, J. The Randolph Lumber Company, a corporation engaged in the retail lumber business at Randolph, brought action against the Western Silo Company, a corporation manufacturing and selling wooden silos. A demurrer was sustained to the plaintiff's evidence, and it appeals.

The petition alleged that the defendant had employed the plaintiff as its agent in making sales at a commission of 20 and 5 per cent.; that six sales had been made, the commission amounting to \$391.20; that the plaintiff had incurred \$146.90 in expenses, for which it was entitled to reimbursement, and had been paid \$200, leaving a balance due of \$338.10. The answer alleged that the defendant had never authorized the contract pleaded by the plaintiff; that a salesman of the defendant had undertaken to make such a contract with the plaintiff (except that the commission was 20 per cent. flat, on list prices), subject to the defendant's approval, but such approval had never been given or asked; that the plaintiff sold the six silos, and, according to the terms of the contract that was being negotiated, would have been entitled to commissions amounting to \$355.80, except for the fact that the sales were made in each instance for less than the list price, the total difference amounting to \$164, which reduced the commissions to \$191.80; the \$200 payment was admitted, and also an expense item of \$131.90; a net indebtedness of \$127.70 was acknowledged, for which the defendant offered to confess judgment.

The evidence was to the effect that a salesman of the defendant, assuming to have authority for the purpose, made the contract with the plaintiff as alleged in the petition, that the sales were negotiated at prices fixed by the salesman referred to, and that they were reported to and filed by the defendant.

The question involved is whether there was any evidence of authority on the part of the salesman to make the contract relied on by the plaintiff, or of facts that would preclude the defendant from denying such authority. We think the case falls within the rule that the principal cannot accept the fruits of a contract made in his behalf, and at the same time reject any of its burdens on the ground that it was unauthorized. *Evans v. Insurance Co.*, 87 Kan. 641, 125 Pac. 86, 41 L. R. A. (N. S.) 1130; *Wagon Co. v. Wilson*, 79 Kan. 633, 101 Pac. 4; *Bank of Lakin v. National Bank*, 57 Kan. 183, 45 Pac. 587. The company could not ratify a sale made at less than the authorized price, and charge the agent with the difference. *Halloway v. Milling Co.*, 77 Kan. 76, 93 Pac. 577. It is true there was no direct evidence that the defend-

ant at the time of filling the orders knew the price at which the sales were made, or the commission its salesman had agreed to pay to the local agent. These matters, at least as to the selling price, might perhaps be inferred, but in any event the jury would have been justified in finding that the salesman was acting within the apparent scope of his employment, and that the plaintiff was protected in dealing with him on the assumption that his acts were authorized. *Townsend v. Railway Co.*, 88 Kan. 260, 128 Pac. 389.

The judgment is reversed and a new trial ordered. All the Justices concurring.

STATE ex rel. BEALS, Co. Atty., v. CITY OF STAFFORD et al. (No. 18,819.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

ELECTRICITY (§ 1½\*) — PURCHASE OF LIGHT PLANT—CONSIDERATION.

On this appeal it is held that there is sufficient testimony to support a finding of the trial court that a part of the amount named as the consideration of a contract for the purchase by a city of a light plant, or a part of the same, which had been owned and operated by a private owner, was paid by the city to such owner for the surrender of an unexpired part of an exclusive franchise previously granted to the owner by the city.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 1½.\*]

Appeal from District Court, Stafford County.

Injunction by the State, on the relation of Ray H. Beals, as County Attorney, against the City of Stafford and others. From judgment for plaintiff, defendants appeal. Affirmed.

C. M. Williams, of Hutchinson, for appellants. Jno. S. Dawson, Atty. Gen., and A. C. Malloy, of Hutchinson, for appellee.

JOHNSTON, C. J. This action was brought by the state, on the relation of the county attorney, to enjoin the city of Stafford and its officers from purchasing the light plant, or the material composing the plant, of the Larabee Light & Power Company, and also from using the funds derived from bonds authorized by a vote of the electors of the city, and issued for the purpose of constructing an electric light plant, and to require the officers to restore to the special light fund the money wrongfully taken therefrom. It appears that the Larabee Light & Power Company, which was made a defendant, had been furnishing light to the city and its inhabitants under what is termed an "exclusive franchise," running 20 years, and that only 14 years of the franchise period had expired. The city, desiring to own and operate a plant of its own, voted the bonds mentioned in the amount of \$25,000, the proceeds of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which were to be kept as a separate and special fund to be devoted solely to the construction of an electric light plant. The Larabee Light & Power Company offered to sell its lighting plant, except the machinery for generating power, and to assign its light franchise to the city for \$14,000, which offer was accepted by the city, and the purchase accordingly made, as appears from the written bill of sale, although it contained a recital to the effect that the money was paid for the machinery and material purchased. About the same time the city purchased additional material from the Larabee Light & Power Company, the exact character of which is not shown, and paid \$2,554.27 for it, but this payment was not made from the special fund. Some of the citizens opposed the purchase, and injunction proceedings were begun, in which it was alleged that the sale was corruptly made, that the plant and fixtures were sold for \$11,800, and the franchise and good will were sold for \$2,200, that the property purchased was worn and almost worthless, and, besides, that the officers had no authority to use the proceeds of the bonds to make the purchase, and the appellee therefore asked for the annulment of the contract and the restoration of the money. The court found that \$14,000 was paid over by the city to the company out of the light fund, and that \$11,800 was paid for the plant, or the material in it, and that the balance, \$2,200, was paid for the surrender of the unexpired franchise held by the company and for its good will. The court acquitted the city officers of fraud, and refused to set aside the entire contract of purchase because of the loss which would result from such action, the city having connected the purchased property with its own plant, having made other contracts and new extensions, and, on account of the effect of a complete rescission, the court concluded to approve the purchase of the material and fixtures at \$11,800, which it expressly found was the full value of the property purchased. It did set aside that part of the contract which provided for the purchase of the unexpired franchise and good will at \$2,200, and ordered the restoration of that amount to the special light fund.

In this appeal there is no contention that the city officers had any power or authority to use the funds of the city to pay for the surrender of the unexpired franchise of the company, but it is contended that the purchase made did not include the franchise, and that there is no testimony tending to show that any part of the \$14,000 consideration was paid for the franchise and good will of the company, and therefore no justification for adjudging the restoration of \$2,200 of the amount paid. That the purchase by the city included the surrender of the franchise is practically admitted in the answer filed by the city officers and by the Larabee Light & Power Company. They alleged that: "By

reason of the purchase of the said material from the said the Larabee Light & Power Company, the Larabee Light & Power Company surrendered its franchise to furnish electric light to the city of Stafford and its inhabitants, thus enabling the said city of Stafford to construct and operate the said electric light plant."

In the resolution adopted by the mayor and council authorizing the contract that was made, it is recited, in effect, that the city had voted bonds to be used in constructing and operating a light plant; that a private party was operating a light plant in the city; that it was not expedient to operate two light plants in the city; and that as the owners of the private plant "are willing to sell to said city a part of the material that they now have on hand and to assign their franchise to the said city of Stafford, and to discontinue the said business of furnishing light to the citizens of Stafford, and whereas the said parties who have the said light material and machinery have made a proposition that they will sell the said material which they have itemized and priced the same, which said material they offer to the said city for the price or sum of fourteen thousand dollars (\$14,000.00)." It was therefore resolved that the proposition of the company be accepted, and that the amount stated be paid for the material obtained by the city from the company. H. F. Tolls, the mayor of the city, testifying about the transaction, said that he understood that the company surrendered its franchise to the city. Several members of the council testified that the city desired to be rid of the franchise in order to avoid competition in furnishing light for the city and its inhabitants, and it was their understanding that the transaction involved the surrender of the franchise to the city. There is abundant testimony, we think, to show that one of the considerations which entered into the contract of purchase and sale between the city and the company was the surrender of the unexpired portion of the franchise.

Is there testimony to support the finding that the real purchase price of the material and machinery purchased was \$11,800, and that \$2,200 of the consideration named in the contract was paid for the unexpired franchise and good will of the company? It has been seen that the offer of the company, which was accepted by the city, included the sale and surrender of the franchise right, and we think there is testimony tending to show that a definite portion of the consideration paid was the agreed value of the surrendered franchise. Prior to the bond election the city employed expert engineers to make a physical examination of that part of the light plant which the company proposed to sell to the city, and they placed a valuation on the same. This was done to the apparent satisfaction of all the parties, and the experts valued the property, according

to appellant's statement, at \$11,800. After this appraisal, and on the day before the election, the mayor issued a notice to the voters of the city in order, as he says, that they might vote more intelligently on the proposition, and this notice was posted and circulated throughout the city. It contained statements to the effect that an agreement of purchase of the electric light plant had been made, the price being the total sum of \$14,000, and, after stating the terms on which the bonds had been sold and the proposed expenditure of the proceeds of the bonds, the mayor proceeds: "Now in regard to the physical value of the electric light plant, which has been disputed by parties unskilled in such material, we simply state that we have had that invoiced by experts in that line at quite an expense to the city in order that no undue advantage be taken, and that all appearance of [it] be apprehended. These experts found the value to be \$13,800, and figured out a reasonable depreciation to be \$2,000, which leaves the present physical value to be \$11,800. The remainder of the \$14,000 is for the surrender of the six-year franchise which the present company have on the city and the transfer of all rights in and to each and every article mentioned in the invoice."

This notice, which was prepared and circulated among the electors, has been treated as an authentic statement by both the city and the company. In their answers filed in this action a reference was made to this statement, very probably for the purpose of meeting the charge of fraud. They alleged that the mayor, acting by the direction of the city council, posted over the city in a large number of conspicuous places the notice which is set out at length, and which contains the admission that \$11,800 was the agreed value of the property sold, and that \$2,200 was the price fixed on the unexpired franchise. In addition to this acknowledgment several of the officers testified in regard to the valuation made by the expert, which was used as a basis of negotiations, and that his appraisal, after deducting the expenses of making it, was substantially the same as the amount named in the mayor's notice. There was testimony in regard to the depreciation in the property, an estimate of which was given by the witnesses, and in that connection there is the statement issued by the officers to the effect that in the purchase of the property the depreciation was figured at \$2,000. As against the claim that the consideration paid may have included additions subsequently made to the plant, there is the testimony that the city paid \$2,554.27 for extra material or things not included in the purchase price in question. While the machinery and material purchased was listed at prices which footed up exactly \$14,000, it is plain that the surrender of the franchise was included in the

price, and we think there is testimony sufficient to sustain the finding that \$2,200 of that sum was paid for the surrender of the franchise.

It follows that the judgment of the district court must be affirmed. All the Justices concurring.

WADE v. HORNADAY et al. (No. 18,619.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. PARTNERSHIP (§ 5\*)—WHAT CONSTITUTES—PARTICIPATION IN PROFITS.

Partnership is a matter of contract, and courts will not create such a contract against the will of a party. A definition of partnership which is at once accurate, comprehensive, and exclusive is extremely difficult. Participation in the profits is only regarded as a circumstance to be considered in determining whether or not a partnership existed. The mere fact that the parties called themselves partners and referred to their business relation as a partnership will not necessarily make them partners, nor their business a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.\*]

2. PARTNERSHIP (§ 5\*)—CREATION—CONTRACT—CONSTRUCTION.

In this case it is held that an arrangement between three persons for a division of the net profits accruing on certain sales of shares of stock in lieu of office rent and services furnished by one, advertising and printing furnished by another, and services of the other in the sale of the stock and in the advertising and correspondence, did not create a partnership, in the sense that one could bind the others by a contract made in the name of all.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.\*]

Appeal from District Court, Douglas County.

Action by H. H. Wade against W. E. Hornaday and others, as partners. Judgment for plaintiff, and defendants Martin and Brady appeal. Reversed and remanded.

R. E. Melvin and Means & Rice, all of Lawrence, for appellants. W. B. Brownell and Henry H. Asher, both of Lawrence, for appellee.

PORTER, J. The question involved is whether a partnership existed between H. A. Martin and J. L. Brady, the appellants, and W. E. Hornaday, by which the appellants were bound to answer for an indebtedness incurred by Hornaday in the name of the partnership. The action was brought to recover for certain advertising printed in the Kansas City Drovers' Daily Telegram, the account having been assigned to the appellee. The advertisement invited subscriptions to the capital stock of the United States Rapid Mail Service Company, a corporation with which, on or about July 3, 1909, Hornaday had entered into an agreement to sell 1,500 shares of its capital stock. On July 20, 1909, H. A. Martin and J. L. Brady, the appellants, entered into an arrangement or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contract with Hornaday whereby they undertook to render him certain assistance in the sale of 250 shares of the capital stock above referred to. Neither Martin nor Brady authorized the insertion of any advertising in the Daily Telegram, and neither of them knew of its publication until long afterwards. If they are liable in this case, it must be on the theory that by their agreement with Hornaday a partnership was created, which gave him authority to bind them upon any contract for advertising which he might see fit to make in furtherance of the sale of stock, whether or not they were jointly interested therein, for it appears that the advertisement mentioned, not only the 250 shares of stock in the sale of which the appellants were interested, but also other shares of stock in the same corporation. The jury returned a general verdict in favor of the plaintiff. From the judgment, Martin and Brady have appealed.

The contract between the appellants and Hornaday recites that Hornaday had undertaken, under a contract with the United States Rapid Mail Service Company, to sell 250 shares of its capital stock at a certain price, and that Brady and Martin desired to work in co-operation with him in the sale of the stock for their mutual benefit and gain; that Hornaday should have charge of the sale of the stock and of the advertising and correspondence; that J. L. Brady was to furnish the free use of the columns of the Lawrence Journal and such advertising and reading notices as should be deemed necessary to sell the stock, and in addition should "supply needed job printing free to this partnership." Martin was to allow the free use of his offices in Lawrence for the sale of the stock, and also to assist in selling the same to the best of his ability. The contract provides that Hornaday should bear his own traveling expenses, and that additional expenses in connection with the sale of the stock should be borne equally between the parties. There is a provision that the profits on the sale of the stock over and above 25 per cent. of the par value, which was to be paid to the company issuing it, should be divided equally between the parties to the agreement, each to receive one-third. Nothing is said with respect to losses.

[1] The question is: Did the contract, conduct, and proceedings of the appellants constitute them partners as to third persons? As a test of partnership, the so-called net profit rule, which dates back to the year 1775, has, since 1860, been abandoned as a result of the decision in *Cox v. Hickman*, 8 H. L. Cas. 268. Prior to 1860, mere participation of the profits, regardless of the intention of the parties, was by the English courts held conclusive of the liability of the participant to the creditors of the concern. The change in the rule in England was readily adopted by the American courts, and since then the fact that there was to be a participation in the

profits is only regarded as a circumstance to be taken into consideration with all the circumstances and the whole transaction in determining whether or not a partnership existed. *Shepard v. Pratt*, 16 Kan. 209, 213; *Beard v. Rowland et al.*, 71 Kan. 873, 81 Pac. 188; *Welland v. Sell*, 83 Kan. 229, 109 Pac. 771. And see the cases cited in note, 18 L. R. A. (N. S.) 963, 1106. Numerous attempts have been made to formulate a definition of partnership, but it has been said to be beyond the capacity of courts to make a definition which is at once accurate, comprehensive, and exclusive. *Langley v. Sanborn*, 135 Wis. 178, 114 N. W. 787. In *Fechteler v. Palm Bros. & Co.*, 66 C. C. A. 336, 133 Fed. 462, Judge Lurton expressed the opinion that "it is not very prudent to define a partnership." The mere fact that the parties call themselves partners, or refer to their business relation as a partnership, will not necessarily make them partners, nor make the business a partnership. *Thompson v. Holden*, 117 Mo. 118, 22 S. W. 905; *Jordan v. Wilkins*, 3 Wash. C. C. 110, Fed. Cas. No. 7,527; *Sailors v. Nixon-Jones Printing Co.*, 20 Ill. App. 509. On the other hand, a contract may create a partnership, although there is no mention in it of the word. *Johnson Bros. v. Carter & Co.*, 120 Iowa, 355, 94 N. W. 850; *Griffen v. Cooper*, 50 Ill. App. 257; *Spaulding v. Stubblings*, 86 Wis. 255, 56 N. W. 469, 39 Am. St. Rep. 888. It has also been repeatedly declared that a man cannot be made a partner against his will, by accident, or by the conduct of others, for the reason that partnership is a matter of contract. *Cook v. Carpenter & Cook*, 34 Vt. 121, 80 Am. Dec. 670; *Freeman v. Bloomfield*, 43 Mo. 391. Nor will it arise by operation of law. The courts will no more create such a contract against the will of a party than they will contracts of any other character. *Fairly v. Nash*, 70 Miss. 193, 12 South. 149; *Phillips v. Phillips*, 49 Ill. 437; *Hankey v. Becht*, 25 Minn. 212. So that the fact that the appellants in this case signed a contract which defined the relation between themselves and Hornaday as a "partnership" is of very slight consequence.

[2] We think it is clear that under the contract in question no partnership was created; that is, no commercial or trading partnership. The arrangement was formed, not for the purpose of buying and selling stock in general, nor did it contemplate the general sale of the stock of the particular corporation mentioned in the agreement. It was for the sole purpose of selling on commission 250 shares of that stock in the city of Lawrence. Similar arrangements between parties for sharing both profits and losses in a single venture, where the division was clearly intended to be in lieu of compensation for services, or of office rent and advertising, and matters of that kind, have been held not to create a partnership in the sense that one partner could bind the other by his contract. In *Lee v. National Bank*, 45 Kan. 8, 25 Pac.

196, 11 L. R. A. 238, a partnership was formed for the purpose of carrying on a real estate, loan, and insurance business on commission, but it was held to be a nontrading partnership. In *Shepard v. Pratt*, 16 Kan. 209, 213, and in *Beard v. Rowland et al.*, 71 Kan. 873, 81 Pac. 188, it was ruled that profit sharing is not an unfailing test of the existence of partnership, but merely a fact which may be taken into consideration to determine the question, and is often controlled by other considerations. In *Welland v. Sell*, 88 Kan. 229, 109 Pac. 771, it was held that the arrangement for a division of the net profits or commissions on certain sales in lieu of office rent and advertising did not create a partnership, and that the sharing of the profits was a circumstance overborne by other controlling facts. In *Horn v. Newton City Bank*, 32 Kan. 518, 522, 4 Pac. 1022, the distinction was drawn between a nontrading partnership and a commercial or trading one. In that case it was held that Horn and Long were partners only in the running of a threshing machine, and it was said that: "Such a partnership is one of occupation or employment only. It is not a commercial or trading partnership"—and although the contract provided for a division of the profits and losses equally, it was held that whoever deals with an individual jointly interested with another in such a matter "must, at his peril, inform himself of the nature of the partnership."

The present case falls within the principle of many cases which have arisen where parties undertake jointly a single enterprise or venture, as, for instance, that of buying a tract of land and selling it again at an advance, the profit or losses to be shared equally, the profits to be in lieu of services in the joint enterprise undertaken, that of selling the particular land. Arrangements like these have repeatedly been held not sufficient to constitute a partnership. *Gottschalk v. Smith*, 156 Ill. 377, 40 N. E. 937; *Adams v. Funk*, 53 Ill. 219; *Coward v. Clanton*, 122 Cal. 451, 55 Pac. 147; *Sain v. Rooney*, 125 Mo. App. 176, 101 S. W. 1127. A case in point is that of *Bruce v. Hastings*, 41 Vt. 380, at page 383 (98 Am. Dec. 593). In the opinion it was said: "But we think a partnership does not arise on the agreement which the evidence tends to show was made between these parties. \* \* \* It was not an agreement to put in capital and labor for the purpose of trade generally; but the agreement, as shown by the evidence, was limited to a single specific purchase by the defendant, with the understanding that the property should be sold as soon as a purchaser or purchasers could be found, and that the defendant would give the plaintiff one-half that should be made in the enterprise, in consideration of his agreement to aid and assist the defendant in carrying out his contract with Nelson. The form of the contract has very

much the appearance of being a mode of determining the plaintiff's compensation for the assistance which he contributed to the defendant in the purchase and sale of the property."

The contract itself shows that there was no commercial or trading partnership formed. The court should have sustained a demurrer to the evidence. The judgment will be reversed, and the cause remanded, with instructions to render judgment in favor of the defendants. All the Justices concurring.

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**ROYER v. WESTERN SILO CO.**  
(No. 18,801.)

(Supreme Court of Kansas. May 9, 1914.)

(*Syllabus by the Court.*)

**EVIDENCE (§ 442\*)—PABOL EVIDENCE—INCOMPLETE CONTRACT.**

A written contract for the employment of an agent to sell silos and other articles, and the commission to be paid to the agent therefor, reads: "On silos: 25 and 5 per cent on fifty—30 per cent on 75 or more." No provision is made in the contract for any commission for the sale of only 42 silos thereunder, but it cannot reasonably be presumed that the agent was to receive nothing for such sales. The contract is evidently incomplete, and oral evidence is admissible to show the agreement between the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. § 442.\*]

Appeal from District Court, Harvey County.

Action by R. W. Royer against the Western Silo Company. Judgment for plaintiff, and defendant appeals. Reversed.

von der Helden & Morgan, of Newton, Franklin & Miller, of Des Moines, and W. H. von der Helden, of Newton, for appellant. Branine & Hart, of Newton, for appellee.

**SMITH, J.** The plaintiff brought this action in the district court of Harvey county to recover a balance alleged to be due him for commissions as agent for the defendant in the sale of silos and cutters in the territory defined in a written contract, a copy of which was made a part of the petition and was admitted in the answer. It was also admitted that the plaintiff sold 42 silos, the list price of which was \$14,513. The defendant in the answer denied all the allegations of the petition except that it admitted the residence of plaintiff, his capacity as its agent, and that the contract was entered into between them. It was alleged that the written contract did not provide what per cent. as commission was to be paid in case the plaintiff sold less than 50 silos, but that it was agreed and understood between plaintiff and defendant, at and before the execution of the contract, that in case less than 50 silos were sold, the plaintiff was to receive 25 per cent. commission, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



no more: that plaintiff did not sell 50 silos, and was entitled to receive only 25 per cent. commission. The defendant admitted that it owed the plaintiff \$735.69, and confessed judgment therefor. The reply was a general denial as to all matters inconsistent with the petition. A trial was had to a jury, and after the introduction of the evidence of each party, the court gave the jury a number of instructions, one of which, No. 2, presents the principal controversy in the case. It reads: "(2) The jury are instructed that under the admitted contract between the plaintiff and defendant, which is set out in plaintiff's petition, the defendant agreed to pay the plaintiff commissions on all sales of silos made at list price, 25 and 5 per cent. on any number of silos sold by plaintiff if the number sold did not exceed 75, and it is further agreed that in case the plaintiff should sell any silos for defendant at less than list price, then the difference between the price for which said silo was sold and the list price should be deducted from plaintiff's commissions. It is further agreed in said contract that the plaintiff will pay defendant 3 per cent. additional on all cash settlements made by the plaintiff on or before August 1, 1912."

The written contract prescribed no percentage of commission for the sale of silos in a less number than 50, but, if 50 silos were sold, it fairly implied there was to be some rate of commission to be paid on a less number of sales. The instruction that the percentage on sales of silos from 1 to 75 was 25 and 5 gives no force whatever to the words, "on fifty." These words, with the context, indicated a change in the rate of commission if 50 silos were sold. The appellant asked leave to introduce evidence that there was an agreement and understanding, concurrent in time with the written contract, that the commission on sales less than 50 in number was to be 25 per cent.; on 50 to 75, the commission was to be 25 per cent. and 5 per cent.; on 75 or more, 30 per cent. This evidence was erroneously excluded. The appellee's evidence shows that he sold only 42 silos, and appellant admitted that it was to pay 25 per cent. for such sales.

As to the freight charges, there was a so-called written contract and a printed contract. They seem to contain conflicting provisions. The rule is, in such case, that if the written part is definite and certain in its provisions, it must govern. The court found, however, that the written part was ambiguous, and that the printed contract in this respect was definite and certain, and should be followed as to this item. The conclusion is disapproved. The ambiguity should have been removed by parol evidence, and the two provisions then considered together as in other cases.

The judgment is reversed, and the case is remanded. All the Justices concurring.

STATE ex rel. DAWSON, Atty. Gen., v. CITY OF ATCHISON. (No. 19,106.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 122\*)—PRESUMPTIONS—ORDINANCES.

Where an ordinance which has been regularly passed by a city council and approved by the mayor is offered in evidence, and the validity of such ordinance depends upon the existence of one or more facts at the time of the enactment thereof, the existence, and not the non-existence, of the necessary facts to sustain the validity of the ordinance, should be presumed, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-289; Dec. Dig. § 122.\*]

Appeal from District Court, Atchison County.

Action by the State, on the relation of John S. Dawson, Attorney General, to oust the City of Atchison from exercising certain powers. From judgment for defendant, plaintiff appeals. Affirmed.

J. S. Dawson, Atty. Gen., B. P. Waggener, of Atchison, and A. E. Crane, of Holton, for appellant. Walter E. Brown, of Atchison, for appellee.

SMITH, J. This action was brought in the name of the state of Kansas, on the relation of the Attorney General, to oust the city of Atchison from exercising certain powers it had assumed to exercise in the passage of Ordinance No. 3096. The ordinance purports to annex 65 acres of land to the city, which power it is alleged was not authorized by law, but was usurped. The relief asked for, as stated by the appellant, is: "The prayer of said petition was that the said city be required to answer all such matters, that it might be ousted forever from the exercise of said usurped corporate powers, and that its said action in the passage of said ordinance, and attempt to annex said 65 acres of land to the city of Atchison, as a part thereof, should be annulled and held void, and in excess of its corporate power."

The city, in its answer, admitted that it was a city of the first class, as alleged by the appellant, that it had all the powers of such a city, and that included in such powers was the power to annex to the city unplatted lands which lie within or mainly within the city, and that the 65-acre tract described in the petition was unplatted land and lies mainly within the city of Atchison. The entire boundary of the 65-acre tract is set forth, with the length in feet of the several boundary lines. To this answer a demurrer was filed, particularly to the third paragraph, describing the metes and bounds of the tract. The demurrer was overruled. Thereupon a reply was filed, which contained a general denial, except as to facts previously admitted. The reply further alleged that

the boundary lines of Atchison, as described in the answer, had never, previous to the passage of Ordinance No. 3096, been established by any legal or valid ordinance, and that said ordinance was therefore void.

The case was tried to the court without a jury. The appellant, assuming the burden of proof, introduced evidence tending to show that the 65-acre tract of land had been laid off in lots, blocks, streets, and alleys in 1880, but that by proper proceedings by the board of county commissioners the tract was expunged from the record and restored to its former condition of unplatted land; also evidence tending to show that more than one-half of the boundary of the 65-acre tract did not consist of the boundary lines of the city prior to the passage of Ordinance No. 3096, except as the same were attempted to be changed by Ordinance No. 3074 and Ordinance No. 3096. To this evidence the city interposed a demurrer, which was overruled. The appellant produced in evidence Ordinance No. 3096. Thereupon the appellee offered in evidence Ordinance No. 3074, to which objection was made that it was incompetent and immaterial, and because the ordinance itself showed that it was not passed in pursuance of any law of the state, no foundation was laid for the introduction of the ordinance, nor was there any evidence tending to show any invalidity therein. This objection was overruled, and the ordinance read in evidence.

Appellee thereupon introduced as a witness one Altman, who testified that he was city engineer of the city of Atchison and produced a plat, which he testified he had prepared from descriptions he got at the courthouse. Whereupon the following questions were asked and answers returned: "Q. What, if any, ordinance did you use in defining the boundaries of the city? A. The ordinance prepared before 3096. Q. 3074? A. Yes, sir. Q. This plat shows the boundaries of the city drawn by you from that ordinance? A. Yes." There was no evidence showing the boundaries of the city, except Ordinances No. 3074 and 3096, and the plat made therefrom by the city engineer. Appellant thereupon filed a motion for judgment in its favor, which was denied.

In 2 Dillon, Municipal Corporations, § 649, it is said: "It will be presumed that an ordinance is valid and the burden of proving its invalidity is on the person asserting it." The ordinance could only be valid if one of the conditions prescribed by section 872 of the General Statutes of 1909 existed; hence the presumption of validity carries with it a presumption of the existence of such condition. The presumption that the ordinance is valid is not conclusive, but is sufficient to cast upon appellant the burden of proving its invalidity. No evidence whatever being offered, the court did not err in admitting the ordinance in evidence. The ordinance

(No. 3074) described the boundaries of the land thereby annexed to the city, and thereby furnished the basis for the enactment of Ordinance No. 3096.

We have not overlooked the contention of appellant that in a quo warranto proceeding, as in the case of McGahan v. People, 191 Ill. 493, 61 N. E. 418, the burden of proof is upon the respondent. In this case the introduction of Ordinance No. 3074 met the requirement, and the burden of proof, as we have seen, shifted upon the appellant.

The court made findings of fact, which, in substance, gave the boundaries of the tract annexed by Ordinance No. 3096; that it contained 65 acres more or less, and was unplatted; that Ordinance No. 3074 defined the boundaries of the city just prior to the passage of Ordinance No. 3096, and, in substance, that Ordinance No. 3074 defined the boundaries of the city, so that the boundary of the 65-acre tract in its entire length was 7,290 feet, of which 4,645 feet was coextensive with the boundary of the city of Atchison immediately prior to the passage of Ordinance No. 3096; that the 65-acre tract of land lies mainly within the city of Atchison; and, in effect, that Ordinance No. 3096 was duly passed, signed, and published. As conclusions of law, the court found that Ordinance No. 3096 was duly passed and is a valid ordinance of the city, and the city had the power to adopt such ordinance; that the annexation of the 65-acre tract of land by Ordinance No. 3096 was legal and valid, and not in excess of the power of the city. Judgment was rendered for the defendant. Motion for new trial was overruled.

The principle question in this case seems to be, when the validity of only one ordinance of the city is attacked, and its validity depends upon the validity of a prior ordinance, whether the burden is imposed upon the city to establish the validity of the prior ordinance, which is not attacked. If so, it may be said the validity of the prior ordinance may depend upon the validity of an ordinance prior thereto; that the city must establish the validity of each sustaining ordinance, so long as the validity of each ordinance depends upon the validity of a prior ordinance. The converse is that the validity of a sustaining ordinance, regularly passed, approved, and published, is to be presumed until the validity thereof is impeached.

The petition in this case admitted the legal existence of the city of Atchison, and it is contended by appellee that such admission admits the corporate boundaries of the city, except so far as such boundaries are put in issue. On the other hand, the appellants claim, in substance, that under their allegation that the city had no authority to annex land attempted to be annexed by a certain ordinance, the validity of which depends upon the validity of a prior ordinance, the burden

rested upon the city to establish the validity of the antecedent ordinance. In appellant's supplemental brief it is asserted that "the act of the territorial Legislature of 1858, incorporating the city of Atchison and specially defined its boundary, and, nothing further appearing, each Ordinance No. 3074 and 3096, was void." If this be true, it might be necessary to sustain the validity of Ordinance No. 3096, which only is attacked, to establish the validity of every ordinance affecting the corporate boundaries of the city, which has been enacted since 1858. This would impose an unnecessary burden upon the city.

No specific facts are alleged in the petition as to the invalidity of any prior ordinance, and the relief prayed for, as we have seen, relates only to Ordinance No. 3096.

The judgment is affirmed. All the Justices concurring.

GILES v. ATCHISON, T. & S. F. RY. CO.  
(No. 18,742.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. CARRIERS (§ 218\*)—SHIPMENT OF LIVE STOCK—DAMAGES—DEFENSE—NOTICE.

A shipment of live stock under the usual contract provided that, as a condition precedent to the right to recover damages for loss or injury to his stock during transportation, the shipper should give notice in writing of his claim before the stock was removed and intermingled with other stock. In an action to recover for damages on account of delay in transportation brought under sections 7116, 7117, General Statutes 1909, requiring carriers to transport live stock at an average rate of speed of not less than 15 miles per hour, *held* error for the court to charge that, if the damages were the direct result of the failure to comply with the 15-mile statute, then the contract requiring notice was no defense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

2. CARRIERS (§ 218\*)—SHIPMENT OF LIVE STOCK—INJURY DURING TRANSPORTATION—NOTICE.

Upon the facts stated in the opinion, it is held that the loss and injury on account of delay in transportation by which the cattle became jaded, gaunt, and emaciated, and after being unloaded became restless and in unfit condition and refused to take the usual and customary fill in order to put them in prime condition for sale, was a loss occasioned during transportation, and that notice of such a claim was required as a condition precedent to the right of recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

Appeal from District Court, Sedgwick County.

Action by John T. Giles against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and Houston & Brooks, of Wichita, for appellant. William Keith, of Wichita, for appellee.

PORTER, J. The railway company has appealed from a judgment in plaintiff's favor for damages and attorney's fees on account of shrinkage in weight in a shipment of live stock from Protection, Kan., to Wichita, Kan. The petition alleged negligence on account of delay in transportation and delivery of the cattle at their destination by which the cattle "became jaded, gaunt, and emaciated," and "greatly disturbed," and "deprived of necessary rest," that after being unloaded they "became restless and in unfit condition" and refused "to take the usual and customary fill that was required to put them in prime condition for sale on the market, in consequence of which plaintiff suffered a loss and extra shrinkage of weight, to wit, 30 pounds per head." It was alleged that the defendant failed to transport the live stock at a rate of speed of 15 miles per hour as required by sections 7116, 7117, General Statutes 1909. The shipment was under the ordinary live stock shipping contract, which provided that as a condition precedent to plaintiff's right to recover damages for loss or injury to his stock during the transportation he should give notice in writing of his claim before the stock was removed and intermingled with other stock. No notice of loss was given.

[1] The court charged the jury that if the damages were the direct result of the failure to comply with the 15-mile statute then the contract was no defense. The instruction was erroneous. The statute does not attempt to create a new liability or cause of action against the carrier, but merely prescribes a minimum rate of speed at which live stock shall be transported. In effect it declares that any less rate of speed shall be prima facie negligence on the part of the carrier. Before the statute was passed it was the duty of the carrier under the common law to transport and deliver at destination within a reasonable time, and he was liable for any damages resulting from delay occasioned by his negligence; but a stipulation in a contract of shipment of live stock, that as a condition precedent to his right to recover damages for loss or injury during transportation the shipper shall give notice of his claim before the stock is mingled with other stock, has been repeatedly held to be a reasonable stipulation. *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465; *Railway Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261; *Railway Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Hayes v. Railway Co.*, 84 Kan. 1, 113 Pac. 421; *Ray v. Railway Co.*, 90 Kan. 244, 133 Pac. 847. A provision requiring such notice as a condition precedent to recovery is not a stipulation

against the carrier's negligence. *Railway Co. v. Morris*, 65 Kan. 532, 70 Pac. 651. The Supreme Court of the United States, in *Mo., Kan. & Tex. Ry. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690, has upheld the same kind of a stipulation where the liability arose under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]) on the ground that the liability which the act of Congress imposes upon the carrier is only a continuation or extension of common-law liability, "and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence" (227 U. S. 672; 33 Sup. Ct. 401, 57 L. Ed. 690). Irrespective of the 15-mile statute, the facts found by the jury are sufficient to make the defendant liable for the loss except for the failure to give the notice as provided in the written contract.

[2] The plaintiff concedes that the shrinkage resulted from delay in transportation, but seeks to avoid the failure to give the required notice by the contention that the loss or injury occurred after the cattle were delivered at destination, and therefore no notice was required. We think this contention cannot be sustained. The findings of the jury are that the cattle arrived at the stockyards in Wichita 15 minutes after midnight and were delivered to the consignee at 7 in the morning of that day; that, after being unloaded from the cars, the cattle did not settle down and rest before the opening of the market; and that they were sold on the market at half past 10 o'clock in the forenoon of the day they arrived. The plaintiff claims that because of the long delay his cattle were restless and jaded, and after being unloaded refused to lie down and rest or to drink the customary amount of water before the time arrived for their sale. He must necessarily and does contend, however, that his loss was occasioned by and was the direct and proximate result of defendant's delay in transporting the cattle. His case therefore falls clearly within the rule of *Railway Co. v. Wright*, supra, where it was held that shrinkage in weight occasioned by the unnecessary length of time the cattle were on the road is an injury during transportation, and hence comes within the contract requiring notice. An exception to this rule has been allowed where the shrinkage resulted from the cattle having to be carried over to next day's market. In such a situation it has been held that notice of the loss was not a reasonable requirement, and therefore the shipper could recover without first giving the notice. Here the cattle arrived in time for the market and were sold 3½ hours after their arrival; the shrinkage was not caused by any delay occurring after the transpor-

tation ended. On the contrary, the condition the cattle were in resulted from the delay that occurred during transportation, and therefore the notice required by the contract was a condition precedent to the right to recover.

It follows that the judgment will be reversed, and the cause remanded, with directions to enter judgment for the defendant. All the Justices concurring.

KANSAS CITY v. STEWART, County Treasurer. (No. 18,979.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

COUNTIES (§ 182\*)—STATUTORY LIABILITIES—SPECIAL ASSESSMENTS—REBATES.

Improvements, the cost of which is charged by a city to the benefited property, are so far public in their nature that the Legislature may require the county to bear a part of the expense of collecting the assessments, by giving a rebate or premium for their prompt payment.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 208; Dec. Dig. § 182.\*]

On rehearing. Former decision adhered to. For former opinion, see 90 Kan. 846, 136 Pac. 241.

MASON, J. Upon a rehearing full consideration has been given to the additional argument of counsel, but the previous conviction of no member of the court has been changed, and it results that the decision already made is adhered to.

Regarding the contention, that the statute which requires the penalty accruing on the tax of a township (or other municipality) to go to the county violates the constitutional provisions against diverting a tax from the object for which it was levied, this may be added: The tax being laid under a system of laws of which this statute is a part, contemplates such a disposition of the penalty as is there provided, so that the proceeds go to the very place specified.

In behalf of the county, the argument is made that, whatever may be the rule as to general city taxes, the county cannot be required to pay the rebates on special assessments for local improvements, or taxes levied to pay bonds issued for that purpose, because these are obligations created by the city in its proprietary rather than in its governmental capacity. We think, however, that the public has such an interest in these improvements that the cost of collecting pay for them may rightfully be cast upon the county. The allowance of a rebate to one who makes an early payment of his tax amounts to paying him a premium for his promptness. It is a legitimate device for facilitating the collection of all taxes, the expense of which the Legislature has seen fit to make a charge against the county, just as it might have placed it upon the entire

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state. In itself it does not operate unequally. The inequality of the statute results from the fact that the penalties collected on the taxes of a city of the first class go to the city, while all other penalties are retained by the county. All taxpayers, so far as concerns being allowed rebates, or charged with penalties, are treated alike. But a city of the first class receives a favor not granted to other municipalities, by being permitted to retain its penalties, and this inures to the benefit of those who pay its taxes. As stated in the original opinion, it is difficult to suggest a reason for the distinction. But there are many differences between the law regulating cities of the first class and that regulating cities of the second class for which it would be impossible to assign a specific reason beyond the fact that the Legislature saw fit to make them. The two forms of government have much in common, but they differ in many details. If the statute were to be held invalid wherever it makes a distinction for which the court cannot account on the basis of a difference in population, many enactments of long standing would have to be set aside. Under the general statutes of 1868, cities of the first class were required to collect delinquent special assessments by selling the property, while cities of the second class certified the amounts to the county authorities, who attended to the collection. Gen. Stat. 1868, c. 18, § 28; chapter 19, § 30, par. 2. The relation of the matter to population is obscure, but not more so than in the case of many other differences. In the defendant's brief the attempt is made (perhaps successfully) to show that a possible ground of distinction in the matter in hand, which was suggested in the original opinion, is ill founded both in theory and in fact. But a classification may be valid, although based on a mistaken belief as to how a law will work out.

The argument made against the statute, on the ground of its unjust operation, has much apparent force, but we are constrained to hold that only the Legislature can grant relief.

The former decision is adhered to. All the Justices concurring.

# MACKETTA v. MISSOURI, K. & T. RY. CO. (No. 18,833.)

(Supreme Court of Kansas. May 9, 1914.)

## (Syllabus by the Court.)

### 1. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

The facts brought out in the evidence are held to be sufficient to uphold the findings of the jury that the owner and operator of a coal mine failed to exercise the care required by the statute providing for the safety of persons employed in coal mines to see that, as the miners advanced the excavations, all loose coal, slate, and rock overhead were secured against falling

on traveling ways, and that by reason of that negligence the plaintiff was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## (Additional Syllabus by Editorial Staff.)

### 2. MASTER AND SERVANT (§§ 204, 228\*)—INJURY TO MINER—DEFENSES—ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE.

Assumed risk and contributory negligence are not available as defenses in a miner's action for injuries due to the defendant mineowner's failure to exercise the care required by statute to protect miners from falling rock.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.\*]

Appeal from District Court, Cherokee County.

Action by John Macketta against the Missouri, Kansas & Texas Railway Company for personal injuries. From judgment for plaintiff, defendant appeals. Affirmed.

W. W. Brown, of Parsons, A. F. Williams, of Columbus, and Jas. W. Reid, of Chanute, for appellant. McNeill & McNeill and Chas. Stephens, all of Columbus, for appellee.

JOHNSTON, C. J. John Macketta, the appellee, an experienced coal miner, was employed by the appellant, the Missouri, Kansas & Texas Railway Company, to work in one of its mines, and while so engaged a large rock fell from the roof of the mine and injured him. He brought this action alleging that the injury was the result of appellant's negligence, and he recovered damages in the sum of \$1,711.

[1, 2] It appears that appellee had been at work in an entry of the mine where he was injured more than four months; that from time to time parts of the roof of the entry had been propped or "timbered" up; but near to the end of the entry and where he and his companion, commonly called his "buddy," were at work no timbering had been done. The roof was defective, and appellee and his companion, observing its condition, sent for the mining boss, and when he came they asked him to allow them to make the roof safe, but he refused permission, telling them they could not do that work, and that he would have a company man come in and fix it before the following morning. When they returned in the morning, rock was found on the traveling way of the entry, and, supposing that the company man had taken the rock down in accordance with the promise made, they proceeded to clear away the rock on the floor, and while doing so a rock fell from the roof and broke appellee's leg. In his petition appellee alleged that appellant, in violation of a statute, failed to exercise care for the safety of its employes working in its mines by seeing that, as the miners advanced the excavations, all loose coal, slate, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rock overhead were carefully secured against falling upon the traveling way. In addition, the petition set out a common-law liability of appellant because it failed to provide appellee a safe place in which to work. On the other hand, appellant claimed that appellee was aware of the dangerous condition of the roof of the mine and was engaged in the work of making it safe when the injury was sustained, and that he and not the appellant was responsible for the accident. That the appellant failed to take the precautions for the safety of the miners as required by the statute was abundantly proven by the testimony, and the jury made a special finding that the injury of the appellee was the result of this default. It has been determined that as against such charge assumed risk and contributory negligence are not available as defenses. *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617; *Balsdrenghien v. Railway Co.*, 91 Kan. 730, 139 Pac. 428.

Appellant insists that an exception should be made to the rule, because appellee and his companion, acting in behalf of the company, were engaged in making the place safe at the time of the injury. What the effect would be if that were the case it is unnecessary to determine. The testimony is that it was no part of their duty to fix the roof and that they were not so engaged at the time of the injury, and the finding of the jury is to that effect. They did clean up the rock in the traveling way, but a company man was employed by the company to timber the roof and make it secure. Instead of giving appellee and his companion the opportunity to remove the rock and make the place safe, as requested by them, the boss insisted that the company man would perform that task and expressly promised that it would be done before the morning of the following day. Appellee appears to have relied on the promise and had a right to assume that it had been kept. If appellee had based a recovery upon the common-law liability, and assumed risk and contributory negligence were available as defenses, the act of the company in denying appellee the right to take steps to protect himself and the promise of the company to make the roof safe before they went to work the next day would, under the circumstances of the case, have justified a recovery.

Although contested, there appears to be sufficient testimony to support the findings with a single exception. In one finding appellee is awarded \$81 for medical services. The only testimony to be found in the abstract relating to medical treatment is that the services performed by one doctor were worth \$25 and those performed by another were worth \$8. It must be held, therefore, that there is an excess in the finding of \$48, and that amount will be deducted from the award of the jury.

With that deduction made, the judgment of the district court will be affirmed. All the Justices concurring.

**STALEY et al. v. WESTON et al.**  
(No. 18,735.) †

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

**1. CONTRACTS (§ 234\*)—CONSTRUCTION—DEDUCTIONS.**

K. agreed to deliver to W. in Kansas City the crops which he had raised upon a farm as tenant of C., who was entitled to one-half of the crops. K., W., and C. entered into a contract in which it was agreed that W. was to receive and sell the crops and pay over one-half of the net proceeds to S., a creditor of C. In this suit of S. against W. upon the contract, the conclusion of the district court that in arriving at the net proceeds W. should not be allowed to deduct from the amount received from sales the sums paid to K. for hauling the products of the farm to the city is sustained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1099, 1100; Dec. Dig. § 234.\*]

**2. CONTRACTS (§ 187\*)—PROMISE FOR BENEFIT OF ANOTHER—RIGHT TO SUE.**

The plaintiff S., for whose benefit the promise above referred to was made, may maintain an action therefor, although not a party to the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

**3. APPEAL AND ERROR (§ 198\*)—REFERENCE—OBJECTIONS—TIME.**

A question relating to an order of reference, and rulings upon evidence, are examined without finding error therein.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1248-1250; Dec. Dig. § 198.\*]

(Additional Syllabus by Editorial Staff.)

**4. APPEAL AND ERROR (§ 1056\*)—RULINGS ON EVIDENCE—ISSUES—PREJUDICE.**

Where, in a suit by a landlord's creditor for an accounting of the landlord's portion of a crop which defendants had promised to pay the creditor, payment of the debt was not pleaded, nor any issue raised as to the amount due, the exclusion of a question calling for the amount due on the debt was not prejudicial to defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**5. APPEAL AND ERROR (§ 1056\*)—RULINGS ON EVIDENCE.**

Defendants were not prejudiced by the exclusion of a question the answer to which must have involved substantially but a rehearsal of defendants' pleaded defense.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**6. APPEAL AND ERROR (§ 1056\*)—RULINGS ON EVIDENCE—PREJUDICE.**

Where, in a suit for an accounting of the proceeds of a crop sold by defendants, the amount of defendants' mortgage on the crop had been agreed on and settled, they were not prejudiced by the court's refusal to allow them to show the items making up the amount so settled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 13, 1914.

Appeal from District Court, Wyandotte County.

Action by L. L. Staley and others against Alfred Weston and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Geo. W. Littick, of Kansas City, for appellants. A. L. Berger, of Kansas City, for appellees.

BENSON, J. This action is to recover the amount of a promissory note made by the lessor and lessees of farming lands, for an accounting of proceeds of the crops raised upon the land and delivered to the defendants for sale, and for the application of one-half the proceeds upon the plaintiffs' claim under an agreement between all the parties. The cause was referred, and judgment was entered upon the referee's report for the plaintiff.

The facts found by the referee, in substance, are these: F. M. Clark leased land near Kansas City to Otta Kurtze and Elizabeth Kurtze for one-half the crop, and agreed to advance \$5 weekly for supplies and seed, to enable the tenant to plant and harvest the crop. To provide for these advances Clark made an arrangement with the defendants that they should make them, which they did from time to time, amounting, on August 15, 1910, to \$700. On that day the Kurtzes gave a chattel mortgage to the defendants on their one-half of the crop to secure this \$700, and \$175, an amount estimated for future advancements. On September 19th Clark and Kurtze and wife obtained a loan from the plaintiffs of \$1,000, for which they gave their promissory note, secured by a mortgage on crops on the land and an assignment of Clark's interest in the crops. On the same day Clark, the Kurtzes, and Weston & Co. entered into a contract in which it was recited that Kurtze and wife had theretofore agreed to deliver to Weston & Co. their one-half of the crop; that Kurtze and wife and Clark had borrowed \$1,000 of the plaintiffs, secured by a mortgage on the Kurtzes' half interest, and an assignment by Clark of her half interest in the crop. The contract also provided that the crop should be delivered by Kurtze to Weston & Co. for sale by them at current prices in the usual course of business, one-half of the net proceeds to be applied to pay the indebtedness due to Weston & Co., on their mortgage, the other one-half to be paid to the plaintiffs on the \$1,000 note. It was further agreed that statements of sales should be made to Wm. Needles, who was to receive and divide the surplus between the lessor and lessees.

[1] The principal contention is over the question whether certain payments made by the defendants to the Kurtzes after the date of the contract of September 19th should be deducted from the amount of sales in arriving at the net proceeds. Part of these payments were for threshing, and amounted to

less than the \$175 estimated and included in the mortgage. Other items were for payments of money to Kurtze for labor and hauling in delivering the crops to the defendants in the city. It is insisted that these items should be deducted from the \$1,179.70 found by the referee to be the net proceeds. In other words, it is contended that these items should have been deducted from the amount of sales, in addition to the expenses of making sales, for drayage, commissions, and the like, which were allowed by the referee in arriving at the amount of \$1,179.70. The contract of September 19th appears to have been the final agreement of the parties, and it nowhere appears that Kurtze was to be paid for hauling in the crops, or that the plaintiffs were to be subjected to any diminution from their one-half for any such expenses. The term "net proceeds" must be applied according to the circumstances presented, and it seems obvious that only the ordinary expenses of converting the crops into money after they had been delivered to the defendants should be deducted from the amount of sales. The truth appears to be that it was supposed that the crops would yield an amount sufficient to pay both creditors. In this they were disappointed, and neither recovered payment in full. One of the defendants testified: "At the time this contract was executed I believed this property was sufficient to pay all indebtedness to the Westons and to the Staleys on the representation of the acreage. I relied on the representations on the acreage, and believed what Clark and Kurtze told me. I supposed we would make enough out of this crop to get all that was due us and pay the Staleys, and then have something left, and we ratified the contract knowing what was in it. I was out at the farm, I expect, three times in the early part of August."

After each sale of products the defendants rendered an account in the ordinary form in transactions of this nature, giving dates, names of purchasers, quantities, amounts received, and deductions therefrom for commissions, loading charges, freight charges, and drayage, as already stated, which expenses were allowed. These statements appear to have been made after the payments for hauling had been made. Thus it appears that the defendants, when the transactions were current, placed the same construction upon the term "net proceeds" that the referee and the district court gave it.

The finding that the money paid to Kurtze for hauling in the crops should not be deducted from the amount of sales in arriving at the net proceeds must be sustained. If it should not be so held as a matter of law from the terms of the contract, a question of fact was presented upon which the finding of the referee, approved by the district court, cannot be disturbed.

[2] Assignments of error upon questions of

practice remain to be considered. It is insisted that a demurrer to the petition should have been sustained because the plaintiffs' remedy was upon the note against the makers. It is not perceived how the existence of that remedy prevented them from resorting directly to the fund specially set apart for payment of the note. It is said, however, that the plaintiffs had no right to recover upon the contract of September 19th because they were not parties to it. That a person may recover upon an agreement or promise made to another for his benefit upon a sufficient consideration has been settled by many decisions. *Griffith v. Stucker*, 91 Kan. 47, 51, 136 Pac. 937.

[3] Complaint is made of the order of reference, but it does not appear that the defendants objected when the order was made, nor before or during the trial, although appearing and participating therein. An objection made when the report was filed was too late. The case involved an accounting of sales of crops of different kinds at various times, supposed at the time to be worth \$5,000. The court believed a reference to be proper, and by their acquiescence it must be presumed that the parties were of the same opinion.

[4] On cross-examination of a witness for the plaintiffs the question was asked what amount was due on the plaintiffs' note. Payment had not been pleaded, nor any issue raised as to the amount due. Although the evidence might have been admitted without apparent prejudice, there was no error in excluding it.

[5] One of the defendants was asked why he had made no payments to Staley. The defendants had stated their reason in their pleading, and the facts of the transaction were related in the evidence. It is not perceived how any possible prejudice could result from excluding an answer to this very general question, which would involve substantially a rehearsal of the defense.

[6] The defendants also allege error in excluding their offer to show the items of the advances making up the amount of \$700, included in their mortgage. There was no error in this ruling because the amount had been agreed to and settled, and there is no claim that it is not correct.

No error is found in the proceedings, and the judgment is affirmed. All the Justices concurring.

MURPHREE v. ANDERSON et al.  
(No. 18,840.)†

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. JUDGMENT (§ 590\*)—CONCLUSIVENESS—ESTOPPEL.

A judgment is not an estoppel as to facts which did not occur until after the judgment was rendered and which were not involved in the former action, notwithstanding references

were made in the pleadings in that action to matters not involved therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102-1106; Dec. Dig. § 590.\*]

2. JUDGMENT (§ 590\*)—RES JUDICATA—ISSUES—SCOPE OF FORMER ACTION.

Plaintiff sued to recover damages for the malicious attachment of his property. The answer pleaded a former judgment in an action wherein plaintiff sued one of the same defendants for false arrest and imprisonment. In the petition in the former action he alleged facts with respect to the attachment of his property for the purpose of showing malice in causing his arrest and imprisonment. When the first case was tried, the attachment case was still pending, and it had not then been determined that the attachment was wrongful. *Held*, that the trial court properly took from the jury the question of the former judgment on the ground that damages for the malicious attachment could not have been adjudicated in the former action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102-1106; Dec. Dig. § 590.\*]

3. APPEAL AND ERROR (§ 1062\*)—QUESTION FOR JURY—FAILURE TO SUBMIT—PREJUDICIAL ERROR.

In an action to recover damages for the malicious attachment of plaintiff's property, the defendant pleaded the former judgment in which the attachment was dissolved and alleged that the plaintiff, as defendant in that action, had set up a counterclaim for the same damages. The trial court rules as a matter of law that plaintiff was not, by reason of the allegations of his answer in the attachment case, estopped from asserting his claim. The question being one of fact should have been submitted to the jury; but, since all the evidence was to the effect that none of the issues were in fact adjudicated in the former action, and no serious contention being now made to the contrary, the error will not be regarded as prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

4. EVIDENCE (§ 543\*)—OPINIONS—COMPETENCY—VALUE OF ATTORNEY'S SERVICES.

In an action to recover damages including attorney's fees for defending a malicious attachment, the plaintiff, who was a farmer, was permitted to testify to the value of his attorney's services in defending the attachment case. *Held*, not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2356½-2358; Dec. Dig. § 543.\*]

Appeal from District Court, Shawnee County.

Action by J. A. Murphree against W. O. Anderson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Hazen & Gaw, of Topeka, for appellants.  
W. A. S. Bird, of Topeka, for appellee.

PORTER, J. The plaintiff sued the defendants for damages alleging that maliciously and without any probable cause they commenced a civil action against him and attached and sold his property. The action is one of a series of lawsuits in which the parties have been involved and which include three civil suits and one criminal action. The defendants are commission merchants deal-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.  
† Rehearing denied June 13, 1914.



ing in fruit and farm produce in the city of Topeka. The plaintiff is a farmer, and in 1909 was a resident of Oklahoma, where he was engaged in shipping watermelons raised by him on his farm. He brought a car load of melons to Topeka, and the defendants claimed that he contracted to sell it to them, but that he sold to some one else in violation of his contract. On August 9, 1909, he came to Topeka with another car load of melons which he sold to a retail merchant in the city. While engaged in delivering a wagonload of them, T. E. Armstrong, one of the defendants, and some other commission men of the city, had one of their number purchase a single watermelon from him for 25 cents, and as soon as the transaction was completed caused him to be arrested by a policeman and confined in the city jail charged with peddling merchandise without a license in violation of a city ordinance. While imprisoned and a stranger in a strange land, he was sued by the defendants in the district court of Shawnee county to recover \$160 damages for breach of the alleged contract for the sale of the first car of melons, and an attachment was levied on the second car load of melons. Soon after the attachment was levied, the melons were sold at public auction and brought \$25, although they were worth about \$100.

The plaintiff employed an attorney, who succeeded in having him acquitted on the charge of violating the city ordinances, and he was discharged. He at once brought suit in the Circuit Court of the United States for the District of Kansas against T. E. Armstrong and the other commission merchants who were charged with being in the conspiracy, in which action he sought to recover damages in the sum of over \$15,000 for false arrest and imprisonment. That case was tried, and he recovered a judgment against Armstrong and the other defendants in the sum of \$400. Subsequently the attachment case came on for trial in the district court of Shawnee county, and he recovered a judgment for costs, having proved that he was not indebted in any manner to Anderson and Armstrong. The only ground for attachment was that he was a nonresident of the state, and defeating the cause of action resulted in the dissolution of the attachment. He thereupon brought this action to recover for loss of time, traveling expenses, hotel bills, and attorney's fees in defending the attachment case. The jury returned a verdict awarding him damages in the sum of \$403.65. The court overruled a motion for a new trial and rendered judgment on the verdict, from which the defendants have appealed.

The principal defense set up in the answer was that the matters involved in this action are *res judicata*, because substantially the same averments were made in the action in the federal court with respect to the commencement of the attachment suit and the expenses and damages which the plaintiff

claims to have suffered thereby. The answer set up a copy of part of the pleadings in the action in the federal court. There are several reasons why we think the plea of *res judicata* cannot be sustained. The parties are not identical. Anderson, who is a defendant here, was not a party to the action in the federal court. When that case was tried, the attachment case in the district court of Shawnee county was still pending, and of course the plaintiff could not recover damages for the wrongful attachment of his property because it had not then been determined that the attachment was wrongfully brought. It is true there is much similarity in the statement of facts in both petitions. In the federal court the plaintiff sought to recover damages for malicious arrest and false imprisonment, and alleged all the facts with respect to the attachment of his property for the purpose of showing malice on the part of defendants. In the present action he sued to recover damages for the malicious attachment of his property, and pleaded the fact of his arrest and all the circumstances connected therewith for the purpose of showing that the attachment was brought maliciously and oppressively.

[1] "A judgment is not and cannot be an estoppel as to facts which did not occur until after the judgment was rendered and which were not involved in the suit in which it was rendered; nor does its conclusive effect extend to references made by a party in his pleadings to matter not involved in the controversy, such references being made merely for the purpose of elucidating the points really at issue." 28 Cyc. 1314.

[2] We think the trial court properly took from the jury the question of the former judgment on the ground that the damages sued for in this action could not have been adjudicated in the former.

[3] It is also contended and it was alleged in the answer that the matters involved herein were adjudicated in the attachment action, for the reason that the defendant in that action, plaintiff in this, filed an answer in which he set up his claim for the same damages, loss of time, traveling expenses, and attorney's fees in defending the attachment proceedings. Plaintiff produced as witnesses the judge of the district who tried the attachment case, and the official stenographer who reported the trial, and showed by them that the defendant was not allowed in the attachment action to litigate the questions involved herein. It is contended that the court erred in admitting this character of testimony. The same fact might have been proved by any one present at the trial whether officially connected with the proceedings or not. In *Chambers v. Land Credit Trust Co.* (Kan.) 139 Pac. 1178, it was held that a court in which a former adjudication is pleaded may ascertain by parol evidence what really was decided if the evidence does not contradict the record. Where-

ever extrinsic evidence is admissible to identify the questions litigated, it is said, in 23 Cyc. 1538, that it is proper to receive for this purpose "stenographic reports or minutes of the testimony taken, the testimony of the judge and jurors who tried the case or the evidence of a person who was present as a witness at the former trial." In *Perkins v. Brazos*, 66 Conn. 242, 33 Atl. 908, it was held that the deposition of the judge who tried the former action was admissible to prove what issues were tried where the facts do not appear by the unaided record. The case of *Pulsifer v. Arbuthnot*, 59 Kan. 380, 53 Pac. 70, is cited by defendants. It was there held that parol evidence is inadmissible in a collateral action to prove the rendition of a judgment or the making of an order by a court of record. In this case the parol evidence was neither for the purpose of contradicting the record nor of proving what judgment was rendered; the purpose was to prove a ruling of the court made on the trial which would not be preserved in the record of the judgment.

Ordinarily the rule is that, if extrinsic evidence is required to establish a question of fact to determine whether the issues in the former action were the same, the question must go to the jury. It becomes a question of law for the court only when it can be determined from an inspection of the record alone. 23 Cyc. 1543, and cases cited. The defendants insist therefore that if the testimony of the judge and stenographer, and other parol evidence offered by the plaintiff, were admissible, the question of fact should have been submitted to the jury, whereas the court instructed that the plaintiff's claim had not in fact been adjudicated in the attachment action, and that plaintiff was not by reason thereof estopped from asserting it here. Manifestly the court improperly took from the jury the determination of the question of fact. But it is equally manifest from an examination of the entire record that the court decided the fact correctly. The plea of *res judicata* rests upon the fact that the answer in the attachment action set up the same issues, and that they might have been, and the presumption is that they were, determined in that action. No evidence was introduced or offered in rebuttal of the evidence of the judge of the district court and the official stenographer, and it is hardly conceivable that, had the question been submitted to the jury, the decision would have been other than that made by the court, and, if it had, it would have been the court's duty to set it aside as contrary to all the evidence. No serious contention is now made that any issue involved in this action was in fact submitted to the jury in the attachment action or was determined therein. It was therefore a question of fact upon which all the evidence was one way; and, while we think the court should have left the determina-

tion of the question to the jury, we cannot regard the error as prejudicial to defendants nor sufficient to justify ordering another trial upon that issue. While the answer pleaded the fact to be contrary to the finding of the court, all the evidence was to the effect that the issues were not tried out in the attachment action, so that the fact which the court determined should be regarded as one about which there was and is no serious dispute.

[4] It is complained that the court erred in refusing to strike out certain portions of the petition. While we think the petition contained a great many statements with respect to the arrest of the plaintiff and the fact that the newspapers had published accounts of his arrest, all of which should have been stricken from the petition, we are satisfied that the defendants were not prejudiced by the ruling. Evidence was admitted for the purpose of proving some of these allegations, but the court charged the jury that none of these matters were to be considered by them except as tending to show malice on the part of defendants, and it is clear from the whole record that the jury understood that they were not to allow any damages for the unlawful arrest and imprisonment or because of the publication in the newspapers and humiliation which the plaintiff claimed he suffered thereby. There was no error in refusing to require the plaintiff to elect upon which cause of action he would rely in the trial of this case. The court on the motion of the defendants required the plaintiff to file an amended petition setting up separate causes of action. As we construe the pleading, however, but one cause of action was alleged, and that was to recover damages for the malicious bringing of the attachment suit. In the petition as amended the plaintiff was unable to state two causes of action, although the order of the court was attempted to be followed by separating the petition into two counts, but both causes of action were for the same items of damages and expenses. It is insisted that the court committed error in allowing the plaintiff to testify as to the value of his attorney's services in the attachment case. We think the evidence was admissible for what it was worth. The fact that the plaintiff is a farmer would not prevent him from having some notion as to the value of attorney's fees, especially where he had participated in as much litigation as the plaintiff has, all within a period of two years. He testified that the services of his attorneys in this case was worth \$125. As observed, it was some evidence, and as he seems to have had a pretty fair opinion of what the services were worth, the defendants have no cause to complain.

We find no prejudicial error in the record, and the judgment will be affirmed. All the Justices concurring.

**GILBERT v. MISSOURI PAC. RY. CO.**  
(No. 18555.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by Editorial Staff.)

**WORDS AND PHRASES**—"OBLIVIOUS"—"OBLIVION."

A person is "oblivious" of a thing when it is extinguished from his mind. "Oblivion" is a kind of annihilation; and for things to be as though they had not been is like unto never being.

On petition for rehearing. Rehearing denied.

For former opinion, see 91 Kan. 711, 139 Pac. 380.

**BURCH, J.** In a petition for a rehearing it is said broadly that the facts set out in the original opinion upon which the decision is based (*Gilbert v. Railway Co.*, 91 Kan. 711, 139 Pac. 380) are not the facts shown by the record. The decision was based on the special findings of the jury (original opinion, 91 Kan. page 714, 139 Pac. page 382), which could not well be falsified. But passing by this fundamental defect in the petition for a rehearing, the following is a sample specification of the plaintiff's general charge: "In the opinion, the court said: 'The fireman was at his post, he did see the plaintiff, he did notify the engineer, the whistle was sounded, the bell was rung, the emergency brake was applied, and everything was done which could be done to avert disaster.' Are these the natural conclusions to be gathered from the evidence? True, the fireman was at his post, and he testified that he notified the engineer; but was the whistle sounded, were the above measures taken? All of appellee's (plaintiff's) witnesses testified that they were not, and the jury so found in answer to special question 52."

The ill-considered extravagance of this statement may be judged when it is pointed out that the plaintiff's own witness Haskett testified that he heard the engine whistle, then the crash of the collision, and then saw the train go by, and that the jury found specially in finding 45, not printed in the original opinion, that the bell was rung and ringing at the time the engine approached the crossing where the collision occurred, when near the crossing.

The plaintiff produced five witnesses who gave negative testimony that they "did not recollect" hearing the bell or whistle, or "did not hear" the bell or whistle just before the collision occurred. Two of these witnesses confessed to defective hearing. Another said he was giving no attention to the train. Another stated that the bell might have been ringing, but he did not recollect it. The fifth was not cross-examined. The positive testimony of a large number of witnesses who could and did hear, including Mr. Haskett produced by the plaintiff, was that the

alarm whistle was sounded before the collision occurred. Several of these witnesses testified to the ringing of the bell. Some of them described the peculiar shrill noise of the whistle. Mr. Haskett called it a screech. The jury, following an instruction of the court on the subject, accepted the positive testimony, as is shown beyond dispute by the finding relating to the ringing of the bell. They were not separately interrogated concerning the sounding of the whistle, but the whole matter was covered by finding 56, which was framed upon the testimony of the engineer, corroborated by the positive testimony referred to. The engineer said that, when he received the alarm from the fireman that a team was about to attempt the crossing, the bell was ringing, that he applied the air immediately, grabbed the whistle, and gave two or three toots and made all the alarm he could in the time he had, and that there was nothing he could have done which he did not do to prevent the accident. The jury found accordingly, and the opinion stated the facts accordingly.

Finding 52 cannot be perverted into a finding that no whistle was sounded at all after the whistle given 1,500 feet east of Fourth street. That finding merely states what ought to have been done to avoid the accident; that is, the whistle should have been sounded when it appeared that the plaintiff was apparently going to attempt to cross in front of the engine. It must be read with finding 42 on the same subject, that the fireman, who was observing the plaintiff, should have called the engineer's attention sooner to give the alarm by whistling when the fireman discovered the plaintiff was about to cross the track in front of the train. Finding 42 is conclusive that the fireman did call the engineer's attention to give the alarm by whistling—but not soon enough to prevent the collision. Finding 56 summarizes what followed.

It is charged in the petition for a rehearing that an important fact was not stated in the original opinion; that is, that the plaintiff had his back turned to the train. There is no testimony in the abstract or counter abstract that the plaintiff had his back turned to the train. The evidence produced by the plaintiff on the subject was as follows: "He was wearing a cap, and was standing up in his wagon, driving with his right hand, and would naturally be turned a little to the west; that his head was not turned to the west, but he wasn't looking right straight north." Witnesses for the defendant said the plaintiff's head was turned in a direction variously described at from just a little northwest to west. The fireman said that in his estimation the plaintiff was looking west and away from the track. (The track ran west.) In preparing the opinion it did not seem important to canvass the evidence on

this subject, because the essential fact was that the plaintiff did not look in the direction of the train. The court instructed the jury in the seventh instruction that this fact was undisputed. Full force was sought to be given to it in the opinion by the expression, "The plaintiff was oblivious of the train" (91 Kan. page 715, 139 Pac. page 382), using the expression, in the sense that the train, which the plaintiff had looked for when going for his team, was extinguished from his mind. This meaning of "oblivious" is illustrated in the Century Dictionary as follows: "Oblivion is a kind of annihilation; and for things to be as though they had not been is like unto never being. Sir T. Browne, *Christ. Mor.*, i. 21."

As bearing on the subject of the use made of the crossing, the plaintiff points out that the original opinion omitted to state that one man was walking behind the plaintiff's wagon toward the crossing. This man, however, had only reached the switch track when the collision occurred, and consequently did not tend to crowd the place, which was in full view of the trainmen for a long distance, as described in the original opinion. 91 Kan. 717, 139 Pac. 380.

The result is that the facts stated in the original opinion need to be neither corrected nor supplemented.

The plaintiff expresses surprise because the decision in the Baker Case (Railway Co. v. Baker, 79 Kan. 183, 98 Pac. 804) is approved, while the judgment of the district court is reversed. The material portions of the opinion in the Baker Case are quoted in the original opinion and speak for themselves. The distinction between the facts of that case and this one, in all material particulars, was pointed out. Then the principle underlying the decision in the Baker Case was applied to this one, and the court is satisfied with the result.

Although the district court instructed the jury (in accordance with the fireman's testimony) as shown in the original opinion beginning at the bottom of page 713 of 91 Kan. (139 Pac. 380), the fireman ought to have notified the engineer sooner, and the whistle ought to have been sounded, as the jury found. The failure to do this constituted negligence on the part of the defendant which would warrant recovery except for the plaintiff's own negligence. But such failure was not wantonness. As stated in the original opinion, the utmost the jury could say was that the fireman's delinquency consisted in not sooner bringing about an alarm by means of the whistle. But when he saw that the plaintiff was leaving a place of safety and was "driving into the train," he either was ringing or then rung the bell himself, and he did notify the engineer, who at once sounded the whistle, applied the emergency brakes, and did everything possible to

avert the collision which the notification called for. Consequently the findings of fact forbid the inference of wantonness.

Other matters contained in the petition for a rehearing do not require discussion, and it is denied. All the Justices concurring.

## **RICCI v. CHEROKEE & PITTSBURG COAL & MINING CO. (No. 18,826.)**

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

### **1. MASTER AND SERVANT (§ 278\*)—INJURY TO MINER—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In an action against the owner of a coal mine for personal injuries to a miner caused by a violation of the statutory duty to furnish sufficient props of suitable length, the evidence is examined, and found sufficient to support the findings and verdict.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

(Additional Syllabus by Editorial Staff.)

### **2. MASTER AND SERVANT (§ 228\*)—INJURIES TO MINER—DEFENSE—CONTRIBUTORY NEGLIGENCE.**

Contributory negligence is not available as a defense in a miner's action for injuries proximately resulting from the defendant mineowner's failure to furnish sufficient props of suitable length, as required by Gen. St. 1909, § 4987.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.\*]

Appeal from District Court, Crawford County.

Action by Anselmo Ricci against the Cherokee & Pittsburg Coal & Mining Company. From judgment for plaintiff, defendant appeals. Affirmed.

W. R. Smith, of Topeka, and D. H. Woolley and B. S. Gaitskill, both of Girard, for appellant. Arthur Fuller and W. J. True, both of Pittsburg, Kan., for appellee.

**BENSON, J.** The plaintiff, a coal miner, was injured at the defendant's mine on July 29, 1912, by a rock falling upon him from the roof of the room in which he was working. He recovered a judgment for \$1,200, and the defendant appeals.

[1] The plaintiff was 53 years old at the time of his injury and had been working in that mine for 11 years, and in the same room for about three months. His room extended northward from the entry for a distance of 150 or 160 feet. The plaintiff and his son Theodor were working together. The vein of coal was 2 feet and 8 inches thick, and that was the height of the room. The rock which fell was 20 feet long, 6 feet wide, and 4 inches thick, and was in the roof at the end furthest from the entry at or near the face of the coal. Its presence had been known to the plaintiff for about 15 days before it fell, and he had been working under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

it all that time. There had been three props, each 2 feet 8 inches in length, under the rock the day before the accident, but they had been blown down by the shots fired that night, and the next morning had been replaced by the plaintiff or his son when they commenced work. These props were under the rock when it fell. One prop was placed four feet from each end of the rock, and the third one in the middle of the rock, forming a sort of triangle. When these props were put up that morning, both the plaintiff and his son sounded the rock with their picks, and, in the language of the plaintiff, "It didn't sound bad." About half past 12 o'clock that day, after the plaintiff had picked coal under the rock for four or five minutes and had taken out three or four shovelfuls, the rock fell. It broke in two or more pieces, and one of the pieces fell upon the plaintiff's back, bearing him to the ground in a kneeling position. The rock broke off right on top of the props and fell on each side, leaving the props standing. The plaintiff's son and other miners came to his assistance and lifted the rock and released the plaintiff.

The sole negligence alleged in the petition was the failure of the defendant to furnish prop timbers of suitable length and size, whereby the plaintiff was unable to prop the roof of his room and prevent it from falling. The evidence disclosed that it was the duty of the driver to furnish props at the request of the miners, and that it was the duty of the miners to make their working place safe by the use of the props supplied by the company. The plaintiff testified that on the day in question he had in his room some loose props  $3\frac{1}{2}$  and 4 feet in length, but claimed that they were too long to put under the rock. At 9 o'clock that morning he ordered props 2 feet 8 inches long from the driver. On his second trip thereafter the driver brought a load of props and delivered them at 11 o'clock, or 11:30 o'clock at the switch entering the plaintiff's room, and said to the plaintiff: "There are no 2-foot-8 props at the bottom, and I have brought you some 3-foot props and some  $3\frac{1}{2}$ -foot props." Two or three of the props which the driver brought were three feet long, and the rest were three and one-half feet in length. They were unloaded by the plaintiff and his son. The plaintiff was using in his room props of various lengths, 2 feet 8 inches, 3 feet,  $3\frac{1}{2}$  feet and 4 feet long, depending upon the varying height of the roof at different places. Most of the props they were using were 2 feet 8 and 3 feet long. The floor of the room was composed of a substance called black-jack, from 4 to 10 inches thick. This bottom could be dug out so as to admit of the use of a prop at least as long as  $3\frac{1}{2}$  feet.

The jury found the following additional facts:

"Q. 7. Did the plaintiff, just prior to the falling of the rock complained of, think that it was safe? A. Yes.

"Q. 8. Did the plaintiff, when he went under this rock to mine out the shot, think the rock was safe? A. Yes."

The contention of the defendant is: "First, that the company had substantially complied with the statute by furnishing props of such a length as could, with proper diligence on the part of the plaintiff, have been used by him in supporting the rock; second, that even though he had had props of the exact length ordered by him, he would not have used them under this rock, as he considered that it was sufficiently propped already, and reasonably safe for him to work under. So it appears conclusively that it was the plaintiff's own negligence, or lack of judgment, and not the want of props, that was the cause of the accident."

These questions were presented to the district court by a demurrer to the evidence and a motion for judgment on the findings. The question here is whether, upon the facts found by the jury, and others which the evidence tends to prove, these contentions of the defendant should be sustained, in other words, whether the findings and verdict are supported by the evidence.

The petition alleges negligence on the part of the defendant in willfully failing to supply sufficient prop timber of suitable length and size for the place where the plaintiff was working, and that this failure was the proximate cause of his injury. The statute, among other things, declares: "Every mine shall be supplied with sufficient prop timber of suitable length and size for the places where it is to be used, and kept in easy access to." Gen. St. 1909, § 4987.

The vein of coal was 2 feet 8 inches in thickness, and most of the props used in the room were of that length, longer ones being used at places where the roof varied from its ordinary height. To support the rock in question, however, the length required was 2 feet and 8 inches; and the plaintiff asked for props of that length for that purpose. It is argued that longer ones might easily have been used by excavating places for them in the black-jack, constituting the floor of the room, to the depth that might be necessary, and there is evidence that this had been done in other rooms. One witness testified: "I ought to have used 2-foot-8, but I could not get 2-foot-8; I used 3-foot props, and sunk them in the bottom to be safe. Q. You used 3-foot props in propping up the roof in your room, did you? A. Yes, sir; because there were no 2-foot-8." There was other testimony of the same nature. The plaintiff testified that, to use a 3-foot prop, he would have to dig up the bottom five inches; that in some places it was too hard to dig, and that he was not paid to sink props; that below the

black-jack there was rock, and to use a prop 3½ feet long would require digging down a foot and a half.

There was evidence tending to show that when the driver came in without any props, after the first order had been made, the plaintiff told him to bring them the next time. When the driver again returned bringing props of a greater length than had been asked for, the plaintiff said, "What did you bring these to me for? they are not serviceable." The evidence did not show a sudden emergency causing an insufficiency in the supply of props of the required length, but tended to prove a condition that had existed for several days.

The defendant contends that the plaintiff was warned of the danger, and was alone responsible for the consequences; and that his failure to use the props he had was the proximate cause of the injury. In support of this contention reference is made to the testimony of the pit boss, who was in Ricci's room between 10 and 11 o'clock on the day the rock fell, and testified: "I told him he had a bad rock there, and I told him to take it down, or to put some more props under it, and he said he would watch it, himself, and I walked away and went on out of the room." It does not appear that the pit boss apprehended such imminent danger as to require immediate removal of the bad rock, but believed that with further propping work might proceed, and this is consistent with the plaintiff's claim that props were desired for that purpose.

It cannot be held as a matter of law that the plaintiff is precluded from a recovery by his failure to dig into the black-jack and rock below, if that was necessary, and in that way use the props that were furnished. But the evidence relating to that matter was material upon the question whether the props so furnished were of suitable length, or reasonably sufficient for use.

Referring to the contention of the defendant that the plaintiff would not have used the shorter props had they been furnished, it will be observed that he called for them, and repeated the call when the driver returned without them. True, he testified that if he had believed that the rock would fall he would not have gone under it. But immediately following this statement he testified: "Q. Then since you thought the rock was safe, what did you order these props for? A. Because, if he had brought some more props, it would have been safe." Having also testified that props that had been under this rock were blown down the night before the injury, and were set under it again but in different places that morning, he was asked the question and gave the answer following: "Q. Well, then, did you put anything in the place that these props had been in the day before, so as to hold the rock at that point?

A. No, sir; I did not have any more." His son, who had, it seems, placed the three props in position under this rock, testified: "The reason I did not put up more props under that rock was because I did not have any 2-foot-8 props; they were all too long. The length of the props that I did put under the rock was about 2-foot-8. \* \* \* I will not say that there were not any 3-foot props. I could not have put a 3-foot prop under that rock." On this and other testimony and some evidence conflicting with it, the question whether the props would have been placed under the rock had they been furnished was properly left to the jury.

The plaintiff is criticized for incurring the risk of death or serious injury rather than to do the extra work necessary in order to use the props that were furnished. But the jury were not bound to infer that he took that risk while knowing or apprehending the danger. The ordinary motive of self-preservation and the love of life suggest a contrary inference.

[2] It must be remembered that contributory negligence is not available as a defense in cases like this where the cause of action arises from the violation of a statutory duty. *Le Roy v. Railway Co.*, 91 Kan. 548, 138 Pac. 646; *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617.

The discussion of the scope and effect of statutes enacted for the protection of life in the cases cited and other recent decisions makes comment upon their interpretation unnecessary. *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657; *Slater v. Railway Co.*, 91 Kan. 226, 137 Pac. 943. No objections to the instructions or to the rulings, other than those already referred to, is urged.

It is concluded that there is competent evidence to support the findings and verdict, and the judgment is affirmed. All the Justices concurring.

#### PALIN v. INSURANCE CO. OF NORTH AMERICA. (No. 18,854.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

#### 1. INSURANCE (§ 143\*)—REFORMATION OF POLICY—ADDITIONAL INSURANCE.

The doctrine of the case of *Pfeister v. Ins. Co.*, 85 Kan. 97, 116 Pac. 245, applied in an action to reform a fire insurance policy to include permission to take out additional insurance according to oral negotiations between the plaintiff and the defendant's agent, and to recover on the reformed policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.\*]

#### 2. APPEAL AND ERROR (§ 1089\*)—DEPARTURE—PREJUDICE.

In taking the application the agent appended the false answer, "No," to the question, "Is the land described mortgaged?" without the knowledge or authority of the plaintiff, and without propounding the question to him. The policy, as written, contained a condition against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

incumbrances. The petition pleaded broadly compliance with the terms of the policy. The answer pleaded the condition against incumbrances. The reply set up the facts stated. A motion to strike out the reply for departure was overruled. A trial on the merits followed, and the plaintiff recovered. *Held*, the defendant was not prejudiced in its substantial rights because of the departure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

3. INSURANCE (§ 576\*)—ADJUSTMENT OF LOSS—WAIVER.

After the insured property burned, a special agent of the defendant procured the plaintiff to sign an agreement to surrender the policy and to accept \$100 in full settlement of his claim. The plaintiff did not surrender the policy, the defendant did not pay or offer to pay the \$100, and further negotiations for settlement followed which induced the plaintiff to believe that the defendant had abandoned the compromise agreement and to act accordingly. *Held*, sufficient to constitute a waiver of the agreement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1486-1488; Dec. Dig. § 576.\*]

4. APPEAL AND ERROR (§ 1039\*)—VARIANCE—PREJUDICE.

A variance between the pleadings and the proof respecting waiver of the compromise agreement *held* not to be prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

Appeal from District Court, Jewell County.

Suit by W. P. Palin against the Insurance Company of North America. Judgment for plaintiff, and defendant appeals. Affirmed.

R. W. Turner and Donald Stanley, both of Mankato, for appellant. W. R. Mitchell, of Mankato, for appellee.

BURCH, J. The action in the district court was one to reform a fire insurance policy to include an agreement permitting additional insurance, and to recover on the reformed instrument. The plaintiff prevailed, and the defendant appeals.

Briefly summarized the facts are as follows: While the plaintiff was at work completing an unfinished dwelling house, an agent of the defendant, named Castello, solicited him to insure it. The cost of the building, when completed, was estimated by Castello at from \$1,200 to \$1,300, and the plaintiff contemplated insuring it for \$1,000. He told Castello that he had promised to give another insurance agent a chance to write a policy, and Castello asked for \$500 of the insurance. The plaintiff said if he could do that it would allow the other fellow to write \$500. Castello replied that when the house was completed the plaintiff could take out more insurance. Castello prepared an application, which the plaintiff signed without reading, and a policy for \$500 was subsequently delivered and paid for. Later the plaintiff took out \$500 additional insurance without notice or permission from the defendant. The building burned, and when the

plaintiff examined the policy issued by the defendant he found that it contained a condition forbidding additional insurance without written consent. The policy also contained a warranty that the property was not incumbered, and when the defendant's answer came in it developed that the application contained a statement that the property was not mortgaged, although the plaintiff had not been interrogated on that subject, and had made no such statement. The property was, in fact, covered by a mortgage. After the fire a special agent of the defendant procured the plaintiff to sign an agreement to surrender the policy and to accept \$100 in full settlement of his claim. The plaintiff did not surrender the policy, however, the defendant did not pay or offer to pay the \$100, and further negotiations followed, resulting in a waiver and abandonment of the compromise agreement.

The foregoing facts are embraced in the general verdict and a special finding of fact returned under instructions to the following effect:

[1] If it was the understanding of the plaintiff and the agent who took the application that the policy would permit the plaintiff to take out additional insurance, the policy was not avoided, although it did not include a provision of that kind, and additional insurance were taken out.

If the agent of the defendant, upon his own motion, and without the knowledge or authority of the plaintiff, wrote in the application an untruthful answer to the question, "Is the land described mortgaged?" the policy was not avoided because the land was mortgaged.

If the defendant waived the compromise agreement, gave the plaintiff to understand that it would not be insisted on, and conducted further negotiations with him looking toward settlement, the agreement was not binding.

These instructions were manifestly correct, and the plaintiff was clearly entitled to judgment, so far as the merits of the case are concerned.

What then are the reasons urged for a reversal?

It is said that the petition should have been made more definite and certain by expanding it to include allegations regarding particular matters upon which it was silent. The defendant understood the case made by the petition well enough, however, to answer in such a way that full advantage was taken of the omitted facts.

[2] It is said that the petition was demurrable in this: It did not use the word, "promise," nor the word "agree," in connection with the statement of the defendant's agent that the plaintiff could take out additional insurance, and it did not allege that permission to take out additional insurance was

omitted from the policy through fraud or mistake. The petition did narrate the facts, however, just as they occurred, using substantially the language of the contracting parties, which, measured by the law, created an agreement.

It is said that the reply departed from the petition, and it did. Not having in his possession the application showing the "warranty" that the property was not incumbered, and overlooking the condition of the policy against incumbrances, the plaintiff pleaded broadly in his petition compliance with all the terms of the policy. The answer disclosed a breach of the condition against incumbrances. The reply presented the facts showing that the warranty in the application was the voluntary work of the defendant's agent, unauthorized by the plaintiff, and consequently that the condition of the policy was outside the contract consummated by the acceptance of the true application and payment of the premium. The reply was attacked by a motion to strike out, and there are decisions enough to the effect that failure to sustain it was fatal to the judgment.

If the motion had been sustained, the plaintiff would have been permitted to amend his pleadings in such a way as to remove the verbal inconsistency between the petition and the reply. The court very properly treated the matter as one of form, and not of substance. The defendant was not misled nor prejudiced in the slightest particular or degree, and it has been a good while since this court has reversed an apparently fair judgment, rendered after a full trial on the merits, because the reply departed from the petition.

It is said that the parol evidence rule prevented the plaintiff from proving the true terms of the application. The court has fully expressed itself on this subject in the case of *Pfiester v. Insurance Co.*, 85 Kan. 97, 116 Pac. 245.

[3, 4] It is said that the plaintiff's evidence did not support the allegations of the reply, which is true. The facts constituting waiver of the compromise agreement were not pleaded as fully nor as accurately as they were proved, and the plaintiff in his pleading undertook to cast them in the mold of fraud. The defendant did not, however, observe the statute relating to variance (Civ. Code, § 134 [Gen. St. 1909, § 5727]), and the court properly instructed on the case made by the proof, without going through the formality of an amendment. The fact that the defendant so changed its attitude toward the compromise agreement as to lead the plaintiff to believe that it was abandoned and to change his course accordingly is sufficient to make the waiver effectual.

The defendant's brief is a model of fine discrimination, clear thinking, and logical reasoning, but, granting, as we must, that the

plaintiff's evidence is true, it is much stronger in insistence on impeccable procedure than in reasons for refusing to pay this loss.

The judgment of the district court is affirmed. All the Justices concurring.

# **FIRST M. E. CHURCH OF STRONG CITY v. NORTH. (No. 18,842.)**

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

## **1. VENDOR AND PURCHASER (§ 322\*)—BREACH OF CONTRACT BY PURCHASER—RIGHT OF ACTION.**

Upon the refusal of a vendee to comply with a contract to purchase property, one of the remedies available to the vendor is an action to recover the fruits of his bargain—the loss which he sustains by the nonperformance of the vendee.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 944-947; Dec. Dig. § 322.\*]

## **2. VENDOR AND PURCHASER (§ 330\*)—BREACH BY PURCHASER—MEASURE OF DAMAGES.**

Ordinarily in such a case, where the title remains in the vendor, and the money in the vendee, the measure of damages is the difference between the contract price and the market value when the breach occurs.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 953-956; Dec. Dig. § 330.\*]

## **3. VENDOR AND PURCHASER (§ 329\*)—BREACH BY PURCHASER—MARKET VALUE—PRICE ON RESALE.**

When the property is resold within a reasonable time after due notice to the vendee, and for the highest price which can reasonably be obtained by the vendor, the price on resale is deemed to be prima facie evidence of its market value.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 952; Dec. Dig. § 329.\*]

## **4. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

An instruction that the measure of damages is the difference between the contract price and the price on the resale, where the vendor used diligence to obtain the highest possible price for the property, but, if the vendor did not do so, then the measure would be the difference between the contract price and the market value of the property, cannot have prejudiced the vendee, where it appears that the jury found that the highest price was not obtained by the vendor, and that the extent of the damages was fixed on the basis of market value, and not on the price obtained at the resale.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Appeal from District Court, Chase County.

Action by the First Methodist Episcopal Church of Strong City against Jacob North. From judgment for plaintiff; defendant appeals. Affirmed.

Madden & Richardson, of Emporia, for appellant. Dudley Doolittle, of Cottonwood Falls, and Huggins & Riddle, of Emporia, for appellee.

JOHNSTON, C. J. This was an action by the appellee, the first Methodist Episcopal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Church of Strong City, against the appellant, Jacob North, to recover damages for the breach of a written contract, in which North agreed to buy an old church building and three lots for the price of \$1,000. The appellee had arranged to erect a new church building, and it was provided that possession of the old building should be reserved until the new one was completed. Shortly after the making of the contract the appellee began preparations to vacate the old church building, and to erect a new one, and also procured an abstract of title to the lots, and executed instruments transferring and conveying the property which it had contracted to sell; but, when these were tendered to appellant, he refused to accept them, or to carry out the contract which he had made. When informed by appellee that it would not release him from the obligations of the contract, and that it was depending on the money derived from this source to go on with the new building, he replied that he did not care what they did with the property, and that he would not take it. The appellee then endeavored to resell the property and finally obtained an offer of \$250 for the building and \$70 for the lots, and this offer was reported to appellant, who remarked that that was all the property was worth, but again refused to have anything to do with the property. Appellee then sold the property for \$320, and sued appellant to recover \$680, the difference between the contract price and the price which was received from the third party, and which was alleged to be the value of the property at the time of the sale. Considerable testimony was offered as to the value of the property; some witnesses placing it as high as \$1,000, and others saying that the value of the building was \$350 and the lots \$40 each. The jury awarded damages in favor of appellee for \$300.

[1] The contention that there was, in effect, an abandonment of the contract and an acquiescence in the refusal of appellant to carry out the contract is not sustained either by the averments in appellee's petition or by the testimony. In its petition appellee set out the facts in the transaction, that a contract was made by the parties and broken by appellant, and consequently a loss ensued; that, to minimize the damages as much as possible, a sale of the property was made to another, but not until notice of the proposed sale had been given to appellant; and, further, that the price received at the sale was the market value of the property at the time. While the appellee had other remedies, it had the right to maintain an action against appellant for the damages occasioned by the breach of the executory contract. The facts stated in the petition warranted a recovery of damages on this theory, and an election of the remedy on which it would rely was not essential. *Henry v. McKittrick*, 42 Kan. 485, 22 Pac. 576; *Huey v. Starr*, 79 Kan. 781, 101 Pac. 1075, 104 P. 1135.

[2, 4] Complaint is made of the instruction relating to the measure of damages. The court, in effect, advised the jury that, if they found there was a breach of the contract in which appellee had not acquiesced, the appellee was entitled to recover the difference between the contract price and the price for which the property was resold subject to the condition that, when there was a refusal of the appellant to perform his contract, it became the duty of appellee to minimize the damages as much as possible, that it might then resell the property for the highest price obtainable, and, if it sold it for a less sum, the amount of recovery would be proportionately diminished. If diligence was used, and the highest possible price obtained, the difference between that price and the contract price would be the measure of recovery; but, if it did not make such a sale, then its damages would be the difference between the contract price and the fair market value of the property. When a vendee refuses to perform an executory contract of sale, the vendor is entitled to the fruits of his bargain, and to any damages he may suffer by reason of the nonperformance of the contract. When the title to the property has not been transferred, nor possession changed, and no part of the purchase price paid, the measure of damages ordinarily applied is the difference between the contract price and the salable or market value at the time of the breach. *Allen v. Mohn*, 86 Mich. 328, 49 N. W. 52, 24 Am. St. Rep. 126; *Prichard v. Mulhall*, 127 Iowa, 545, 108 N. W. 774, 4 Ann. Cas. 789; *Kelley v. West*, 36 Minn. 520, 32 N. W. 620; *Clifton v. Charles*, 53 Tex. Civ. App. 448, 116 S. W. 120; *Dickson v. Turner*, 149 Ill. App. 394; *Weatherbe v. Whitney*, 30 Nova Scotia, 447; 2 *Sutherland on Damages* (3d Ed.) § 570; 3 *Joyce on Damages*, § 1758.

[3] It has also been held that in case of nonperformance the vendor is at liberty to resell the property, and, if he does it publicly within a reasonable time, and exercises due diligence in making the sale, he may recover the difference between the contract price and the price at which it was sold, in addition to the costs and expenses of the resale, and in such a case the price for which the property has been resold is prima facie evidence of its market value. 2 *Warvelle on Vendors* (2d Ed.) § 936; 3 *Joyce on Damages*, § 1765; 2 *Sutherland on Damages* (3d Ed.) § 570; *Wood's Mayne on Damages* (1st Am. Ed.) § 243.

Ordinarily the price received at a resale properly made will be deemed to be the market value of the property; but, if at such a sale more than the market value is received, the vendee is entitled to a credit for the excess on the recovery, and, if as much or more than the contract price is received, then only nominal damages are recoverable. In this case the price obtained at the resale is not material to the determination of the case, as it appears from the verdict that the

property did not bring its salable value. Although diligence appears to have been used by the appellee in the resale, and although notice was given the appellant before the sale was effected, the jury manifestly decided that appellee did not secure the highest price obtainable for it. If appellee had done so, the award would have been \$680, the difference between the contract price and the reselling price; but, as only \$300 was awarded, the jury evidently concluded that the property could have been sold for a greater price. The trial court told the jury that, if appellee did not obtain the highest possible price, its damages would be the difference between the contract price and the fair market value, and hence the rule for which appellant is contending was the one which governed the jury in the determination of the case.

There is nothing substantial in the claim that the case was tried on the wrong theory, nor do we find any prejudicial error in the other rulings of which complaint is made.

The judgment is affirmed. All the Justices concurring.

**DRAPER et al. v. MILLER.** (No. 18,552.)  
(Supreme Court of Kansas. May 9, 1914.)

*(Syllabus by the Court.)*

**1. LICENSES (§ 39\*)—OCCUPATION TAX—FAILURE TO PAY—REMOVAL OF DISABILITY.**

Although one doing business without having paid an occupation tax required by a city ordinance cannot ordinarily maintain an action for services performed and material rendered in that connection, this is because of a disability imposed upon him, which may be removed by a subsequent ordinance, or by a pardon.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 76-78; Dec. Dig. § 39.\*]

**2. LIMITATION OF ACTIONS (§ 130\*)—PENDING OF ACTION—DISMISSAL—NEW ACTION.**

Where a plaintiff while under such a disability brings an action of that character, dismisses it without prejudice, and afterwards obtains a pardon, he may within a year after such dismissal institute a new action upon the same claim, notwithstanding any other statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130.\*]

**3. CONTRACTS (§ 83\*)—RIGHT TO ENFORCE—VARIANCE IN DUPLICATES.**

Where the terms of a contract are agreed upon, and two writings, supposed to be in conformity thereto, are executed, each party retaining one, the enforcement of the contract against the party who prepared the writings cannot be prevented by the fact that the copy retained by him does not conform to the agreement, and that the one given to the other party conforms to it only by reason of an addition, not clearly legible, made before its execution with a different kind of pencil from that employed in the body of the instrument.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 144-154; Dec. Dig. § 33.\*]

**4. CONTRACTS (§ 303\*)—BUILDING CONTRACTS—BREACH—RECOVERY OF DAMAGES.**

In an action against the owner of property for the value of improvements made there-

on, the defendant cannot be allowed damages on account of the plaintiff's refusal to complete the work, where such refusal was caused by his own repudiation of the terms of the contract regarding the price he was to pay.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.\*]

Appeal from District Court, Wyandotte County.

Action by E. D. Draper and others against Edwin L. Miller to enforce a subcontractor's mechanic's lien for work and material. From judgment for plaintiffs, defendant appeals. Affirmed.

Metcalf, Brady & Sherman, of Kansas City, Mo., McNamany & Alden, of Kansas City, Kan., and D. R. Hits, of Topeka, for appellant. K. P. Snyder and T. A. Pollock, both of Kansas City, Kan., for appellees.

MASON, J. E. D. Draper brought an action against Edwin L. Miller seeking to enforce a subcontractor's mechanic's lien for plumber's work and material. He recovered a judgment, and the defendant appeals.

The present action was not brought within a year after the filing of the lien statement. But within that time an action was brought seeking to foreclose the lien, which was dismissed without prejudice, and the present action was begun within a year after such dismissal. At the time the account sued on accrued, a city ordinance required the payment of an occupation tax by persons pursuing various callings, including that of a plumber. The engaging in business without the payment of the tax was designated in the ordinance as a misdemeanor, and was made punishable by a fine of not more than \$100. At the time the plaintiff did the work and furnished the material sued for, he had not paid such tax. After his first action was dismissed, and before the second one was begun, he paid the tax, and a new ordinance was passed purporting to pardon all violations of the original law, and to remit all penalties thereby incurred, by persons who had in the meantime made such payment. The mayor also undertook to grant a specific pardon to the plaintiff. The defendant maintains (1) that, as the ordinance forbade the plaintiff to transact business as a plumber without paying his tax, his act in fitting up the defendant's house was illegal, and no recovery for it can be had; (2) that the subsequent ordinance and the pardon granted by the mayor cannot give validity to the act, and cannot confer a right of recovery; and (3) that, if a recovery is authorized by virtue of the new ordinance and the pardon, the first action was not upon the same cause as the second, and the provision of the Code (Civ. Code, § 22 [Gen. St. 1909, § 5615]) authorizing another suit within a year, where there has been a failure otherwise than on the merits, has no application.

[1] In *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207, it was held that one doing business without having paid an occupation tax required by an ordinance similar to that here involved could not recover for his services in that connection. That doctrine has been subsequently applied (*Mayer v. Hartman*, 77 Kan. 788, 90 Pac. 807), although it has been subjected to some criticism (*Fossett v. Lumber Co.*, 76 Kan. 428, 430, 92 Pac. 883, 14 L. R. A. [N. S.] 918; *Manker v. Tough*, 79 Kan. 46, 53, 98 Pac. 792, 19 L. R. A. [N. S.] 675, 17 Ann. Cas. 208). The Legislature of course, has power to give such an effect to the nonpayment of an occupation tax. The question whether it has done so is one of statutory construction. Note, 1 L. R. A. (N. S.) 1159; Note, Ann. Cas. 1912D, 378. The Kansas cases above cited place an interpretation on our own statute, and, as no amendment has been made thereto, the Legislature must be deemed to have acquiesced in the construction adopted. We are constrained to follow the actual decisions already made, but think the rule announced should be restricted as much as is consistent with that principle. The ordinance involved does not forbid one to engage in business as a plumber until he has passed an examination or otherwise proved his competency. Its conditions can be fully met by any one who pays the specified tax. The so-called license which is issued is in effect nothing but a receipt for such payment. The case of the merchant or mechanic who does business while his tax is unpaid is not closely analogous to that of one who engages in a traffic which for some public purpose is altogether forbidden, or permitted only to a restricted class who have met some prescribed condition. The distinction suggested is recognized as a just basis of classification.

"The test whether an unlicensed person can enforce his contracts made in the line of vocation or trade required to be licensed under penalty is apparently whether the license law was enacted merely to obtain a revenue without restrictions upon the class of persons from whom it was to be derived, or whether, besides or altogether, it was designed to protect the public from imposition by ignorance or dishonesty. In the former case the penalty is sufficient to secure the revenue, is an ample substitute for the license fee; in the latter case nullification of the contract is a necessary consequence." Note, 12 L. R. A. (N. S.) 613.

In accordance with our prior decisions we hold that one who, in violation of the ordinance, continues in business while refusing or neglecting to pay the tax cannot ordinarily maintain an action upon a claim growing out of such business. But we think this consequence must be regarded as a penalty laid upon the delinquent to encourage the prompt payment of taxes, and should be treated as a mere personal disability. The act is not to be classed as so far criminal or

unlawful that no legal right can be founded upon it. The city council, authorized by the Legislature, ordains that he who does business without paying his tax shall be incapable of enforcing a contract made under such conditions. This is a part of the penalty of his dereliction. In that view of the case there is no difficulty in saying that the public, through its ministers, may remove the disability—that this is merely forgiving a part of the penalty. Here the plaintiff paid his tax, and an ordinance was passed undertaking to grant him a full pardon for the delay. This was in effect a pardon by the mayor, with the consent of the council, which the statute permitted. Gen. Stat. 1909, § 941. The effect of a pardon is to remit all penalties and release the individual from all the legal consequences of his dereliction. 29 Cyc. 1566. The new ordinance may be regarded as an amendment of that previously passed, extending the time of payment, and restoring capacity to those who, although originally in default, had subsequently made payment. The situation is similar to that of which this language was used: "The state, for purposes of its own, denied to him who violated its revenue law the right to enforce any contract he made in reference to the business unlawfully carried on. It was competent for the state to remove the disability it had imposed, and to permit contracts not before enforceable because of this disability to be enforced. The state may not make contracts between individuals, it is true; but, when individuals have themselves made contracts not enforceable only because of some obstacle the state has interposed, the power which created the barrier may remove it at any time before it has become res judicata between the parties. Until then there cannot be said to be a vested right beyond the reach of legislative interference." *Phoenix Insurance Co. v. Pollard*, 63 Miss. 641, 664.

[2] We conclude that by virtue of the subsequent action of the mayor and council the plaintiff was enabled to maintain an action against the defendant. We also think that the bringing of the first action prevented the running of the statute of limitations, notwithstanding that while it was pending the plaintiff had no legal right to maintain it. It was based upon the same cause of action as that subsequently sued upon, and it failed "otherwise than upon the merits" within the meaning of the statute. *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22.

[3] The court found, upon sufficient evidence, these facts, among others: When the original contract was negotiated between the defendant and Preston Bros., the contractors, the price agreed upon was \$1,875. Miller undertook to reduce the agreement to writing, and prepared two copies, which were executed by both parties; each retaining one. That retained by the defendant specified the amount as "eight hundred and

seventy five dollars." That retained by Preston Bros. as originally written (with a purple copying pencil) read in the same way. But before it was executed an addition was made with an ordinary lead pencil to the word "eight," so that it bore a fair resemblance to the word "eighteen." The defendant maintains that, while the petition asked a reformation of the written contract so as to make it read "eighteen hundred and seventy-five dollars," the allegations did not justify that relief. We hardly think the question of pleading on this point is important. The writing prepared by the defendant and held by Preston Bros. seemed to read "eighteen," the evidence abundantly supported the finding that it was so intended, and the fact that the copy retained by the defendant did not conform to the agreement does not seem sufficient on any theory to defeat the enforcement of the actual contract.

It is contended that the trial court erred in rendering a judgment upon an instrument which showed upon its face a material alteration. There was positive testimony that the writing was in the same condition when executed as when produced at the trial. The question was one of fact, and we see no reason to set aside the finding of the trial court.

[4] After the plumbing was nearly completed, a dispute arose as to whether the contract price was \$1,875 or \$875; the defendant maintaining the latter. In view of this the plaintiff, by direction of Preston Bros., quit work. The defendant asked an allowance for damages thereby occasioned. Inasmuch as he refused to be bound by what has been determined to be the actual contract of the parties, he is not in a position to complain because the contractors refused to proceed further under it.

The judgment is affirmed. All the Justices concurring.

#### YOUNG MEN'S CHRISTIAN ASS'N OF SALINA v. RITTER et al. (No. 18,326.)

(Supreme Court of Kansas. May 9, 1914.)

On Rehearing. Reversed and remanded.

For former opinion, see 90 Kan. 332, 133 Pac. 894.

Z. C. Millikin, of Salina, for appellants. Burch, Litowich & Mason, of Salina, for appellee.

**PER CURIAM.** In the former opinion in this case (90 Kan. 332, 133 Pac. 894), the judgment was reversed and the cause remanded with directions to render judgment for the appellant because of the failure of the association, the owner of the building, to retain the required percentage of the estimates for work and labor furnished until notice to and consent of the surety company. A rehearing was granted on the sole question

of whether or not the failure to retain the required percentage caused any loss to the appellant. We find it impossible to determine this from the state of the record. The trial court adopted plaintiff's theory of the case, which was that the contract and bond did not require the retention of 20 per cent. of the estimates, and submitted the case to the jury upon that theory. We construe the contract differently, and adhere to what was said in the former opinion; but, in view of the fact that the case was tried upon the wrong theory, the judgment will be reversed and remanded, with directions to find the amount of each estimate and the payments thereon, and the amount retained in the hands of the association, and to find whether or not the surety company lost by reason of the failure to comply with this provision of the contract and bond. The appellant is only entitled to defend the action to the extent it has been injured, if any, by such failure.

None of the other questions discussed in the original briefs or in the briefs on rehearing is to be retried.

#### STATE v. EVANS. (No. 18,652.)

(Supreme Court of Kansas. May 9, 1914.)

On rehearing.

Former opinion (90 Kan. 795, 136 Pac. 270) adhered to.

**PER CURIAM.** On rehearing, the former judgment is adhered to.

#### SMITH et al. v. BEASLEY et al. (No. 18,848.)

(Supreme Court of Kansas. May 9, 1914.)

**MASTER AND SERVANT (§ 238\*)—CONTRIBUTORY NEGLIGENCE.**

Where plaintiff, repairing a roof, walking backwards, struck an 18-inch fire wall, and fell over, the danger being open to common observation, and as fully known to him as to his employer, the latter was not liable for the resulting injuries.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.\*]

Appeal from District Court, Crawford County.

Action by Clarence Smith, by his next friend, against John H. Beasley and another. Judgment for defendants, and plaintiff appeals. Affirmed.

A. B. Keller, Geo. R. Malcolm, and C. S. Denison, all of Pittsburg, Kan., for appellant. B. S. Gaitskill, of Girard, and J. J. Campbell, of Pittsburg, Kan., for appellees.

**PER CURIAM.** The plaintiff was in the employ of defendants who were engaged in repairing a roof on a two-story building. He had worked for them on two other buildings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

and had been at work on this roof about two days prior to his injury. He was past 18 years of age, a young man of more than average intelligence. His duties required him to take a roll of paper which he held with a stick through the center of the roll, and to walk backwards from a point about midway of the roof to the east end. Another employé held the other end of the paper walking backwards in the opposite direction, and the paper was thus unrolled. At the east end of the roof there was a fire wall 18 inches high. The plaintiff knew the fire wall was there; that it was 25 or 30 feet to the alley below; and that there was nothing to prevent his falling over this 18-inch wall if he became overbalanced. He walked backwards with the roll of paper without looking to see how near he was to the edge of the roof, and continued walking until he struck the fire wall, fell over it to the ground, and was injured. The danger was open to common observation and was as fully known to him as it was to the defendants. His own evidence showed that he was fully capable of knowing and measuring the risk of his employment, and that his injury was caused solely by his failure to take ordinary care to protect himself from an obvious and apparent danger. No negligence was shown on the part of the defendants. All that the court could do was to sustain the demurrer.

The judgment is affirmed.

GIBSON v. REA et al. (No. 18,332.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by Editorial Staff.)

1. MORTGAGES (§ 464\*)—FORECLOSURE—RECITALS IN MORTGAGE.

Recitals of a real estate mortgage, given to secure a note, were sufficient to prove prima facie the execution of the note which the mortgage described and secured, so that production of the note and mortgage at the trial proved prima facie title in him.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1362; Dec. Dig. § 464.\*]

2. MORTGAGES (§ 459\*)—FORECLOSURE—ISSUES AND PROOF.

Where, in a suit to foreclose a real estate mortgage, plaintiff proved record title in the mortgagor and introduced the note and mortgage with its indorsement in evidence, he proved all that was essential to sustain a judgment of foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1343-1347; Dec. Dig. § 459.\*]

3. MORTGAGES (§ 459\*)—FORECLOSURE—ISSUES AND PROOF.

In a suit to foreclose a mortgage, the allegation that the mortgagor had left the state prior to a specified date was material only to forestall a demurrer on the ground of limitations.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1343-1347; Dec. Dig. § 459.\*]

4. LIMITATION OF ACTIONS (§ 172\*)—RIGHT TO INVOKE STATUTE—TAX TITLE HOLDER.

The holder of a tax title against mortgaged property cannot invoke limitations as a defense to a suit to foreclose.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 657; Dec. Dig. § 172.\*]

5. MORTGAGES (§ 459\*)—FORECLOSURE—ISSUES AND PROOF.

In a suit to foreclose a real estate mortgage, plaintiff was not obliged to prove the allegation that the mortgagor had sold his land to another against defendant, who claimed under a tax title adverse to the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1343-1347; Dec. Dig. § 459.\*]

6. TAXATION (§ 788\*)—TAX DEED—ATTACK.

A tax deed less than five years old is open to attack for irregularities in the proceedings on which it was based.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.\*]

Appeal from District Court, Stanton County.

Action by Charles M. Gibson against Charles L. Rea and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

See, also, 89 Kan. 714, 132 Pac. 1006.

Scates & Watkins, of Dodge City, for appellant. George Getty, of Syracuse, for appellees.

PER CURIAM. [1,2] The certificate of acknowledgment indorsed on the mortgage was sufficient to prove prima facie the execution of the mortgage. The recitals of the mortgage were sufficient to prove prima facie the execution of the note which the mortgage described and secured. Production of the note and mortgage at the trial by the plaintiff proved prima facie title in him. When the plaintiff proved record title in the mortgagor and introduced the note and the mortgage with its indorsement in evidence, he proved all the allegations of his petition which were essential to sustain a judgment for foreclosure. These principles are elementary.

[3-5] The plaintiff could strike out or ignore as superfluous the allegations of the petition showing how he acquired title to the papers sued on, rely on the ultimate fact of ownership, and prove that fact in the manner described. The allegation of the petition that the mortgagor had left the state prior to a certain date could be material only for the purpose of forestalling a demurrer to the petition based on the statute of limitations, and the defendant, who was a tax title holder, could not invoke that statute. The plaintiff was not obliged to prove the allegation that the mortgagor had sold his land to another, against the defendant, who claimed title as against the mortgagor.

[6] The tax deed evidencing the defendant's title to the land was not five years old when the action was instituted, and was open

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to attack for irregularities in the proceedings on which it was based. The allegation of the reply was that an unauthorized sum was included in the redemption notice, and, according to the computation presented in the defendant's brief, the redemption notice did wrongfully include the very item specified in the reply.

There is no presumption of payment in this case. The plaintiff did not lose his remedy through laches, and the defendant is not in a position to invoke that equitable doctrine.

The judgment of the district court is reversed, and the cause is remanded, with direction to foreclose the plaintiff's mortgage.

#### HEWEY v. FOUTS et al. (No. 18,435.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

#### FRAUD (§ 30\*)—FALSE REPRESENTATIONS.

One who makes false statements for the purpose of inducing another to buy property may be liable for the fraud, even although he has no interest in the deal and is not acting in collusion with the seller.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 35; Dec. Dig. § 30.\*]

Petition for rehearing. Denied.

For former opinion, see 139 Pac. 407.

MASON, J. In a petition for a rehearing it is strongly urged that the verdict was unjust, and was affected by erroneous trial rulings. Upon a careful re-examination this court remains of its former opinion that there was enough evidence of fraud on the part of the defendant to take that question to the jury, and that it was fairly submitted to them. The original opinion failed to mention one contention of the appellant, which is now renewed. The plaintiff bought goods of one Prince. He claims that he was defrauded by reason of misrepresentations made by both Prince and Fouts, whom he alleges to have conspired together in the matter. The trial court gave an instruction to the effect that, if a conspiracy was shown, each conspirator would be bound by the acts and declarations of the other, but that, even if there was no conspiracy, a recovery might be had against Fouts if he was found guilty of fraud. The defendant Fouts maintains that the latter clause was erroneous, on the ground that, not being himself a party to the sale made to the plaintiff, he could be liable for false representations made concerning it only on the theory that he aided in a fraud perpetrated by Prince. We think the instruction was correct. If Fouts, knowing that the plaintiff was thinking of buying the goods, made false statements for the purpose of inducing him to buy them, and the trade was brought about by that means,

he was liable although he had no personal interest in the matter, and was not in conspiracy with Prince. "In order that an action to recover damages for false and fraudulent representations may be maintained, it is well settled that it is not at all necessary to show that the defendant had any interest in the subject-matter of the representation, or that he was in any way benefited by making the same, or that he was in collusion with some other person who was benefited. He is liable, not upon any idea of benefit to himself, but because of his wrongful act and the consequent injury to the other party." 14 A. & E. Encycl. of L. 153.

The petition for a rehearing is denied. All the Justices concurring.

#### BURCHFIELD v. BRINKMAN et al.

(No. 18,841.)†

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

#### 1. COVENANTS (§ 130\*)—BREACH OF WARRANTY—DAMAGES RECOVERABLE.

In an action on the covenants of warranty in a deed conveying certain hotel property, possession of which was withheld by the vendor's tenant, who claimed to be in for a term of years, but who was, in fact, a mere tenant from month to month, it is held that the measure of damages was the loss occurring to the plaintiff as the natural, direct, and proximate result of the breach, which would include the necessary and reasonable expense of a forcible detention action which the plaintiff had brought to obtain possession, the attorney's fee therein, and also what the possession of the tenant was fairly and reasonably worth.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 245-253, 255, 256, 257; Dec. Dig. § 130.\*]

#### 2. LANDLORD AND TENANT (§ 86\*)—LEASE—RENEWAL—RIGHTS OF TENANT.

A lease for a term of years, with an option to remain for another like period, provided the terms and conditions are satisfactory to both parties, is not available by the tenant, when the landlord, at the expiration of the term, informs him that the lease will not be renewed, that a sale of the property is desired, and he can remain only as a tenant from month to month.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270-275; Dec. Dig. § 86.\*]

Appeal from District Court, Stafford County.

Action by James W. Burchfield against August Brinkman and another. From judgment for plaintiff, defendants appeal. Reversed and remanded.

C. M. Williams, of Hutchinson, for appellants. Robert Garvin, of St. John, for appellee.

WEST, J. Brinkman, who owned a hotel property, leased it for five years to Stewart,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

† Rehearing denied June 12, 1914.

with an option of five years more. Stewart transferred to Maxfield, who was accepted as his successor by Brinkman. Afterwards Brinkman sold the property to Burchfield, giving a warranty deed. Burchfield came on to take possession, and Maxfield refused to surrender, claiming to be a tenant for a second five-year term. A notice to vacate served by Brinkman was not observed, and Burchfield brought a forcible detention action in justice court, and was defeated. Maxfield had offered to sell the furniture in the hotel for \$3,200, and, after considerable negotiation, Burchfield paid him \$2,500, and took a receipt showing that \$1,000 was for furniture and \$1,500 for possession. This suit was brought on the covenants of warranty to recover the \$1,500, together with other items, including the expense of the suit in justice's court and attorney's fee, alleging that the \$1,500 paid for possession was less than its value. The court instructed the jury that, if Maxfield held possession under the lease, and Brinkman collected rent after the expiration of the term without objection on his part, this would make Maxfield a tenant for another term of five years; that the measure of damages was the fair and reasonable worth of Maxfield's interest, together with such additional sum as the plaintiff was obliged to expend in an endeavor to obtain possession. The plaintiff testified that the possession was worth what he paid for it. The jury returned a verdict in favor of the plaintiff for \$1,489.40, being nearly the amount sued for, less certain offset and credit. The defendant appeals, and maintains: First, that the five-year lease had expired, and that Maxfield was only a tenant from month to month; and, second, that the court erred in charging the measure of damages to be the value of the possession, instead of the amount the plaintiff was compelled to pay therefor.

[2] The jury apparently understood that Maxfield's option to hold for another term had been recognized by Brinkman's collecting rent without objection, the only instruction on this point being the one already referred to. The option provision of the lease was as follows: "It is further agreed that after the expiration of this lease the party of the second part shall have the option for a further period of five years from that date, provided that the terms and conditions are satisfactory to both parties of this lease." Brinkman

testified that when the lease expired, and repeatedly afterwards, he told Maxfield that he wanted to sell the property, and would not renew the lease, and that he (Maxfield) could renew only as a tenant from month to month. Another witness testified that he heard one of these statements in a conversation between Brinkman and Maxfield. An equivocal denial of such conversation was made by Maxfield, but no direct denial of Brinkman's statements to him. Two other witnesses stated that Maxfield had told them that Brinkman would not give him a new lease, but would only let him have it a month at a time, and this was not denied, so that the evidence, without substantial dispute, showed that there was no permission to hold over except from month to month.

One of the grounds of the motion for a new trial was that the verdict was not sustained by sufficient evidence, and was contrary to law. Another was error in assessment of the amount of recovery, the same being too large. While the evidence shows a liability for failure to put the plaintiff in possession of the property which he had purchased by warranty deed, it appears that the error regarding the renewal of the lease caused the matter to be regarded from the standpoint of Maxfield's tenancy under a five-year term, instead of his tenancy from month to month.

[1] The true measure of damages is the loss occurring to the plaintiff as the natural, direct, and proximate result of the breach. *George v. Lane*, 80 Kan. 94, 102 Pac. 55. This would consist of the reasonable and necessary expense of the forcible detention action, including the attorney's fee therein, but not the sum paid for house rent, or for moving, these being too remote. The plaintiff is entitled to recover also what the tenant's possession was fairly and reasonably worth on the basis of his being a tenant from month to month. *Gilbert v. Rushmer*, 49 Kan. 632, 81 Pac. 123; *George v. Lane*, 80 Kan. 94, 102 Pac. 55; *Barker v. Denning*, 91 Kan. 485, 138 Pac. 573. The set-off and credit appear to have been properly allowed.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith, which proceedings may be avoided if the parties agree upon the adjustment of the matter between themselves, as it would seem they ought to do. All the Justices concurring.

**ELKINS v. BOARD OF COM'RS OF WYANDOTTE COUNTY (ZIMMER, Intervener).** (No. 18,621.)

(Supreme Court of Kansas. May 20, 1914.)

On petition for rehearing. Rehearing denied. For former opinion, see 91 Kan. 518, 138 Pac. 578.

**MASON, J.** In a petition for a rehearing it is suggested that the evidence (some of which is not abstracted) shows that Elkins was appointed a deputy sheriff, at his own request, to assist in discovering and arresting the murderer. This cannot be the case, as the appointment was made October 9, 1909, and the murder was not committed until October 19, 1909.

It is also suggested that the opinion states as facts certain matters concerning which there was a conflict in the evidence. The statement made was that there was evidence *tending* to establish these facts; there was no purpose on the part of the court to treat them as established.

The jury must, of course, be the judge of the facts, but there is abundant evidence to support the conclusion that each of the claimants rendered effective service in bringing the offender to justice, and the case is one where a division of the reward suggests itself as the most equitable solution of the problem.

The petition for a rehearing is denied. All the Justices concurring.

**CALHOUN COAL CO. v. MOHAWK COAL CO.** (No. 18,838)†

(Supreme Court of Kansas. May 9, 1914.)

Appeal from District Court, Crawford County.

Action by the Calhoun Coal Company against the Mohawk Coal Company. From judgment for plaintiff, defendant appeals. Affirmed.

Arthur Fuller and W. J. True, both of Pittsburg, for appellant. F. B. Wheeler and O. S. Denison, both of Pittsburg, for appellee.

**PER CURIAM.** This action was brought by the appellee to recover from the appellant damages for the failure of appellant to execute and deliver a written lease in accordance with an oral agreement for such lease.

On the authority of *Rains v. Schermerhorn*, 88 Kan. 854, 122 Pac. 883, and under the evidence and findings of the jury in this case, the appellee was entitled to recover. We have ex-

amined the various assignments of error as to the instructions, and find no error therein. Also it appears the evidence was sufficient to support the verdict of the jury, and the judgment rendered thereon.

The judgment is affirmed.

**FIRST NAT. BANK OF WINFIELD v. BANGS et al.** (two cases).

(Nos. 18,437, 18,914.)

(Supreme Court of Kansas. May 9, 1914.)

On rehearing. Former decision adhered to. For former opinion, see 91 Kan. 54, 136 Pac. 915.

**MASON, J.** A rehearing was granted in this case because the court was impressed with the argument of counsel, especially with regard to the hardship which results, in some aspects, from the decision rendered. Upon full consideration, however, we adhere to the view that the judgment appealed from should be affirmed.

We do not regard the representation that the furniture and fixtures were the property of the minors as an imposition on the probate court. No actual transfer of title had been made to them, but the ownership of A. C. Bangs, and his obligation on the mortgage, were only formal. The mortgaged chattels were treated as going with the hotel property, and belonging to the minors. If a bill of sale had been made to them, the actual situation would not have been very materially changed. The operation undertaken was a funding of the debt against the entire hotel property. It must be regarded in the light of conditions as they then appeared, not as they have subsequently developed. In that view it may well have been considered expedient, if not absolutely necessary. We do not think there was a failure of jurisdiction even as to the \$1,800 item.

Upon the other phase of the case, it was said in the original opinion that a guardian may, in some circumstances, be authorized to make a blanket mortgage upon real estate, of which his wards are tenants in common. It has been suggested that the rule, as so stated, would not apply here, because the minors, being remaindermen only, and having no right of possession, are not covered by the term employed. The phrase "tenants in common" was used as a convenient one, whether technically correct or not, to express the relation of the members of a group each of whom had an undivided interest in the property.

The former decision is adhered to. All the justices concurring.

† Rehearing denied June 13, 1914.



**B. SCHADE BREWING CO. v. CHICAGO, M. & P. S. RY. CO. (No. 11,742.)**

(Supreme Court of Washington. May 18, 1914.)

**1. RAILROADS (§ 113\*)—DAMAGES—CONSTRUCTION—CONTRACTS FOR SETTLEMENT.**

A settlement between a railroad company, which desired to construct a subway under a city street, and the owner of property abutting on the street, which gave to the railroad company the same right as it would have acquired by condemnation of the right to construct the subway, but provided that the compensation paid should not be deemed compensation for any damages to the buildings on the property, by its express terms does not exempt the railroad company from liability for injuries to such buildings caused by blasting without negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.\*]

**2. RAILROADS (§ 113\*)—COMPENSATION—DAMAGES INCLUDED.**

Even without the clause expressly excepting such damages, the injuries occasioned by blasting were at the time of the settlement too speculative to be contemplated by the parties in making a settlement for damages as upon condemnation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.\*]

**3. PLEADING (§ 369\*)—ELECTION—INJURIES FROM BLASTING.**

Where a railroad company had acquired the right to construct a subway under a street, but was not exempted from liability for injuries caused by blasting during such construction, whether the blasting was negligent or not, allegations in a complaint for such injuries to the buildings of an adjoining owner, some of which relied upon the inherent danger of the work, and others upon the railroad's negligence, are not inconsistent, and the plaintiff cannot be required to elect as to which theory he intends to rely upon.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

**4. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—REFUSAL TO REQUIRE ELECTION.**

Even if the refusal to require the plaintiff to elect was erroneous, it was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

**5. RAILROADS (§ 113\*)—INJURY BY BLASTING—LIABILITY.**

Where plaintiff's building was injured by very heavy blasting during the construction of a subway for a railroad under the adjoining street, which blasting was carried on close to the building, and resulted in a serious cracking of both the foundation and the upper walls thereof, the railroad company is liable for such injury regardless of its negligence in the blasting.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.\*]

**6. APPEAL AND ERROR (§ 1070\*)—HARMLESS ERROR—SPECIAL FINDINGS.**

In an action for such injuries, special findings by the jury that the work was not inherently dangerous, and that the injury might have been avoided if due precautions had been taken, amounted merely to a finding of negligence on the part of the defendant, and were not prejudicial to it, since it was liable, whether it was negligent or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.\*]

**7. MASTER AND SERVANT (§ 318\*)—INDEPENDENT CONTRACTORS—INJURIES BY BLASTING.**

A contractor who was engaged in the construction of a subway for a railroad company, under a contract which required the work to be done under the direction of the railroad engineer, and subject to his control, was not an independent contractor, and the railroad company was liable for his acts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the B. Schade Brewing Company against the Chicago, Milwaukee & Puget Sound Railway Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

F. M. Dudley, of Seattle, and Cullen, Lee & Matthews, of Spokane, for appellant. Graves, Kizer & Graves and Turner & Geraghty, all of Spokane, for respondent.

PARKER, J. This is an action to recover damages which the plaintiff claims resulted to its brewery building from blasting done by the defendant in the construction of a subway in the adjoining avenue. A trial resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

Respondent owns and operates a brewery plant situated in the city of Spokane, occupying a block bounded on the west by Sheridan street and on the south by Front avenue. On the southwest corner of the block is situated respondent's main building, fronting westerly 100 feet on Sheridan street and southerly 130 feet on Front avenue. The building as originally built, and before being injured, was a substantial brick structure; its different parts varying in height from three to five stories. Appellant has been, for some years past, engaged in constructing its railway into the city of Spokane on a line which passed near respondent's main building. In the construction of its railway along this line, it became necessary for appellant to procure a franchise from the city of Spokane authorizing the construction of the railway along Front avenue in a subway for a distance of 800 feet. The subway, as proposed and afterwards constructed, is in that portion of Front avenue upon which respondent's brewery plant and grounds front to the extent of approximately 450 feet; respondent's main building fronting thereon to the extent of 130 feet. The subway, as proposed and constructed, extends westerly along and in the avenue from the southwest corner of respondent's plant approximately 250 feet, where the railway emerges therefrom into an open cut upon ap-

ture and effected by the use of dynamite; that the blasting was carried on at the furthest within a few hundred feet of the building; that it resulted in seriously cracking both the foundation and upper walls of the building, that is, if it had any injurious effect upon the building, as the jury, of course, found. This contention, we think, is fully disposed of in favor of respondent by the observation of Justice Gose in our recent decision in *Patrick v. Smith*, 75 Wash. 407, 411, 134 Pac. 1076, 1078, as follows: "The authorities are agreed upon the question that one who, in blasting upon his premises, casts debris upon the land of another is liable in damages regardless of the degree of care or skill used in doing the work. 19 Cyc. 7. But where one, in blasting upon his land, exercising reasonable care, causes a concussion in the air or a vibration in the earth, or both, to the injury of the premises of another, but casts no physical substance upon his property, the authorities are divided on the question of liability. One line of cases holds that the injured party is without remedy; the other line holds that an actionable wrong has been committed. We think the latter view is both logical and just. It seems illogical to say that, if one puts off a blast of powder, a substance inherently dangerous, on his own premises, which causes a stone to be thrown through his neighbor's window, he is liable without regard to the degree of care used; but if it destroys his neighbor's house, but casts no physical substance upon the premises, he is immune from liability, unless it can be shown that reasonable care was not exercised." Attention is called to our decision in *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478, which, it is apparently insisted, is applicable to the facts of this case. We do not think so. In the *Hieber* Case there was not involved any permanent physical injury to the adjoining property or buildings.

[6] Our attention is called to certain special interrogatories submitted by the trial court to the jury, and the answers thereto returned with the verdict, as follows:

"Was the work of blasting for the work at the time and place in question inherently dangerous? Answer: No.

"If you find that plaintiff's building was damaged by blasting, then state if the blasting could have been done without any damage, if proper precautions had been taken. Answer: Yes."

We think enough has been said already to show that, standing alone, the answer to the first interrogatory would have to be regarded as contrary to law, in view of the undisputed facts of this case touching the nature of the blasting. However, when both interrogatories and answers are read together, we think they amount simply to a finding of negligence on the part of appellant. This, it seems clear to us, would, in any event, be held to be without prejudice, since we con-

clude, as a matter of law, that respondent was entitled to recover, regardless of appellant's negligence, if the damage to respondent's building in fact occurred from appellant's blasting in the construction of the subway. We have noticed that it was conclusively shown that the damage occurred from that cause if it occurred from any act of appellant.

[7] It is contended in behalf of appellant that it is not liable for the damages to respondent's building in any event, because the work of the construction of the subway was carried on for appellant by an independent contractor. While there may be two or three answers to this contention, we think a conclusive one is found in the terms of the contract existing between appellant and its contractor, *Bates & Rogers Construction Company*. By that contract the construction company was to do the work of excavating and constructing the subway and receive compensation therefor by the method which is commonly called "force account," which is a percentage upon the cost of the work. Touching the supervision and control over the work of construction retained by appellant, we find in that contract, which is in writing, the following:

"The construction company will oversee, superintend, and execute for the railway company in accordance with the plans and instructions of its chief engineer, the construction of a subway for the tracks of said railway company. \* \* \*

"The construction company will employ and pay, subject to the approval of the chief engineer of the railway company, the necessary labor, clerical help, and superintendence for said work. \* \* \* It will make any contracts for subletting any portion of the work in its own name and at the lowest prices consistent with the speedy prosecution of said work, having due regard to economy, so as to secure the completion at the earliest possible date; it will, subject to the approval of the chief engineer, purchase all material and supplies for said work not furnished by the railway company.

"The construction company will, so far as may be necessary for the prompt, economical, and efficient prosecution of said work, devote the whole time of its principal officers in charge of said work, and will give the same its best skill, diligence, and attention. The construction company agrees that all of said work shall be prosecuted under the direction of the chief engineer of the railway company, and that all contracts, specifications, agreements, and instructions for the doing of all or any part of the said work, and all specifications and prices of supplies and material furnished by it for the work, the rates for labor, arrangements for medical attendance, and casualty insurance, if any and for all matters pertaining to the work, shall be subject to the approval of said chief engineer.

"The construction company agrees that the

rate of progress of the work embraced in this agreement shall at all times be under the control of the railway company, and at its direction may be accelerated, suspended, or stopped, and that the construction company shall not be entitled to any damages or allowances on account of such suspension or stoppage, but only be paid for such work as had been previously done, and for such material as had previously been furnished by it in pursuance of this contract."

The principle here involved was thoroughly reviewed in our recent decision in *North Bend Lumber Co. v. Chicago, Milwaukee & Puget Sound Railway Co.*, 135 Pac. 1017, 1022, where Justice Fullerton, speaking for the court, said: "A contractor, to be independent, must exercise an independent employment. He must be at liberty to perform the work he undertakes in his own way, at his own time within the limits of the time fixed in the contract, and by such means as to him seems most suitable. This does not mean, of course, that the contract itself may not prescribe that the work shall be performed in a particular manner, or that certain parts of it must be completed within a time less than the time fixed for the completion of the whole, or that certain means shall be employed in the accomplishment of the work; but it means that control over these matters must not be left to the whim or caprice of the employer, or his representative, to be exercised as the work progresses. If such right of control is retained, if the employer reserves to himself, or to his representative, the right to control at his pleasure the manner and means by which the work contracted for is to be accomplished, if the employer may stand by and tell the person undertaking the work where, when, and how it shall be performed, such person is the agent and servant of the employer, and not an independent contractor."

It seems quite plain to us that the Bates & Rogers Construction Company was not an independent contractor for the construction of the subway, and that appellant was not relieved from answering for damages of the nature here awarded resulting from such construction, whether caused by negligence or otherwise.

It is contended that the evidence was not sufficient to support the verdict and judgment, in that it was not such as to warrant the conclusion that the damage to appellant's building was the result of blasting in the construction of the subway, but that it was the result of other causes which had existed prior to the commencement of the construction of the subway. We have carefully reviewed all of the evidence touching this contention and deem it sufficient to say that we cannot see our way clear to disturb the verdict for want of evidence to support it in this regard. While there was evidence tending to

show that other causes contributed to the injury of the building before the commencement of the construction of the subway, there was ample evidence, if believed by the jury, warranting the conclusion that damage, at least to the extent awarded by the jury, was the direct result of blasting in the construction of the subway. There is no contention made here that the amount so awarded by the jury was excessive, but only that none of the injury to the building was the result of acts attributable to appellant.

Some other errors are suggested by counsel for appellant which we have not overlooked. We think, however, that the contentions thereon are clearly without merit, at least in so far as the prejudicial effect of such claimed errors is concerned, and that they do not call for further discussion.

The judgment is affirmed.

CROW, C. J., and FULLERTON, MORRIS, and MOUNT, JJ., concur.

#### SCANDINAVIAN AMERICAN BANK OF TACOMA v. PUGET SOUND MACHINERY DEPOT. (No. 11,386.)

(Supreme Court of Washington. May 16, 1914.)

PAYMENT (§ 89\*)—RECOVERY—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for money paid to defendant upon its representation and warranty as to the balance due upon machinery which it had sold upon the contract of conditional sale assigned to plaintiff, held to show either a false representation or a suppression of the truth equivalent to a suggestion of falsehood entitling plaintiff to recover.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 291-296; Dec. Dig. § 89.\*]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by the Scandinavian American Bank of Tacoma against the Puget Sound Machinery Depot. Judgment for plaintiff, and defendant appeals. Affirmed.

Ira Bronson, of Seattle, for appellant. J. A. Sorley, of Tacoma, and C. L. Baxter, of Seattle, for respondent.

GOSE, J. This action was brought to recover a judgment for money paid to the defendant in consequence of its alleged fraudulent representations.

On the 15th day of April, 1910, the appellant sold to Nelson-Johanson Mill Company, a corporation, hereafter called the mill company, upon a conditional sale contract, one pair of twin engines with complete equipment, for an agreed consideration of \$2,150. \$537.50 cash, the balance payable in five monthly installments of \$322.50 each, evidenced by interest-bearing notes. The contract provided that, if the vendee failed to

make any payment when it became due, the payments theretofore made should be deemed rental, and the "contract of conditional sale shall be forfeited and determined at the election" of the vendor. The vendee installed the engines in its sawmill near Tacoma. The respondent had mortgages upon all the property of the mill company, both real and personal, including the engines, to the extent of the full value of all of its property. On the 8th day of September, 1910, the mill company was adjudged a bankrupt, and its property passed into the hands of a trustee. On the 28th day of December, 1910, the last two installments, aggregating, with interest, \$681.55, were due and unpaid. On that day the appellant assigned its conditional sale contract to the respondent and received as a consideration \$1,185.95. When the assignment was presented to the appellant and before its delivery, the following words were added in pencil: "Which is guaranteed the balance due from the above mentioned company." At the time of the assignment, the mill company owed the appellant, upon a note and an account which were unsecured, a sum equal to the difference between \$681.55 and \$1,185.95; that is, \$504.40. The respondent sued for this difference, alleging that it purchased the engines for the balance due upon the conditional sale contract, which the appellant falsely and fraudulently represented to be \$1,185.95, when in truth and in fact it amounted to only \$681.55. The court found the facts in favor of the respondent, and entered a judgment in its favor for the amount claimed. The court expressly found that the mill company had no property or assets of any kind with which to pay any part of the claims of the general creditors. This finding is conceded to be true by both parties. It also found that the respondent, in order to retain the engines in the mill, agreed to pay the appellant the balance due and owing upon the conditional sale contract; that the appellant agreed to assign the contract to the respondent for such balance; that the appellant represented and warranted to the respondent that the balance due and owing upon the conditional sale contract was \$1,185.95, when in truth and in fact the balance, including principal and interest, was \$681.55; that respondent, relying upon the representations, and believing them to be true, "and not otherwise," paid the appellant the sum of \$1,185.95. The court deduced as a conclusion of law that the respondent was entitled to recover the amount paid to the appellant in excess of the amount actually due upon the conditional sale contract.

The respondent was required to sustain its allegations of fraud by clear and convincing evidence. We think that it did so. In fact, the evidence, as we read it, is overwhelming in support of the findings of the court. Prior to the execution and delivery of the assignment, a representative of the appellant wrote the respondent that it had a

conditional sale agreement upon the engines; that it expected this claim to be paid in full; that it was entitled to take the machinery; and that it desired to avail itself "of that course unless we can obtain the money in full settlement of our claim," and that it was unwilling "to take the chances of securing a purchaser [meaning at a trustee's sale] who will pay enough to liquidate all the preferred claims." In other correspondence it referred to this conditional sale contract and to its preferred claim. It mentioned no other claim. On the day the conditional sale contract was assigned representatives of the appellant met with representatives of the respondent, and the only question discussed was the conditional sale contract and the amount due upon it. When the assignment of the contract was presented to the representative of the respondent who closed the deal in its behalf, he requested the appellant's representative to insert a guaranty in the assignment that the \$1,185.95 was the amount due upon the contract. In response to this request, he wrote the pencilled quotation. As we have said, the appellant at no time suggested its unsecured claims. The parties were negotiating concerning the conditional sale contract as a preferred claim.

It is argued that, because the engines, as installed in the mill, were worth more than the amount received as a consideration for the assignment, the respondent was not injured, and that, in view of the fact that the appellant had the right at its election to remove the machinery, there can be no recovery. These suggestions are beside the question. We need not determine whether the appellant could have exercised its option to remove the machinery. It had not exercised it, and the correspondence and the oral testimony show conclusively that it did not desire to exercise it. It obtained the difference between the amount due upon the contract and the amount which it received either by false representations or by a suppression of the truth, which was equivalent to a suggestion of falsehood. In either case its liability is complete.

The judgment is affirmed.

CROW, C. J., and MAIN, J., concur.

PARKER, J. I am of the opinion that respondent's interest in the mill was such as gave it the right to have the engines remain in and a part of the mill by paying to appellant the balance due it upon the conditional sale contract, whether appellant consented thereto or not, since appellant had not at that time, as I view the situation, effectively exercised its right to reclaim the machinery. Until it did so, the mill company, the vendee under the conditional sale contract, could retain the machinery and consummate the conditional sale by paying the balance due thereon. Respondent, I think, stood in the shoes of the mill company, and could therefore exercise

the same right until that right was terminated by the actual reclaiming of the property by appellant under the conditional sale contract. The fraud consisted in appellant inducing respondent to pay more than the balance due upon the conditional sale contract to secure the right it had to have the engines remain in the mill, upon payment of the actual balance due on the conditional sale contract, a right which was not dependent upon the will of appellant. When respondent offered to pay the balance so due, appellant was bound to state the truth as to the balance due thereon and accept payment thereof. Any amount paid by respondent to appellant in excess of the true balance due, even through honest mistake, would be recoverable by respondent. I concur upon this ground.

CHADWICK, J. (dissenting). As I read the record, the appellant is entitled to a judgment of dismissal as upon an executed contract by the Scandinavian American Bank of Tacoma to pay the sum of \$1,185.95, or there was no contract for the reason that the minds of the parties never met. I have gone through the record in this case, and I find nothing that in my judgment warrants the conclusion of the court below and of the majority that the appellant represented and warranted to the respondents that the balance due and owing upon the conditional sale contract was \$1,185.95, or that any proof was suppressed or falsehood suggested. In fact, all of the concomitant circumstances make it plain to me that the parties must have contracted with reference to the whole amount due from the machinery company to the appellant. Without discussing the testimony at length, it is enough to say that appellant had a conditional sale contract for the machinery; that there was a balance due of \$681.55; and that the machinery company was owing \$504.40 upon an open account. The machinery company had a legal right to take the machinery without reference to the amount of the balance due. The machinery exceeded in value the sum of \$1,185.95. There is direct evidence to sustain this conclusion, and the fact that respondent was willing to pay that amount makes it incontrovertible. It is highly improbable that appellant would deliberately release a hold that it had upon the property, and which, if exercised, would have more than paid its whole debt, and content itself with the loss of half the amount which was its due. The assignment of the conditional sale contract with the amounts and dates of the payments due was, in the absence of anything else, sufficient to put respondent upon inquiry. The insertion of the words, "which is guaranteed the balance due from the above mentioned company," after the typewritten body of the contract which contained the recitals "for and in consideration of the sum of \$1,185.95,

we hereby sell, etc., all our right, title and interest in and to one pair 17x22 inch, Class EE Atlas Engine, etc., together with our right, etc., in a certain conditional sale contract," is enough to bind the respondent. The parties used the figures \$1,185.95 without qualification. The words guaranteeing that sum to be the balance due, without reference to the amount due from the conditional sale contract, indicates to my mind that the parties had a perfect understanding at the time that the respondent was willing to and did pay the sum of \$1,185.95 for the engine, with the expectation and intent of making a profit to itself over and above that sum, and that it would not have paid that amount if it had not considered it to be a profitable venture. Moreover, if the parties had contemplated a transfer of the conditional sale contract for the amount due thereon, a simple assignment of it would have been enough, without making a formal bill of sale of the engine. Upon its findings of fact the court below, as well as the majority, have convicted the representatives of the appellant, whose only offense has been to give up nearly \$1,200 worth of property for about \$600, of being knaves. If they did what the majority say they did, they were not knaves. They lack the understanding and cunning of knaves and should be classed as fools.

Respondent has not only failed to make out a case of fraud by the clear and convincing evidence required by the law, but it has failed, in my judgment, to make a case at all.

I am inclined to believe, and it is the more reasonable theory, that both parties acted in good faith. The bank may have thought it was purchasing the engine for the amount due upon it. It is certain to my mind that appellant never intended to sell upon those terms. A proper holding would be that the minds of the parties never met, and that the transaction lacks this essential element of a contract.

#### TOUPIN v. KENT LUMBER CO. (No. 11-509.)

(Supreme Court of Washington. May 16, 1914.)

##### 1. APPEAL AND ERROR (§ 1099\*)—SUBSEQUENT APPEAL—FORMER DECISION AS LAW OF CASE.

The holding on a former appeal that plaintiff's evidence in his action for personal injury made a case for the jury was the law of the case on a subsequent appeal, where there was no material difference in the evidence on the two trials.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\*]

##### 2. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—INJURY TO LEG.

A verdict of \$2,500 for a severe fracture of the thigh bone of plaintiff's left leg, confining him in a hospital for 6 months and shortening that leg at least 1½ inches, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Joseph Toupin against the Kent Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 66 Wash. 594, 120 Pac. 100.

Milo A. Root, of Seattle, for appellant. Willett & Oleson, of Seattle, for respondent.

CROW, C. J. This action, which was commenced by Joseph Toupin against Kent Lumber Company, a corporation, to recover damages for personal injuries, is now before us on second appeal. On the first trial a challenge was sustained to the sufficiency of plaintiff's evidence, and the cause was dismissed. Upon plaintiff's appeal the judgment of the superior court was reversed; this court holding that the evidence made a case for the consideration of the jury. After remittitur a new trial was had, which resulted in a verdict and judgment in plaintiff's favor, from which the defendant prosecutes the present appeal. A complete statement of the case may be found in our former opinion. 66 Wash. 594, 120 Pac. 100. As the plaintiff was appellant on the former appeal, and the defendant is now the appellant, we will avoid confusion by referring to them as plaintiff and defendant.

The defendant now insists that the trial court should have sustained its motion for a directed verdict at the close of all the evidence for the reason that no negligence upon its part was shown; that the plaintiff assumed the risk; that the accident was caused by plaintiff's negligence, and by the negligence of his fellow servant. Calling attention to the fact that the former appeal was heard on plaintiff's evidence only, and that we now have before us the evidence of both parties, defendant insists that the present record does not disclose as strong a case on plaintiff's behalf as was presented on the former appeal. We have carefully read the entire record, including all the evidence, which is voluminous, and are convinced that no material variance appears between the facts disclosed by plaintiff's evidence on the former appeal and those shown upon this appeal. In making this statement we are not unmindful of the fact that, as to the distance between the donkey engine and the place where plaintiff was employed as a rigging slinger, there is some variance in the evidence of plaintiff's witnesses. On the former appeal their testimony was that the distance mentioned was about 1,000 feet, while on the last trial their testimony was that the distance was between 700 and 800 feet. This discrepancy was explained by statements of plaintiff's witnesses to the effect that prior to the first trial no exact measurements had been made, but that such measurements were made prior to the second trial. The discrepancy mentioned we

do not regard as material. The vital point involved on both trials was whether the signalman was located so far from the plaintiff that he could not hear plaintiff's signals given while the donkey engine was working. The evidence on both trials was that the signalman should not have been located more than 150 or 200 feet from the plaintiff, but that he was much further away.

[1] If the case should have been submitted to the jury on the first trial, it was properly submitted upon the second trial. The law of the case was determined upon the first appeal, and necessarily controlled the action of the trial court upon the second hearing. An examination of defendant's briefs upon the first appeal discloses the fact that it made the same contentions which it now makes. Having heretofore held that the case was for the jury, and the additional evidence now before us failing to disclose anything further than a conflict, we are controlled by the law of the case as announced in our former opinion, and necessarily conclude that the verdict cannot be disturbed.

[2] Defendant further contends that the verdict and judgment are excessive. The jury awarded \$2,500 damages. The evidence shows, and it is conceded, that plaintiff sustained a severe fracture of the thigh bone of his left leg; that he was confined in a hospital for 6 months; and that the injured leg has been shortened at least 1½ inches. Further evidence as to the extent of his injuries is conflicting. On the record before us we are unable to conclude that the verdict is excessive.

The judgment is affirmed.

MAIN, ELLIS, and GOSE, JJ., concur.

OKAZAKI v. SUSSMAN. (No. 11642.)

(Supreme Court of Washington. May 16, 1914.)

# 1. JUDGMENT (§ 297\*)—OPENING OR VACATING—AUTHORITY OF COURT.

Since, under the Constitution, the superior courts have no terms, but are always open, their judgments are not subject to change during the term as at common law, and a judgment entered after the time for filing a motion for new trial has all the conclusiveness of a common-law judgment after the term, and can only be changed or modified as provided by statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 581, 584-586; Dec. Dig. § 297.\*]

# 2. JUDGMENT (§ 340\*)—OPENING OR VACATING—CHANGE OF VIEWS BY JUDGE.

That the judge changed his views as to the effect of the evidence on which the jury founded their verdict was not a sufficient cause for setting aside a judgment upon such verdict; as judgments would have no stability if that be recognized as a sufficient cause for setting them aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 666; Dec. Dig. § 340.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. JUDGMENT (§ 199\*)—ON TRIAL OF ISSUES—RENDITION, FORM AND REQUISITES—NOTWITHSTANDING VERDICT.**

If a motion for judgment notwithstanding the verdict was filed after judgment, it was too late, and, if it was filed before, it was overruled by the entry of a final judgment against the mover.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

**4. NEW TRIAL (§ 116\*)—PROCEEDINGS TO PROCURE—EFFECT OF FINAL JUDGMENT AGAINST APPLICANT.**

A motion for new trial could not survive a final judgment against the mover, whatever might be the grounds for relief against the same; the motion being overruled by the judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238, 238½, 240, 241; Dec. Dig. § 116.\*]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by I. Okazaki against Frank Sussman. From a judgment for defendant setting aside a judgment for plaintiff entered upon a verdict in his favor, plaintiff appeals. Reversed and remanded, with instructions to reinstate the original judgment.

H. B. Lea, of Tacoma, for appellant. Williamson, Williamson & Freeman, of Tacoma, for respondent.

FULLERTON, J. The appellant, plaintiff below, brought this action against the respondent for malicious prosecution. Issue was joined on the complaint, and a trial entered upon before a jury on February 19, 1913. On February 21, 1913, the jury returned a verdict in favor of the appellant for \$3,500. On February 24, 1913, a formal judgment, signed by the judge of the court, was entered in favor of the appellant on the verdict for the sum returned therein. On the same day (February 24, 1913), but whether before or after the entry of the judgment the record does not disclose, the respondent filed a motion for judgment notwithstanding the verdict. On April 18, 1913, the motion was brought on for hearing, at the conclusion of which the court set the former judgment aside, and entered a judgment in favor of the respondent to the effect that the appellant take nothing by his action, reciting in the judgment that there was no sufficient evidence in the record to sustain the verdict of the jury. This appeal is prosecuted from the last-mentioned judgment.

[1] We think the court erred in setting the judgment aside. It will be remembered that, under the Constitution of this state, superior courts have no terms, but are open for the transaction of business on every day, except nonjudicial days. Judgments therefore have no probationary period during which they are subject to change and modification by the court, such as a judgment had during the term at common law. Under our practice, judgments entered after the time within

which a motion for a new trial may be filed have all the conclusiveness of a common-law judgment after term, and can only be changed or modified in the manner, and for some one or more of the causes, provided by statute for vacating and modifying judgments. State ex rel. McConihe v. Stelner, 58 Wash. 578, 109 Pac. 57.

[2] Here there was no showing of cause whatever. All that appears is that the judge who presided at the trial changed his views as to the effect of the evidence on which the jury founded their verdict. But, if this were to be recognized as a sufficient cause for setting aside a judgment, judgments would have no stability. Instead of being the final determination of the rights of the parties to the action, as the Code prescribes they shall be, they would be but subjects of the whim and caprice of the court, determinative of nothing.

[3] We have said that the record fails to make it clear whether the motion for judgment notwithstanding the verdict was filed before or after the formal judgment was entered. It, however, makes no difference in the result which event happened first. If the motion was filed after the judgment was entered, it came too late; if before, it was determined against the mover by the entry of the final judgment.

[4] It was also said by counsel for the respondent in the oral argument at bar that a motion for a new trial had been filed which remained undetermined, and we were asked, in case we reversed the judgment finally entered, to remand the cause, with instructions to the lower court to pass upon the motion. The record in this court, however, shows no such motion, but, if it be true that such a motion were filed, it likewise could not survive the entry of the final judgment, however potent the fact might be for relief against the judgment under the statute providing for relief against judgments entered by mistake, inadvertence, surprise, or excusable neglect. But, as we have indicated, the record affords no basis for relief on this latter ground.

The judgment appealed from is reversed, and the cause remanded, with instructions to reinstate the original judgment.

PARKER, MORRIS, and MOUNT, JJ., concur.

NORTON et ux. v. PACIFIC POWER & LIGHT CO. (No. 11,646.)

(Supreme Court of Washington. May 16, 1914.)

**1. GAS (§ 14½\*)—INJURIES INCIDENT TO CONSTRUCTION AND OPERATION OF WORKS—NEGLIGENCE—BURDEN OF PROOF.**

One suing for injuries by stumbling over a gas pipe projecting through a sidewalk and connected with a pipe leading out to the gas

main has the burden of proving that the pipe belonged to the gas company; but, since the question of the company's ownership is peculiarly within its own knowledge, the burden rests somewhat more lightly than if proof of ownership was equally available to both parties.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 12; Dec. Dig. § 14½.\*]

**2. GAS (§ 14½\*)—INJURIES INCIDENT TO CONSTRUCTION AND OPERATION OF WORKS—NEGLECT—EVIDENCE.**

In an action for injuries to a pedestrian stumbling over a gas pipe projecting through a sidewalk, evidence held to support a finding that the pipe belonged to the gas company so that it was liable for the injuries.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 12; Dec. Dig. § 14½.\*]

**3. APPEAL AND ERROR (§ 970\*)—DISCRETION OF TRIAL COURT—RULINGS ON EVIDENCE.**

The action of the court in granting, after motion for nonsuit but before decision thereon, the request of plaintiff to offer further evidence on an issue to which the motion was directed and in permitting the evidence to take a wider range than indicated by the request, rested within the discretion of the court, and its ruling would not be disturbed unless the discretion was abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\*]

**4. APPEAL AND ERROR (§ 544\*)—QUESTIONS REVIEWABLE—MISCONDUCT OF JURY—AFFIDAVITS—BILL OF EXCEPTIONS.**

The affidavits in support of or against a motion for new trial for the misconduct of the jury cannot be considered unless brought to the Supreme Court by bill of exceptions or statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

**5. TRIAL (§ 260\*)—INSTRUCTION—REFUSAL OF REQUESTED INSTRUCTIONS.**

It is not error to refuse requested instructions sufficiently covered by the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Department 2. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Roy Norton and wife against the Pacific Power & Light Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Rader & Barker, of Walla Walla, for appellant. Pedigo & Smith, of Walla Walla, for respondents.

**PARKER, J.** This is an action to recover damages for personal injuries which are claimed to have resulted to the plaintiff Anna Selkirk Norton from the negligence of the defendant in maintaining a gas pipe projecting through the sidewalk in a public street in Walla Walla. Verdict and judgment were rendered in favor of the plaintiff, from which the defendant has appealed.

Appellant maintains a gas main in the street in front of the respondents' home in

Walla Walla. At the time in question, there was a gas pipe projecting through the sidewalk, near its outer edge, in front of respondents' home, at a height of about eight inches. This pipe was about three-quarters of an inch in diameter, and had a cap screwed on the top. Under the sidewalk, it was connected with a pipe which led out towards appellant's gas main in the street. The main in the street is admitted to belong to appellant, but the ownership of the pipe which projected through the sidewalk is, we will assume, one of the controverted questions of fact raised by the pleadings, so that the burden was on respondents to show that this pipe belonged to appellant. During the evening of May 27, 1912, Mrs. Norton, upon returning home after spending the evening with friends, alighted from an automobile in front of her home, and proceeded to walk across the parking and sidewalk to her front door, when her foot struck against the gas pipe, causing her to fall, resulting in serious personal injuries to her for which she seeks recovery in this action.

[1, 2] It is first contended by counsel for appellant that the evidence does not sustain the verdict and judgment, in that there was a failure of proof of the ownership of the projecting gas pipe being in appellant. It must be conceded that the evidence was not very definite and certain upon this question, but there was testimony produced showing that the projecting pipe was, in fact, a gas pipe; that the mother of Mrs. Norton telephoned to appellant's office soon after the accident; that some men came soon thereafter, apparently in response to this telephone message, and removed the projecting pipe, claiming that they were doing so for appellant; and that the pipe was so situated and connected underneath the sidewalk as to have the appearance of being connected with appellant's gas main, though there was no evidence that it was actually so connected. Appellant offered no evidence whatever upon the trial touching the question of the ownership of the projecting pipe. In view of these facts, we are of the opinion that there was sufficient evidence to warrant the jury in concluding that the projecting pipe belonged to appellant. The fact of whether or not appellant was the owner of the projecting pipe was peculiarly within its own knowledge, and, if it were not the owner thereof, such fact could be easily proven by it. We do not mean by this that the burden of proof rested upon appellant as to this question, but we are constrained to view the circumstances as making that burden rest somewhat more lightly upon respondents than as if proof of the ownership of the pipe in appellant was equally available to both parties. 16 Cyc. 937.

[3] At the close of respondents' evidence, and after appellant had made a motion for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



nonsuit upon the ground, among others, that there had been a failure of proof of ownership of the projecting pipe in appellant, and before the court ruled thereon, counsel for respondents asked leave to offer further evidence, which was granted over objection of counsel for appellant. When the evidence was produced, it took a somewhat wider range than the purpose indicated in the request made by counsel for respondents. It is insisted that the court erred both in granting the request, and, further, in permitting the evidence to take a wider range than was indicated by the request. This ruling of the court involved a matter of discretion; and, in view of the fact that counsel for appellant had ample opportunity to rebut whatever additional evidence was thus brought before the jury, since they had not even commenced to produce their answering evidence in behalf of appellant, we are quite clear that the trial court did not abuse its discretion in ruling as it did. *Bellingham v. Linck*, 53 Wash. 208, 212, 101 Pac. 843.

[4] One ground of the motion for new trial was misconduct of the jury. The motion was denied, and, so far as it rested upon this ground, was evidently supported by affidavits, and involved questions of fact as to the actions of the jurors claimed to be misconduct. None of these affidavits are brought before us by bill of exceptions or statement of facts; therefore we have no legal means of knowing the facts considered by the court upon its denial of the motion. *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873; *Haines & Spencer v. Kelley*, 57 Wash. 219, 106 Pac. 776; *Spoar v. Spokane Turn-Ver-ein*, 64 Wash. 208, 116 Pac. 627; *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28. These and several earlier decisions show the repeated holdings of this court to the effect that affidavits used in support of or against motions involving questions of fact cannot be considered unless brought here by bill of exceptions or statement of facts. Since this question, however, has not been raised by counsel for respondents, we may say that we have read the affidavits appearing in the clerk's transcript as being filed in the trial court, and that we do not regard the facts as shown thereby such as to warrant reversal of the trial court upon this question, even though we should treat such affidavits as all of the facts presented to the trial court upon this question.

[5] Some contention is made against the action of the trial court in refusing to give certain instructions requested by counsel for appellant. We think the contention wholly without merit. The instructions requested were, in substance, embodied in the court's instructions which were given, at least in so far as appellant was entitled to have such requested instructions given.

We cannot say, as a matter of law, that the verdict was excessive, as is contended

by counsel for appellant. We deem it of no profit to review the evidence in detail here touching this question.

The judgment is affirmed.

CROW, C. J., and FULLERTON, MORRIS, and MOUNT, JJ., concur.

## GUNSTONE v. CHICAGO, M. & P. S. RY. CO. (No. 11,796.)

(Supreme Court of Washington. May 16, 1914.)

### TROVER AND CONVERSION (§ 48\*)—MEASURE OF DAMAGES—VALUE AT TIME AND PLACE OF CONVERSION.

Where plaintiff conveyed a railroad right of way reserving the timber thereon, and afterwards cut the timber and piled the logs near the right of way, and the railroad in clearing it inadvertently and wrongfully, but not willfully or with any intent to misappropriate, converted the logs there worth \$1.50 a thousand and sold them at a mill for \$5 a thousand, the measure of damages was the value of the logs at the time and place of conversion, and not at the place where they were sold.

[Ed. Note.—For other cases, see *Trover and Conversion*, Dec. Dig. § 48.\*]

Department 2. Appeal from Superior Court, Thurston County; C. E. Claypool, Judge.

Action by John Gunstone against the Chicago, Milwaukee & Puget Sound Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Geo. W. Korte, of Seattle, and Frank C. Owings, of Olympia, for appellant. Thos. M. Vance, of Olympia (Harry L. Parr, of Olympia, of counsel), for respondent.

MOUNT, J. The sole question in this case is the measure of damages for the unlawful taking and conversion of a lot of logs belonging to the respondent. It appears that on June 30, 1909, the appellant railway company purchased from the respondent a strip of land to be used as a right of way for the construction of its railway. The deed conveying the land contained a reservation to the effect that "the timber on said strip of land is reserved by said John Gunstone." Shortly thereafter the right of way was cleared and the timber cut into logs and piled upon or along near to the right of way of the appellant company. More than a year after the timber had been cut, the appellant company desired to clear up its right of way in that vicinity. It loaded this particular timber with other timber of its own along its right of way, upon trains, and shipped it to a saw-mill owned by one Lundeen, and disposed of the timber at a price of \$5 per thousand, board measure. The object of the railway company in removing the timber was to remove a menace to the safe operation of its railroad. It does not appear that there was

any purpose of the railway company or of its employes who were actually engaged in removing the logs to commit a willful trespass, or to misappropriate the property. The complaint alleges that the property was wrongfully and unlawfully taken and carried away. It is not alleged in the complaint, nor shown by the evidence, that the taking was willful or intended to deprive the respondent of his property. The case was tried to the court without a jury. The court found that the appellant sold and delivered the logs to Lundeen for \$5 per thousand, delivered at Lundeen's mill, and that the officials of the appellant company engaged in cleaning up the right of way had no personal knowledge of the ownership of the timber so taken and sold; that the appellant did not commit any unnecessary trespass upon the respondent's land; and allowed the respondent to recover the value of the logs, delivered at Lundeen's mill. It was shown that the logs lying upon the ground were worth \$1.50 per thousand, board measure; that it was worth \$3.50 per thousand to load and haul the logs to mill. At the time the action was brought, the appellant conceded that the property had been wrongfully taken, and tendered the value of the logs at the time and place of taking. So that the question in the case is, as above stated: Was the respondent entitled to recover the value of the logs at the time and place they were converted by the appellant, or the added value thereof at the place where the logs were sold by the appellant to Lundeen?

In the case of *Chappell v. Puget Sound Reduction Co.*, 27 Wash. 63, 87 Pac. 391, 91 Am. St. Rep. 820, an action was brought for the value of 1,000 cords of wood alleged to have been wrongfully taken from the plaintiff's land by one Duffey. The wood was shipped to Everett and sold to the defendant. The plaintiff claimed the value of the wood at Everett, which was \$2.32½ per cord, while the defendant maintained that the plaintiff was entitled to the value of the timber standing on the premises, which was 10 cents per cord. We held in that case that, where there was no willful or malicious trespass, the plaintiff's recovery was limited to the value of the property taken at the time and place of conversion. In that case we said: "The great weight of authority in the United States in regard to the measure of damages in cases of this character is, as expressed in *Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 898 [27 L. Ed. 230], where it is held that where the defendant was an unintentional or mistaken trespasser, or his innocent vendee, the measure of damages is the value at the time of conversion, less what the labor and expenses of his vendor have added to its value. In *Ayres v. Hubbard*, 57 Mich. 322, 23 N. W. 829, 58 Am. Rep. 361, the court in a case similar to the one at bar, says: 'The general rule of damages is the value of the property lost under such circumstances

at the time and place of conversion,' and 'complete indemnity for the actual loss sustained in this case by the plaintiff is what he was entitled to recover.'" Further along in the same case we said: "In the case of *Beede v. Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 428, the court, after reviewing very many cases, says: 'The weight of authority, however, in this country is in favor of the rule which gives compensation for the loss, that is, the value of the property at the time and place of conversion with interest after, allowing nothing for value subsequently added by the defendant, when the conversion does not proceed from willful trespass, but from the wrongdoer's mistake or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner, or a contemplated special use of the property by him.'" And more to the same effect. We think the rule there stated is conclusive of the question presented here.

In *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720, we said: "If the taking was inadvertent, the owner is entitled to such damages, and only such, as are compensatory; that is to say, he is entitled to what the trees would be worth on a sale in the condition in which they were at the time of the taking, unenhanced by the labor of making into logs and placing in the water. But if the taking was by willful trespass, then he is entitled to recover in damages the enhanced value of the timber without any deduction for labor and expense bestowed upon it. In the latter case the damages are not merely compensatory but punitive. In an action of trover, in the absence of statute, the one or the other of these would be the measure of damages, and which of these would be dependent upon turpitude or lack of turpitude in the taker. This is the rule according to the decided weight of authority, both in this country and in England, in cases where no damage to the land itself is claimed"—citing a number of cases.

This rule, we think, must govern in this case. It is plain in this case that there was no willful or wanton trespass. The trial court so found. It is true the appellant had in its possession the deed which reserved the logs in question to the respondent, and, as the trial court declared, notice was imputed to the appellant and to its employes that the logs belonged to the respondent. But the mere fact that notice was imputed to the employes did not make a case of willful trespass. The taking, while it was unlawful, because the property of the respondent, was taken by the employes of the appellant by mistake simply, for the employes who took the property had no actual notice of the fact that the logs belonged to the respondent. They supposed the logs belonged to the appellant company, and by mistake or inadvertence took them away. It is not alleged in the com-

plaint that the taking was wilful, nor was it proven that the appellant or its agents took the property wilfully. The rule for determining the value, therefore, was the one laid down in *Chappell v. Puget Sound Reduction Co.*, and *Bailey v. Hayden*, supra.

The respondent argues that, because he could have maintained an action in replevin for the logs against Lundeen, he is therefore entitled to recover the value of the property at Lundeen's mill. It is not necessary to decide in this case or to discuss the question whether the respondent could have maintained replevin against Lundeen for the logs. Even if he had the right to that remedy, he did not avail himself of it, but pursued his remedy in damages against the railway company which inadvertently converted the logs. For such conversion he is entitled to the value at the time and place of conversion, and not the enhanced value. In other words, having selected his remedy, he is bound by that selection.

The judgment is therefore reversed, and the cause remanded, with instructions to the lower court to enter a judgment in favor of the respondent for the amount of the tender only, with costs against the respondent.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

# MARTINDALE CLOTHING CO. v. SPOKANE & EASTERN TRUST CO. et al. (No. 11,597.)

(Supreme Court of Washington. May 8, 1914.)

## 1. LANDLORD AND TENANT (§ 169\*)—BURSTING WATER PIPES—NEGLIGENCE OF LANDLORD—PROXIMATE CAUSE—EVIDENCE.

Evidence, in an action by the tenant of the lower floor and basement of a two-story building for injury from water through the bursting, on a cold night, of a water pipe in a storeroom on the second floor, held to warrant a finding that the negligence of the landlord in failing to inform the tenant of the second floor as to the location of the cut-off for such pipe, the plumbing indicating another cut-off would stop the flow of water therein, was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.\*]

## 2. LANDLORD AND TENANT (§ 169\*)—BURSTING WATER PIPES—CONTRIBUTORY NEGLIGENCE OF TENANT.

The tenant of the lower floor and basement of a two-story building, injured by the bursting of a water pipe, on a cold night, in a storeroom on the second floor, leased to another, was not guilty of contributory negligence, as matter of law, in not anticipating that proper precaution would not be taken to prevent the freezing, and in not using a shut-off in the basement which would shut off all water from the second floor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.\*]

## 3. LANDLORD AND TENANT (§ 166\*)—INJURY TO TENANT'S PROPERTY—LEASES—EFFECT OF PROVISIONS.

The provision in the lease of the tenant of the second floor, as well as in that of the tenant of the lower floor and basement, of a two-story building, requiring the tenants to make "interior repairs," does not affect the landlord's liability for its negligence, causing the bursting of a water pipe on the second floor, resulting in injury to the lower tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 647-655, 657-660; Dec. Dig. § 166.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the Martindale Clothing Company against the Spokane & Eastern Trust Company and another. From a judgment for plaintiff, defendant company appeals. Affirmed.

David Herman and W. W. Zent, both of Spokane, for appellant. Voorhees & Canfield, of Spokane, for respondent.

PARKER, J. This action was commenced by the plaintiff to recover damages claimed to have resulted to it from the negligent maintenance by the defendants, Spokane & Eastern Trust Company and T. H. Gowman, its tenant, of a water pipe in the upper story of a building owned by the trust company, and negligently permitting the pipe to burst from freezing, thereby causing a large quantity of water to be precipitated upon the goods of the plaintiff in its store, occupying the ground floor of the building. A trial resulted in verdict and judgment in favor of the plaintiff and against the defendant trust company, and exonerating the defendant Gowman. The trust company has appealed.

The clothing company occupied the ground floor and basement of the building under a lease as a tenant of the trust company, while Gowman occupied the entire second floor of the building under a lease as tenant of the trust company. Both tenants had been in the occupancy of their respective leased premises for several years. These were entirely separate tenancies. In so far as concerns the right of either tenant to go upon or interfere with the premises leased by the other, such right was no different than as if each occupied a separate building under their respective leases. The provisions of the leases do not call for any particular notice here, except, possibly, the following provision found in each of them: "And the said party of the second part [the tenant] does covenant and agree with the said party of the first part, its successors and assigns, that the said party of the second part shall and will make all interior repairs to said rooms during the life of this lease and without any cost to the party of the first part."

The building is situated at 716 Riverside avenue, in Spokane, being on the northerly side of that avenue. It is but two stories high,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in addition to its basement. It is not supplied with heat other than such as the respective tenants supplied for themselves. The second floor was occupied by Gowman and wife with a photograph gallery and their living rooms, and also by a dentist, who was a subtenant of Gowman. Water was supplied to the second floor through a pipe which ran from the avenue into the basement and up through the clothing company's store on its westerly wall some distance back from the avenue, passing into a toilet room on the second floor situated near the middle of that floor on the westerly side of a hallway running north and south. In the basement there was a cut-off in the pipe leading to the upper floor, by which the water could be entirely shut off from that floor. From the toilet on the upper floor a pipe ran under the floor of the hallway to a sink in the room on the east side of the hall. This room was included in Gowman's tenancy, though seemingly unoccupied save possibly as a storeroom. The pipe leading to the sink in this room had a cut-off near the bowl in the toilet room. Whether reasonable inspection by Gowman, under the circumstances, would have disclosed to him the fact that this pipe carried water across the hall to the sink and that the water could have been cut off therefrom by this cut-off is one of the principal controverted questions touching both his and the trust company's negligence. The damage occurred from the bursting by freezing of this pipe at a point near the sink in this room on the east side of the hall during a very cold night in January, when such freezing and bursting of the pipe might have been anticipated with the water left in it, and might have been prevented by the use of the cut-off in the toilet room. Another pipe ran under the floor of the hall into the dental rooms at the front of the building. There was a cut-off in this pipe under the floor of the hall nearly opposite the sink in the room to the east of the hall. Gowman claims that he thought this cut-off could be used to stop the flow of water to the sink as well as to the dental rooms. This cut-off was accessible by raising a loose board left for that purpose over it in the floor of the hall. During the evening of the night when the bursting of the pipe at the sink occurred, Gowman, deeming it a necessary precaution because of the intense cold, turned the cut-off in the hall floor to stop the flow of water, as he had often done during previous cold spells. Gowman testified, in substance, that, when he went into possession of the upper floor under his lease, the cut-off in the floor of the hall was called to his attention by the agent of the trust company, and that the agent then requested him "to see that this shut-off was shut off during cold weather, to prevent any freezing of the water in the dental rooms"; also that other cut-offs in the upper floor were then called to his attention, but that the one in the toilet room was not then mentioned, though we may assume, for

argument's sake, that Gowman knew it was there. He also testified, in substance, that there was nothing to indicate that the pipe supplying the sink in the room to the east of the hall came from the toilet room. Two experienced plumbers testified, in substance, that the cut-off in the toilet room was simply such as are usually installed in such places to enable repairs to be made to toilets, and that there was nothing, so far as the outward appearance of the plumbing was concerned, to indicate that the pipe leading to the sink came from the toilet room, or that the cut-off therein controlled the flow of water to the sink, but that, from outward appearances, the cut-off under the hall floor seemed to be the one to check the flow of water to the sink, though, as demonstrated by the freezing and bursting of the pipe here involved, that was not the fact. The trial court submitted to the jury a special interrogatory, which it answered and returned with its verdict, as follows: "Did the defendant Gowman, under all the circumstances of this case, at and immediately prior to the time of the alleged freezing and bursting of the water pipe, act as an ordinarily prudent man would have acted relative to the water pipe? Ans. Yes."

The principal contention made by counsel for the trust company is that the trial court erred in refusing to dispose of the cause in its favor as a matter of law, upon its motions for nonsuit, for instructed verdict, and for judgment notwithstanding the verdict. It is argued that the trust company was entitled to have the cause so disposed of: (1) Because of failure of proof showing any negligence on the part of the trust company; and (2) because the evidence conclusively showed that whatever damage the clothing company suffered was the result of its own negligence. We will notice these in order.

[1] Was there sufficient evidence to sustain the jury's conclusion that the trust company's negligence was the proximate cause of the damage? We ignore, for the present, the question of the clothing company's contributory negligence. Had the trust company been in the actual occupancy of the second floor as owner instead of such occupancy being by its tenant Gowman, it seems to us there would be but little room for serious argument in defense of the trust company, in view of the well-recognized necessity of taking precautions against the bursting of water pipes by freezing and the means readily at hand on that floor to exercise such precaution. The trust company actually knew of the cut-off in the floor of the hall, and, in the absence of evidence showing to the contrary, we think the jury were warranted in believing that the trust company also knew that the cut-off in the toilet room would stop the flow of water to the sink; the placing of the pipe leading from the toilet to the sink in the storeroom being before Gowman's tenancy commenced, and done presumably at the instance of the trust company, the owner of

the building. Now, if all this knowledge of the trust company, which, we conclude, the jury were warranted in believing it possessed, touching the means at hand for cutting off the water to prevent freezing, had been in possession of Gowman, counsel for the trust company might well argue that it was Gowman's negligence in not shutting off the water flowing to the sink which was the proximate cause of the damage. But it was the duty of the trust company, as owner of the building, to inform Gowman of the means provided by it to shut off the water flowing to the sink, either by specific directions, as it did relative to the cut-off in the hall floor, and other cut-offs upon Gowman's leased premises, or by having the plumbing so constructed in its building as to render it apparent to Gowman upon reasonable inspection that the cut-off in the toilet room would stop the flow of water to the sink. In view of the apparent condition of the plumbing, indicating, as testified to by the plumbers, that the cut-off in the hall would stop the flow of water to the sink, as well as the flow to the dental rooms, and the other circumstances the evidence tends to show, we think the jury was justified in making their special finding, which, in effect, exonerated Gowman from all negligence in his failure to cut off the flow of water to the sink by the use of the cut-off in the toilet room, and that the negligence of the trust company induced Gowman to so act, and thus became, as we think the jury could rightfully conclude, the proximate cause of the damage. Among the decisions called to our notice dealing with the negligence of tenants on upper floors causing damages to those on lower floors, the following are of interest: *Lederer v. Fox*, 151 Ill. App. 300; *McCarthy v. York County Savings Bank*, 74 Me. 315, 43 Am. Rep. 591; *Allen v. Smith*, 76 Me. 335; *Kenny v. Barns*, 67 Mich. 336, 34 N. W. 587; *Lebensburger v. Scofield*, 155 Fed. 85, 86 C. C. A. 105, 12 L. R. A. (N. S.) 1025, and note.

These decisions, however, turn upon the question of the negligence of the upper tenant, and are of but little aid here, in view of the jury's finding, exonerating Gowman, the upper tenant, from negligence, which finding, we conclude, was justified by the evidence. The following decisions are of interest, touching the question of a landlord's negligence in allowing water to escape in upper stories under his control, thereby causing damage to his tenant's goods occupying a lower story: *Priest v. Nichols*, 118 Mass. 401; *Freidenburg & Co. v. Jones*, 63 Ga. 612; and our own recent decision in *La Vette v. Hardman's Estate*, 137 Pac. 454.

These decisions, however, cannot be said to be directly in point upon the exact question here involved, nor has any decision come to our notice which can be said to be exactly in point. We think, however, the logic of the decisions above noticed, relating to negligence of tenants and landlords controlling

upper floors resulting in damage to tenants occupying lower floors, support the conclusion that the facts of this case warranted the jury in finding that the negligence of the trust company was the proximate cause of the injury here complained of, in that such negligence resulted in Gowman's failure to shut off the water flowing in the pipe to the sink. Our attention has been called to *Buckley v. Cunningham*, 103 Ala. 449, 15 South. 826, 49 Am. St. Rep. 42. That decision, however, in so far as it may be regarded as applicable to this situation, is seemingly not in harmony with our views expressed in *Le Vette v. Hardman's Estate*, supra.

[2] Was the evidence such as to enable the court to determine, as a matter of law, that the clothing company's contributory negligence was the proximate cause of the damage suffered? We think not. It is true there was, in the basement occupied by the clothing company, a cut-off which would, if used, have stopped the flow of water to the entire upper floor. The failure of the clothing company to stop this flow of water to the upper floor and thereby prevent freezing, by the use of this cut-off, is claimed to be the principal act of contributory negligence on its part. We have seen that the tenancies were entirely separate. It seems quite clear to us that the clothing company would have no more right to turn this cut-off and stop the flow of water to the upper floor than it would to go off its own leased premises and stop the flow of water to that floor. That pipe and the water flowing through it, while upon the clothing company's leased premises, was not for its use, and was no more a part of its leased premises than as if it had been, in fact, physically off such premises. The argument amounts, in substance, to this: That the clothing company did not anticipate the negligence of those who were in control of, or responsible for, the taking of proper precaution to prevent the freezing and bursting of water pipes on the upper floor, which floor, we have noticed, was no part of the premises leased by the clothing company. While it may be contributory negligence, under some circumstances, not to anticipate fault in others, yet it cannot be said, as a matter of law, that it was so on the part of the clothing company under the circumstances here shown. *Thompson on Negligence*, §§ 190, 191. The clothing company had occupied the ground floor and basement of this building for a number of years. It had manifestly never had occasion to anticipate that proper precaution would not be taken by those in control of the upper floor to prevent freezing and bursting of the water pipes on that floor; though it is apparently conceded that in the climate of Spokane in a building such as this, without any other heat than such as the tenants themselves furnished, it was necessary, during the winter months, to take such precautions. We have had occasion to deal with the question of damages occurring

upon leased premises as between the landlord and the tenant of the particular premises upon which the claimed negligence occurred in *Howard v. Washington Water Power Co.*, 75 Wash. 255, 134 Pac. 927, and *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092. This, however, is not a case of the clothing company exercising the proper control and care over its own leased premises, but, so far as its contributory negligence is concerned, it becomes a question of its anticipating the negligence of others upon premises which it did not occupy.

[3] Some contention is made rested upon the duty of these tenants, to wit, the clothing company and Gowman, to make "interior repairs" upon their respective leased premises as provided in their leases. We are unable, however, to see that this provision touches any duty of the clothing company as to needed repairs upon Gowman's premises, defective condition of plumbing therein, or negligence on the part of Gowman or the trust company in failing to properly control the water on that floor, in view of the fact that the respective tenancies were entirely separate and independent of each other.

We think what we have said disposes, in substance, of the numerous assignments of error made by counsel for the trust company, and that further discussion is not called for.

The judgment is affirmed.

FULLERTON, MORRIS, and MOUNT, JJ., concur.

#### CONGDON et ux. v. AUMILLER et al. (No. 11,605.)

(Supreme Court of Washington. May 16, 1914.)

#### 1. APPEAL AND ERROR (§ 562\*)—RECORD—TRANSCRIPT—AFFIDAVITS.

Affidavits in support of motions in the trial court were not made a part of the record on appeal by being included in the clerk's transcript of the files in his office, as they were in the nature of evidence, which could only be brought up by a statement of facts, and hence were not entitled to consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495-2499; Dec. Dig. § 562.\*]

#### 2. DISMISSAL AND NONSUIT (§ 60\*)—INVOLUNTARY—WANT OF PROSECUTION.

The court did not abuse its discretion in dismissing for want of prosecution an action commenced in 1906, which by stipulations was continued until June, 1909, when a demurrer was filed by defendants, and nothing more was done until 1911, when defendants moved for a dismissal, plaintiffs being without any attorney after October, 1907, save a dissolved firm, no member of which appeared to have authority to represent them, and, when an attorney was secured in April, 1913, he attempted to call up the demurrer instead of taking steps to purge the record of the motion to dismiss.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.\*]

#### 3. DISMISSAL AND NONSUIT (§ 60\*)—INVOLUNTARY—MOTION FOR DISMISSAL.

The court did not err in first disposing of a pending motion to dismiss the action for want of prosecution without regard to plaintiffs' notice calling up a demurrer filed by defendants about four years previously, during which time nothing had been done.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.\*]

#### 4. DISMISSAL AND NONSUIT (§ 60\*)—INVOLUNTARY—WANT OF PROSECUTION.

A plaintiff who hales a defendant into court assumes, and as long as he has the affirmative of the main issue, retains the duty of diligent prosecution, and plaintiffs could not prevent a dismissal because defendants failed to call up their demurrer to the complaint.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.\*]

Department 1. Appeal from Superior Court, Yakima County; E. M. Card, Judge.

Action by Chester A. Congdon and another against Anna G. Aumiller and another. From a judgment dismissing the action for want of prosecution, plaintiffs appeal. Affirmed.

Wende & Taylor and E. B. Velkanje, all of North Yakima, for appellants. Lee C. Delle, of North Yakima, for respondents.

ELLIS, J. This is an appeal from a judgment dismissing an action for want of prosecution. The complaint was filed and the summons was served upon the defendants on October 15, 1906. The complaint and summons were signed by E. B. Preble as attorney for plaintiffs. The defendants demurred to the complaint on all of the statutory grounds on October 31, 1906. On January 11, 1907, an order was entered granting leave to the defendants to withdraw their demurrer and answer the complaint within 15 days. On June 6, 1907, a stipulation between counsel for the respective parties was filed giving the defendants until August 15, 1907, in which to file an answer or such other pleadings as they desired, or to move the court for such other orders or relief as they might deem necessary. On October 1, 1907, E. B. Preble was appointed superior judge. On May 6, 1909, another stipulation of exactly the same purport was signed by counsel for the respective parties, extending the defendants' time for further action until June 15, 1909. Judge Preble signed this stipulation as attorney for plaintiffs. On June 15, 1909, the defendants again demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The record shows that this demurrer was served upon E. B. Preble, as plaintiffs' then attorney. On February 2, 1911, the defendants moved to dismiss the action for want of prosecution. This motion recites that the plaintiffs had abandoned the action and, for more than 18 months prior to the filing of the motion, had no attorney in charge of the cause, nor any attorney of record or known to the

defendants. The motion also recites that it is based upon the record, and files an affidavit of one of the attorneys for the defendants. Proof of service of this motion was filed on February 3, 1911, reciting service by delivery of a copy thereof, and of the affidavit thereto attached, to Allen S. Davis and J. O. Cull, attorneys of North Yakima, who were partners of Judge Preble at the time he signed the complaint, and also reciting service of the motion by mailing copies thereof, and of the affidavit thereto attached, to each of the plaintiffs at Duluth, Minn., and that Duluth, Minn., was the place of residence and post office address of each of the plaintiffs.

On February 14, 1911, Snively & Bounds, attorneys of North Yakima, served and filed in the action a notice that they appeared and represented the plaintiffs therein. On April 12, 1911, an affidavit of Judge Preble was filed, setting forth certain verbal agreements for indefinite continuance pending propositions for settlement and an understanding that the litigation might be resumed at the convenience of both parties.

On April 18, 1913, the plaintiffs caused to be served upon the attorney for the defendants and filed in the cause a sworn substitution of attorneys, reciting, in substance, that the firm of attorneys of which Judge Preble had been the senior member had been the plaintiffs' attorneys of record since the commencement of the action, and that, "so far as plaintiff is advised, they still are such attorneys of record, although said firm no longer exists"; that the plaintiff has no recollection of ever having authorized the substitution of H. J. Snively as attorney, and revokes the appointment of every attorney for the plaintiffs theretofore appointed, and appoints E. B. Veilkanje as sole attorney for plaintiffs, with authority to employ such associate counsel as he may deem best. On the same day, Mr. Veilkanje, as attorney for plaintiffs, served and filed a notice of argument of the last demurrer of the defendants, which had been filed on June 15, 1909. On the same day, April 18, 1913, the defendants renewed their motion to dismiss for want of prosecution, which had been served and filed on February 3, 1911. The motion for dismissal was heard by Judge Ernest M. Card, a visiting judge, who on June 9, 1913, entered an order dismissing the action for want of prosecution. This order recites the appearance of counsel for both sides at the hearing, and that the order was made "after fully examining all of the records and files in this cause, and the affidavits presented and filed, and after listening to the arguments of the respective counsel and all and singular the facts and arguments being presented to, heard and considered by, the court, and the court being fully advised in the premises." The appeal is prosecuted from that order.

[1] The respondents interpose a motion in this court to strike from the transcript the affidavit of Judge Preble referred to in our

statement of the case. This affidavit was neither attached to nor referred to in any motion. The appellants failed to propose or have certified any statement of facts. The case is here upon a transcript of the files in the clerk's office certified by the clerk. In this transcript are copies of the affidavit above referred to and an affidavit of the respondents' attorney, apparently filed in support of his original motion to dismiss on February 3, 1911. These affidavits are not properly a part of the record. They are in the nature of evidence which can only be brought to this court by a statement of facts properly proposed, settled, and certified. We said in *Hayworth v. McDonald*, 67 Wash. 496, 499, 121 Pac. 984, 986: "We have, in a long line of cases, held that affidavits filed as proof of particular facts cannot be made a part of the record in this court by the mere certification of the clerk." See, also, to the same effect, *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873; *Haines & Spencer v. Kelley*, 57 Wash. 219, 106 Pac. 776; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Spoar v. Spokane Turnverein*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190; *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837; *State v. Moran*, 66 Wash. 588, 120 Pac. 86; *Gazzam v. Zimmer*, 68 Wash. 41, 122 Pac. 366; *State v. Rice*, 72 Wash. 104, 129 Pac. 911; *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Powers v. Washington Portland Cement Co.*, 139 Pac. 615; *Agens v. Powell*, 139 Pac. 873; *Mattson v. Eureka Lumber Co.*, 140 Pac. 377. The statute governing appeals, orderly procedure, uniformity and certainty of practice, fairness to the trial court, and advised, intelligent action by this court all call for the observance of this rule. The affidavits cannot be considered a part of the record in this appeal.

[2, 3] The record proper, which alone we are at liberty to consider, carries conviction that the court did not abuse its discretion in dismissing the action. It had been pending since October 15, 1906. The only affirmative measure thereafter taken looking even to the formation of an issue was taken by the respondents. Continuances by stipulation, presumably to meet the convenience of both parties, were had, the last extending in action to June 15, 1909. The respondents then filed a demurrer presenting an issue of law. So the case remained until February, 1911, when the respondents moved for a dismissal. The case again stood pending upon this motion until April 18, 1913. During all of the time since October, 1907, the appellants, as fairly appears from their substitution of attorneys, were, "so far as they were advised," without any attorney, save a dissolved firm, no member of which, as an individual, so far as the record shows, had any authority to represent them. When, in April, 1913, the appellants finally secured an attorney, they took steps, not to purge the

record of the pending motion to dismiss, but to call up the demurrer. The trial court committed no error in disposing of the latter motion first without regard to the appellants' belated notice seeking to call up the demurrer, which ignored the pendency of a motion going to their very right to prosecute the action. The case is thus clearly distinguishable from the situation in *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519, upon which the appellants mainly rely. It is also distinguishable in another particular. That case had been pending less than two years when the motion to dismiss was made, only a few months after the demurrer was filed. The court, in effect, held that the refusal to dismiss, under the circumstances, was not an abuse of discretion—a very different thing from a holding that a dismissal, even under the circumstances there shown, would have been a positive abuse of discretion. The same is true of the decision in *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086.

[4] Moreover, what is intimated, rather than said, in the *Bignold* Case as to the duty of a defendant to notice his demurrer for hearing was unnecessary to the decision and is, in any event, contrary to the later decisions of this court. In *Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112, on record closely parallel to that here presented, it was said: "The discretion of the court in dismissing this action, under the circumstances shown by the record, cannot be questioned, nor do we think that the fact that the statute permits the defendant to bring a case on to hearing deprives the court of its unquestioned common-law, if not inherent, power to clear its dockets of abandoned or stale actions." See, also, *First National Bank v. Hunt*, 40 Wash. 190, 82 Pac. 285.

It seems consonant with reason that a plaintiff who hales a defendant into court assumes and, so long as he has the affirmative of the main issue, retains the duty of diligent prosecution. *Neff v. Neff*, 82 Wash. 82, 72 Pac. 1011; *Arthur v. Washington Water Power Co.*, 42 Wash. 481, 85 Pac. 28; *Rehmke v. Fogarty*, 67 Wash. 412, 107 Pac. 184.

As said by the Supreme Court of California in a case also closely analogous to this: "But it is said that it was not the duty of the appellants to have urged the hearing of the demurrer; that this should have been done by the respondents, who filed it; and hence that the court was wrong in assuming that the laches of the appellants justified a dismissal of the action. The appellants brought the action; it would seem that upon them rested the burden of prosecuting it to a finality, and that as a step in that direction, from the facts then appearing to the court, they should have taken measures to have the demurrers determined, so that the action could progress." *Kubli v. Hawkett*, 80

Cal. 638, 641, 642, 27 Pac. 57, 58; *Simmons v. Keller*, 50 Cal. 38; *Hassey v. South San Francisco H. & R. Ass'n*, 102 Cal. 611, 36 Pac. 945; *San Jose L. & W. Co. v. Allen*, 129 Cal. 247, 61 Pac. 1083; *Mowry v. Weisenborn*, 137 Cal. 110, 69 Pac. 971; *Gray v. Times-Mirror Co.*, 11 Cal. App. 155, 104 Pac. 481; *Lambert v. Brown*, 22 N. D. 107, 132 N. W. 781.

There was no abuse of the trial court's discretion.

The judgment is affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

## STATE v. ASOTIN COUNTY. (No. 11,430.) (Supreme Court of Washington. May 18, 1914.)

### 1. STATES (§ 192\*)—CAPACITY TO SUE—SUIT IN NAME OF ATTORNEY GENERAL.

Laws 1909, c. 135, created the office of state commissioner of horticulture, and provided for the appointment of district inspectors, by section 14 divided the state into districts, by section 63 provided that the district inspectors should furnish to county auditors a statement of the expenses of their office for work done in such counties, and by section 64 required county commissioners to levy a tax for the expenses of horticultural inspection to be turned over to the state treasurer for the benefit of the district fund. Laws 1911, c. 43, relating to salaries and expenses of inspectors, by section 3 provided that county treasurers should remit to the state treasurer the amounts assessed for horticultural inspection, and by section 4 that the Attorney General should bring action against any county failing to pay the amount assessed therefor. Const. art. 3, § 1. 21, makes the Attorney General an executive officer of the state to perform duties prescribed by law. *Held*, that the Attorney General might bring an appropriate action in the name of the state to collect the money due from a county for horticultural purposes.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 185; Dec. Dig. § 192.\*]

### 2. STATUTES (§ 125\*)—SUBJECTS AND TITLES—CONSTITUTIONAL PROVISIONS.

Laws 1911, c. 43, entitled "An act relating to salaries and expenses of horticultural inspectors making an appropriation therefor," etc., by section 4 directing the Attorney General to bring an action against a county to collect the amount assessed for horticultural purposes, did not violate Const. art. 2, § 19, providing that no bill shall embrace more than one subject, which shall be expressed in the title, since the method of recovering expenses was incidental to the general purpose expressed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 187-191; Dec. Dig. § 125.\*]

### 3. STATUTES (§ 109\*)—SUBJECTS AND TITLES—CONSTITUTIONAL PROVISIONS.

Under Const. art. 2, § 19, providing that no bill shall embrace more than one subject, which shall be expressed in its title, it is not necessary that the title of an act should be a complete index to its provisions; but it is sufficient if it indicates to an inquiring mind the scope and purpose of the law.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 136-139; Dec. Dig. § 109.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



#### 4. AGRICULTURE (§ 3\*)—INSPECTION—CONSTRUCTION OF STATUTE—"ASSESSED OR LEVIED."

Laws 1909, c. 135, creating horticultural districts, by section 63 required district inspectors to furnish to county auditors a statement of their expenses, and by section 64 made it the duty of the county commissioners to levy a tax to meet such expenses, and Laws 1911, c. 43, relating to expenses of horticultural inspectors, by section 4 required the Attorney General to bring action against any county failing to pay the amount assessed against it therefor. *Held*, in an action against a county which had failed to levy such tax, that, reading the latter act as a continuation of the former act, the term "assessed or levied" meant nothing more than charged, so that the county was liable, even though the term "assessed or levied" could not be given effect.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

#### 5. STATUTES (§ 181\*)—REASONABLE CONSTRUCTION.

An act should not be given an interpretation which would make it absurd when susceptible of a reasonable interpretation which would carry out the manifest intent of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 268; Dec. Dig. § 181.\*]

#### 6. MANDAMUS (§ 113\*)—ACTS OF COUNTY COMMISSIONERS—LEVY OF TAX.

Laws 1909, c. 135, creating horticultural inspection districts, provided by sections 63, 64, that district inspectors should furnish to county auditors a statement of their expenses, and that county commissioners should levy a tax to meet such amount; and Laws 1911, c. 43, §§ 3, 4, required county treasurers to remit the amount assessed to the state treasurer, and instructed the Attorney General to bring action against any county failing to pay the amount assessed for such purposes. *Held* that, upon the county commissioners' failure in the primary duty of levying the tax, the state's remedy was by mandamus to compel the levy of such tax.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 239, 240, 244-248; Dec. Dig. § 113.\*]

#### 7. PARTIES (§ 51\*)—BRINGING IN NEW PARTIES.

It is permissible to bring in new parties when necessary, and to enter a judgment that will meet the merits of the case.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77-82; Dec. Dig. § 51.\*]

Department 1. Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by the State of Washington against Asotin County. Judgment for defendant, and plaintiff appeals. Remanded for further proceedings.

W. V. Tanner and R. E. Campbell, both of Olympia, for appellant. J. C. Applewhite, of Clarkston, and Sturdevant & Baily, of Asotin, for the State.

MAIN, J. The state of Washington brought this action for the purpose of recovering from Asotin county a sum of money alleged to be due from it and payable into the horticultural fund of the state. The amended complaint, omitting the formal parts, alleged as follows:

"That between the 1st day of July and the

1st day of September, in the years 1909, 1910, and 1911, the horticultural inspector for horticultural district No. 12 certified to the county auditor of Asotin county, as provided in chapter 135 of the Session Laws of 1909, statements showing the expense of his office with respect to the work done under the provisions of said act in said county during each previous year or part thereof.

"That, according to the statement so filed with the auditor of Asotin county, between the 1st day of July, 1909, and the 1st day of September, 1909, there was expended in said county during the months of May, June, July, and August of said year, for the purpose of carrying out the provisions of said horticultural act, the sum of four hundred fifty-two and 06/100 (\$452.06) dollars.

"That, according to the statement so filed with the county auditor of Asotin county, between the 1st day of July, 1910, and the 1st day of September, 1910, there was expended in said county during the months of January, February, March, April, May, June, July, and August of said year, for the purpose of carrying out the provisions of said horticultural act in said county, the sum of four hundred ninety and 47/100 (\$490.47) dollars.

"That, according to the statement so filed with the county auditor of Asotin county, between the 1st day of July, 1911, and the 1st day of September, 1911, there was expended in said county during the months of January, February, March, April, May, June, July, and August of said year, for the purpose of carrying out the provisions of said horticultural act in said county, the sum of eight hundred twenty-four and 29/100 (\$824.29) dollars.

"That the total amount expended in said county of Asotin during the years of 1909, 1910, and 1911, in carrying out the provisions of said horticultural act in said county, and which has been certified to the county auditor of said county, as heretofore alleged, and as provided in chapter 135 of the Session Laws of 1909, amounts to one thousand seven hundred sixty-six and 82/100 (\$1,766.82) dollars.

"That said amount so expended is now due and payable by said county of Asotin to the state of Washington, to be placed in the horticultural fund of the state, as provided in chapter 43 of the Session Laws of 1911.

"That said amount or no part thereof has been paid to the state of Washington, or has been paid into the horticultural fund of the state of Washington, or into the district horticultural fund of district No. 12."

To this amended complaint, a demurrer was interposed and sustained. The plaintiff elected to stand upon its amended complaint, and refused to plead further. Judgment was entered dismissing the action, from which the present appeal is prosecuted.

The ultimate question to be determined is

whether the state can maintain such an action as this against the county. The respondent, in support of the correctness of the judgment of the superior court, in its brief, makes the following contentions: First, that the state is not authorized to maintain the action; second, that chapter 43 of the Laws of 1911 violates the provision of the Constitution which requires that no bill shall embrace more than one subject, and that shall be expressed in its title; third, that the terms "assessed or levied," as used in chapter 43 of the Laws of 1911, cannot be given effect; and, fourth, that the state's appropriate remedy was by mandamus to compel the officers of the county to levy the tax necessary to meet the horticultural inspection expenses in the county.

[1] I. First, then, is the state clothed with power to institute and maintain the present action? At the legislative session for the year 1909, an act was passed entitled "An act relating to horticulture and prescribing penalties for the violation thereof and declaring an emergency." Laws of 1909, c. 135, p. 495. This act created the office of state commissioner of horticulture, provided for the appointment of a deputy and district inspectors, and defined their respective duties. By section 14 the state is divided into 15 horticultural districts. District 12 is comprised of Whitman and Asotin counties. Section 63 provides that the district horticultural inspectors shall furnish to the county auditor of each county included in their respective districts a statement showing the expenses of their office with respect to the work done under the provisions of the act in each county. By section 64 it is made the duty of the board of county commissioners, at the time of making the regular annual tax levy in each year, to include and levy a tax upon the taxable property of the county in such amount as may be necessary on account of the horticultural inspection, this tax to be levied and collected in the same manner as other taxes, and upon its collection the same to be turned over to the state treasurer for the benefit of the "district horticultural fund."

In the year 1911 the Legislature passed an act entitled "An act relating to salaries and expenses of horticultural inspectors, making an appropriation therefor, and declaring an emergency." Laws of 1911, c. 43, p. 141. Section 3 of this act provides that the county treasurers of the several counties shall remit to the state treasurer the amount assessed against the counties for purposes of horticultural inspection, and shall pay to the state treasurer such amounts as were then due and owing, or should thereafter become due and payable to the state treasurer. Section 4 provides: "The Attorney General of the state of Washington is hereby instructed to bring an action against any county or counties which have failed to pay the amount assessed or levied against said counties by

horticultural inspectors for said horticultural purposes."

Asotin county failed to make the levy as required by the act of 1909. Consequently no remission to the state treasurer from that county was made as required by the act of 1911. The purpose of the present action was to recover a judgment against the county for the amount of the expenses which had been incurred by the district inspectors in that county, and which had not been paid into the state treasury.

It is argued that the state cannot maintain this action because the Legislature has not authorized it. Section 4 of the act of 1911, above quoted, instructs the Attorney General to bring the action. But it is claimed that, since the statute does not specify that it shall be brought in the name of the state, it cannot be so brought. This contention cannot be sustained. By section 1 of article 3 of the Constitution the Attorney General is made one of the executive officers of the state. By section 21 of this article it is provided that he shall be the legal adviser of state officers, and shall perform such other duties as may be prescribed by law. The function of this officer is to represent the state in legal matters and proceedings. When the Legislature directed him to bring an action against any county or counties for the purpose of collecting moneys which, by section 3 of the act, were made due and payable to the state treasurer, it was certainly contemplated that such action would be instituted in the name of the state, whose representative and counselor the Attorney General is.

[2, 3] II. The title of the act, the sufficiency of which is questioned, is, "An act relating to salaries and expenses of horticultural inspectors," etc. Section 19 of article 2 of the state Constitution provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." It is claimed that the title of the act is not sufficiently broad to include that part of the subject-matter thereof which directs the Attorney General to bring an action against the county. It is not necessary that the title of an act under this constitutional provision should be a complete index to its provisions. *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *State ex rel. Zenner v. Graham*, 34 Wash. 81, 74 Pac. 1058; *Seattle & L. W. W. Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845. It is sufficient if it indicates to an inquiring mind the scope and purpose of the law. The title may be general, and will include all matters incidental and germane thereto. In *State ex rel. Jones v. Clausen*, 138 Pac. 653, in construing this provision of the Constitution, it was said: "The Constitution does not require that a title shall be an index to the body of the act. It is enough if it indicates to the inquiring mind the scope and purpose of the law. The title may be general, and all matters incidental or

germane thereto may be written into the body of the law. This has been declared so often by the court and is so familiar that a list of the cases would occupy space that had better be devoted to other uses." The act by its title related to salaries and expenses of horticultural inspection. The method provided by section 4 for recovering these salaries and expenses was a matter which was incidental and germane to the general purposes of the act as expressed in the title.

[4] III. Section 4 of the act of 1911, already set out, required the Attorney General to bring an action against any county which had failed to pay the amount "assessed or levied against said counties by horticultural inspectors for said horticultural purposes." Inquiry must be directed to the determination of what is meant by "assessed or levied" as used in this statute. By section 63 of the act of 1909 it is made the duty of district horticultural inspectors between the 1st day of July and the 1st day of September each year to furnish to the county auditor a statement showing the expenses of their office, together with an estimate of the expense of such work within the county for the ensuing year. By section 64 it was provided: "It shall be the duty of the board of county commissioners at the time of making the regular annual tax levy in each year to include and levy a tax upon the taxable property of such county in such an amount as they shall find will produce funds sufficient to meet the estimated expense for horticultural purposes for the ensuing year, which tax shall be known as a 'horticultural tax' and which shall be levied and collected the same as other general taxes. \* \* \*". It is apparent, therefore, that by the act of 1909 the district inspectors were only to furnish a statement showing the expenses incurred and the estimated amount for the ensuing year, and that it then became the duty of the county commissioners to make the tax levy. While the Legislature, in using the terms "assessed or levied" in the act of 1911, was somewhat imprecise in the use of its language, it seems plain that it was not there intended that the district horticultural inspectors should levy the tax. This act was in effect a continuation of the act of 1909, and must be read in the light of the provisions of that act. As already stated, it was there provided that the district inspectors should furnish a statement to the counties, and that the county commissioners should levy the tax as in other cases. In the light of these provisions it is obvious that "assessed or levied," as used in the act of 1911, means nothing more than "charged." Any other construction would defeat the very purpose of the act. The district inspectors having no power to levy a tax, it cannot be presumed that the Legislature, when providing for the collecting from the counties the amounts which had become due and payable under the act of 1909, intended to do a useless thing.

[5] An act of the Legislature should not be given an interpretation which would make it an absurdity when it is susceptible of a reasonable interpretation which could carry out the manifest intent of the Legislature. In *Endlich*, Interpretation of Statutes, § 264, it is said: "The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience, or injustice. The Legislature may be supposed to intend all of these; but it can scarcely be supposed to intend its own stultification. Accordingly, it has been said that, when to follow the words of an enactment would lead to an absurdity as its consequences, that constitutes sufficient authority to the interpreter to depart from them."

[6, 7] IV. Finally, the respondent takes the position that the state's available remedy was an action in mandamus against the county commissioners to compel the levy of the tax, and that it had no right to bring the action against the county in its present form. This argument must be upheld. We think it was not intended by the Legislature to make a charge against the general funds of the county. There is nothing in either the act of 1909 or 1911 to indicate it; but there is much suggesting the contrary. Section 64 of the act of 1909, already referred to, makes it the duty of the board of county commissioners, at the time of making the regular annual tax levy in each year, to include and levy a tax upon the taxable property of such county to meet the estimated expense for horticultural purposes, which tax shall be levied and collected the same as other general taxes. The act provides that the sum so collected shall be paid over to the state treasurer and used for purposes specially indicated. The primary duty, therefore, the violation of which sustains and justifies the proceeding or action, is a breach of duty on the part of the county commissioners. If the tax had been levied, and was in the process of collection, and for any reason its payment had been delayed by the property owner, a showing of this fact would be a complete defense to an action of this kind. In such an event the court would no doubt hold that the tax was not payable out of the general fund, and that the only remedy would be mandamus to compel the treasurer to collect by process. The principle remains the same whether the tax is in process of collection or has never been levied at all. The remedy is to reach the taxpayer and create a special fund, and not to compel the payment out of the general revenues of the county against which the horticultural expense has not been estimated as a possible liability. Nor does it follow, because the Attorney General is required to bring an action against any county which fails to pay the amount assessed or levied against such counties by the horticultural inspectors for horticultural purposes, that he can bring an ac-

tion for a money judgment. The action referred to in the statute is such an action as is made appropriate by statute or by a resort to the common law. The appropriate remedy to compel the performance of a statutory duty by a public officer is mandamus. This suit is between the state and one of its political subdivisions, and should be directed by the court in the proper way. Without assembling the cases, it may be said that, under repeated decisions of this court, it is possible to bring in new parties when necessary, and to enter a judgment that will meet the merits of the case. It would serve no useful purpose to dismiss the action and require a new proceeding to be instituted.

The cause will be remanded, with leave to bring in the proper county officials as parties to the action, and to amend the complaint so that the duty imposed by the Legislature may be required to be performed, and the money due the state brought from the source that the Legislature intended. The cause will be remanded for further proceedings as indicated.

CROW, C. J., and ELLIS, CHADWICK, and GOSE, JJ., concur.

#### STATE v. PITNEY. (No. 11565.)

(Supreme Court of Washington. May 16, 1914.)

##### 1. CONSTITUTIONAL LAW (§ 230\*)—LICENSES (§ 7\*)—EQUAL PROTECTION OF LAWS.

Laws 1913, c. 134, forbidding the use, in connection with the sale of goods, of trading stamps, unless a license fee be paid, does not violate the right of citizen to the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230;\* Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

##### 2. CONSTITUTIONAL LAW (§ 48\*)—DETERMINATION OF CONSTITUTIONALITY.

A law is to be sustained as constitutional unless its invalidity is so apparent as to leave no reasonable doubt on the question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

##### 3. CONSTITUTIONAL LAW (§ 81\*)—"POLICE POWER."

The "police power" includes all regulations designed to promote the public convenience, general welfare, and general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7766.]

##### 4. CONSTITUTIONAL LAW (§ 81\*)—DETERMINATION OF CONSTITUTIONALITY—PRESUMPTION.

In determining whether a law is within the police power, it need not be found that facts exist which would justify it, but it is enough that a state of facts can reasonably be presumed to exist which would justify it, in which case it will be presumed that they did

exist and that the law was passed for that reason.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

##### 5. CONSTITUTIONAL LAW (§ 287\*)—DUE PROCESS—POLICE POWER—TRADING STAMPS LAW.

Laws 1913, c. 134, in effect prohibiting, by imposing an annual license fee of \$6,000, the use of trading stamps in the sale of goods, is within the police power, and so does not violate the due process of law clause.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 905; Dec. Dig. § 287.\*]

Mount and Gose, JJ., dissenting.

En Banc. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Demurrer to information against F. S. Pitney was sustained, judgment of dismissal entered, and the State appeals. Reversed and remanded, with directions.

John F. Murphy, Rob't H. Evans, and Brightman, Halverstadt & Tennant, all of Seattle, for the State. Stroock & Stroock, of New York City, and Hughes, McMicken, Dovell & Ramsey, of Seattle, for respondent.

MAIN, J. The defendant in this case was by information charged with the crime of using trading stamps, in violation of law. At the legislative session of 1913 (Laws of 1913, p. 413), an act was passed forbidding the use in connection with the sale of goods, wares, or merchandise, of any stamps, coupons, tickets, certificates, cards, or other similar devices, unless a license fee in the sum of \$6,000 per annum be paid, as specified in the act. A violation of any of the provisions of the act was made a gross misdemeanor. To the amended information charging the defendant with the use of trading stamps, in violation of the statute, a demurrer was interposed. This was sustained by the trial court. The state elected to stand upon the amended information and refused to plead further. Thereupon a judgment dismissing the cause was entered, from which the present appeal is prosecuted.

The sole question for determination is whether the act in question violates any provision of the state or federal Constitutions.

As sustaining the judgment of the trial court, our attention is called to the following provisions of the state Constitution: Article 1, § 3, which provides that no person shall be deprived of life, liberty, or property without due process of law. Section 12 of the same article, which guarantees the equal protection to all citizens. And section 14, which prohibits excessive fines. The provision of the federal Constitution which is pointed out is section 1 of the fourteenth amendment, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

[1] That provision of the state Constitution which prohibits excessive fines need not be further noticed. For the purposes of this opinion it will be assumed that the fine of \$6,000 which the act provides for is prohibitory. In other words, the act will be considered as though it prohibited the use of trading stamps. This assumption also makes it unnecessary to determine whether the court may inquire into the amount of the tax, when the right to tax is once established, and determine whether it is prohibitive. The provisions of the federal and the state Constitutions relative to the equal protection of the laws, and due process of law, are substantially the same. That the law does not violate the right of a citizen to equal protection of the laws is settled in the cases of *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; *Sperry & Hutchinson v. Tacoma*, 68 Wash. 254, 122 Pac. 1060.

[2-5] The ultimate question for determination is whether a law which prohibits the use of trading stamps violates the due process of law clause of either the state or federal Constitutions. When the constitutionality of a legislative enactment is called in question, it will be presumed constitutional and valid until the contrary clearly appears. It is the duty of the court to sustain the law, unless its invalidity is so apparent as to leave no reasonable doubt upon the question. In *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 67 L. R. A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634, the court speaking upon this subject said: "Before proceeding to the consideration of the objections interposed by appellant to this poll tax law and these city ordinances, we deem it proper to observe that it is settled by the highest authority that a legislative enactment is presumed to be constitutional and valid until the contrary clearly appears. In other words, the courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions against its validity. And, when the constitutionality of an act of the Legislature is drawn in question, the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject."

If the law under consideration is a proper exercise of the police power, its constitutionality will hardly be denied. In determining the validity of the law, therefore, inquiry must be directed to whether its provisions come within the scope of the "police power." The early decisions define this power as extending to those regulations promulgated by or under the authority of the Legislature which had for their object the promotion of the public health, the public morals, or the public safety. Without reviewing the evolution of the law upon this subject as evidenced by the decisions of courts of last resort, it may be said that, whatever may be the limits by which the earlier decisions circumscribed the power, it has in the more re-

cent decisions been defined to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety. In *C. B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, it was said: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

In *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912a, 487, it was said: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, it was said: "The right of state Legislatures or municipalities acting under state authority to regulate trades and callings in the exercise of the police power is too well settled to require any extended discussion. In *Gundling v. Chicago*, 177 U. S. 183, 188 [20 Sup. Ct. 633, 635 (44 L. Ed. 725)], the doctrine was stated by this court as follows: 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with, or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.'"

This court, in *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, discussing the scope of the police power, used this language: "The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate the better will of the people in their social, industrial, and political devel-

opment. If, then, the executive and judicial departments unite to uphold the will of the legislative department, it may fairly be said that all reasonable men can agree that the act is essential for the preservation of the public welfare and that the Constitution does not apply."

In determining whether the provisions of a law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power. In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, speaking upon this question it was said: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

In *Home Telephone, etc., Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176, a like view is expressed. It is there said, quoting from a previous decision of the same court: "But in determining whether the Legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is a well-settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

It follows, then, that if a state of facts could exist which would justify the Legislature in forbidding the use of trading stamps, it must be presumed to have actually existed. What state of facts might reasonably have prompted the Legislature to forbid the use of trading stamps in connection with the sale of merchandise? It might reasonably be supposed or presumed that the Legislature believed that the use of these stamps would encourage indiscriminate and unnecessary purchasing by people ill able to indulge in any extravagance. Or suppose that the Legislature believed that the use of these stamps was practically forced upon certain merchants without any practical benefit resulting therefrom, and thus they were compelled to pay  $8\frac{1}{2}$  per cent. upon their gross sales for

the use of the stamps. The Legislature might reasonably have believed that the stamp companies, in order to cause the stamps to be used in a certain city, would contract with one merchant for their use, agreeing to pay him a percentage of the sums collected by them from other merchants, and then use the first contract so secured to force other merchants into using the stamps, or suffer loss of trade by failure so to do. In other words, that legitimate business was virtually coerced into paying tribute to the stamp company, a nonproducer of wealth or value.

In the case of *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323, the question before the court was whether a provision of the California Constitution which prohibited the sale of the shares of capital stock of any corporation on margin to be delivered at a future date offended against the due process of law clause of the federal Constitution. It was held that the regulation provided for in the state Constitution did not exceed the power of the state. It was said: "We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion."

In the case of *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164, there was under consideration an act of the Legislature of South Dakota which prohibited a person in the production, manufacture, and distribution of any commodity in general use, from discriminating between different sections or communities or cities of the state by selling such a commodity at a lower rate in one section than in another. The constitutionality of the law was sustained. In the course of the opinion it was said: "We must assume that the Legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the Legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the Legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction, appears from the decisions in other states. (Citing authorities.)"

The facts hypothetically stated, as well as others that might be presumed to have existed, would seem to bring the present case

within the holdings of the two cases last cited. That the law was not passed in response to "sporadic impulse or exuberant displays of emotion," but embodies a settled conviction that the use of trading stamps is harmful, is evidenced by the fact that the Legislature at two different sessions has legislated against their use, first in 1905 (Laws of 1905, p. 374) and second, in 1913, the present law. We think this act of the Legislature falls within the scope of the police power as it is now understood and defined by the courts, and therefore the Legislature did not exceed its power or offend against any constitutional provision, either state or federal, in promulgating the regulations or prohibitions found in the act. This conclusion, it must be admitted, is not in harmony with the great weight of authority, numerically speaking. But many, if not most, of the decisions that have held trading stamp laws inimical to the due process of law clause found in the Constitutions, were decided when the police power was defined as having a more limited scope than it has at the present time.

In considering the law of 1905 prohibiting the use of trading stamps, this court, in *Leonard v. Bassindale*, 46 Wash. 301, 89 Pac. 879, held that law unconstitutional. The holding in that case is the exact opposite of the conclusion we have reached in this case. That decision will therefore be overruled. The opinion in that case contains a suggestion that the court there concluded to follow the weight of authority, even though it would have been inclined, were the question one of first impression, to sustain the law. It was there said: "While we might, were the question one of first impression in the courts, entertain a different opinion, we have felt impelled to follow the great weight of authority and hold the statute constitutional, especially in view of the fact that the federal courts have shown an inclination to hold the statute in contravention of the Constitution of the United States."

As already stated, the due process of law clauses in the state and federal Constitutions are substantially the same. While a number of the subordinate federal courts have held that a trading stamp law contravenes the due process of law clause of the federal Constitution, the United States Supreme Court, so far as we are informed, has never spoken upon that question. The result of this case will offer an opportunity to have the question there presented and finally determined by the court of highest authority.

The judgment will be reversed, and the cause remanded, with directions to the superior court to overrule the demurrer.

CROW, C. J., and ELLIS, CHADWICK, FULLERTON, PARKER, and MORRIS, JJ., concur. MOUNT and GOSE, JJ., dissent.

**CITY OF COLORADO SPRINGS v. PIKE'S PEAK HYDRO-ELECTRIC CO. (COLORADO SPRINGS ELECTRIC CO., Intervener). (No. 6404.)**

(Supreme Court of Colorado. May 4, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 272\*)—MUNICIPAL FUNCTIONS.**

While the erection and maintenance of public utilities, such as an electric light plant for lighting streets, etc., is not a function governmental in its nature, it is strictly a municipal purpose, as intended to promote the comfort and convenience of the citizens.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 727; Dec. Dig. § 272.\*]

**2. ELECTRICITY (§ 4\*)—FRANCHISES—CONSTRUCTION—"MUNICIPAL PURPOSES."**

A franchise by which a city authorized the construction of an electrical power plant, required the grantee to furnish to the city such arc lights as might be required for lighting its streets at a certain rate per light, and a certain number of incandescent lights and arc lights for city buildings free of cost, and further provided that there should be furnished to the city free of cost such electrical power, not exceeding 50 horse power, as might be necessary for use by the city for "municipal purposes," and "such other power as may be required for municipal purposes at the same prices that are paid by the most favored customer" of the grantee, provided the city gave 90 days' notice of its intention to use power in excess of 50 horse power. *Held*, that the city could require the grantee of the franchise and his assigns to furnish it electrical power in excess of the 50 horse power provided, for the purpose of operating an electric plant for lighting the streets, etc.; such a use being for "municipal purposes," within the franchise agreement.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. § 4.\*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4629.]

**3. MUNICIPAL CORPORATIONS (§§ 271, 272\*)—POWERS—AUTHORITY OF LEGISLATURE.**

The Legislature has power to authorize cities to erect and maintain electric light plants, waterworks, etc., to supply its citizens, to be paid for from taxes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 726, 727; Dec. Dig. §§ 271, 272.\*]

**4. ELECTRICITY (§ 11\*)—FRANCHISE—CONSTRUCTION.**

Where a franchise by which a city authorized the erection of an electrical power plant merely provided that the grantee should furnish to the city such arc lights as "may be required by said city" for lighting the streets at a certain rate, as well as such other power as might be required for municipal purposes at prices paid by the most favored customer of the grantee, the city would not be bound by implication to take any arc lights from the grantee, in the absence of an express provision requiring it to do so; the contract merely giving the city an option to purchase power from the grantee.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 11.\*]

**5. ELECTRICITY (§ 11\*)—CONTRACTS—CONSIDERATION.**

The grant by a city of a valuable franchise, authorizing the grantee to erect and maintain an electrical power plant, was sufficient consideration for an option contained in the franchise,

giving the city the right to free use of certain electrical power for municipal purposes and the right to purchase any additional amount required.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 11.\*]

**6. ELECTRICITY (§ 11\*)—FRANCHISES—CONSTRUCTION.**

Under a contract by which a city granted a franchise for the construction and maintenance of an electrical power plant, which provided that the grantee should furnish to the city, in addition to certain free power, such other power "as may be required for municipal purposes at the same prices that are paid by the most favored customer," the city was not required to take the minimum amount of power contracted for by the most favored customer of the power company in order to demand such additional power; the word "required" only referring to the power which might be necessary for municipal purposes as provided, and the word "price" meaning the rate fixed by the contract for the sale of the power to such favored customer, irrespective of such incidental considerations as that the contract with the most favored customer, which was an electric company, avoided competition between it and the grantee of the franchise, and that it was to furnish transmission lines for a part of the distance, etc.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 11.\*]

**7. ELECTRICITY (§ 4\*)—FRANCHISE—ENFORCEMENT—CONTRACTS FOR ELECTRICAL POWER.**

An electrical power company, which was bound under its franchise from a city to furnish the city with power for the operation of an electric lighting plant for lighting the streets, could not defeat an action by the city to enforce its rights under the contract, on the ground that it did not appear that the city had been authorized by vote of the electors to maintain an electric light plant, as required by statute; it not being presumed that the city would not proceed pursuant to the statutes.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. § 4.\*]

White and Garrigues, JJ., dissenting. Bailey, J., dissenting in part.

En Banc. Appeal from District Court, El Paso County; Chas. Cavender, Judge.

Action by the City of Colorado Springs against the Pike's Peak Hydro-Electric Company, in which the Colorado Springs Electric Company intervened. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

W. B. Price and C. L. McKesson, both of Colorado Springs (Ira Harris, of Colorado Springs, of counsel), for appellant. R. L. Holland and Schuyler & Schuyler, all of Colorado Springs, for appellee.

SCOTT, J. This case was submitted to the district court upon an agreed statement of facts as between the appellant, the City of Colorado Springs, and the appellee, the Pike's Peak Hydro-Electric Company. Afterward the intervener, the Colorado Springs Electric Company, was permitted to file its petition of intervention. The suit arises out of a dispute as to the construction to be given

section 9 of a franchise granted by the city to George W. Jackson, now owned by the appellee, the Pike's Peak Hydro-Electric Company.

At the time, and long before the date, of this franchise the city was the owner and in possession of certain water rights, reservoirs, pipe lines, tunnel rights, flumes, ditches, and real estate situate in the mountains in El Paso county, west of the city, and constituting a part of the water system of that city. The requirements of the city demanded the construction of a tunnel through which water was to be conducted so as to flow into the flumes and water pipes of the city. Jackson and an associate entered into a contract with the city to construct this tunnel. Unexpected obstacles intervened which made it impossible for Jackson, who had succeeded to the rights and interests of his associate, to complete the tunnel within the contract price, or at all, because of the unexpected increase in cost on account of such difficulties.

On the 8th day of September, 1898, Jackson obtained from the city a franchise authorizing the construction and maintenance of a power plant for the generation and sale of electrical power for a period of 25 years from that date. Jackson's rights under the franchise were, in substance, as follows: (1) "The right and privilege of laying, maintaining, and operating such conduits, cables, and wires in the streets and alleys within the fire limits of the city, and of erecting, maintaining, and operating such poles and wires in the streets and alleys of the city outside its fire limits as should be necessary for the transmission and sale to the city and its inhabitants, of electricity for the development of electrical power, and the right and privilege of renting space in the conduits. (2) The right and privilege of constructing, maintaining, and operating at suitable places on the lands of the city, and through the lands, rights of way for streams, reservoirs, flumes, ditches, pipe lines, and conduits of the water system of the city, dams, reservoirs, pipe lines, conduits, power houses, plants, poles, wires, and cables for the transfer and transmission of electrical power, together with the right to use from such lands such earth, stone, and dead timber as might be needed to construct such power houses, reservoirs, plants, and dams. (3) The right to divert and use for the generation of electric power all the water of any streams, ditches, flumes, pipe lines, conduits, and reservoirs of the city on condition that all water so diverted should be returned to the water system of the city unimpaired; provided that the use thereof under the contract should not diminish the flow of, nor pollute, the water; that the city should determine what constituted waste and pollution; that Jackson, his associates and assigns, should do nothing which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



would interfere with the successful operation of the city's system of water works; that the work under the contract in the city should be done under the supervision of the city; and that the city reserved its right to exercise its police power over the conduits, poles, and wires provided for by the contract."

The benefits under the franchise which the city was to receive were, in substance, as follows: (1) The completion of the tunnel on or before December 8, 1899, as specified in the original contract of 1895; (2) the necessary space in all the conduits that should be laid, and on all the poles that should be erected, for the telegraph and telephone wires of the city, and freedom of access and facilities for placing and removing them equal to those which Jackson and his associates or assigns should enjoy; (3) on the expiration of the franchise, September 9, 1923, any electrical plant used to furnish these lights and this power and any transforming station, wires, cables, and other improvements which Jackson, his associates or assigns, shall have then constructed, strung, or made for the purpose of transforming and delivering the electricity necessary to furnish these lights and this power, and a 20-inch water pipe line from Lake Moraine to some point in the town of Manitou, were to become the property of the city.

There was also the obligations upon the part of Jackson contained in section 9 of the franchise, concerning which the dispute in this action arises. This section provides as follows: "Sec. 9. The said George W. Jackson, his associates or assigns, shall within one year after the completion of the Strickler tunnel and during the remainder of the term of this grant, furnish to the city of Colorado Springs, such arc lights of standard 2,000 candle power each, as may be required by said city for the purpose of lighting its streets, alleys and public grounds at the rate of five dollars and fifty cents (\$5.50) per light per month, said lights to be used from sunset to sunrise during each and every day of each and every month; also, free of cost, such arc and incandescent lights as may be required by the said city for the lighting of the buildings belonging to the said city, not exceeding five arc lights of 2,000 candle power each, and 200 incandescent lights of 16 candle power each, or the equivalent; also, free of cost, such electrical power, to be delivered at such points in the city of Colorado Springs as the city may specify, as may be necessary for use by said city for municipal purposes, said power not to exceed fifty (50) horse power; and will at all times during the term of this grant furnish to the said city such other power as may be required for municipal purposes, at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, provided, the said city give the said George W. Jackson, his asso-

ciates or assigns, ninety days notice of its intention to use any of said power in excess of fifty horse power, and the amount required."

Upon the credit of this franchise Jackson was enabled to secure a large amount of money with which to discharge his debts and proceed with the completion of the tunnel. He afterward organized a corporation, to which he assigned all his rights and privileges under the franchise, known as the Pike's Peak Power Company, which company later transferred its interest in the matter to the Pike's Peak Hydro-Electric Company, a corporation and the appellee here. This franchise was before the United States Circuit Court of Appeals upon the validity of a subsequent ordinance of the city purporting to repeal the ordinance granting the franchise. 105 Fed. 1, 44 C. C. A. 333.

Many phases of the Jackson franchise were there discussed, and counsel for both parties to this proceeding cite the case and to some extent rely on it. The principal question in that case, however, was the validity of the repealing ordinance, and such ordinance was held to be in violation of section 10, art. 1, of the federal Constitution, which prohibits the passage of a law impairing the obligation of contracts, and the fourteenth amendment of the Constitution, which forbids the taking of property without due process of law. Here both parties stand upon the validity of the ordinance granting the franchise in question, but contend for a widely different construction of some of its provisions. In addition to what has been said, the agreed statement recites: (1) That Jackson or his assigns completed the tunnel referred to in the ordinance, known as the Strickler tunnel, and has constructed, and is now operating, by means of water taken under the ordinance from the water system of the city of Colorado Springs, an electric power plant for the purpose of generating electric current for all purposes to which it may be applied. (2) That the defendant has heretofore been furnishing to the plaintiff free such arc and incandescent lights as plaintiff has demanded, as and for the arc and incandescent lights which the plaintiff, under section 9 of said ordinance, is entitled to receive free of cost, and no controversy now exists between the parties hereto as to such arc and incandescent lights; that the defendant is now supplying to the plaintiff arc lights for the purpose of lighting the streets and alleys of the plaintiff, and charging for the same at the rate of \$5.50 per month, under the provisions of section 9 of said ordinance. (3) That the Colorado Springs Electric Company was, on January 31, 1903, and now is, a corporation organized under the laws of the state of Colorado, and engaged in the business of supplying to the inhabitants of the city of Colorado Springs electric current for light, power, and other purposes; that on or about January 31, 1903, the appellee made and entered

into a contract with the said the Colorado Springs Electric Company, which said contract is still in force, and which covers a period of sixteen (16) years from its date, and which said contract said the Colorado Springs Electric Company has the option to renew or extend for an additional period of seven years; that by said contract the defendant agreed to deliver and now is delivering electric power to said the Colorado Springs Electric Company for the price under the conditions in said contract set forth; that the price named in said contract is the lowest price that is being paid the defendant by any of its customers. (4) That, prior to the filing of this agreed case, plaintiff gave the defendant notice of such intention on its part, and demanded of defendant that on and after 90 days from the date of such notice it furnish and deliver to the plaintiff, at the price of .585 cents per kilowatt hour, or at such price as said the Colorado Springs Electric Company is paying for the same, electric power in excess of 50 horse power to the amount of 10,000 kilowatt hours per day, the same to be used by the plaintiff for the municipal purpose of operating an electric light plant whereby such power shall be distributed throughout the city of Colorado Springs, to be used for lighting the streets, alleys, parks, and other public grounds and the buildings of said city, and also whereby such power shall be sold to and distributed among the inhabitants of said city to be used in lighting their residences, grounds, and places of business; that, although the defendant is now able to generate and deliver, and is now generating by means of water system of the plaintiff, all the electric power and current necessary to comply with the above-mentioned demand of the plaintiff, the defendant immediately notified the plaintiff that it would decline at any time to furnish the plaintiff such power, or any part thereof, for the purposes aforesaid, at the price paid therefor by said the Colorado Springs Electric Company, and wholly denied any duty or obligation on its part so to do; and that the defendant has at all times since denied that there was any duty or obligation resting on it under section 9 of said ordinance to furnish such electric power to the plaintiff for the purposes above mentioned or at the price aforesaid. (5) The plaintiff claims that the said the Colorado Springs Electric Company is the most favored customer of the defendant power company.

The ordinance granting the franchise and the contract between the Pike's Peak Hydro-Electric Company and the Colorado Springs Electric Company, referred to in the agreed statement, are set out in full as exhibits.

The prayer of the city under the agreed statement is: "The plaintiff claims it is entitled to, and prays for, a judgment against the defendant decreeing and finding that, under section 9 of said ordinance, it is the duty of defendant, 90 days after this date, to de-

liver to plaintiff electric power in excess of 50 horse power to the amount of 10,000 kilowatt hours per day at and for the price paid by the Colorado Springs Electric Company, for the purpose of operating the electric light plant hereinabove mentioned, for the purposes mentioned, and ordering and directing said defendant to deliver such power to plaintiff at said time, or at any time thereafter that plaintiff may be ready to receive it at and for the price aforesaid."

The Colorado Springs Electric Company was permitted to intervene. Its contract with the defendant was not made until several years after the date of the Jackson franchise, and was made with knowledge and in the light of that ordinance. Not only is the franchise referred to in that contract, but it is a singular and unusual fact that the parties to the contract specifically state therein their disagreement as to the construction to be placed on section 9, now in controversy, though in this case they appear to be in entire harmony in that particular.

This full knowledge of the terms of the Jackson franchise and the difference in the matter of its construction is clear from the reading of paragraph 11 of the contract between the defendant and the intervener as follows: "(11) It is understood and agreed that this contract is in no wise to be considered as a waiver by the power company of any of its rights under the said franchise granted to George W. Jackson by the city of Colorado Springs, and that the power company may, at any time during the life hereof, and at any time after it shall be in position to furnish the lights and power herein referred to, demand of the city of Colorado Springs that it permit the power company to furnish to the city of Colorado Springs, and that the city purchase from the power company the lights and power provided for in and upon the terms and conditions mentioned in section 9 of the said Jackson franchise for the remainder of the term of said franchise; and it is agreed that, when the said city of Colorado Springs, voluntarily or involuntarily, permits the power company to furnish the lights and power as provided in section 9 of said Jackson franchise, for the remainder of the term thereof, the electric company shall assume and perform all of the obligations imposed by the said section, so far as such obligations relate to the supply of lights and power, using its own distributing system for that purpose, upon receiving an assignment from the power company in due form of all its rights under the said section, which assignment the power company agrees to make; but the electric company shall in no way assume any of the obligations of the power company to construct any works or plants for carrying out the provisions of such contract, or to turn over to the city of Colorado Springs any works or plants used for performing such obligations; it being understood between the parties hereto that the

electric company shall assume the obligations as to supplying light and power of said section 9 of the Jackson franchise when accepted for the remainder of the term thereof by the city, as above provided, whether such acceptance on the part of the city is voluntarily granted, and the obligations of the city voluntarily recognized, or in any matter voluntarily enforced, inasmuch as the power company is by its counsel advised, and now believes, that the said section 9 of said Jackson franchise of itself, and in connection with the other sections thereof, constitutes a binding contract obligating the city of Colorado Springs to purchase its street lights upon the terms and conditions therein mentioned, when and as soon as the power company shall be in a position, and the water power shall have been sufficiently developed to furnish said lights, while the electric company is advised by counsel, and believes, that neither said section of itself, or in connection with the other sections of said franchise, constitutes a binding contract, but is merely an option on the part of the city of Colorado Springs. The provisions of this paragraph are understood by the parties, and are to be construed as in no way conflicting with or abrogating or modifying the obligations of either part under other parts of this agreement."

It will be seen from this that, while counsel for the intervener contends strenuously here, having reference to the arc lights and the stipulated price to be paid therefor, "the city has expressly bound itself to take and use these lights, we desire most earnestly that if we are mistaken in this position, then we insist that regardless of there being an express contract, binding upon the city, there is, nevertheless, an obligation upon the city to take and pay for these lights, which is necessarily implied." Yet at the time of the contract it viewed the matter in an entirely different light, for it there said, as to section 9, and other sections of the franchise: "While the electric company is advised by counsel and believes that neither said section of itself, or in connection with the other sections of said franchise constitutes a binding contract, but is merely an option on the part of the city of Colorado Springs."

The contract then, between the intervener and the defendant, was made with full knowledge of the rights of the city under the franchise, and was clearly subject to any and all such rights.

Specifically the demand of the city in this case is for power which it claims under section 9 of the franchise to the extent of 10,000 kilowatt hours per day, and at the price paid by the Colorado Springs Electric Company as the most favored customer of the power company, for the purpose of operating an electric light plant, to be used for lighting the streets, alleys, parks, and other public grounds and the buildings of said city, and also whereby such power shall be sold to

and distributed among the inhabitants of said city, to be used in lighting their residences, grounds, and places of business. This it claims under that part of section 9, as follows: "And will at all times during the term of this grant furnish to the said city such other power as may be required for municipal purposes at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, provided the said city give the said George W. Jackson, his associates or assigns, ninety days' notice of its intention to use any of said power in excess of fifty horse power, and the amount required."

The contention of the defendant and intervener against this is:

(a) That the purpose for which the power is demanded is not a municipal purpose within the meaning of section 9 of said Jackson franchise.

(b) That such purpose and demand of the city is not within the contemplation of section 9 of said Jackson franchise, or any part thereof, and for said city to take power for said purpose is and would be in contravention of that part of section 9 of the said Jackson franchise in which, as claimed by defendant, said city contracts with George W. Jackson, his associates or assigns, to take from him or them all arc lights that may be required by said city for the purpose of lighting its streets, alleys, and public grounds at the rate of \$5.50 per light per month, and the provisions of said section 9 under which the defendant has the right to furnish such arc and incandescent lights as may be required by the said city for the lighting of the buildings belonging to said city; and because the operation of such a plant for such a purpose would contravene the provisions of section 9 and the contract and privileges which defendant enjoys thereunder, and constitute an impairment of the obligation of contracts.

(c) Because, under said section 9, and the facts therein set out, it is not the duty of defendant to furnish power to the plaintiff, unless the plaintiff will agree to take the same minimum amount of power as is taken by the Colorado Springs Electric Company, to wit, \$64,000 worth per annum, by virtue of which agreement defendant claims the prices named in the said contract between the defendant and the Colorado Springs Electric Company were fixed.

The district court sustained the contentions of defendant power company, and dismissed the action. Clearly, under the language of the agreement, to wit, "and will at all times during the term of this grant furnish to the said city such other power as may be required for municipal purposes at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, provided the said city give the said George W. Jackson, his associates or assigns, ninety days' notice of its intention to use any of said power in

excess of fifty horse power, and the amount required," the obligation to furnish power is limited only by the term "for municipal purposes." If the purpose for which the power is demanded is a municipal purpose, the city is within its right in making such a demand, unless such right is clearly negated by some other provision of the franchise.

It will be noticed that the power company was to furnish 50 horse power to the city for municipal purposes without price and without notice, and the fact that 90 days' notice was agreed upon in case of demand of such other and additional power would seem to contemplate a large amount of power, and the consequent time for preparation for its delivery.

The grant of the Jackson franchise was for a public purpose, and was so construed by Judge Sanborn in 105 Fed. 1, 44 C. C. A. 333, *supra*, for, as was said in that opinion, a grant for a private purpose is one from which neither the city nor its citizens derive any consideration or benefit. It is apparent that the grant in this case does involve consideration and benefit to the city and its citizens. Its purpose was the improvement of its waterworks and lighting systems. To sustain his conclusion, Judge Sanborn quotes from page 1144, 3 Mills' Ann. Stat., as follows: "They [city councils] shall have power to purchase or erect waterworks or electric light works; or to authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town who are taxpayers under the law voting on the question at a general or special election, by vote approve the same." The court in that case said: "The purpose of the city in making the contract of September 8, 1898, was to enlarge its waterworks, to increase its supply of water, and to furnish itself and its inhabitants with electric light."

The defendant power company contends, and the lower court held, that the words "municipal purposes," as used in the franchise, should be interpreted as meaning "governmental functions." But this contention was distinctly denied in the opinion in that case, for it was said: "Another position urged by counsel for the appellee is that the system of waterworks of this city, its streets, parks, and public grounds, are held by the municipality in its political or governmental, and not in its proprietary or business, capacity; that consequently they cannot be diverted from municipal uses, and a city council cannot make any agreement or contract relative to them which a succeeding council may not freely annul. The proposition is not novel. It has received the careful consideration of this court, and, so far as the question it presents is material to the issues in this case, it is no longer open to debate here. In *Ill. Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 282, 22 C. C. A. 171, 181, 84 L. R. A. 518, 525, this court announced its

conclusion in these words: 'A city has two classes of powers; the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. *Dill. Mun. Corp.* (3d Ed.) § 66, and cases cited in the note; *Safety Insulated Wire and Cable Co. v. City of Baltimore*, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 463, 469; *Com. v. City of Philadelphia*, 132 Pa. 238, 19 Atl. 136; *New Orleans Gaslight Co. v. City of New Orleans*, 42 La. Ann. 188, 192, 7 South. 559, 560; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. St. 316, 325, 28 Pac. 516, 519, 14 L. R. A. 660 [28 Am. St. Rep. 561]; *Wagner v. City of Rock Island*, 146 Ill. 139, 154, 155, 34 N. E. 545, 548, 549, 21 L. R. A. 519; *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 126, 31 N. E. 573, 577, 16 L. R. A. 485; *City of Indianapolis v. Indianapolis Gaslight & Coke Co.*, 66 Ind. 396, 403; *Read v. Atlantic City*, 49 N. J. Law, 558, 562, 9 Atl. 759. In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 *Dill. Mun. Corp.* § 27; *City of Cincinnati v. Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, *supra*, and cases cited under it."

The many definitions and citations presented by the appellee are not inconsistent with this conclusion. The mere fact that a municipal corporation may possess the two separate and distinct powers, the one termed governmental or public and the other private, corporate, or ministerial, does not detract from the conclusion that all such powers are alike municipal; for both are delegated powers to be used for the use and benefit of the municipality and its inhabitants. Counsel for defendant relies on *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493, to sustain its contention. But that case simply determines that a private corporation authorized to furnish water for the city was

not thus endowed with municipal powers; that such a corporation must be organized under the general laws of the state; and it is not within the constitutional power of the Legislature to confer municipal powers upon a private corporation.

[1] While functions of the municipality, such as the erection and maintenance of public utilities, are not governmental in their nature, yet they are strictly municipal purposes; that is to say, they are intended specially and peculiarly to promote the comfort, convenience, safety, and happiness of the citizens of the municipality, though perhaps not essential to the welfare of the general public. 28 Cyc. 268.

[2] Hence, in the light of these authorities, it cannot be said that, in the granting of the franchise, the city did not, and did not intend to, provide for power for all municipal purposes. To so hold is to impute to the city counsel either ignorance or bad faith with its people. The practice of the courts in referring to this class of municipal purposes other than governmental as private has had a tendency to confuse, inasmuch as these cannot be said to be in any sense private, as that term is commonly understood. The purpose is essentially a public one and for the general good of all the inhabitants, the support of which is provided for by a public tax, levied upon all the citizens and property of the city.

The very fact that the Legislature has conferred the power upon cities to erect and maintain gas and electric light plants, water-works, etc., to supply its citizens, to be paid for from taxes to be levied upon the inhabitants, is sufficient determination of the municipal purpose and character of these utilities.

[3] The power of the Legislature to do this is not questioned in this case, and is universally recognized by the courts. *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 18 South. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24.

Judge Elliott, in his recent work on *Municipal Corporations*, has stated as the rule: "The erection of an electric light plant to supply a city with light for use in the streets and public places and in the homes and places of business of the inhabitants is a municipal purpose for which bonds may be issued and taxation authorized."

The language of the franchise is that the grantee will at all times furnish to the said city such other power as may be required for municipal purposes, at the same prices that are paid by the most favored customer of the said George W. Jackson, his associates or assigns, with the provision only that the city shall give 90 days' notice of its intention to use any of such power and of the amount required. There is nothing in the language of the franchise or the extent of its purpose that would indicate a different intent of the parties than the exact language conveys, or

as the city contends, nor does it appear to be unreasonable.

The franchise is purely one for the generation of electric power. It does not purport to grant the right or privilege of erecting or maintaining an electric light plant, or of supplying lights to the inhabitants, or of using the streets and alleys for such purpose. Neither does it appear that Jackson or his assigns have otherwise construed the franchise by the erection of a light plant, or by furnishing electric light to the citizens, or even for street purposes; for the latter were supplied by the electric company to whom Jackson and his assigns sold power.

The generation and sale of electric power is the sole business in which Jackson and the defendant, his assignee, has been engaged. This power has been sold not only to the intervenor, but to other cities and to industrial companies. Then why is it not entirely reasonable to conclude that, as one of the considerations of the granting of so valuable a franchise, the city should reserve to itself the right to purchase the power it might at any time require, upon the same terms as the most favored customer of the owners of the power plant, to be so erected under and by virtue of the franchise. Aside from this, the city was to receive comparatively little for the franchise granted. It was to receive such arc lights of indicated power as it might require at the stipulated price of \$5.50 per month. But it does not appear that this was not the reasonable or adequate value for such service. The only free service that the city might receive under the franchise was five arc lights of 2,000 candle power each, not more than 200 incandescent lights of 16 candle power each, and the maximum of 50 horse power if required. Certainly this was small consideration for so valuable a grant, and it may well be concluded that the city had in view the very purpose which it now contemplates—supplying its own citizens with light by means of its own lighting plant. Indeed, it is not conceivable that the city could use any considerable amount of power for any other purpose, within the scope of its municipal power as then and now understood.

The second proposition of the power company is that the demand of the city, in so far as it relates to power to be used for lighting the streets, is a direct impairment of the obligation of the contract wherein it is provided that "Jackson and assigns shall within one year from the completion of the Strickler tunnel and during the remainder of the term of the grant, furnish to the city of Colorado Springs, such arc lights, of standard 2,000 candle power, each, as may be required by said city for the purpose of lighting its streets, alleys, and public grounds at the rate of five dollars and fifty cents (\$5.50) per light per month said lights to be used from sunset to sunrise during each and every day of every month."

The argument of counsel is based upon

the assumption that the city agreed to take these lights and at such price for the full term of the grant. There is no such express agreement; for the only stated provision is that Jackson shall furnish the lights, and not that the city shall take and use them for any period whatsoever, or at all. But, if the contract did so provide, then there is nothing in the grant to prevent the city from constructing its own plant and furnishing light to its inhabitants, and to serve the city's other purposes.

[4] The contract refers to no other lights for which the city was to pay than its requirements for arc lights, of the power and at the price named. The only express agreement upon the part of either party in this respect was that Jackson shall furnish such arc lights as may be required by the city. We do not find any authority to sustain the contention of appellee that the city may be bound by implication or otherwise than by express agreement. That an obligation of the public in such a case must be expressly stated, and will not be implied, is settled by the Supreme Court of the United States in *Helena Waterworks Company v. Helena*, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245. That was a case where the waterworks company had contracted to supply the city and its inhabitants with water for a period of 20 years. At the time of the agreement the city council made an appropriation covering the price of the water for the city's purposes for 5 years of that period. It was conceded by the court for the purposes of that case only that the effect of such appropriation by the city was that of an agreement to pay the agreed price for the period of 5 years, but the contention of the company that the city was bound by implication for the full period of the franchise was denied. Upon that question the court said: "Properly construed, we think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, certainly after the expiration of five years, from constructing its own plant. It has not specifically bound itself not so to do, and, as has been frequently held in this court, nothing is to be taken against the public by implication. *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165, and cases cited in the opinion. Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. It is doubtless true that the erection of such a plant by the city

will render the property of the water company less valuable, and perhaps unprofitable; but, if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract."

Counsel for defendant cite *Minn. Lumber Co. v. Whitehurst*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, *Leadville Gas Co. v. Leadville*, 9 Colo. App. 400, 49 Pac. 268, and *Golden Cycle Mining Co. v. Rapson Coal Co.*, 188 Fed. 179, 112 C. C. A. 95, as sustaining its contention that, because of the agreement upon the part of Jackson to furnish the city such arc lights "as may be required by the city" during the life of the franchise, the city is for that reason impliedly bound to take such lights at the price named for such full term of the franchise.

These cases, with the exception of the *Leadville Case*, all involved private, and not public, contracts. The present case involves a public contract, and the city has not specifically bound itself to take such lights for any period whatsoever, and, as said in *Helena Waterworks Co. v. Helena*, supra, "nothing is to be taken against the public by implication." But the cases relied on do not sustain the contention of the power company. In *Minnesota Lumber Co. v. Whitehurst Coal Co.*, as was said by the court, "appellant had agreed to buy, and appellee had agreed to sell and deliver, \* \* \* all the coal which would be needed \* \* \* for the season." The dispute in that case was as to the construction of the word "require," as used in the agreement.

*Leadville Gas Co. v. Leadville*, supra, was an action for recovery of the price of gas had and received by the city under its contract. The contention of the city was that the contract was invalid because no prior appropriation had been made by the city council to cover the expense, under the provision of section 449, *Mills' Ann. Stat.*

In *Golden Cycle Mining Co. v. Rapson Coal Mining Co.*, supra, it was expressly agreed that "*the mining company agrees to buy from the coal company all the coal it may use, etc., 'for the period, and the coal company agrees to supply and deliver all such coal,' etc.*" This was an express agreement upon the part of both parties, which is not found in the franchise under consideration. In our opinion, the contract neither placed obligation on the city to take from Jackson any light at all, nor limited its rights and privileges in that respect in any manner whatsoever, even admitting for the sake of the argument that the city had power so to do, which is not necessary to determine here.

The contract is entirely silent as affects any such obligation on the part of the city, and, if it was the intention of the parties that the city should be so obligated, the contract should have so stated, rather than that courts be asked to insert it into the agreement. Indeed, section 9 of the fran-

chise, in so far as it effects the city, can be construed only as an option to purchase, as it relates both to arc lights and to power, wherein the price at which such purchase may be made is definitely stated as to the former, and certainly determinable as to the latter, under the terms of the agreement.

[5] The valuable grant to Jackson is a sufficient and valuable consideration for such option.

[6] The third contention of the defendant company is that it is not its duty to furnish the power demanded by the city, unless plaintiff will agree to take the same minimum amount of power contracted for by the Colorado Springs Electric Company, or a minimum of about \$64,000 per annum.

This seems to admit the unsoundness of the claims of defendant heretofore discussed; for, if the city was not entitled to any such power as claimed, clearly it was not entitled to or required to demand power to the extent of \$64,000 in value per annum. But there is nothing in the agreement by which such claim of defendant can justly be inferred, or even suspected. The agreement is that the holder of the franchise will at all times during the term of the grant "furnish to the city such other power as may be required for municipal purposes." Plainly this must mean much or little, dependent upon the requirement for the specific purpose. It is not within the province of the court to rewrite the agreement for the parties. Much is said in the briefs as to the construction of the word "required." We do not find it important or necessary to enter into any nice distinctions in that regard in this case, or to even discuss it, in view of our conclusions above stated. There can be no other conclusion in either of the instances in which the word is used in section 9 of the franchise, whether relating to arc lights or power, than that it refers to that which may be necessary for the purposes specified.

It is agreed in the briefs that the Colorado Springs Electric Company is the most favored customer of the defendant. The price, then, fixed in defendant's agreement with that company should govern. This, then, under the terms of the franchise, is the price at which the city is entitled to receive the power demanded in this case.

Counsel for defendant in error makes an ingenious argument to show that this price is augmented and the price to the city made undeterminable by other provisions contained in the contract with the electric company: (a) The amount to be consumed by the electric company, minimum and maximum; (b) the question of competition avoided under the agreement between the electric company and the power company; (c) the fact that the electric company was to furnish transmission lines from Manitou to Colorado Springs; and (d) possible transformer and transmission losses.

The last two of these propositions can in no event be considered; for in the agreed statement the claim of the city is for the right to demand and receive from the power company, and at the price paid by the electric company under its said contract, the amount of power claimed, "to be measured and delivered to plaintiff at the same places where power is measured and delivered" to the electric company. And it is provided in the contract between the two companies that all power supplied thereunder shall be delivered at the eastern limit of the city of Manitou to transmission lines to be furnished by the electric company. The place of delivery to the city must therefore be held to be at such eastern limit of the city of Manitou, and hence the question of the cost of transmission lines and losses in transmission from such point to the city of Colorado Springs is not involved. The price was to be that agreed upon between the power company and its most favored customer, and this is admitted to be the electric company.

The term "price" cannot be said to include anything but the rate fixed by the contract for the sale of the commodity. The price under the terms of paragraph 7, of the contract between the power company and the electric light company, and which paragraph must be controlling in the fixing of price to be paid by the city of Colorado Springs, was to be 5.85 mills per kilowatt hour, when the monthly consumption does not exceed 1,000,000 kilowatt hours, and when the average daily load factor for the calendar month is from 50 to 57 per cent. But, when the said load factor is less than 50 per cent., the rate per kilowatt hour is to be increased .05 of a mill for each per cent. of such decrease of load factor down to 45 per cent., but no decrease of load factor was to be considered below 45 per cent. in fixing the rate. Therefore the rate for less than 45 per cent. would be 5.85 mills, added to .25 mills for the 5 per cent. decrease in load factor, or 6.10 mills per kilowatt hour.

The amount demanded by the city is much less than 1,000,000 kilowatt hours per month, and if the load factor is 45 per cent. or less, the price to the city under the said paragraph in the agreement, for the amount so demanded, must be 6.10 mills per kilowatt hour.

If, however, the said load factor shall exceed 45 per cent., then the rate must be reduced according to the schedule contained in the said contract between the electric company and the power company.

This was the agreed price at which the power was to be sold and purchased in the contract with the most favored customer, and the city cannot be hampered by other and different contract agreements, which may or may not have had influence in fixing that price. It is the price fixed for the sale of the commodity that is to govern.

[7] Finally defendant contends that it does

not appear in the agreed statement that there has been a vote of the qualified electors, of the city authorizing the construction of and maintenance of an electric light plant, as required by the statute, and therefore the city may not demand the power to be used for that purpose.

This is not a question that defendant can raise in this case. It does not involve the right or power of the city to erect and maintain an electric light plant for the purposes asserted, nor to levy taxes therefor. It is simply a question of procedure provided by the statute in such case, and the court cannot presume that the city has not, or will not, proceed in accordance with the requirements of the statutes.

The judgment of the district court is reversed, with instruction to that court to enter judgment for the city in accordance with the prayer of its complaint, and the views herein expressed.

WHITE and GARRIGUES, JJ., dissent. BAILEY, J., agrees to the construction given the contract, but dissents upon the record before the court, upon the proposition of fixing the rate at which the city is to be furnished current.

#### KING v. FOSTER. (No. 3966.)

(Court of Appeals of Colorado. May 11, 1914.)

##### 1. EVIDENCE (§ 366\*)—JUDGMENT OF COURT—PRODUCTION OF JUDGMENT ROLL.

A decree of the court is not admissible as proof of title without the production of the judgment roll.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. § 366.\*]

##### 2. ADVERSE POSSESSION (§ 91\*)—PAYMENT OF TAXES—COLOR OF TITLE.

A decree of the court, entered four years prior to the commencement of the present action, does not constitute sufficient color of title to support a plea under the seven-year statute of limitation, and, if no other color of title is shown, proof of actual possession and payment of taxes is insufficient to support the plea.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 512-516; Dec. Dig. § 91.\*]

Error to District Court, Kiowa County; C. S. Essex, Judge.

Action by Albert E. King against George S. Foster. Judgment for the defendant, and plaintiff brings error. Reversed.

John F. Mail, of Denver, for plaintiff in error.

MORGAN, J. Code action for the possession of a quarter section of land. The defendant had judgment. The plaintiff brings error.

The plaintiff alleged ownership in fee simple; the defendant denied it, admitted possession and alleged ownership in himself; pleaded the seven-year statute of limitation

and a decree of the district court of Kiowa county quieting his title, which decree was entered only four years before the commencement of the action herein. Plaintiff proved fee-simple title in himself and rested. The defendant offered no evidence except the decree aforesaid and his own testimony that he was and had been in the actual possession of the land for a little over 10 years, that it was fenced when he bought it, and had been fenced ever since, and that he had paid all taxes on it during that time.

[1, 2] The plaintiff objected to the introduction of the decree on the ground that it was not accompanied by the judgment roll, but it was admitted over the objection. It was error to admit this decree as proof of title without the judgment roll; and, as it was not made but four years before this action was commenced, it did not support the plea of the statute of limitation pleaded, even if it be considered as color of title. Actual possession for seven years and payment of taxes is insufficient to sustain the plea of the statute, in the absence of proof of color of title, made in good faith prior to the commencement of the seven-year period.

Judgment reversed.

#### MILLER et al. v. WELDON. (No. 3787.)

(Court of Appeals of Colorado. May 11, 1914.)

##### 1. TAXATION (§ 762\*)—TAX CERTIFICATE—ASSIGNMENT BY COUNTY CLERK—TIME.

A tax deed, showing an assignment by the county clerk of the certificate of purchase more than three years after the date of the sale, rendered the deed void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1514-1516; Dec. Dig. § 762.\*]

##### 2. ADVERSE POSSESSION (§ 79\*)—PAYMENT OF TAXES—SHORT STATUTES OF LIMITATIONS.

A tax deed void on its face did not set in motion the five-year statute of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

##### 3. ADVERSE POSSESSION (§ 93\*)—PAYMENT OF TAXES.

Where defendant company received a tax deed to land in controversy which was void on its face, April 10, 1901, the first subsequent taxes that could be paid thereunder for the purpose of obtaining title under the deed as color of title and payment of taxes for seven years was the tax of 1901, which could not be paid until 1902, and hence there could not be payment for seven years prior to the commencement of an action to quiet title on August 28, 1908.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 525-527; Dec. Dig. § 93.\*]

##### 4. EVIDENCE (§ 366\*)—JUDGMENT—JUDGMENT ROLL.

A decree unaccompanied by the judgment roll is inadmissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. § 366.\*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.



Action by Minnie E. Weldon against J. L. Miller and the Empire Ranch & Cattle Company. Judgment for plaintiff, and defendants appeal. Affirmed.

R. H. Gilmore, of Denver, for appellants. Dana & Blount, of Denver, for appellee.

BELL, J. This action was brought by the plaintiff and appellee, Minnie E. Weldon, against the defendants and appellants, J. L. Miller and the Empire Ranch & Cattle Company, in the district court of Yuma county, Colo., August 29, 1908. In her complaint, she alleges that she is the owner in fee simple and entitled to the possession of the N. W.  $\frac{1}{4}$ , section 7, township 4 N., range 48 W. of the Sixth P. M., and that the defendants wrongfully withhold and wrongfully exercise acts of ownership over the same, and prays judgment to the effect that she is the owner of the land above described and entitled to the possession thereof, and for damages in the sum of \$250.

The first defense stated in the answer denies the allegations of the complaint; the second sets up that the defendant J. L. Miller and his predecessor in interest, the Empire Ranch & Cattle Company, have been in possession of the land under claim and color of title made in good faith, based upon a treasurer's tax deed, for more than five years, and that plaintiff's right of action did not accrue within five years from the date of the commencement of the action; the third recites that the land in question was vacant and unoccupied, and that defendant Miller and his predecessor in interest as aforesaid have, during seven successive years, paid all taxes assessed upon the same under claim and color of title made in good faith; and the fourth alleges that a decree of the county court of Yuma county in the year 1902 quieted the title to said premises in said Empire Ranch & Cattle Company. There seems to have been no other pleading in the case.

[1] The appellee deraigned title from the government of the United States to herself through divers mesne conveyances, and the defendants offered in evidence a treasurer's tax deed to the Empire Ranch & Cattle Company, dated April 10, 1901, and recorded April 22, 1901. The deed showed an assignment by the county clerk of the certificate of purchase more than three years after the date of sale, thereby rendering the same void upon its face, as held in *Johnson v. Gibson*, 24 Colo. App. 392, 133 Pac. 1052, and, upon proper objection, it was excluded as evidence of paramount title, but admitted as color of title.

[2] The deed, being void upon its face, did not set in operation the five-year statute of limitation relied upon in the second defense. *Empire Ranch & Cattle Company v. Howell*, 24 Colo. App. 417-420, 133 Pac. 1124; *Gomer v. Chaffee*, 6 Colo. 314-317.

[3] Under the defense of payment of taxes for seven successive years under claim and color of title made in good faith, defendants offered to prove the payment of taxes for the years 1900 to 1907, both inclusive. The payment of the taxes for the year 1900, past due when the tax deed issued, could not properly be counted as one of the necessary seven yearly payments. The payment of taxes for the year 1901 could not have been made until 1902, which would be the first payment under the deed to have started the running of the statute, and it was impossible for seven years to have expired between the date of such payment and the date of the commencement of the action. Therefore the proof offered was insufficient, and, upon objection being made, was properly excluded.

[4] In support of the fourth defense, a decree of the county court of Yuma county purporting to quiet the title to the premises in the Empire Ranch & Cattle Company was offered in evidence. The decree was unaccompanied by the judgment roll, and its admission was objected to for this reason, and the objection was properly sustained. *Empire Ranch & Cattle Company v. Battelle*, 24 Colo. App. 375, 133 Pac. 1123.

This left the defendants without any proof of title whatsoever and without any showing of the right of possession, whereupon judgment was rendered in favor of the appellee.

Numerous objections were raised to the introduction of evidence and the rendition of judgment, and the rulings of the court thereon are now assigned as error. Many of them have been repeatedly decided by this or the Supreme Court adversely to the contentions of the appellants, some of them are without any record in the abstract in support of the questions presented, and others are wholly untenable, and we have found none, under the condition of the record, that would justify us in disturbing the judgment of the trial court, and therefore it is hereby affirmed.

Affirmed.

BALLINGER v. VATES. (No. 3959.)

(Court of Appeals of Colorado. May 11, 1914.)

1. ASSIGNMENTS (§ 121\*)—CHOSE IN ACTION—LEGAL TITLE—RIGHT TO SUE.

Where a claim for money due was assigned to B. for collection, the legal title to the claim vested in him, and he became the real party in interest, and entitled to prosecute an action on the claim in his own name.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.\*]

2. ASSIGNMENTS (§ 89\*)—CHOSE IN ACTION—TRANSFER FOR COLLECTION—TRUSTS—POWER COUPLED WITH INTEREST.

Where a chose in action was assigned to B. for collection, he to institute suit thereon and retain 25 per cent. of the proceeds for his services on recovery of judgment against the debtor, B. held the judgment in trust for his assignor, coupled, however, with an interest in himself to the amount of 25 per cent. of the claim; and hence the assignor could not compel

an assignment of the judgment, nor require B. to release it until his interest had been satisfied.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 137; Dec. Dig. § 89.\*]

**3. ASSIGNMENTS (§ 89\*)—CHOSE IN ACTION—TRANSFER OF CLAIM FOR COLLECTION—BAILMENT.**

Since a chose in action may be bailed, an assignment thereof for collection creates a relation, as between the assignor and assignee, analogous to that of a bailment under contract by the bailee to perform services for the bailor for which the bailee is entitled to compensation, and to retain the possession of the chose in action or its proceeds until his claim is satisfied.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 137; Dec. Dig. § 89.\*]

**4. ASSIGNMENTS (§ 92\*)—PAYMENT—ASSIGNOR OF CAUSE OF ACTION.**

Where a claim was assigned to B. for suit, under an agreement that he was to have 25 per cent. of the judgment obtained, he having obtained judgment, the judgment debtor, with knowledge that the suit had been brought and judgment obtained in B.'s name, could not compromise or otherwise settle the same by payment to the creditor, except at his peril.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 158; Dec. Dig. § 92.\*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by William B. Vates, trustee in bankruptcy for E. M. Johnson, against E. E. Ballinger for the cancellation of a judgment. From a decree in favor of complainant, Ballinger brings error. Reversed and remanded.

John Hipp, of Denver, for plaintiff in error. Ezra Keeler, of Denver, for defendant in error.

KING, J. January 1, 1909, the Stern-Prince Importing Company retained the State Collection Agency of Denver as its agent for the collection of claims under a written contract, by which the collection agency agreed that "all accounts worthy of legal proceeding will be placed in its law department for suit, and such suits will be brought at the expense of the agency," and it was agreed that upon judgments secured by it the agency should receive 25 per cent. of the judgment. E. M. Johnson being indebted to the Stern-Prince Importing Company in the sum of \$519.75, the company made a written assignment of its claim against Johnson to E. E. Ballinger for suit and collection. Ballinger was manager of the collection agency. On the 23d day of February, 1909, Ballinger commenced suit in his own name against the said Johnson, caused summons to be issued and served, thereafter, on or about the 15th day of April, obtained a judgment in the sum of \$582.30, and costs taxed at \$4.45, and on the 22d day of April caused a transcript of the judgment docket in said action to be filed and recorded in the office of the recorder of the county of Pueblo, which became a lien upon the real estate of the judgment debtor. All costs and expenses were paid by Ballinger. On or about the

19th day of October, 1909, the said Johnson made a settlement with the Stern-Prince Importing Company, by which that company, in consideration of \$250 in cash paid to it, and execution and delivery of three notes of \$31.50 each, admitted satisfaction of the judgment, agreed to release the same, and gave an order as follows: "State Collection Agency, City—Gentlemen: Upon this order kindly release the judgment which you hold for us in your name against E. M. Johnson, Pueblo, and oblige. Yours truly, The Stern-Prince Importing Co., by J. L. Stern, Treas."

On presentation of said written request, Ballinger refused to release or discharge the judgment, except upon payment to him of 25 per cent. of said judgment. Thereupon Johnson brought suit against Ballinger and the importing company, asking for a decree declaring said judgment satisfied. The importing company made no defense, but Ballinger filed answer and cross-complaint, setting up the foregoing facts, and alleging that he was interested in the said judgment to the extent of 25 per cent. thereof and the costs by him expended, that the settlement made between the plaintiff Johnson and the Stern-Prince Importing Company was entered into to defraud said Ballinger and deprive him of his commission and costs, and offering to satisfy and release said judgment upon payment. W. B. Vates, trustee in bankruptcy of the said Johnson, was substituted as party plaintiff. Judgment was rendered in favor of the plaintiff against said Ballinger.

[1] 1. Upon the assignment of the chose in action aforesaid to Ballinger for collection, the legal title thereto vested in him. He became the real party in interest, and was entitled to prosecute an action thereon in his own name. 4 Cyc. 67; Lake County v. Schradsky, 31 Colo. 178, 182, 71 Pac. 1104.

[2] While it is true that Ballinger held the legal title to said judgment in trust for the Stern-Prince Importing Company, it is likewise true that his trust was coupled with an interest in himself, and the cestui que trust could not compel the assignment of the judgment to it nor require the trustee to release it until it had paid the trustee, or otherwise satisfied him for his interest in the judgment, in this case amounting to at least 25 per cent. of the judgment obtained.

[3] While the assignee held the assigned claim for collection, his relation to the Stern-Prince Importing Company was analogous to that of a bailee under contract to perform services for the benefit of the bailor, and for which he was to receive compensation, and entitled to retain possession of the chose in action, or its proceeds, until paid. Their relations have not been materially changed by securing a judgment, except that it is more nearly analogous to that of a trustee holding a legal title for the benefit of his cestui que trust, but with an interest which must be satisfied before he can be compelled to exe-

cute the trust by turning over the judgment or the proceeds thereof.

[4] The judgment debtor, having full knowledge of the suit brought and judgment obtained in Ballinger's name, could not compromise or otherwise settle the judgment by payment to the Stern-Prince Importing Company, except at his peril, and he is not, and cannot be, in any better position to enforce the release or satisfaction of the judgment by the judgment creditor than is the Stern-Prince Importing Company.

A chose in action may be bailed. In this case, the contract of bailment created a trust. 4 Cyc. 166; Cabaniss v. Ponder, 65 Ga. 134; Sanders v. David, 13 B. Mon. (Ky.) 432; Loomis v. Stave, 72 Ill. 623; Pindell v. Grooms, 18 B. Mon. (Ky.) 501; Cowdrey v. Vandenburg, 101 U. S. 572, 25 L. Ed. 923.

The judgment is reversed, and the cause remanded, with directions to the trial court to enter judgment in favor of plaintiff in error, Ballinger, unless within 90 days the plaintiff pay into said court for the use of said Ballinger 25 per cent. of the judgment, together with interest thereon from its date, in which event said Ballinger shall be required to execute and deliver a release and satisfaction of the said judgment, or, upon failure so to do, the judgment may be set aside by order or decree of the court; provided, however, that in case the plaintiff can show that the said Ballinger, or the State Collection Agency of Denver, was at the time of the commencement of this suit, and now is, indebted to the Stern-Prince Importing Company in any sum, the amount of said indebtedness may be offset against the claim of the said Ballinger herein; and for the purpose of making such showing, if he be so advised, the defendant in error herein may be permitted to file amended or supplemental reply to defendant's answer and cross-complaint.

Reversed and remanded.

# GIBSON v. RIEHLE. (No. 3975.)

(Court of Appeals of Colorado. May 11, 1914.)

## 1. SPECIFIC PERFORMANCE (§ 49\*)—CONTRACTS ENFORCEABLE — CONSIDERATION — MUTUAL PROMISE.

In a contract for the exchange of real property, the promise by each party to convey is a valuable consideration for the other party's agreement, and specific performance of such contract may be decreed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

## 2. SPECIFIC PERFORMANCE (§ 32\*)—CONTRACTS ENFORCEABLE—MUTUALITY—CONDITION.

Where a written contract for the exchange of real property between the parties provided that the plaintiff should have the right to inspect the property before being bound, and it appeared that the plaintiff had made such inspection, and had notified the defendant that the property was satisfactory prior to the time set in the contract for the performance thereof, the

contract became mutually binding and may be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-90; Dec. Dig. § 32.\*]

Error to District Court, Denver County; James H. Teller, Judge.

Action by William E. Gibson against William Riehle. From a judgment for the defendant on the pleadings, plaintiff brings error. Reversed and remanded.

Clarence J. Morley, of Denver, for plaintiff in error. William A. Bryans, of Denver, for defendant in error.

MORGAN, J. The lower court sustained defendant's motion for judgment on the pleadings. Plaintiff brings error. The complaint was for the specific performance of a written contract for the exchange of real property owned by each of the parties, respectively. The answer admits the contract, pleads it in *hæc verba*, and alleges that it is wholly without any valuable consideration, wholly without mutuality, and void, together with other defenses not now involved. The consideration consisted in the respective promise and agreement to convey by each party upon conveyance by the other. Plaintiff's promise and agreement to convey was followed by a proviso, or condition, that defendant's property should prove, on inspection, satisfactory to him. This provision seems to have been inserted because plaintiff had not seen defendant's property at the time the contract was made. The complaint states, however, that, prior to the time set for performance, the plaintiff inspected defendant's property and notified the defendant that the same was satisfactory, and that, after so notifying defendant, plaintiff went to the place where it was agreed the contract was to be carried out, on the date agreed upon, ready and prepared to perform his part of the contract, and that defendant did not appear there, and afterward refused to perform his part of the contract, stating, also, that plaintiff is still prepared, able, and desirous of carrying out the contract.

There are many reasons why a suit for the specific performance of a contract will not lie, when an action for damages, at law, for a breach thereof, may; but it is our intention to notice none of them except the two that are urged herein, to wit: First, want of a valuable consideration; second, lack of mutuality because of the proviso—as to the plaintiff's promise to convey—that defendant's property should prove satisfactory on inspection. The lower court based its judgment wholly upon the first, but it is contended here that its judgment should stand for the second, reason. It is concluded that neither reason is available to support the judgment on the pleadings.

[1] 1. The promise and agreement to convey by each party, respectively, upon conveyance

by the other, expressed in the written contract as the consideration for each party's agreement to convey the real property in exchange, was a valuable consideration. Bishop on Contracts (Enlarged Ed.) § 76; Parsons on Contracts (9th Ed.) p. 466 et seq. This being true, specific performance could be enforced, so far as the objection as to the consideration is concerned. Pomeroy on Specif. Perf. (2d Ed.) § 57.

Under this contention, defendant in error relies upon the case of *Winter v. Goebner*, 2 Colo. App. 259, 30 Pac. 51, and, it seems, the lower court based its conclusion on the rule announced in that case. The court in that case used the words, "valuable consideration" as contrasted with a naked promise of nothing of value, or a voluntary promise or agreement; and, while the court in that case further said "a promise against a promise is not, in this class of cases, \* \* \* a good consideration," it used the word "promise" in the sense of a naked promise of nothing of value against the same kind of a promise or against a promise of a valuable thing on one side only. The court intended to say that the promises must be mutual, both of a thing of value, in this class of cases; so that either party to the contract may be entitled to the equitable relief of specific performance, thus carrying out the principle that a party coming into a court of equity must be prepared to do equity, and not be permitted to demand of another that which he could not be required to do on his part. 3 Pomeroy's Eq. Juris. (2d Ed.) § 1404 et seq.

[2] 2. While the proviso, or condition, in the contract, that plaintiff's obligation depended upon his inspection of defendant's property and upon its being satisfactory to him may have destroyed the mutuality thereof at its inception, and, in effect may have rendered plaintiff's promise to convey optional with him, and also made the contract unilateral and conditional in form, nevertheless he alleges sufficient facts, as above mentioned, to remove this bar to mutuality and to establish absolutely mutual engagement prior to the time set in the contract for the complete performance thereof at which time the conveyances were to be made. It is true, it is the general rule, that the mutuality must be determined as of the time when the contract is executed, but there are several well-defined exceptions to this general rule, and plaintiff's allegations, as above referred to, bring this contract directly within one of these. Mr. Pomeroy, in his work, says: "These exceptions are well established; many of them are common and familiar." Referring to that species of exceptions, "contracts unilateral in form," he says: "Among the examples of this species are those contracts

by which the party, upon whom alone an obligation arising from the express stipulations rests, covenants or promises to do or to forbear from some specified act upon the request of the other, and those by which the party making an offer covenants or promises to do or to omit some act upon the assent or acceptance of the person to whom the offer is addressed, and those in which the party confers an option upon the other. The contracts of this kind are, in reality, conditional agreements. Upon the happening of the condition—that is, upon making the request giving the assent or declaring the option—they become absolute, and in many instances mutual in their obligation." Pomeroy on Spec. Perf. of Contracts (2d Ed.) §§ 168, 169, and authorities cited in note (1) pp. 236, 237, where authorities contra are also discussed; Fry on Spec. Perf. (3d Ed.) § 465, p. 218, and note 4, where, illustrating, it is said, "Where a conditional contract had become absolute by the exercise of an option of purchase." See, also Pomeroy's Eq. Jurisp. (2d Ed.) § 1405, p. 2162, and note 1, p. 2163, where, distinguishing the general rule, the author quotes: "Where the plaintiff has already complied with the unenforceable condition, the objection of want of mutuality cannot be made." *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 18 Atl. 4, 1 L. R. A. 380; *Wilks v. Georgia P. R. R. Co.*, 79 Ala. 180; *Welch v. Whelpley*, 62 Mich. 15 [28 N. W. 744] 4 Am. St. Rep. 810. While the foregoing authorities have met with some opposition in the past, our courts seem to follow them quite directly. See *Gordon v. Darnell*, 5 Colo. 302; *Frue v. Houghton*, 6 Colo. 318; *Wood et al. v. Casserleigh*, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138; *Rude v. Levy*, 43 Colo. 482, 96 Pac. 560, 24 L. R. A. 91, 127 Am. St. Rep. 123.

So, where a written contract for the exchange of real property expresses the consideration as the respective agreements and promises to convey of both parties, upon conveyance by the other, specific performance may be enforced, other necessary elements appearing, although the promise and agreement to convey by one of the parties, who is the plaintiff, is followed by a clause expressing a condition that the property of the other shall, on inspection, prove satisfactory, if the plaintiff alleges and proves that he inspected the said property and accepted it as satisfactory and so notified the defendant all prior to the time set in the contract for the performance thereof, in the absence, of course, of any other obstacle otherwise than the two interposed herein, and disposed of by this opinion.

The judgment on the pleadings is therefore reversed, and the cause remanded.

**CARSON v. CUDWORTH, County Treasurer.**  
(No. 3977.)

(Court of Appeals of Colorado. May 11, 1914.)

**WATERS AND WATER COURSES (§ 226\*)—IRRIGATION DISTRICTS—LANDS WHICH MAY BE INCLUDED.**

Land, the title to which was evidenced by a United States receiver's receipt, was properly taken into an irrigation district, especially where a patent was subsequently issued to the holder of the receipt, since the patent related back to the issuance of the receipt, and showed conclusively that the holder had complied with all the requirements of the statute prerequisite to the issuing of the receipt, and that his title when the district was organized was unassailable even by the government, and Rev. St. 1908, § 3440, providing for the irrigation of such districts whenever a majority of the resident freeholders owning land so desire, and section 3441, requiring the petition to be signed by a majority of the resident freeholders, do not exclude holders of such receipts.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 318; Dec. Dig. § 226.\*]

Error to District Court, Morgan County; H. P. Burke, Judge.

Action by George W. Carson against George L. Cudworth, County Treasurer of Morgan County, Colo. A general demurrer to the complaint was sustained, and plaintiff brings error. Affirmed.

Taylor & Pendell, of Ft. Morgan, for plaintiff in error. C. C. Rickel and Stephenson & Stephenson, all of Ft. Morgan, for defendant in error.

CUNNINGHAM, P. J. Plaintiff in error, Carson, held a United States receiver's receipt for 80 acres of land in Morgan county, which receipt, issued to him on November 21, 1908, was recorded in Morgan county on December 31, 1908. This land lies within the boundaries of the Badger irrigation district organized February 17, 1909. Carson received a patent to the 80 acres on July 26, 1909. On October 24, 1911, he filed his complaint in the Morgan district court for the purpose of restraining defendant in error, who was county treasurer of Morgan county, from making sale of said land for the delinquent irrigation tax for the year 1910. In his complaint Carson averred that he held the land under a receiver's receipt, as stated above, and also alleged: "That the Badger irrigation district was duly organized and formed, and the organization thereof completed on, to wit, February 17, 1909; that at the time of its organization plaintiff's interest in said described lands was evidenced by what is known as a receiver's receipt issued out of the public land office at Denver, Colo., on, to wit, November 21, 1908, many months prior to the organization of said district, which said receiver's receipt is of record in the county clerk and recorder's office of Morgan county," etc. The court sustained a general demurrer to plaintiff's complaint, and he brings

the case here on writ of error. The sole question for our determination is presented in the following quotation from plaintiff's brief: "Plaintiff contends that the Irrigation Act of Colorado covers only such owners of land as are owners in absolute fee simple, and that a holder of a receiver's receipt is not such an owner."

1. Plaintiff predicates his contention that lands held by a receiver's receipt cannot be covered by the Irrigation Act and taken into an irrigation district upon the fact that in sections 3440, 3441, and 3442, R. S., such language as the following occurs: "Whenever a majority of the *resident freeholders owning lands* in any district desire to provide for the irrigation of the same they may propose the organization of an irrigation district under the provisions of this act," etc. Section 3440, R. S. And again: "For the purpose of the establishment of an irrigation district as provided by this act, a petition shall be filed with the board of county commissioners of the county \* \* \* said petition shall be signed by a majority of the *resident freeholders* within said \* \* \* district." Section 3441, R. S. There is no allegation in the complaint that the plaintiff was not fully advised of all the steps leading up to the organization of the district, nor is there any averment that he in any wise protested or took any steps whatever to have his land excluded. Our attention has been called to no case or authority of any kind directly in point. Plaintiff concedes that lands held under a receiver's receipt are subject to taxation for state and county purposes, that they are subject to barter and sale, and that they may be considered as marketable title. The authorities are harmonious to the effect that a receiver's receipt is prima facie evidence of title; therefore, the plaintiff having pleaded that he held the land under a receiver's receipt (which receipt he set out in his bill in *hæc verba*), and the defendant having demurred generally to the complaint, it would appear that plaintiff's title, for the purposes of this case, must be conceded as sufficient.

Plaintiff must have represented to the government that he had in good faith complied with all of the requirements of the federal law prerequisite to the issuance to him by the government of the receiver's receipt, and his representations must have been relied upon by the government, else the receipt would not have issued. The only thing that could excuse the government or relieve it from the necessity of issuing, in due time, a patent to the plaintiff would be a discovery that the representations of plaintiff were false. He makes no contention here that he was not entitled to the receiver's receipt which he had received, and therefore to a patent, and it is not perceived how he could be permitted to so contend. Moreover, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

patent having issued to him later on, as he avers in his complaint, it relates back to the date of the issuance of the receiver's receipt, and shows conclusively that he had complied with all the requirements of the federal statute prerequisite to the issuing of a receiver's receipt, and determines conclusively that his title at the time the district was organized was unassailable, even by the government. A receiver's receipt, regular in all respects, both as to its form and the antecedent acts of the entryman leading up to it, has been held to be good as against a subsequent patent issued by the government.

In *Simmons v. Wagner*, 101 U. S. 261, 25 L. Ed. 910, it is said: "It is well settled that when lands have once been sold by the United States, and the purchase money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. \* \* \* Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty." *Barney v. Dolph*, 97 U. S. 652, 24 L. Ed. 1063; *Stark v. Starr*, 6 Wall. 402, 18 L. Ed. 925; *Stoddard v. Chambers*, 2 How. 284, 11 L. Ed. 269.

Our former Court of Appeals, in *Dallemand v. Mannon*, 4 Colo. App. 264, 35 Pac. 679, held that a receiver's receipt constitutes record title, upon the margin of which the word "homestead" might be entered, so as to give the owner the benefit of the homestead act.

2. Plaintiff cites and quotes at length from *Fallbrook Irrigation Co. v. Abila*, 106 Cal. 355, 39 Pac. 794. That case is not in point, for the reason that the receipt there under consideration was not a United States receiver's receipt, but was a receipt issued by the registrar of the state land office, and was issued to one who had entered into a contract to purchase certain state lands, upon which he had paid but 20 per cent. of the purchase price. Commenting upon the receipt in this case, the California court says: "Certificates of purchase under the United States land system are not issued until the entire purchase money has been paid; and cases arising under that system are not in point."

Plaintiff also cites and quotes at length in his brief from *Gourley v. Countryman*, 18 Okl. 220, 90 Pac. 430. While the Oklahoma court, in the *Gourley* Case, does say that the certificate or receiver's receipt does not convey the entire estate, but conveys an estate less than a fee, it also says: "But until pat-

ent does issue the certificate carries with it to the purchaser the full equitable title, with all the benefits, immunities, and burdens of ownership."

If the federal government, as was said by Mr Justice Field in *Stark v. Starr*, supra, in its dealing with the public lands, treats the right to a patent once vested as equivalent to a patent issued, we are unable to perceive why the state or any subdivision thereof dealing with such lands, may not so regard and treat them.

Judgment affirmed.

#### TIBBETTS v. TERRILL et al. (No. 3909.)

(Court of Appeals of Colorado. April 12, 1914.  
Rehearing denied May 11, 1914.)

#### 1. APPEAL AND ERROR (§ 1097\*)—LAW OF THE CASE.

The rulings of the Supreme Court were binding on the Court of Appeals on a subsequent appeal as the law of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.\*]

#### 2. LIS PENDENS (§ 26\*)—PURCHASE OF PROPERTY—REIMBURSEMENT FOR IMPROVEMENTS.

Where, after the recovery of a judgment against a husband who, for the purpose of defrauding the judgment creditor, conveyed land through a third person to his wife, the creditor filed a *lis pendens* stating that he would urge and contend that the conveyances were fraudulent, and thereafter brought suit to set them aside, one who, after the filing of the *lis pendens*, but before the commencement of such suit to set aside the conveyances, purchased from the wife, with knowledge of facts and circumstances putting him on inquiry as to the wife's title, was not entitled to reimbursement for improvements made by him as a condition to setting aside the fraudulent conveyances.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 58-62; Dec. Dig. § 26.\*]

#### 3. LIS PENDENS (§ 26\*)—PURCHASE OF PROPERTY—REIMBURSEMENT FOR PAYMENTS.

Such purchaser was not entitled to reimbursement for the amount paid on a mortgage given by the wife after the recording of the judgment, especially where he had actual notice of the recorded judgment when he paid off the mortgage.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 58-62; Dec. Dig. § 26.\*]

#### 4. SUBROGATION (§ 14\*)—SETTING ASIDE—JUDGMENT.

Plaintiff recovered a judgment against a husband who, for the purpose of defrauding plaintiff, conveyed land through a third person to his wife. Plaintiff levied upon the land, and the wife procured a restraining order vacating the levy and enjoining further proceedings. While the injunction suit was pending, plaintiff filed a *lis pendens*, giving notice that he would urge and contend that the conveyances were fraudulent, and thereafter brought suit to set them aside. Defendant purchased from the wife after the filing of the *lis pendens*, with constructive knowledge of the fraud, but it did not appear that he had any actual knowledge thereof, or that his purchase was in furtherance of the fraud, and he was advised by two attorneys, one of whom had never been employed by either the husband or wife, that the wife's title was good, and moreover his purchase was made after the restraining order was granted, corrob-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

orating the attorney's judgment as to her title. *Held*, that defendant was entitled to be subrogated to the rights of the holder of a purchase-money mortgage given by the husband, which he assumed and agreed to pay and did pay.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 35-39; Dec. Dig. § 14.\*]

Cunningham, P. J., dissenting.

Error to District Court, Rio Blanco County; John T. Shumate, Judge.

Action by Walter E. Tibbetts against Louise C. Terrill and others. Judgment for defendant John L. Gray, and plaintiff brings error. Reversed and remanded.

See, also, 44 Colo. 94, 96 Pac. 978, 104 Pac. 605.

Rogers, Ellis & Johnson and Pierpont Fuller, all of Denver, for plaintiff in error. James C. Gentry, of Meeker, for defendant in error Alley.

HURLBUT, J. The original complaint in this action was filed August 8, 1902, by plaintiff in error (plaintiff below), and the action was brought to enforce the collection of a judgment for \$6,378, rendered January 5, 1901, in favor of plaintiff Tibbetts, against David P. Terrill. The judgment was recovered in Arapahoe county, in the Second judicial district, and transcript thereof filed for record with the clerk and recorder of Rio Blanco county, on the 18th day of January, 1901. Plaintiff caused execution thereon to be issued and sent to the sheriff of Rio Blanco county, who levied upon the property in issue on April 29, 1901. After the levy, Louise C. Terrill brought an action against Tibbetts et al., in the district court of Rio Blanco county (June 18, 1901), and succeeded in securing a restraining order out of that court against the sheriff of Rio Blanco county, therein recalling the said execution, vacating the levy, and prohibiting the sheriff from further proceeding to advertise and sell the property under the execution. Apparently that suit was never prosecuted to a final hearing. On September 9, 1901, and while the injunction suit was pending, plaintiff Tibbetts caused a *lis pendens* to be filed with the clerk and recorder of said Rio Blanco county, it being therein stated that on November 22, 1900, defendant David P. Terrill, then being the record owner of the premises, conveyed the same to John L. Gray, his attorney; that on December 30, 1900, said Gray deeded the premises to defendant Louise C. Terrill, wife of said David P. Terrill; that on October 3, 1901, the said Louise C. Terrill, with full knowledge and notice of the filing of said transcript of judgment and *lis pendens* as aforesaid, deeded said property to defendant J. A. Alley; that said *lis pendens* gave notice that plaintiff would urge and contend that the transfers and conveyances made by said David P. Terrill, John L. Gray, and Louise C. Terrill, as aforesaid, were without consideration, fraudulent, and void

as against plaintiff Tibbetts. After said restraining order had been issued, and after the conveyance of the property hereinbefore mentioned, the present action was begun. It seeks to secure a decree of the court canceling all said conveyances, subjecting the property to plaintiff's lien, and ordering the property sold to satisfy the judgment of \$6,378.

This is the second time this case appears in our appellate courts. At the first trial judgment was rendered for defendants Alley et al., from which plaintiff prosecuted an appeal to the Supreme Court, which court, in April, 1908, reversed the judgment and remanded the case. *Tibbetts v. Terrill*, 44 Colo. 94, 96 Pac. 978, 104 Pac. 605. It was tried again in the district court without a jury, and judgment was again rendered for defendant Alley, from which this appeal is taken. In the second trial all the evidence which had been introduced at the first trial was admitted, followed by other evidence upon an issue which had been formed by an amendment to defendants' original answer; the issues thus tendered pertaining to improvements made on the property after Alley's purchase, and to a mortgage existing thereon at the time Tibbetts fastened his judgment lien on the property. The amendment was apparently filed because of the language used by the Supreme Court in the latter part of its opinion in the case cited.

The statement of the facts of this case by Justice Bailey in *Tibbetts v. Terrill*, *supra*, renders it unnecessary for us to restate them in full. In that case the Supreme Court substantially held that, although defendant Alley paid to Mrs. Terrill full value for the property, he was not a purchaser in good faith without notice; that the deeds between the Terrills and Gray were fraudulent and void as against the judgment creditor Tibbetts; that Alley made the purchase with knowledge and information, by himself and his attorney, of the recorded *lis pendens* and levy, and other facts and circumstances sufficient to put him on inquiry as to the fraudulent character of the deeds between defendants David and Louise Terrill and Gray; that such facts and circumstances were sufficient to put Alley on his guard, and imposed upon him the duty of further investigating the charge of Tibbetts that such deeds were fraudulent as to him—further holding that the title of defendant Alley, acquired by him through the deed of Louise C. Terrill, was subject to the payment of plaintiff's judgment of \$6,378, less \$2,000 which Alley was entitled to as a prior claim, through and by virtue of the homestead filed by Louise C. Terrill, September 5, 1901. After that opinion had been rendered, appellant Tibbetts filed in the Supreme Court a motion asking that court to direct the entry of judgment in the lower court in accordance with its opinion. Appellee Terrill also filed a motion asking that the amount of the two mortgages

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which were standing against the premises when defendant Alley purchased the same from Louise C. Terrill, and which Alley had paid off and canceled after his purchase, be declared to be a superior lien to that of appellant Tibbetts. The Supreme Court denied both motions in the following language: "There is nothing in the pleadings concerning these incumbrances; neither is there anything in the original briefs filed in this court relating to them. It appears by the abstract that the consideration paid by the appellee was in part the payment of certain incumbrances, but no issue was made of that matter in the trial court, and we cannot, upon motion after the rendition of an opinion, determine the merits of a controversy which was not involved in, nor passed upon by, the trial court."

The amendment to the answer above alluded to set up substantially that the mortgages were in favor of one C. J. Dickinson, mortgagee, and that the \$4,000 represented thereby was a part of the original purchase price in the sale from Dickinson to David P. Terrill; that Alley had purchased the premises in good faith and paid off the \$4,000 represented by said mortgages, with interest, and had caused both to be released of record. The amended answer further alleged that defendant Alley had placed improvements upon the premises, after his purchase from Louise C. Terrill, of the value of \$1,700, which is conceded.

There are but two propositions for consideration by the court on this appeal, viz.: (1) Whether or not defendant in error Alley is entitled to an allowance for the improvements placed on the property after his purchase from Mrs. Terrill, and entitled to claim the same as a superior lien to that of Tibbetts' judgment; (2) whether or not Alley should be subrogated to the rights of the mortgagee Dickinson, by reason of having assumed the mortgage of \$3,000 at the time of his purchase, and which mortgage he subsequently paid, and whether or not he is entitled to like subrogation after paying off the \$1,000 mortgage.

[1] We may say at this time that the questions: (1) As to whether or not defendant in error Alley was an innocent purchaser for value without notice from Mrs. Terrill; (2) as to whether or not he had sufficient knowledge of the facts and circumstances surrounding the giving and receiving of the fraudulent conveyances aforesaid to put him upon inquiry and cause him to investigate further the validity thereof, as against Tibbetts' judgment lien; (3) as to whether or not said conveyances were without consideration, fraudulent, and given to hinder and delay the creditor Tibbetts from collecting his said judgment; and (4) as to whether or not Alley is deemed in law to have possessed constructive knowledge of the fraudulent character of said conveyances and want of title in his grantor, Mrs. Terrill, to con-

vey the premises to him free from Tibbetts' lien—have all been decided and disposed of by the Supreme Court in the case cited, against the claims and contentions of Alley. The rulings of the Supreme Court upon these questions are binding upon us under the doctrine of the "law of the case," which is invoked by plaintiff in error.

It may be well to notice here that although the answer, as amended, alleges that the property was incumbered to Dickinson for \$4,000 at the time Alley purchased from Mrs. Terrill, and the same was part of the original purchase price from Dickinson to David Terrill, the record seems to show that only \$3,000 thereof was a part of such purchase price. The abstract of title (in evidence) shows that the mortgage to Dickinson from David Terrill for \$3,000 was on record before Tibbetts' transcript of judgment was recorded, while the other \$1,000 was represented by a mortgage given for that amount to Dickinson by Mrs. Terrill on April 10, 1901, recorded April 22, 1901, which was after the filing of Tibbetts' transcript of judgment. It further appears from the record that the written contract of sale between Mrs. Terrill and Alley makes no mention of the last-mentioned mortgage, so that Alley did not assume or agree to pay the same. The facts concerning the payment of this \$1,000 mortgage by Alley, as disclosed by the record, are as follows: When the deed from Mrs. Terrill was delivered to Alley on October 29, 1901, he, at her request, paid to the bank, to the credit of Dickinson, \$1,000, which sum was deducted from that part of the purchase price which Alley had agreed to pay Mrs. Terrill that day. The \$1,000 so paid to Dickinson was for the sole purpose of discharging that mortgage.

[2] Now, as to the question of improvements made by Alley and his right to a lien therefor, it is well to call attention to the circumstances under which such improvements were made. As said by the Supreme Court, Alley bought the premises with knowledge and information of the fraud perpetrated upon Tibbetts by Mrs. Terrill and her grantors, or at least with knowledge of facts and circumstances which in law imposed upon him the duty, before buying the premises, of investigating further the title of Mrs. Terrill. We think, as regards these improvements, that Alley, having constructive knowledge, as he did, of the fraudulent character of the conveyances from David Terrill and Gray, down to his immediate grantor Mrs. Terrill, expended his money in improving the property, well knowing that Tibbetts was vigorously following up his claim and contention that Mrs. Terrill's title was fraudulently obtained and was invalid as against his judgment lien. It was in no way imperative that Alley should have made such improvements. His failure to do so would in no way have jeopardized the title which he thought he had. Under such circumstances,



common prudence should have caused him to refrain from expending any money on the premises other than was absolutely necessary to prevent loss of the same, until after the claims of Tibbetts had been finally determined. This being the situation, we are unable to agree with his contention that he should be reimbursed for the improvements placed on the premises after his purchase. He made such improvements at his own peril so far as Tibbetts is concerned, and ought to suffer the consequences. As between himself and Mrs. Terrill, he had the legal title to the property, and had a right to do with it as he chose, but he assumed the risk of proving he was an innocent purchaser for value without notice. *Shand v. Hanley et al.*, 71 N. Y. 319; *Linthicum and Wife v. Thomas*, 59 Md. 574. In *Strike v. McDonald*, 2 Har. & G. (Md.) 191, 281, we find this language: "The quoted passage of Sugd. 525, furnishes a sound, practical rule for rejecting claims for improvements, where the transaction is tainted with fraud. It is expressed nearly in these words: If a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, he is not entitled to avail himself of it."

We are of the opinion that the district court erred in allowing for the improvements made by Alley and decreeing the same to be a prior lien to that of Tibbetts' judgment.

[3] We come now to the question of subrogation, as applied to the mortgages paid by Alley after his purchase. We will first consider the mortgage of \$1,000 given by Mrs. Terrill to Dickinson after Tibbetts' transcript of judgment had been recorded. The determination of this question should require but little space, as Alley's position concerning this payment does not appear to us to warrant the interposition of a court of equity to save him from any loss he might have sustained through the release of that mortgage. The mortgage was recorded over three months after the recording of the transcript of judgment. Alley not only had constructive notice of the recorded transcript, but he had actual notice thereof at the time he paid off the mortgage. The lien created by the filing of the transcript of judgment was paramount to that of the mortgage and was in no way affected by it; hence the court erred in decreeing this mortgage to be a prior lien to that of the judgment.

[4] There is but one question remaining for determination, viz., the right of Alley to be subrogated to Dickinson, mortgagee, through payment and release of the \$3,000 mortgage. The record shows that, at the time Alley purchased the premises from Mrs. Terrill, he assumed and agreed to pay that mortgage. It may be well to briefly recite Alley's position in connection with the payment of this mortgage. The pleadings nowhere charge Alley with fraud or with knowledge of the fraud

practiced upon Tibbetts through the execution of the fraudulent deeds referred to, and do not charge him with participation therein. The complaint goes no further than to charge him with notice of the recorded *lis pendens* and its contents.

From the evidence and findings of the court it appears that Alley was a resident of the state of Missouri, had only been in Colorado, or in the vicinity of the premises, about a week before he made the purchase, and had never known David or Louise Terrill or Gray prior to that time; that he personally knew nothing about the fraud practiced against Tibbetts by the Terrills and Gray, in the execution and delivery of the said conveyances; that he never had any conversation with any of said parties, or with any one else, concerning the purpose or intent of any of them in the execution and delivery of the deeds; and that, at the time the deeds were made, he was not within the boundaries of the state, and those people were entire strangers to him. From this it would appear that the only knowledge he had of the fraudulent purpose in giving and recording such deeds was such knowledge, necessarily constructive, as the law charged against him through notice of the recorded *lis pendens*, levy, and other documents. He might have examined the records thoroughly and made every effort to obtain therefrom information concerning the motives of the Terrills and Gray in giving the deeds, and still the limit of information so acquired would have been that Tibbetts *claimed* and *contended* that the fraudulent deeds were given solely for the purpose of fraudulently defeating him in the collection of his judgment out of the premises. It is more than probable that the question of intent or evil design on the part of the Terrills and Gray in giving the deeds would have remained a closed secret to Alley. He might have interrogated them concerning such intent and design, and would in all probability have failed to elicit any information from them on that subject. It is certainly a reasonable presumption that none of them would have taken him into their confidence and divulged to him their fraudulent design and purpose in executing the deeds. We have already seen that the Supreme Court held this constructive knowledge possessed by Alley was sufficient to defeat his claim that he was an innocent purchaser for value without notice, thereby holding that he took no lien to the premises as against the judgment lien, through the deed executed to him by Mrs. Terrill. Therefore any question as to Alley having any title to the premises as against Tibbetts, by virtue of Mrs. Terrill's deed to him, is closed. Alley is not here complaining on that score, and concedes he has been defeated on that issue; but he vigorously contends that while *Tibbetts v. Terrill*, *supra*, destroyed his title under the deed from Mrs. Terrill, so far as Tibbetts' judgment is concerned, it

did not pass upon or determine his equitable rights emanating from his payment of the \$3,000 mortgage. In this contention he is clearly right. The Supreme Court expressly refused to consider this point. Nothing said in that case can be taken or considered as applicable to this question. In fact the Supreme Court in that case had under consideration but two questions; one pertaining to the homestead claim and the other to Alley's title under his deed from Mrs. Terrill as against Tibbetts' judgment lien. We believe its reasoning and analysis of the evidence was intended to be applied only to the issue under consideration, viz.: Was Alley an innocent purchaser without notice? The rule there was clearly defined, but went no further than to hold that a purchaser from a fraudulent grantee was not an innocent purchaser for value without notice when the record disclosed that he had knowledge of facts and circumstances at the time of purchase which would put a prudent man upon inquiry, and which, if followed up by investigation, would have disclosed the fraudulent and defective title of his grantor. "The rule is familiar that general language in an opinion is to be taken in connection with the facts of the particular case. \* \* \* To make the matter entirely clear, we call attention to the difference in the character of the action and the issues therein." *Halbouer v. Cuenin*, 45 Colo. 507, 101 Pac. 763.

There is reputable authority holding that a purchaser from a fraudulent grantee cannot be deprived of his title unless it is shown that he had actual knowledge of the fraudulent intent and design of those actually participating in the fraudulent transaction, and that constructive knowledge, such as given by the record, etc., is not sufficient. Whatever may be the rule in other jurisdictions, we recognize only the rule adopted by our Supreme Court.

The question of Alley's title, then, having been disposed of adversely to him, has he, under the facts and circumstances here disclosed, any standing in a court of equity for relief against the judgment lien, by reason of having paid off the \$3,000 mortgage? We recognize that there is a decided conflict of authority upon this question. It must be conceded that, when Alley purchased, he knew the *lis pendens* was on record, which notified everybody that Tibbetts *claimed* that the deeds from David Terrill to Gray and from Gray to Mrs. Terrill were fraudulent and void, given without consideration, and executed for the purpose of hindering, delaying, and defrauding Tibbetts and other judgment creditors of David Terrill; that a levy had been made on the premises under execution issued upon the Tibbetts judgment; and that he knew of facts and circumstances which, if investigated, would have informed him that a transcript of the Tibbetts judgment had been recorded. While this con-

structive knowledge must be attributed to Alley, there is not a word in the record that even tends to show that he was a participant in the frauds or had any notice or knowledge whatever of the evil intent or design of the Terrills or Gray in executing the conveyances aforesaid. The record shows that he was not in the state when they were given and never knew either of the Terrills or Gray until about one week before he purchased the property. This was about ten months after the fraudulent deeds had been given. The written agreement of purchase between Mrs. Terrill and Alley was made October 3, 1901. Soon after this he went to his home in Missouri and did not return until about October 28, 1901. In the meantime he had employed two attorneys to examine the title, one of whom had at one time been Mrs. Terrill's attorney. The other had never been attorney for either of the Terrills. Both advised him that Mrs. Terrill had a good title to the premises, and that the claim of Tibbetts as against Mrs. Terrill's title was unfounded and of no force or effect. He relied wholly upon this advice, and, believing Mrs. Terrill had a good title, made the purchase. The record does not tend to show that, when Alley made the purchase, he intended thereby to further the fraud previously consummated by the Terrills and Gray, or intended in any way to commit any fraud upon Tibbetts or any one else. Alley's situation is about as follows: By the Supreme Court decision he lost his title as against Tibbetts' judgment lien, except the \$2,000 saved to him through the homestead filing of Mrs. Terrill; also the \$3,000 paid to Mrs. Terrill at the time he took his deed, and all taxes paid. We have just decided that he loses the \$1,700 paid for improvements, and the \$1,000, with interest, which he paid to release the second Dickinson mortgage, in addition to which he loses his costs and attorney's fees, which is doubtless quite an item. Must such losses now be augmented by the \$3,000 which he paid to release the first Dickinson mortgage? Alley strenuously contends that he paid off this mortgage in the utmost good faith, relying on his attorneys' advice and believing that he had a good title to the premises.

It is well worthy of notice that the *lis pendens* was filed by Tibbetts after the suit was instituted by Mrs. Terrill against the sheriff of Rio Blanco county to restrain him from advertising or selling the property. The record shows the sheriff was enjoined from selling, and that he released the levy previously made under the execution, all of which Alley had full knowledge of *before* he paid off the \$3,000 mortgage, so that in addition to the advice of his attorneys to the effect that Tibbetts' claim was of no force or validity as against Mrs. Terrill's title, which he had bought, he had the further assurance of a decree of a competent court of record,

corroborating his attorneys' judgment in that regard.

So far as Alley is concerned, there appears to be no badge of fraud disclosed by the record. The Terrills and he were practically strangers to each other at the time of purchase. The record, taken as a whole, rather tends to show that Alley was free at all times from actual fraudulent design, and free from any actual knowledge or information of evil or fraudulent intent on the part of any one connected with the transaction. The only serious charge that can be made against him is that he was lacking in common business acumen and foresight in his dealings with this property. He therefore should stand in a court of equity in a favorable light and receive its protection, provided it can relieve him without doing injustice to other interests which are involved in the transaction. He stands alone in this litigation; both the Terrills and Gray having defaulted.

"As a general rule, where the purchaser's title to the land fails, he will be subrogated to the rights of the holders of liens or incumbrances which he has paid, or which have been paid out of the purchase money." Am. & Eng. Enc. of Law, vol. 27, p. 239.

The case of *Lynch v. Burt et al.*, 132 Fed. 417, 67 C. C. A. 305, is one in which the facts were quite similar to those found in the case at bar. The court said: "The facts as clearly give Phipps, an equitable claim or right to reimbursement as they exclude Burt therefrom. She (Burt) was an active and conscious participant in the fraud, while he (Phipps) was an entire stranger to it for more than three years after it was committed, and was at no time a conscious participant therein. He was constructively chargeable with knowledge of it, because he entered into the written agreement with Burt, and acquired her title pending the present suit, and subsequent to the Gotzian decree. He also advanced the money to pay Burt's counsel and other expenses in this suit, and was therefore constructively chargeable with her vexatious and wrongful effort to sustain the fraudulent transfer and to defeat the complainant's claim. The evidence, however, clearly establishes that in all this Phipps was acting in perfect good faith, without intent to defraud any one, in a mistaken belief in the honesty of Burt's claim and conduct, and under the approving advice of reputable counsel. \* \* \* In pursuance of the agreement with Burt into which he had entered in good faith, and acting upon an honest belief that he had thereby acquired a right and incurred an obligation so to do, Phipps discharged and removed this paramount lien by paying \$17,168.33 in redemption from the sale thereunder. Under the rules stated, he was entitled, as against complainant, to reimbursement for that expenditure, and to have its repayment made a

condition to the relief granted to complainant, and declared a lien upon the lands as the Gotzian claim had been. He was also entitled to interest upon this sum from the date of the redemption," etc.

In the instant case Alley stood in the same relative position as did Phipps in the one cited. Phipps was not a participant in any way in the frauds perpetrated by Burt and others in having the title to the premises fraudulently deeded to Burt for the purpose of cheating and defrauding the creditors of the judgment debtor Bartholomew Pickert, and he knew nothing about those deeds until three years after they were made and given. In the instant case Alley knew nothing about the fraudulent deeds between Gray, David Terrill, and Mrs. Terrill, given for the purpose of cheating and defrauding the creditors of David Terrill, until about ten months after they were given. Phipps, at the time he made his contract with Burt, agreed with her to discharge the Davis mortgage then on record. At the time Alley took the deed in the instant case he agreed to pay the \$3,000 mortgage.

In *Tompkins v. Sprout*, 55 Cal. 31, we have another case wherein the facts were noticeably similar to those of the case at bar. April 2, 1877, decision was rendered in favor of plaintiff Tompkins against defendant Charles Peterson, followed by final judgment on April 7th following. April 2d, after decision, defendant conveyed the land to his brother Gustav Peterson. Gustav received the deed with full knowledge of Charles' intent to defraud the judgment creditor Tompkins, and colluded with Charles in the fraud. April 24, 1879, execution on the judgment was issued, and the property sold thereunder, followed by sheriff's deed to plaintiff on March 21, 1879. Between the issuing of the certificate of sale and execution of sheriff's deed, and about September 28th, defendant Sprout purchased the land from Gustav Peterson, and paid full value therefor, but he had no actual knowledge of the fraud against Tompkins in the deed from Charles to Gustav, though he had both actual and constructive knowledge that the land had been sold at sheriff's sale as Charles' property and that plaintiff Tompkins held the certificate of sale therefor. He also had actual knowledge of the judgment in favor of Tompkins against Charles. At the time of the sheriff's levy and sale of the premises, there was a valid mortgage on the property, which the defendant Sprout assumed and agreed to pay at the time he took his deed from Gustav, and he afterwards paid off the same and had it discharged of record. Under these facts, the court held that Sprout should have been protected, and that, if Tompkins sold the premises, Sprout would have a first lien thereupon for the amount he had paid to release the mortgage. We quote from the opinion as follows: "There being, at the time the plaintiff recovered his judg-

ment against Charles Peterson, and at the time of the conveyance from Charles to Gustav Peterson, and at the time of the purchase by plaintiff under his execution sale, a valid, subsisting mortgage lien upon the property, it is obvious that the latter cannot be injured by requiring of him payment of the amount of the lien as a condition precedent to vacating the sale to the defendant. The court below expressly found that defendant had no actual knowledge of the fact that the conveyance from Charles to Gustav Peterson was fraudulent, and that the conveyance from the latter to defendant was constructively fraudulent only. In such case, a court of equity will protect the purchaser as well as the creditor, where, as here, both can be protected without injury to either. \* \* \* *Clements v. Moore*, 6 Wall. 312 [18 L. Ed. 786]; *Colron v. Millaudon*, 91 How. 115 [15 L. Ed. 575]. \* \* \* Applying the principles thus announced to the facts of the case under consideration, it is clear that the court below should have imposed upon the plaintiff, as a condition to vacating the sale to defendant, and requiring a conveyance of the property from him to the plaintiff, the payment by the latter to the defendant of the amount paid by the defendant in the satisfaction and discharge of the mortgage lien existing upon the property during the time already stated. In this way, and in this way only, justice can be done between the parties."

From 20 Cyc. 647, we quote the following: "But, where the purchaser's conveyance is merely constructively fraudulent, a court of equity, in setting aside the conveyance, will protect him, as well as the creditor, where both can be protected without injury to either as by requiring that the purchaser be reimbursed for a prior incumbrance against the property which he has paid, or for taxes paid."

"When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and can have no relief either at law or in equity. But, when the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. If it appears that the grantee has been guilty of no actual fraud, but the circumstances render it inequitable, equity, while it will set aside the conveyance, will protect the grantee to the extent of his payment." 14 Am. & Eng. Enc. of Law, 345. See, also, 37 Cyc. 444.

None of the Colorado cases cited by counsel for either side involve the question we are now considering.

Plaintiff in error contends that the law is settled by the overwhelming weight of authority that, if a purchaser expressly assumes the payment of valid mortgages of record at the time of purchase, he thereby becomes the principal debtor, primarily and absolutely liable for the debt, and may not be subrogated to the benefit of the incumbrance upon

making payment according to his contract. There is authority supporting the rule, but a number of decisions seem to have qualified it and held the same not to be inflexible, viz.: *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92; *Bressler et al. v. Martin et al.*, 133 Ill. 278, 2 N. E. 518; *Young v. Morgan*, 89 Ill. 199; *Cameron v. Holensshade et al.*, 13 Ohio Dec. 430, 1 Cin. R. 83; *Bryson v. Myers*, 1 Watts & S. (Pa.) 420; *Peet v. Beers*, 4 Ind. 46.

While the case of *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 95 Pac. 314, 16 L. R. A. (N. S.) 470, 127 Am. St. Rep. 108, deals with a situation but little similar to that existing in the instant case, I find the following language, which indicates the court's leaning, on the doctrine of subrogation: "We think that the authorities largely preponderate in favor of the proposition that, although the deed recites that the purchaser shall pay off the mortgage as a part of the purchase price, he is entitled to the subrogation"—citing cases from Illinois, New York, Minnesota, Indiana, and California.

In the instant case the deed to Alley recited that he assumed and agreed to pay this \$3,000 mortgage. Strongly supporting this view are the following cases: *Young v. Morgan*, supra; *Bressler et al. v. Martin et al.*, supra; *Matzen v. Shaeffer*, supra. In the last case cited the Supreme Court of California held that the vendee paying off the existing mortgage as part of the purchase price entitled him to the benefits of the mortgagee as against the judgment creditor of his vendor, although the mortgage had been released of record; the court saying: "This presents a case in which the interests of the appellant required that the lien of the mortgage which she paid off should be kept alive. Her interests can only be fully protected by regarding the transaction in which she paid off the mortgage as an assignment of it to her, and the lien as being kept alive for her security and benefit. \* \* \* We think this is one of the cases in which the satisfaction of a mortgage of record does not of itself prevent a court of equity from holding that the payment of it operated as an assignment of it to the person making the payment. There is nothing to indicate that appellant, when she paid off the mortgage, intended to purchase it, or to have it kept alive for her benefit. It does not appear that anything was said on that subject. She paid it off, and the mortgagee, without her request, satisfied it of record. But the payment was made for her benefit, or for that of respondent. If the payment under the circumstances operated as an equitable assignment of the mortgage to her, she gets the benefit of it; otherwise the respondent. Now it is quite clear that she intended the payment of the mortgage should inure to her own, and not to his, benefit. She had in view her own, and not his, interest. And it is only by regarding the transaction as an assignment of the mortgage to her that her interests can be protected and

maintained, and a court of equity will presume that it was intended she should reap the benefit of her investment. Equity regards that as done which ought to be done, and looks to the intent rather than to the form. There is no equitable ground on which the respondent could object to the mortgage lien being kept alive for the protection of appellant's interest; and, the mortgage having been satisfied of record when it should have been assigned to appellant, it was not error to vacate the satisfaction."

If Alley acted in good faith in paying the mortgage, and with a desire to save his property from probable foreclosure, and under an honest belief that he had a good title thereto, then he should be protected by the court, if in so doing no injustice be done to Tibbetts. The payment of the mortgage was an entirely separate and distinct act from the taking of the deed from Mrs. Terrill. True, his deed gave him no title to the property as against the judgment lien, but it does not necessarily follow that, because he failed to sustain the title which he thought he had, he thereby lost all right of subrogation which he might have otherwise possessed by reason of having paid off the mortgage. The integrity of the mortgage is in no way questioned. It was a valid lien of record when the transcript of judgment was recorded. Alley is not charged with any kind of fraud in its payment. Such being the case, wherein is Tibbetts prejudiced, or wherein does he lose any rights by requiring him to first pay this prior lien of \$3,000 from the proceeds of the sale?

In the two cases last cited the Supreme Court without cavil or hesitation invoked equitable principles to administer common justice and prevent a serious wrong and financial loss to one who was not in any way chargeable with any actual fraud, connivance, or evil design against the judgment creditor; and we say here that this mortgage, against which no suspicion of invalidity is suggested, was paid off by Alley as part of the purchase price under his agreement to do so, and, even though nothing was said at the time as to whether or not he intended to rely upon the mortgage as a protection against Tibbetts' judgment lien, equity will presume that his intention in paying it off was to have it inure to his own benefit, and not that of the judgment creditor. It is clear that, at the time Tibbetts' transcript of judgment was filed in Rio Blanco county, the mortgage was of record, in full force and effect, and the creditor could by no rule of law or equity have sold the property under the execution free from the lien thereof. It appears to be a well-settled rule of law that a levy by execution or attachment is effective only as against the interest or title in real property which the judgment or attachment debtor has at the time of such levy or attachment. Under these circumstances, we do not see why the rights of the judgment creditor Tibbetts should be enlarged, or the value of

his judgment lien increased, by the fraudulent acts of his judgment debtor. After a court has defeated the evil design of a judgment debtor to defraud his creditors, by setting aside a fraudulent deed given by the debtor for that purpose, we know of no rule of equity that would, as a penalty for the debtor's fraud, destroy the right of subrogation in a third person who has paid off a mortgage which was a paramount lien to that of the creditor's judgment.

Most of the cases cited by plaintiff in error involve transactions between fraudulent grantors and their immediate fraudulent grantees, wherein all are actual parties to the fraud; hence those cases do not apply to a state of facts such as we are now considering. The general rule seems to be that a fraudulent grantee who has actually and knowingly participated in the fraud has no standing in a court of equity for any purpose, and will not be subrogated or otherwise protected for moneys paid in discharging liens existing at the time of the fraudulent purchase. We think, however, that a purchaser from such fraudulent grantee, who has only constructive knowledge of the fraud, and has no knowledge or information of the fraudulent intention of those perpetrating the same, and in no way participates therein, ought not to be denied relief in a court of equity, where such relief works no injury to others. We think the authorities cited amply support our conclusions and are well grounded in sound, equitable principles.

The judgment will be reversed, and the case remanded to the district court for further proceedings as the parties may be advised, and, in case the property be sold under the Tibbetts judgment, there shall be first paid to defendant in error Alley, out of the proceeds thereof, the sum of \$2,000, being the amount of the homestead exemption, plus the \$3,000 which was paid to release the mortgage, the balance, if any, to be applied on the plaintiff's judgment; plaintiff in error to recover his costs.

Reversed and remanded.

CUNNINGHAM, P. J. Finding myself unable to concur either in the reasoning of or the result reached by my Associates, and being impressed with the importance of the rule announced in the majority opinion, and the precedent which it establishes, I have reluctantly concluded that it is my duty to set forth, at some length, my reasons for dissenting.

I shall not incur the opinion with lengthy quotations from the opinion of the Supreme Court rendered in this case when it was before that body, as the same has been referred to in the majority opinion, and will be found in 44 Colo. 94, 96 Pac. 978, 104 Pac. 605. Summarized, the opinion of the Supreme Court squarely holds: (1) That Mrs. Terrill held the property in trust for the

creditors of her husband; (2) that, in taking the property from Mrs. Terrill, Alley *willfully* closed his eyes to the facts and circumstances surrounding the transfer of the property from Terrill to his wife. These are findings of fact. Upon these and other similar findings of fact, the Supreme Court made findings of law to the effect that knowledge of the circumstances, such as Alley had, was equivalent to *actual* notice, and that "*in such event, as we have seen, the law assumes that he had actual knowledge of such fraud.*" Italics, wherever used, are mine. In the circumstances of this case, the Supreme Court announces the rule to be (quoting from *Balfour v. Parkinson* [C. C.] 84 Fed. 860): "Courts of equity do not permit a party to claim *any* benefits from his own ignorance of facts which he could have learned by exercise of ordinary prudence and diligence." The Supreme Court's conclusions, if any authority were required to make the same binding upon us, finds ample support in the authorities, case, and text.

"Knowledge or *implied* notice is equivalent to, and constitutes, participation, where the transfer is to one not a creditor." 20 Cyc. 471.

"Participation, as the term is used, need not be by some *affirmative* action on the part of the transferee in consummating the fraudulent intent of the transferor, but the transferee is a participator in the fraud if he takes the conveyance with actual notice of the grantor's fraudulent intent, *or under circumstances where the law will impute to him knowledge of the purpose of the transferor*, without his actively taking part in the fraudulent design of the transfer *other than the taking of it.*" 20 Cyc. 471, note; *Kansas Moline Plow Co. v. Sherman*, 3 Okl. 204, 41 Pac. 626, 32 L. R. A. 33.

Furthermore, the right to subrogation is never granted as a reward for negligence. *Ft. Dodge Bldg. Ass'n v. Scott*, 86 Iowa, 431, 53 N. W. 283.

The majority opinion, in so far as it treats of the money paid by Alley to redeem from the mortgage, appears to proceed upon the theory that unless one actually enters into a conspiracy, *and by word of mouth discusses the intentions and purposes of the one from whom he obtains his title*, there can be no *actual* participation in the fraud of the grantor. The authorities last cited are opposed to this view.

My Brethren may not approve of the opinion handed down by the Supreme Court in this case, but they ought to be bound by it, and they ought to cheerfully accept it as the law of this case; they have no more right to silently reverse an opinion of the Supreme Court, or ignore it altogether, than they have to, in terms, announce their dissent, and thus refuse to follow it. My conclusion, therefore, is that, if for no other reason than that the Supreme Court has laid down rules and made findings, both of

fact and of law, which are binding upon us, the majority opinion in this case is wrong. But I find myself in hearty accord with the conclusions of the Supreme Court. My position is that, under the decision of the Supreme Court in this case, Alley was guilty of actual fraud, or guilty of such willful carelessness as that the law imputes to him actual knowledge, and even the majority opinion nowhere combats the universal rule that one guilty of actual fraud may not invoke the doctrine of subrogation. On this point, at least, the authorities are harmonious. The relief extended to Alley by the majority opinion presupposes a finding that he did not have actual knowledge; that he acted in good faith. These findings are squarely in the teeth of the opinion of the Supreme Court, as I read it.

I am persuaded that my Associates have reversed the rules that apply, or ought to apply, in cases of this sort, viz.: That: "The burden is always on one who claims this equity of subrogation to show that he is entitled to it." *Sheldon on Subrogation* (2d Ed.) § 11. "And also that the relief can be granted to him without prejudice to the rights of innocent parties." *Harris on Subrogation*, p. 561. That: "To entitle a party to subrogation, his equity must be *strong*, and the case *clear*. In such applications great care should be taken by the court that the subrogation will *work no injustice to the rights of others.*" *Knouf's Appeal*, 91 Pa. 78; *Lloyd v. Galbraith*, 32 Pa. 103; *Keeley v. Cassidy*, 93 Pa. 318. That: "The rights of one seeking subrogation must have greater equity than those who oppose him; the burden being upon the would-be subrogee to establish his right, for subrogation will be ordered only in a *clear case of pure equity*. The right is never allowed one who would thereby reap advantage in *any way* from his own wrongdoing. \* \* \* As its purpose is only to prevent fraud or subserve justice, it will not be applied where its exercise would promote injustice, and thus can be applied only with a due regard to the legal and equitable rights of others." 37 Cyc. 371; *McNeill v. Miller*, 29 W. Va. 483, 2 S. E. 335. That: "The party seeking such relief must show a superior equity, for, the equities being equal, the law will be allowed to take its course." *Pritchett v. Jones*, 87 Ala. 317, 6 South. 75.

The majority opinion appears to proceed upon the theory that the burden was on Tibbetts to satisfy the chancellor that Alley had been guilty of fraud, and that his fraud would work to the injury of Tibbetts. But even under this perversion of the rules, as indicated by the above quotations, the majority opinion is wrong, for, as I shall presently show, the record demonstrates that Tibbetts *will* suffer injury.

In the majority opinion attention is called to the difficulty which would have confronted Alley, had he attempted by inquiry to as-

certain whether or not Tibbetts' contentions were well-founded. There are two all-sufficient answers to this: (1) He could have refrained from purchasing the land until that question was settled; he knew that there was an issue or question on that point, and, if he found it difficult to get at the facts, no hardship would have resulted to him had he kept out of the controversy. (2) The Supreme Court has found (44 Colo. 104, 98 Pac. 978, 104 Pac. 605) that, if Alley "had pursued these investigations with *reasonable* skill and diligence, he would have ascertained that the consideration which Gray gave for the property was his unsecured promissory note, and the consideration which Gray received for the property when he conveyed to Mrs. Terrill was the same note, which was still in the hands of Mr. Terrill. He would also have discovered the existence of the judgment in favor of appellant. He would thus have learned that the conveyances leading from Terrill to Mrs. Terrill were without consideration and void as to creditors, or that the consideration for the conveyance from Gray to Mrs. Terrill was paid by Terrill, which resulted in Mrs. Terrill's holding the property subject to the rights of her husband's creditors; that, in either event, the transaction was fraudulent, so far as it affected the creditors. Aside from the knowledge possessed by the attorney, there were sufficient facts known to Alley, before the purchase was consummated and the purchase price paid, to put him upon inquiry, *and to charge him with knowledge of facts which he might have acquired if he had exerted himself to the degree of ordinary diligence and prudence in making inquiry.*"

Moreover, my Brethren appear to be oblivious to the difficulties that would confront Tibbetts, were he to attempt to establish actual fraud on the part of Alley. Paraphrasing from the original opinion: "He (Tibbetts) might have examined the records thoroughly, and made every effort to obtain information concerning the motives of Alley and the Terrills in giving the deed, and still the limit of information so acquired would have been that Alley *claimed* and *contended* that the deed from Mrs. Terrill to him was given for a good consideration. It is more than probable that the question of intent or evil design on the part of Mrs. Terrill or Alley (if there was any) in giving the deed would have remained a closed secret to Tibbetts. He might have interrogated them concerning such intention and design, and in all probability would have failed to elicit any information from them on the subject. It is certainly a reasonable presumption that neither Mrs. Terrill nor Alley would have taken him into their confidence and divulged to him their fraudulent design (if they entertained one) and purpose in executing the deed." It is worthy of note that we have in this case no evidence whatever that Alley paid off this mortgage, to the lien of which the majority

opinion subrogates him, with his own money, or in good faith, except his unsupported statement. It is conceded in the majority opinion, in treating of the improvements made by him, that his conduct was most extraordinary. But it was no more unusual in this respect than in respect to buying into this controversy, and paying off the mortgage before the maturity of the debt it secured. The unlimited opportunity for grave injustice, being thus done to Tibbetts, ought to make the court doubly cautious in the application of the benign doctrine of subrogation, for the books all hold that it is purely a benevolent rule. There is other evidence to be found in the majority opinion of extreme tenderness towards the supposed rights of Alley, for the writer of that opinion even appears to commiserate with Alley on the loss of the improvements which the majority opinion takes from him, on the sum of money which he says he paid to Mrs. Terrill in cash, and even on the attorney fees and costs which he has paid out in this case. What these items have to do with the matter is not clear; nor is it plain why sympathy should be extended to Alley for the money which he has voluntarily and contumaciously paid out in the way of costs and attorney fees, while overlooking similar expenditures which he has wrongfully forced Tibbetts to incur.

There are only two authorities that are cited in the majority opinion which, to my mind, sufficiently resemble the instant case in their facts to require notice, and they may be readily distinguished. My Associates appear to rely largely upon the case of *Tompkins v. Sprout*, 55 Cal. 31. It is apparent upon a reading of that opinion that the Supreme Court made much of the express finding of the trial court that: "The defendant paid full value for the land, and 'did not have actual knowledge of the fact that the conveyance from Charles to Gustav was fraudulent.'" Here, if Alley did not have *actual* knowledge, he had what the Supreme Court has ruled was the *equivalent* thereto, and therefore the Supreme Court says *the law imputes to him actual knowledge*. Proceeding upon and supplementing this finding by the trial court, the California Supreme Court (55 Cal. on page 36) says: "The court below expressly found that the defendant had no actual knowledge" that the transfer "from Charles to Gustav Peterson was fraudulent, and that the conveyance from the latter to the defendant was constructively fraudulent only. In such case, a court of equity will protect the purchaser as well as the creditor, where, *as here, both can be protected without injury to either.*" In other words, I take it that the California Supreme Court found that there was ample equity in the property to cover the claims of both parties. At least there is in the opinion nothing to negative this presumption. Another case much relied upon in the majority opinion (*Lynch v. Burt*,

132 Fed. 417, 67 C. C. A. 305) may be distinguished in the same manner as the California opinion.

The land in this case, with all the personal property thereon situate belonging to Mrs. Terrill (including household furniture, live stock, hay, etc.), was sold to Alley for \$7,000. With the \$2,000 deducted on account of the homestead right mentioned in the majority opinion, and \$3,000 on account of the mortgage debt, it is not probable there will be anything remaining as the result of an execution sale to apply on the Tibbetts judgment which 14 years ago amounted to \$6,378, besides costs, and now must amount to approximately \$15,000.

The majority opinion is inconsistent in denying to Alley the value of his improvements, while allowing him for the money he advanced in redeeming the land from the mortgage. The authorities make no distinction between improvements and money applied to the liquidation of liens which were upon the land at the time of the purchase, and especially in this case ought there to be no distinction made, since it was stipulated that the amount claimed by Alley by way of improvements was \$1,700; that they *were permanent and necessary and enhanced the value of the property*. In the majority opinion it is said that Alley "expended his money in improving the property, well knowing that Tibbetts was vigorously following up his claim and contention that Mrs. Terrill's title was fraudulently obtained, and was invalid as against a judgment lien. \* \* \* Under such circumstances, common prudence would have kept him from expending any money on the premises other than was absolutely necessary to prevent the loss of the same, until after the claims of Tibbetts had been finally determined. \* \* \* He made such improvements at his own peril, so far as Tibbetts is concerned, and ought to suffer the consequences." With this finding I fully agree; but did he not know, when he paid out his money by way of redeeming the land from the mortgage, that "Tibbetts was vigorously following up his claim and contention that Mrs. Terrill's title was fraudulently obtained"? There is nothing in the record to show when he made the improvements with reference to when he paid out the money by way of redeeming from the mortgage, but the record does disclose that he paid out a substantial part of the money *after this suit was started, and a year before the note was due*; that is to say, a year before the mortgage could have been foreclosed or his title jeopardized.

In denying to Alley what he had paid out for necessary improvements, which enhanced the value of the property by \$1,700, Judge Hurlbut quotes the following from Strike v. McDonald, 2 Har. & G. (Md.) 191, 281: "The quoted passage Sugd. 525, furnishes a sound, practical rule for rejecting claims for im-

provements, where the transaction is tainted with fraud. It is expressed nearly in these words: If a man has acted fraudulently, and is conscious of a defect in his title, and, with that conviction on his mind, expends a sum of money in improvements, he is not entitled to avail himself of it."

Having quoted, without qualification, the above language from the Maryland case, I suppose my Associates concede its applicability to the defendant in error Alley. Then we have this remarkable conclusion: That where a transaction is tainted with fraud, and where a man has acted fraudulently and is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in paying off a mortgage, he is entitled to avail himself of the benevolent doctrine of subrogation; but where he makes valuable improvements, which are necessary to the estate, and which actually enhance the value of the estate, he is not.

The highest court of this country has clearly indicated that as between improvements placed upon land purchased under the circumstances presented by this case, and money paid out to lift an incumbrance therefrom, the law makes no distinction, and that court has expressly ruled that a man who has acted fraudulently, "and with that conviction on his mind," can recover for neither of these items. In Railroad Co. v. Soutter, 13 Wall. 517, 20 L. Ed. 543, Mr. Justice Bradley, speaking for the court, used this language: "Was it ever known that a fraudulent purchaser of property when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity." 20 Cyc. 470; Gilbert v. Hoffman, 2 Watts (Pa.) 66, 26 Am. Dec. 103; Guckenhimer v. Angevine, 81 N. Y. 394; Bump on Fraudulent Conveyances, § 198; Weiser v. Kling, 38 App. Div. 268, 57 N. Y. Supp. 48; Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Seivers v. Dickover, 101 Ind. 495; Goble v. O'Conner, 43 Neb. 59, 61 N. W. 131; Beidler v. Crane, 135 Ill. 99, 25 N. E. 655, 25 Am. St. Rep. 349; Sands v. Codwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305.

There is yet another reason which, in my judgment, ought to bar Alley from the right to invoke the doctrine of subrogation, at least as to \$1,000 of the sum which the majority opinion allows him; the \$3,000 which the majority opinion concludes he ought to recover was represented by three promissory notes. The last note, of \$1,000, was paid by him (if paid at all) in two installments; *the first being paid some 18 months before the maturity of the note, and the last installment a year before maturity, and 5 months*



after this action was brought. I have discovered no authority that permits one, under circumstances of this kind, to invoke the doctrine of subrogation.

There is still another reason which is, in and of itself, sufficient to defeat the claims of Alley to subrogation, and that is that at the time he filed his original answer in this case, to wit, March 21, 1903, he had paid, as the record shows, every dollar that he now claims by way of subrogation; i. e., he had, according to his evidence, extinguished the mortgage by paying all of the notes which it was given to secure, save and except a small balance of less than \$350 on the last of the three notes, and this balance was paid before the issues in the case were joined. In the original answer no claim whatever is made by Alley that he had paid off the mortgage and desired that it be kept alive for his use and benefit; nothing whatever is said by him, or on his behalf, concerning the question of subrogation, until the Supreme Court, in April, 1908 (some five years after he filed his original answer), handed down its opinion in this case. Then, for the first time, and in that court, he sought, by motion, to claim and have enforced in his behalf the doctrine of subrogation. The Supreme Court very properly refused to consider his demand, because, as it says, "there is nothing in the pleadings concerning these incumbrances." Whereupon he goes back to the district court, and on September 7, 1909, after a lapse of 17 months more, files his supplemental answer, setting up the facts upon which he now bases his claim of right to invoke the doctrine of subrogation. In other words, for more than six years, while this litigation was pending, he made no claim or mention that he had paid off the mortgage and desired to be subrogated to the rights of the mortgagee. On the contrary, seven times in his original answer he insists upon the illegality and utter want of virtue in Tibbetts' lls pendens, execution, etc., and upon that defense alone went forward to trial. The original answer of Alley, considered in connection with the opinion rendered by the Supreme Court in this case, conclusively shows that the only mistake that Alley made was a mistake of law, not a mistake of fact, and the rule that one may not invoke the doctrine of subrogation when his only contention is that he has made a mistake of law is too elementary to require the citation of authorities.

Innocence of actual fraud may, under certain circumstances, entitle a purchaser of mortgaged land, who pays off a debt thereon, to the right of subrogation, but my Associates seem to think it *must* do so, regardless of the grossest and most willful negligence, and in the face of the clearest possible proof of waiver.

"Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and pro-

tection of the one in whose favor it is originated, may be asserted or waived at pleasure, either expressly or by implication." 37 Cyc. 383.

"The right of subrogation may be lost by the waiver of the party entitled to it. \* \* \* *A long delay without action will be fatal to a claim of subrogation.*" Sheldon on Subrogation, § 41.

Alley's right of subrogation, if any he had, accrued when he paid the last installment on the mortgage. "The surety's right of subrogation accrues upon his payment; and, as to his principal, the statute then begins to run against him, and he should then call at once for the securities, if he desires to be subrogated to them." Sheldon on Subrogation, § 110. He paid the last installment January 5, 1903. Six years and eight months elapsed before he attempted to assert his alleged right of subrogation. His supposed right was then barred by the statute of limitations. "The right of subrogation will be barred by the statutory period of limitations like any other right." Sheldon on Subrogation, § 110. If it be said that Tibbetts, by not pleading the statute of limitations, waived his right to invoke the same, I reply: Alley had waived his right to invoke the equitable rule of subrogation long before Tibbetts was called upon to plead the statute of limitations. But the truth is Alley has never asked to be subrogated to the rights of the mortgagee. The prayer of his original answer reads as follows: "Wherefore, this defendant prays that he go hence without day, with his costs herein expended." He does not even pray for general equitable relief. And his amendment, filed September 7, 1909, contains no prayer; it is simply an insert in the original answer. So the climax of Alley's good luck in this piece of litigation comes in the form of a relief for which he has not asked. Having chosen his weapons of defense (specific and general denials as to the legality of Tibbetts' claims), and having signified his satisfaction with the battle field, he goes forth to a seven-year war, at the end of which, having lost everything for which he contended, instead of capitulating, he draws an ancient and forgotten weapon (a stale, so-called equity), and renews the fight, achieving in the end, if the majority opinion shall stand, a signal victory. If he has not already done so, Alley ought to adopt as his coat of arms a rusty sword, with the legend emblazoned thereon, "If at first you don't succeed, try, try again." So far as I am now able to recall, this is the first instance where a litigant has successfully invoked his own laches and his mistake of law to arrest the statute of limitations.

From the time the Supreme Court handed down its opinion in April, 1908, until this good hour, Alley has held Tibbetts at bay by advancing an issue or contention which might just as well have been presented and deter-

mined on the first trial, and all this time he has benefited by retaining possession of the land (for the use of which he is not required to account), thus preventing its sale under execution. In the meantime, Tibbetts' judgment has more than doubled, and can now never be made by the sale of the land. In *Lake County v. Johnson*, 81 Colo. 184, 71 Pac. 1106, our Supreme Court expressly ruled that a judgment is conclusive respecting *omitted defenses*, as well as defenses that were *in fact offered*, if the omitted defenses *might* have been pleaded in the action in which the judgment was obtained.

"A valid judgment for plaintiff definitely and finally negatives every defense, objection, or exception which *might* and *should* have been raised against the action; and this is true not only with respect to further or supplementary proceedings in the same cause, but for the purpose of every subsequent suit between the same parties, whether founded upon the *same* or a *different cause* of action." 23 Cyc. 1196.

The above-quoted text from Cyc. is supported by hundreds of citations from practically every state in the Union.

"The rule is often stated in general terms that a judgment is conclusive, not only upon the question actually contested and determined, but *upon all matters which might have been litigated and decided* in that suit; and this is undoubtedly true of all matters properly belonging to the subject of the controversy and within the scope of the issues, so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons, or evidence in support of it, on pain of being barred from showing such omitted matters in a subsequent suit; and it is also true that, where the second suit is upon the same cause of action, all matters which *might* have been litigated are *conclusively settled by the judgment*, and that generally the estoppel applies where matters which should have been urged as a defense in the first suit are attempted to be made the basis of a second action, or, according to some of the authorities, where defenses which were available against an adverse claim in the first suit, but not then set up, are sought to be used in a second action, either by way of defense or *as the foundation of a claim for relief*." 23 Cyc. 1295.

*Lake County v. Johnson*, supra, is cited as supporting, and it does support, the last rule announced in the above quotation.

It is true that Tibbetts, in this case, has not interposed estoppel or res adjudicata as a defense, but his failure in this respect does not impress me as more serious than the failure of Alley for more than six years to claim the right of subrogation, and his entire failure, up to the present time, to even ask for that right.

The majority opinion sends this case back

"for further proceedings as the parties may be advised." I shall be greatly surprised if Alley does not incubate another time-consuming alleged equity, and project this litigation five years or more further into the future, the while he holds possession of the property and receives the income therefrom.

It is my conclusion that the judgment of the trial court should be reversed unqualifiedly, and the case remanded, with instructions to carry out the directions of the opinion of the Supreme Court, permitting Alley what was awarded him by that court, and nothing more.

#### DEL MAR WATER, LIGHT & POWER CO. v. ESHLEMAN et al. (L. A. 3533.)

(Supreme Court of California. May 13, 1914.)  
COURTS (§ 102\*)—DETERMINATION—NUMBER OF JUDGES CONCURRING—MAJORITY OF COURT.

In the Supreme Court in bank the concurrence of at least four justices is necessary to the determination of any proposition stated as the basis of the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 351, 352; Dec. Dig. § 102.\*]

On rehearing. Denied.

For former opinion, see 140 Pac. 591.

PER CURIAM. In view of the principal grounds advanced in the petition, it is proper to say, in explanation, that in the decision of a case before the court in bank the concurrence of at least four justices is necessary, and that any proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices. The concurring opinion herein is the only one that is agreed to by the necessary number. That opinion contains the only propositions which are to be considered as decided. It does not hold that the plaintiff company is not a public utility, or that it is not engaged in distributing water for public use; it merely declares that the land of the claimant, Glass, is not, *and is not found by the commission to be*, within the district, or area, to the use of which the water owned or controlled by that company is dedicated, and, therefore, that he is not entitled to demand distribution thereof to his land.

The petition for a rehearing is denied.

ANGELLOTTI, J. I concur in what is said in the foregoing as to the effect of the opinions heretofore filed in this case. Further consideration of the case, however, has made me very doubtful of the correctness of the judgment annulling the order of the Railroad Commission, especially in view of our limited powers of review under the Constitution of this state. The importance of the questions presented is such that I would prefer to see further consideration given the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case by the court before the decision becomes final, and therefore I do not concur in the order denying a rehearing.

### SILL v. CESCHI. (S. F. 6363.)

(Supreme Court of California. April 30, 1914.  
Rehearing Denied May 29, 1914.)

#### 1. BROKERS (§ 86\*)—ACTIONS FOR COMPENSATION—EVIDENCE—SUFFICIENCY.

Evidence, in an action by a real estate broker for commissions, held sufficient to support a finding that the contract sued on had not been canceled, and that plaintiff had performed his part of the contract so as to entitle him to the commission agreed upon, and to support a verdict for \$2,000.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

#### 2. BROKERS (§ 10\*)—COMPENSATION—REVOCATION OF AUTHORITY.

A contract making a broker the owner's agent to sell certain real estate "for the term of thirty days from date, and until this agreement is canceled in writing by ten days' notice," could not be revoked within the 30 days if the broker had expended money and effort in seeking a purchaser.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 11; Dec. Dig. § 10.\*]

#### 3. BROKERS (§ 49\*)—COMPENSATION—SUFFICIENCY OF SERVICES.

A real estate broker's obligation was fully performed when he procured from a prospective purchaser an enforceable contract to purchase at the agreed price, and it was no concern of the owner, who agreed that the broker should receive all over that amount, that the excess was in the form of fruit that the purchaser agreed should go to the broker, rather than money.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

#### 4. BROKERS (§ 71\*)—COMPENSATION—RATE OR AMOUNT.

Where a broker who was to receive all over an agreed price as his commission procured a purchaser who agreed to pay the agreed price, and to pay for the growing fruit in addition, but the owner refused to carry out the contract, such agreement was in effect for the purchase of the entire property with the return to the broker of the fruit as a part of the purchase price, the value of which became the measure of the broker's compensation.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 56; Dec. Dig. § 71.\*]

#### 5. BROKERS (§ 88\*)—ACTIONS FOR COMPENSATION—TRIAL—INSTRUCTIONS.

In an action by a real estate broker for commissions, an instruction that one who signs a contract after obtaining independent advice, and causes the same to be drafted by his adviser, cannot say he did not understand it, and is not bound by it, was not in conflict with another that plaintiff could not recover if defendant understood that his apple crop was reserved, where the first instruction related to defendant's claim that he did not understand he was signing a contract, as they dealt with entirely distinct matters.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

#### 6. APPEAL AND ERROR (§ 1066\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Error, if any, in modifying an instruction that a broker could not recover compensation if he represented, and the owner understood, that the paper signed was not a contract, by adding that, if the defendant's own adviser

drafted it, he could not complain, was not prejudicial, where the evidence showed conclusively that defendant did regard the paper as a contract.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by George W. Sill against Bernardo Ceschi. From a judgment for plaintiff, defendant appeals. Affirmed.

Dougherty & Lacey, of Salinas, and Geo. W. Smith, of Watsonville, for appellant. Wyckoff & Gardner, of Watsonville, and B. K. Knight, of Santa Cruz, for respondent.

SLOSS, J. This is an action by a broker to recover commissions upon a sale of real estate. The trial was by jury, and plaintiff recovered a verdict and judgment in the sum of \$2,000. The defendant appeals from the judgment, and brings up the evidence by means of a bill of exceptions.

The defendant was the owner of 28 acres of land, most of which was orchard in bearing, situate in Santa Cruz county. On April 20, 1911, he signed and delivered to plaintiff a paper reading, so far as material here, as follows:

"Watsonville, Cal., April 20th, 1911.

"I hereby authorize George W. Sill, my agent for the term of thirty days from date hereof, and until this agreement is canceled in writing by ten days' notice, and under such appointment give him authority to sell and accept money for the sale, at the sum of \$15,000.00, or as much less as I may hereafter agree to take, of the following described property [describing the tract above mentioned], together with this year's fruit crop, save and except the crop of cherries, pears, and apricots for this year, also all farming tools and implements, save and except one fruit wagon, spring wagon, cart, and two horses, with set of harness for said horses. For his services in this matter *nil* promise to pay him *nil* per cent. commission on the selling price of said property and one-half of any amount for which he may sell said property over the price herein asked by me, to wit: \$15,000.00."

The complaint alleged that the parties had intended, in the clause last quoted, to provide for a compensation to the broker of the whole amount, over \$15,000, for which a sale might be made, and that the agreement to pay one-half of such excess had been inserted in the contract by mutual mistake. It was prayed that the agreement be reformed in this particular, and the judgment included such relief. No point is made on the present appeal with respect to this feature of the case, and no further discussion of it is required.

The complaint alleged, further, that on the 19th day of May, 1911, within 30 days after

the authorization, plaintiff obtained purchasers who were ready, able, and willing to purchase the property in accordance with the terms of the contract, for the sum of \$15,000, and in addition thereto the crop of apples and grapes then standing and growing on the land. (The apple and grape crops, it will be noted, had not been excepted by defendant from sale, as had the crop of cherries, pears, and apricots.) Said purchasers offered in writing to pay the said price for said property, and plaintiff, as defendant's agent, accepted their offer in writing; but defendant refused and ever since refuses to sell or convey the property to such purchasers. On said 19th day of May, 1911, it is averred, the reasonable value of the crop of grapes and apples, to which plaintiff was entitled as his commission, was and is the sum of \$3,500, for which amount judgment was asked. The complaint also contained two separate causes of action, each of which set up a claim for \$3,500 in the form of a common count for work and labor done.

The answer denied most of the allegations of the complaint. It also set up several separate defenses. One of these was to the effect that the defendant was unable to read English and understood the English language, when spoken, very imperfectly. It alleged that plaintiff had induced defendant to sign the authorization by representing to him that the writing was a mere notice that the lands were for sale, and defendant signed the writing relying upon such representation. Another, after repeating the matter regarding defendant's want of familiarity with the English language, alleges that by the mistake of the defendant, suspected by plaintiff, the contract failed to provide for reserving from sale the apple and grape crops. A third separate defense is that defendant canceled the contract before plaintiff had done anything thereunder.

[1, 2] The verdict of the jury was, as has already been stated, in favor of plaintiff for \$2,000. One of appellant's contentions is that the verdict was not justified by the evidence. The signing of the contract, as alleged in the complaint, was testified to by two witnesses, and was, indeed, admitted by the defendant in his testimony. One Huff, who was an employé of plaintiff, and had represented him in the negotiations with Ceschi, testified that plaintiff had advertised the property for sale, and submitted it to several prospective purchasers, prior to April 29, 1911. On that day defendant handed him a written notice stating that he canceled the agreement. At the same time, however, the defendant, according to this witness, on being told that plaintiff was absent, had said, "All right, go on and sell it." This fully justified a finding against the separate defense setting up a cancellation. Besides, since the authorization was for 30 days, a revocation within that period would not have been effectual, if plaintiff, prior to the attempted

cancellation, had expended money and effort in seeking to find a purchaser. *Blumenthal v. Goodall*, 89 Cal. 251, 26 Pac. 906; *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 Pac. 354. The issue of cancellation was submitted to the jury upon an instruction presenting this view of the law. Huff further testified that on May 19, 1911, he, acting for plaintiff, obtained from George M. and Belle Latimer an offer to buy the property at the price of \$15,000, and also the apple and grape crops. The written offer was introduced in evidence, and it was stated therein, as was the fact, that the Latimers had, at the same time, paid plaintiff \$1,000 as a deposit and part payment, agreeing to pay the balance of \$14,000 and to give a conveyance of the apple and grape crops upon delivery of abstract, reasonable time for examination of same, and good and sufficient deed of conveyance of the ranch. The defendant was in Italy at the date of this transaction, and the offer, with the \$1,000, was delivered by plaintiff to Mr. C. A. Palmtag, an officer of the Pajaro Valley Bank, who was a trusted adviser of the defendant. On the defendant's return from Italy he refused to carry out the contract, or to pay plaintiff any commission. The Latimers were, as the testimony shows, willing and able to pay the purchase price which they had offered for the property. There was evidence justifying the conclusion that the apple and grape crops, which represented the excess of the purchase price over \$15,000, were worth \$2,000, the amount of the verdict in plaintiff's favor. The defendant sold his apple and pear crops for a figure which brought him a net return of \$2,500, of which \$800 was, as testified by the purchaser, the value of the pears, leaving \$1,700 as the proceeds of the apples. The plaintiff produced a witness who testified that the grape crop was worth \$300.

[3, 4] Omitting for the moment consideration of the affirmative defenses other than that of cancellation, which has already been considered, the evidence above outlined fully warranted the verdict of the jury. Under the contract, the plaintiff was authorized to sell upon any terms which would give to the defendant a cash return of \$15,000. The plaintiff was entitled to anything beyond this sum as his commission, and the defendant, so long as he received his \$15,000, was not interested in the terms agreed upon between the agent and the purchaser for the payment of the excess (*Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167), nor in the fact that that excess was to be paid in something other than money. There is no force in the claim that plaintiff did not prove such performance as entitled him to a recovery of the commission agreed upon. The contract authorized him to sell the property upon certain terms. His obligation was fully performed when he procured from a prospective purchaser "a valid contract to purchase, which can be enforced by

the vendor if his title is perfect." *Gunn v. Bank of Cal.*, 99 Cal. 349, 353, 33 Pac. 1105, 1107, and cases cited; *Jauman v. McCusick*, 137 Pac. 254. Such contract was obtained by plaintiff from the Latimers. By their written offer they bound themselves to buy the property described in defendant's authorization for \$15,000, plus the apple and grape crops, which were a part of the property to be sold. This was in effect an agreement to purchase the entire property covered by the authority to sell, and to return, as a part of the purchase price, the apple and grape crops. Such crops, or their value, then became the measure of the compensation to which the broker was entitled.

[5] At the request of the defendant, the court gave the following instruction numbered I: "You are instructed that, in order to constitute a contract, there must be a meeting of the minds of the contracting parties upon the terms of the contract. If you believe from the evidence that, in executing the contract with plaintiff, the defendant understood that his apple crop was reserved from sale, you must return a verdict for the defendant."

Of this statement of the law affecting the plea of mistake with reference to the reservation of certain crops, the defendant cannot, and does not, complain. Nor can there be any doubt that the evidence on this issue was conflicting to such a degree as to put the finding of the jury thereon beyond the possibility of attack here.

[6] A further instruction requested by defendant read as follows: "If you believe from the evidence that Huff told the defendant that the contract in question was a mere memorandum, and that the defendant, without negligence on his part did not understand the true purport of said contract you must return a verdict for the defendant." This instruction, which appears in the record as number VII, the court gave, after modifying it by the addition of the following: "But in this connection I instruct you that, if a person signs and executes a contract with another, and before signing the same obtains independent advice as to the meaning and contents of the instrument, and causes the same to be drafted by his own adviser and read over and explained to him by such adviser, he cannot afterward be heard to say that he did not understand it, and is not bound by it; under such circumstances, the signer is bound by the contract he signs."

The appellant insists that the instruction, as modified, lays down an erroneous statement of the law, and, further, that it is in conflict with instruction I, above quoted. But it cannot be said that there is any conflict between the two instructions, since they deal with entirely distinct matters. Instruction I applies to the defense based on the alleged mistake regarding the crops included in the contract. Instruction VII has to do

only with the averments, set up separately in the answer, that the plaintiff had misrepresented the nature and effect of the writing signed by defendant. The only question is whether the modification of instruction VII was erroneous, and, if so, whether the error prejudicially affected the defendant's rights. For the purposes of this discussion, it may be assumed that the instruction proposed should not have been modified as it was. Even so, we are satisfied that no prejudice resulted to the defendant, for the reason that the evidence would not, under any view of the law, have warranted a finding in his favor on the issue to which instruction VII was directed. Huff, the plaintiff's agent, testified that on April 20, 1911, he had applied to the defendant for a contract authorizing plaintiff to sell the ranch. The defendant declined to sign any contract or authorization until he had consulted with C. A. Palmtag of the Pajaro Valley Bank, who attended to all of his business. The defendant and Huff went together to the office of Palmtag. There, in the presence of Palmtag, the terms of the proposed contract were discussed, and Palmtag drew up the form of agreement and read it aloud twice. The defendant expressed his satisfaction, saying that he wanted to get \$15,000 net for the property, and thereupon signed the paper. This testimony, so far as it related to the transaction in the bank, was, in substance, corroborated by Mr. Palmtag. The defendant himself, when called as a witness, stated that he had told Huff that he would be willing to sell the land, without any of the crop, for \$15,000 net to him, but that he would not sign any contract until he had seen Palmtag. He then went with Huff to the bank, and both talked with Palmtag "as to the kind of a contract we wanted." Palmtag told him what the contract was, that it was "for him to receive \$15,000 net." The defendant so understood it. Palmtag read the paper. The defendant did not pay any attention to the matter of the fruit crops. Palmtag, after reading the paper, asked defendant if he was satisfied, and the defendant answered that he was. He then signed the contract and gave it to Huff. As against all this, showing plainly, on the defendant's own statements, that he fully understood that he was signing a contract authorizing the sale of his ranch, there is nothing but the following vague declarations at the close of defendant's testimony: "Mr. Huff," he testified, "did not tell me if it was a binding contract of any kind, but said it was only a memorandum. I thought it was just a notice that my ranch was for sale. I believed that contracts about selling lands were written on large papers, and did not know that a little slip of paper like this contract was used for such purposes." The testimony of the other witnesses, supported by that of the defendant himself, showed conclusively a course of conduct entirely incon-

assistent with the existence of the belief which the defendant, in his testimony last quoted, claims to have entertained. His admissions were direct to the effect that he undertook to contract for the sale of his land, that he insisted on consultation with Mr. Palmtag, that the terms of the contract were fully discussed with his adviser, that the latter drew a contract and explained it to him, and that he then signed it. In the face of these admissions, corroborated, as they were, by unimpeached testimony, a finding that he did not understand the nature of the instrument, if such finding had been made, could not have been upheld as supported by the evidence. The vague statements of appellant that he thought he was signing a mere notice that his land was for sale were not enough to raise a substantial conflict. It may be added that the defendant, notwithstanding his claim of inability to understand the English language, gave his testimony without the aid of an interpreter. Under all the circumstances the trial court would have been warranted in directing the jury to find for the plaintiff on the issue under consideration. See *Estate of Baldwin*, 162 Cal. 471, 473, 123 Pac. 267, and cases cited. Any error in the instructions would not therefore afford ground of complaint to the defendant. There are no other points made.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

#### POUCHAN v. GODEAU. (S. F. 6490.)

(Supreme Court of California. April 28, 1914.  
Rehearing Denied May 28, 1914.)

#### 1. LIBEL AND SLANDER (§ 19\*)—CONSTRUCTION OF LANGUAGE—CHARGING ONE TO BE A THIEF.

The language used by defendant to plaintiff, when intercepting and barring his entrance to a hall, "thieves are not allowed in here" carries a charge of plaintiff being a thief.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 98, 99; Dec. Dig. § 10.\*]

#### 2. LIBEL AND SLANDER (§ 71\*)—REPETITION IN ANSWER TO QUESTION.

Defendant using to plaintiff, in the presence of others, language carrying the charge of his being a thief, the fact that plaintiff, by a question, drew out a reiteration in more direct language of the charge, in the presence of the same people, does not bring the case within the rule of "volenti non fit injuria."

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 173; Dec. Dig. § 71.\*]

#### 3. TRIAL (§ 141\*)—QUESTION FOR JURY—UNDISPUTED FACTS.

There being no question under the pleadings or evidence but that whatever language was used by defendant concerning plaintiff was spoken in the presence and hearing of third persons and was understood by them, an instruction cannot be complained of because withdrawing the question of it having been heard and understood by a third person.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.\*]

#### 4. LIBEL AND SLANDER (§ 124\*) — FUTURE DAMAGES—INSTRUCTIONS—"CALCULATED."

Future damages recoverable being, under Civ. Code, § 3283, those "certain to result," an instruction in slander, permitting allowance of damages for future injury which the uttering of the words was calculated to inflict, is erroneous; "calculated" meaning either likely or intended.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. § 124.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 942, 943.]

#### 5. LIBEL AND SLANDER (§ 100\*)—MITIGATION—PLEADING AND PROOF.

All circumstances in mitigation, other than such as tend to establish the truth of the charge, may, in slander, be proved without being pleaded.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. § 100.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Germain Pouchan against Julius S. Godeau. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

See, also, 21 Cal. App. 365, 131 Pac. 879.

Emilio Lastreto, Perry & Perry, and Samuel M. Shortridge, all of San Francisco, for appellant. Costello & Costello and A. W. Brouillet, all of San Francisco, for respondent.

**PÉR OURIAM.** This case was transferred from the District Court of Appeal of the First District by reason of a disagreement of the justices. Mr. Justice Hall was in favor of a reversal of the judgment and order, and this court agrees with the view which he took. He said:

"Plaintiff recovered judgment against defendant, in an action for slander, in the sum of \$1,600. The appeal is from the judgment and the order denying defendant's motion for a new trial.

"The only grounds relied upon for a reversal are alleged errors committed by the court in giving and refusing certain instructions and in its rulings upon certain objections to testimony.

"The language which it is charged that defendant used with regard to plaintiff was spoken in the French tongue at the entrance of a hall, wherein a meeting of French people was about to be held, to consider matters concerning the French Hospital and the election of officers thereof. The language charged to have been used is set out in the complaint, together with its translation into English.

"It is charged that defendant intercepted plaintiff at the doorway of said hall, and in the presence and hearing of divers persons said to him, 'Thieves are not allowed in here, to which plaintiff responded, 'Then you call

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

me a thief,' to which the defendant replied, 'Yes, you are a thief.'

"The evidence amply sustains the charge as it is set forth in the complaint.

[1,2] "The defendant requested the court to give to the jury two instructions, as follows: 'I charge you that if you believe or if you find that the words alleged to have been uttered by the defendant, as set forth in plaintiff's complaint, were in reply to a question or questions propounded by defendant to plaintiff, then said replies are privileged, and that you may not assess any damages against defendant.' And: 'I charge you that if you find the publication was proved at the trial, and that it was brought about by the plaintiff's own contrivance, this does not constitute sufficient evidence of publication, and your verdict must then be for the defendant.' The court refused to give either of said instructions.

"Each and every witness who testified to the use of the language complained of testified to the effect that defendant intercepted and barred the entrance of plaintiff to the hall, and at the same time opened the conversation by saying to him, 'Thieves are not allowed in here.' This language, under the circumstances of its use, clearly in itself and without further explanation *prima facie* carries the inference that plaintiff was a thief, or that defendant so charged.

"The fact that plaintiff, by a question, drew out a reiteration in more direct language of the charge already made, in the presence of the same people, does not bring the case within the rule of 'Volenti non fit injuria,' relied upon by defendant in support of his request for the rejected instructions.

"Where a defendant, not in the presence or hearing of third persons, makes a slanderous statement about a plaintiff, and thereafter, at the request of the plaintiff, repeats the statement in the presence and hearing of third persons, such repetition cannot be made the basis of an action for slander. Such a case is within the rule now invoked by defendant. *Patterson v. Frazer* (Tex. Civ. App.) 79 S. W. 1082; *O'Donnell v. Nee* (C. C.) 86 Fed. 96; *Heller v. Howard*, 11 Ill. App. 554; *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129.

"But under no phase of the evidence in the case at bar does it appear that the language complained of and proven to have been used was but a repetition, at the request of plaintiff, of language previously used but not in the presence of third persons. All the evidence that tends to show the use of the language complained of shows that it was used under the circumstances above detailed, and that the first remark was made by defendant to plaintiff, as above stated, under such circumstances as of itself to carry the meaning that plaintiff was a thief.

"The witnesses for the defendant denied that the language complained of or any part of it was used at all by the defendant. Un-

der this condition of the evidence, there was nothing to justify the giving of either of the refused instructions.

[3] "Defendant complains that by an instruction which the court gave it practically withdrew from the consideration of the jury the question as to whether or not the language complained of was heard and understood by any third person. In this the court did not err for two reasons: First, the answer, by not denying the allegations of the amended complaint, to the effect that the language was spoken in the presence and hearing of many persons who understood it, admitted the same. Second, all the witnesses, both those for plaintiff and those for defendant (and there were three for each), besides the litigants, testified to hearing and understanding everything that was said by either of the parties. There was thus absolutely no controversy and no question, either in the pleadings or in the evidence, but that whatever language was used by defendant concerning plaintiff was both spoken within the presence and hearing of several third persons and was understood by such third persons.

[4] "At the request of plaintiff the court charged the jury as follows: 'If, from the evidence, under the instructions of the court, you find the defendant guilty, then, in fixing the amount of the plaintiff's damages, you may take into consideration the mental suffering produced by the utterance of the slanderous words, if you believe from the evidence that such suffering has been endured by the plaintiff, and the present and future injury, if any, to plaintiff's character which the uttering of the words was calculated to inflict.' This instruction cannot be supported as a correct statement as to the elements to be considered in fixing damages.

"By the instructions given the jury were permitted to allow damages both for such *present and future injury* to the character of plaintiff which the uttering of the words *was calculated* to inflict.

"The word 'calculated,' in the connection in which it was used in the challenged instruction, may mean either likely or intended. The jury was told that they could allow damages for present and future injury to character, intended or likely to be produced by the uttering of the slanderous words. 'Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future.' Section 3283, Civ. Code.

"The instruction under review does not conform to the rule as expressed in the section of the Code above quoted. It does not limit the damages for future injury to character to such as are certain to result, but permits damages either for such injury as is likely to result from the uttering of the slanderous words, or such as was intended.

"The instruction is more faulty than a similar one given on the question of dam-

ages for future suffering and held to require a new trial in *Melone v. Sierra Ry. Co.*, 151 Cal. 116, 91 Pac. 522. Neither can it be said that the instructions as a whole correctly charge the jury on the question of damages. Certain general instructions were given to the jury to the effect that they could not allow excessive or extravagant damages, and that damages can only be the necessary and reasonable result of the slander and not the remote result thereof, and that the jury should not assess problematical damages which may possibly happen. None of these takes the virus from the challenged instructions. They were but general instructions against allowing excessive or problematical damages. None of them is pointed to the question of allowing damages for future injuries. Certain it is that none of them limits the jury to allowing damages for only such future injury to the character as is certain to result. The instruction, and the only instruction, which the court did give on the question of damages for injury to character was radically wrong; and none of the general instructions which the court gave on the subject of damages can be fairly said to have so modified or qualified the rule given as to make of the charge as a whole a correct one upon the elements of damage for future injuries. For this reason this case is not within the cases of *Hersperger v. Pacific Lumber Co.*, 4 Cal. App. 460, 88 Pac. 587, 591, and *Lonnergan v. Stansbury*, 164 Cal. 493, 129 Pac. 770 (decided January 14, 1913), where the trial court, after using in an instruction upon damages "the unhappy phrase "reasonably probable" sums up its declaration of the law with the pronouncement of the correct rule."

"The court erred in giving the instruction which it gave upon the question of damages for future injury to character, and for that reason the judgment and order must be reversed."

The other authorities which have been called to our attention do not alter the rule adopted in *Melone v. Sierra Ry. Co.*, supra, in *Ryan v. Oakland Gas, Light & Heat Co.*, 21 Cal. App. 23, 130 Pac. 693; the instruction criticised by counsel and upheld by the court was one by which the jury was told that compensation might be awarded for "pain suffered or to be necessarily suffered from the injury"—clearly a substantial compliance with section 3283 of the Civil Code. In *Walker v. Southern Pacific Co.*, 162 Cal. 123, 121 Pac. 369, we were considering an instruction by which the jurors were told that they might consider the pecuniary loss "likely to be sustained" by the plaintiff "during life," but they were also informed that the physical pain and mental anguish, if any, of which they might take cognizance in reaching a verdict were such the plaintiff would necessarily suffer in the future. The instruction also specified such elements of damage

as the pain and anguish which plaintiff would "certainly suffer in the future." These instructions, if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.

[6] Upon the matter of proof of mitigating circumstances, Mr. Justice Hall's opinion contained the following language: "Complaint is also made that the court erred in certain rulings, which it is claimed unduly restricted defendant in his right to show the mitigating circumstances under which the language was used. Upon an examination of the record it is very doubtful whether or not the defendant could have been injured by any of the rulings complained of under this head. We are inclined to believe that the circumstances sought to be proved were in fact provided substantially by answers to other questions. But for the purposes of a new trial, and in view of the fact that, from the character of the objections made and the remarks of the court, it would appear that both counsel for plaintiff and the court were of the impression that only such mitigating circumstances as were pleaded could be proved, we deem it proper to say that such is not the rule. All circumstances in mitigation, other than such as tend to establish the truth of the charge, may be proved without being pleaded. *Davis v. Hearst*, 160 Cal. 143 [116 Pac. 530]."

For the error in giving the instructions upon the subject of damages for future injuries to character, the judgment and order are reversed.

BEATTY, C. J., and ANGELLOTTI, J., do not participate in the foregoing.

#### SHILLOCK v. SHILLOCK. (Civ. 1129.)

(District Court of Appeal, Third District, California. March 25, 1914.)

#### DIVORCE (§ 202\*)—ALIMONY—JURISDICTION—SERVICE BY PUBLICATION.

A personal judgment for alimony cannot be rendered in a divorce action against a nonresident defendant served only by publication.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 593; Dec. Dig. § 202.\*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Agnes L. Shillock against Paul Shillock. From an order denying a motion to set aside so much of a divorce decree as awarded alimony against defendant, he appeals. Reversed, with directions.

Adams & Adams, of San Francisco, for appellant. Duncan McLeod and Wm. M. Cannon, both of San Francisco, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



CHIPMAN, P. J. This is an action for divorce, wherein the court proceeded to hear and determine the case upon publication of summons. The affidavit in support of the order for service thus made reads in part as follows: "That the defendant last resided in the city of San Diego, county of San Diego, California, but that said defendant has departed from the state of California; that at the time of the commencement of this action the defendant herein, Paul Shillock, resided out of the state of California, and ever since has resided and still resides out of the state of California; that said defendant now resides at, and the present address of said defendant is No. 812 Fourth Street S. E., Minneapolis, state of Minnesota."

In its interlocutory decree adjudging that plaintiff had established grounds for the dissolution of the bonds of matrimony between plaintiff and defendant, it was ordered that the care and custody of the minor children be awarded to plaintiff, and that \$200 per month is a reasonable amount for the support and maintenance of the plaintiff and said minor children. It was further ordered as follows: "It is hereby further ordered, adjudged, and decreed that the sum of two hundred (\$200) dollars a month be paid by said defendant to said plaintiff, for the support of said plaintiff and said minor children of said marriage, and that said sum of \$200 be paid on the 13th day of June, 1911, and upon the 13th

day of each and every month thereafter. Done in open court this 13th day of June, 1911. A. J. Buckles, Judge of the Superior Court."

Defendant, by his attorneys, served notice on the plaintiff that, appearing specially for that purpose and no other, he would, on November 8, 1911, move the court "for an order of said court vacating the judgment heretofore made, rendered, and entered herein on the 13th day of June, 1911, in so far as the same relates to alimony or any provision for the support and maintenance of plaintiff and the minor children of plaintiff and defendant, or for the support or maintenance of plaintiff, or of the minor children of plaintiff and defendant." On June 12, 1912, the court made an order denying said motion. Defendant appeals from this order. Respondent makes no appearance and has filed no brief.

The question here involved was presented in *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. The principle there announced was that a personal judgment upon publication of summons cannot be rendered against a nonresident. So held in *Merchants' Nat Union v. Buisseret*, 15 Cal. App. 444, 115 Pac. 58, and other cases there cited.

The order is reversed, with directions to enter an order granting defendant's motion.

We concur: HART, J.; BURNETT, J.

**BASS & HARBOUR FURNITURE & CARPET CO. v. HARBOUR. (No. 3242.)**

(Supreme Court of Oklahoma. April 17, 1914.)

*(Syllabus by the Court.)*

**1. CORPORATIONS (§ 187\*)—AGREEMENTS BETWEEN STOCKHOLDERS—EQUITABLE ESTOPPEL.**

The doctrine of equitable estoppel applies to the internal concerns of stock corporations. Saving so far as public policy and the interests of creditors and other third parties are involved, the stockholders may bind themselves inter se and in favor of the corporation by their own acts and agreements; and what will bind all the stockholders with respect to an obligation from the company to one of its members will bind the company as such.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 702, 703; Dec. Dig. § 187.\*]

**2. CORPORATIONS (§ 388\*)—CONSENT OF STOCKHOLDERS—ESTOPPEL.**

Unanimous consent and acquiescence of the stockholders, acted on by the parties concerned to such extent as to materially change their position, preclude the assenting stockholders as individuals and the corporation as such from afterwards setting up legal informalities in matters of internal concern affecting only the interests of the stockholders, to the overthrow of rights that have been acquired on the faith of the consent and acquiescence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.\*]

**3. EVIDENCE (§ 90\*)—TRIAL (§ 25\*)—BURDEN OF PROOF—ARGUMENT—RIGHT TO OPEN AND CLOSE.**

The burden of proof is determined by the pleadings, and not by admissions of testimony made during the progress of the trial, and the burden of proof carries with it the right to open and close the argument to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.\* Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

**4. TRIAL (§ 25\*)—ARGUMENT—RIGHT TO OPEN AND CLOSE.**

When, at the commencement of the trial, the defendant makes certain admissions of testimony, and without objection assumes the burden of proof, and proceeds to introduce his evidence, and his right to open and close the argument is questioned at the close of the testimony and resisted on the ground that the answer had not been amended in conformity to the admission made, *held*, that, the parties having treated the answer as amended, the court should do the same, and sustain the right claimed to open and close in the party assuming the burden of proof at the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Bass & Harbour Furniture & Carpet Company against J. F. Harbour. From the judgment, plaintiff appeals. Affirmed.

Wilson & Tomerlin and Burwell, Crockett & Johnson, all of Oklahoma City, for plaintiff in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error.

**GALBRAITH, C.** The principal parties in interest in this action, J. F. Harbour and J. M. Bass, were formerly partners in business in Gainesville, Tex. They removed to Oklahoma City at an early day in its history, and purchased the business of the Oklahoma Furniture Company, and organized a corporation under the laws of Oklahoma Territory, under the name of Bass & Harbour Furniture & Carpet Company, with a capital stock of \$50,000 divided into 500 shares of the par value of \$100 each. The last meeting of the stockholders and board of directors of this corporation seems to have been held on the 15th day of June, 1903. At that time the interest of a third party in the corporation was purchased by Bass and Harbour, and from that time until July 18, 1910, when the dissolution of the business occurred, Harbour owned and controlled 260 shares of the capital stock of the company, and Bass owned and controlled 240 shares. In June, 1910, Bass gave notice to Harbour of a dissolution, and informed him that one or the other of them must get out of the business. After frequent negotiations extending over a period of several days, it was agreed that Bass should submit to Harbour a "give or take proposition," and a contract in writing was entered into between Bass and Harbour, in which Mrs. Harbour joined, for the reason that she and Bass jointly owned the property known as the Insurance Building, in Oklahoma City, but the corporation, as such, was not a party to the written contract. It was agreed that the property in which the parties were interested, and subject to division, should be divided into two groups; one of which included the Insurance Building, located on lot 27, block 7, in Oklahoma City, which was in the name of J. M. Bass and Mrs. J. F. Harbour, and valued at \$250,000; and the stock of merchandise, the store building, where the business was conducted, and the warehouse used in connection therewith, constituted the other group. Bass made the propositions as agreed, and Harbour accepted the one which gave him the property in group 1 and the sum of \$71,000 as his individual share of their property. He transferred the 260 shares of stock controlled by him, and executed deeds conveying his interest in the lots where the business was conducted, and, also, the warehouse lots, as provided in the agreement of dissolution. In a written agreement, setting out the details of the dissolution, it was stipulated that each party should pay his "personal accounts" to the Bass & Harbour Furniture & Carpet Company, and this lawsuit has grown out of a misunderstanding and disagreement between the parties as to what was included in this term "personal accounts."

The books of the corporation show a personal account against Bass and one against Harbour. The parties agree that these re-

spective accounts are correct, and there is no trouble about them, but in the department of the ledger kept on behalf of the corporation in which were kept the personal accounts is an account given as "warehouse account." It is agreed that this account arose in the following manner: Bass and Harbour, in the year 1909, owned four lots in block 20 in South Oklahoma addition to Oklahoma City. They agreed to erect on these lots a warehouse for the use of Bass & Harbour Furniture & Carpet Company, and that the corporation should advance the money to erect this building, and that the corporation would repay the advances so made in rent at the rate of \$250 per month. The corporation advanced some \$24,000 for this building, and this "warehouse account" was opened on its books showing such advance. At about the time of the dissolution this account was credited with \$1,250, being five months' rent at \$250, and Bass gave his note to the corporation for one-half of the balance, and it is sought by this action to recover the remaining one-half of Harbour, which it is charged he agreed to pay under the stipulation that he would pay his "personal accounts" to the corporation. There are two counts in the petition, the first claiming judgment for \$11,462.09, as balance due on this "warehouse account," and the second asking for \$126 due on Harbour's personal account. The answer admits the correctness of the account claimed in the second count and tenders payment, but denies that anything is due as claimed in the first count, averring that this "warehouse account" was settled and paid in the dissolution arrangement. It is claimed that this account was changed, or rather the heading of it, after the agreement of dissolution had been made, by writing "J. M. Bass and J. F. Harbour, personal," thereon. It seems that each of these parties had the assistance of counsel during the negotiations leading up to the agreement of dissolution, and that neither of the parties mentioned this "warehouse account" to his respective counsel, and also that the parties conferred with their mutual friend and banker, Mr. Hogan, prior to the dissolution agreement and during the negotiations in regard to the terms of the settlement, and neither referred to this "warehouse account" in that conference.

It is contended by the plaintiff in error that this warehouse account was a part of the assets of the corporation, and that the corporation is a separate and distinct entity from its stockholders, and that the corporation was not a party to the dissolution agreement between Bass and Harbour, and cannot be bound thereby, and that the corporation cannot be divested of its property by the individual act of its stockholders, and that the integrity of the assets of the corporation must be maintained, and that the defendant, Harbour, owes one-half of this account, that

it is and was a "personal account," and that he should pay it.

The cause was tried to the court and jury, and at the trial the defendant claimed, and was allowed to assume, the burden of proof. The verdict of the jury was for the defendant on the first count, and for the plaintiff on the second count of the petition.

The cause was tried upon the theory that there was an ambiguity in the written agreement of dissolution; that it was uncertain as to what the parties intended to include under the term "personal account" as therein used; that it was uncertain whether or not they intended to include by this term "warehouse account." The trial court allowed, over the objections of the plaintiff in error, oral testimony to show how the parties had conducted their business and how they had treated this "warehouse account," as tending to throw light on the question in dispute.

The principal question submitted to the jury and determined by it was as to how the parties had treated this "warehouse account," and whether or not it was their intention at the time of entering into the written agreement of dissolution that it should be included under the terms of "personal account," or whether it was the intention and purpose of the parties under that contract to treat this account as settled and paid by the dissolution agreement. The verdict of the jury sustained the contention of the defendant in error, and the verdict and finding, being supported by sufficient evidence, is conclusive upon the court upon this appeal.

[1, 2] The only question of law argued by the plaintiff in error and urged with earnestness and skill both in the brief and oral argument is made under the assignments of error relating to the action of the court in overruling its demurrer to the evidence. The burden of this argument is that a corporation is an entity separate and apart from its stockholders, and the title to its property is in the corporation, and it can only be divested thereof by the acts of its proper officers, and that, as the corporation did not sign the contract, it is not bound by the terms of the agreement. We are frank to say that the numerous citations of authorities made on behalf of the plaintiff in error are good law, and announce the correct general rule. It cannot be successfully denied that generally the law considers and treats a corporation as a separate entity from the individuals who formed or compose it, and that the title to its property, its assets, is in the corporation, and not in its stockholders, and also that individual stockholders acting in their individual capacity cannot divest the corporation of the title to such property, and that corporate property is conveyed by the acts of its officers taken in the manner provided by law. Counsel for defendant in

error concedes the correctness of these general rules, but it is contended that these general rules are not of universal application; that there are limitations and restrictions thrown around the application of the general rules to the facts of each particular case in order to effectuate justice, and not to support an attempted fraud. This contention finds abundant support in the authorities.

It is said by Mr. Thompson:

"The proposition that a corporation has an existence separate and distinct from its membership has its limitations. It must be noted that this separate existence is for particular purposes. It must also be remembered that there can be no corporate existence without persons to compose it; there can be no associations without associates. This separate existence is to a certain extent a legal fiction. Whenever necessary for the interests of the public or for the protection or enforcement of the rights of the membership, courts will disregard this legal fiction and operate upon both the corporation and the persons composing it." 1 Thompson on Corp. par. 10.

It will be remembered that J. M. Bass and J. F. Harbour owned and controlled this corporation. They determined its policy and directed its business. The last meeting of the stockholders and directors of the corporation was held on June 15, 1903. During the seven years intervening between that date and the separation, the act, wish, or agreement of Bass and Harbour was the act, wish, or agreement of the corporation. If it needed merchandise, Bass and Harbour purchased it. If it needed money, Bass and Harbour borrowed it. Bass and Harbour fixed the amount of rent it should pay and selected its officers, and did every other act that the board of directors or the stockholders usually do for corporations. During all these years Bass and Harbour treated and used the separate entity, the fiction, the corporation, the Bass & Harbour Furniture & Carpet Company, as a convenience in their business. In the light of these facts, it does not become either Bass or Harbour to attempt to stand behind this fiction to his personal advantage and to the disadvantage of the other. The law may treat their individual acts in regard to their business "as if the act had been clothed with all the formalities of a corporate act."

The first paragraph of the syllabus in the case of *State v. Standard Oil Co.*, 34 Am. St. Rep. 541 (49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145), reads:

"The doctrine that a corporation is a legal entity existing separate and apart from the natural persons composing it is a mere fiction, introduced for purposes of convenience and to subserve the ends of justice. Hence, where that fiction is urged to an end subversive of its policy, or such is the result of giving effect to it, it must be ignored, and an averment that a certain act has been done by the stockholders simply as individuals, and to promote their individual interests, cannot preclude judicial inquiry as to whether the act in question was really done by them in the capacity and for the purposes alleged, or was, as a matter of fact, done to control the corporation and af-

fect the transaction of the corporate business, in the same manner as if the act had been clothed with all the formalities of a corporate act."

Mr. Justice Pitney, in discussing this question, said:

"In the eye of the law, corporations are entities separate and distinct from their constituent members and not bound by the individual acts of the latter. The law deals with the corporation as an artificial person. Equity realizes that this legal entity is but a legal fiction; looking through the form, it discerns the substance. It finds that a stock corporation is, in essence, an aggregation of individuals, a statutory partnership with assignable membership and limited liability of the members, and so the doctrine of equitable estoppel applies fully to all the internal concerns of stock companies. Saving so far as public policy and the interest of creditors and other third parties are concerned (none of which is involved in the present case), the stockholders may bind themselves inter sese and in favor of the corporation by their own acts and agreements; and what will bind all the stockholders with respect to an obligation from the company to one of its members will bind the company as such. The authorities to this effect are abundant. Mr. Thompson, in his new work on Corporations, lays it down: 'That the body of stockholders are, in substance, the corporation; that estoppels are concurrent as between the stockholders and the corporation; in other words, that whatever will estop the stockholders will estop the corporation, and whatever will estop the corporation will estop the stockholders.' 4 Thompson Corp. par. 5269. And again, at section 6314, he says: 'The body of stockholders, in every business corporation, are the persons who are incorporated. They are, in a substantial sense, the corporation. They are the ultimate constituency, and the directors who are elected by them from their own number are their officers. The ideal body is, in theory of law, the principal, and the board of directors are the managing agents; but, in theory of equity, the body of stockholders are the beneficiaries in a trust, and the directors are their trustees. It follows that many acts which the directors may do outside the scope of their powers become ratified and validated by the acquiescence of the body of shareholders, and, in general, the body of shareholders can ratify and confirm any act done by the directors or other officers of the corporation without a precedent authorization which the shareholders could have authorized originally.' See, also, 4 Thompson Corp. par. 4496, 4497." *Breslin v. Fries-Breslin Co.*, 70 N. J. Law, 274, 282, 283, 58 Atl. 313, 316.

The management of the business of Bass & Harbour Furniture & Carpet Company by Bass and Harbour clearly shows that they treated the corporation as a fiction and convenience more than a reality. Bass will not be permitted to shield himself behind the fiction of this corporation to his personal advantage.

The foregoing authorities sustain the contention that the Bass & Harbour Furniture & Carpet Company was bound by the dissolution agreement the same as if it had been executed by it, acting through its proper officers and in pursuance of a resolution adopted by its board of directors and justify the overruling of the assignment of error under consideration.

[3, 4] One other assignment is urged, and that is that the defendant was permitted to

assume the burden of proof, which carried with it the right to open and close the argument to the jury. Authorities are cited to sustain the proposition that the burden of proof in every case is determined by the pleadings, and not by admissions of evidence that are made by counsel during the course of the trial. We concede that these authorities state the correct rule. The burden of proof is determined by the pleadings. *McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187; *Central Railway v. Morgan*, 110 Ga. 172, 35 S. E. 345; *Railway Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598; *Douglass v. Hill*, 29 Kan. 527. However, since the admissions were made in this case at the commencement of the trial, and before any testimony had been offered by the plaintiff, the counsel making the admissions stated that, having made the admissions, the burden of proof was upon the defendant, and no objection being made to his assuming the burden and being permitted to introduce his evidence, until the close of the testimony, when the question was raised by counsel for the plaintiff claiming the right to open and close the argument.

We are constrained to hold that the ruling of the trial court giving the right to open and close the argument at the trial was not error, and, if necessary to sustain this holding, we should say that the answer was treated by the parties as if it had been amended to conform with the admissions made by the defendant at the beginning of the trial. *Allison v. Bryan*, 26 Okl. 520, 109 Pac. 934, 30 L. R. A. (N. S.) 146, 138 Am. St. Rep. 988.

Numerous other assignments are made in the petition in error, but they all grow out of the theory of law advanced by the plaintiff in error, and which has been disposed of against its contention in disposing of the first assignment herein.

The record in this case is voluminous. It was a long trial. The case was carefully tried, and it has been ably briefed and supplemented by earnest and able oral arguments for each of the parties.

We are constrained to hold that upon the whole record the case was fairly tried, and that the assignments should be overruled, and the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

#### STATE v. GRANT.

(Supreme Court of Idaho. June 18, 1914.)

#### 1. CRIMINAL LAW (§ 511\*)—TESTIMONY OF ACCUSED—CORROBORATION.

Under the provisions of section 7871, Rev. Codes, the corroborating evidence required to substantiate the testimony of an accomplice must be upon some material fact or circumstance which, standing alone and independent of the testimony of the accomplice, tends to connect the defendant with the commission of the

offense. *State v. Knudtson*, 11 Idaho, 524, 83 Pac. 226, approved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.\*]

#### 2. CRIMINAL LAW (§§ 736, 780\*)—TESTIMONY OF ACCOMPLICE—INSTRUCTIONS—QUESTION FOR JURY.

When the question as to whether a witness is an accomplice arises in a criminal case under section 7871, Rev. Codes, it is the duty of the trial court to instruct the jury on the law of accomplices, and leave the question as to whether or not any witness is an accomplice in the commission of the offense charged for the decision of the jury as a matter of fact, unless it appear without substantial conflict in the testimony that such witness was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1219, 1220, 1221, 1701, 1702, 1705, 1716, 1859-1863; Dec. Dig. §§ 736, 780.\*]

#### 3. CRIMINAL LAW (§ 507\*)—"ACCOMPLICE"—WHAT CONSTITUTES.

In order to make a person an accomplice in the commission of a crime, some aiding, abetting, or actual encouragement by such person must be shown. Mere presence at the plotting of a crime or silent acquiescence in its commission is not, in the absence of a legal duty to act, sufficient to constitute one an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

#### 4. CRIMINAL LAW (§ 507\*)—ACCOMPLICE—WHAT CONSTITUTES.

The failure to disclose known facts regarding the commission of a crime does not render one having such knowledge an accomplice of the person who committed the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

#### 5. CRIMINAL LAW (§ 1208\*)—INDETERMINATE SENTENCE—VALIDITY.

Held that, under the provisions of section 1, c. 200, of the Laws of 1911. (Sess. Laws 1911, p. 664), amending section 1 of Indeterminate Sentence Act of 1909 (Laws 1909, p. 81), taken together with section 7008, Rev. Codes, fixing the penalty for the crime of arson in the first degree at a minimum sentence of 2 years, and maximum for life, the defendant was legally sentenced to serve a maximum term of 50 years in the state penitentiary, with a minimum of 25 years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.\*]

#### 6. CRIMINAL LAW (§ 1156\*)—APPEAL—DISCRETIONARY RULING—NEW TRIAL.

A wide discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits on motion for new trial on the ground of newly discovered evidence, and the action of the trial court in denying such motion will not be disturbed, where the discretion reposed is not shown to have been abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

#### 7. CRIMINAL LAW (§ 1176\*)—HARMLESS ERROR—REFUSAL TO STRIKE COUNTER AFFIDAVITS.

The action of the trial court in refusing to strike from the files counter affidavits submitted by the state on defendant's showing on mo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion for a new trial, on the ground that such counter affidavits are immaterial and irrelevant, is not a ground for reversal of a judgment of conviction, where it does not appear that the defendant has been prejudiced by allowing such counter affidavits to remain in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3190, 3191; Dec. Dig. § 1176.\*]

Appeal from District Court, Bannock County; J. M. Stevens, Judge.

Walter A. Grant was convicted of arson in the first degree, and appeals. Affirmed.

Clark & Budge and Carl Barnard, all of Pocatello, for appellant. D. C. McDougall, of Boise, J. H. Peterson, Atty. Gen., and J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., for the State.

AILSHIE, C. J. In the month of July, 1913, the appellant, Walter A. Grant, and one W. M. Truman, generally known as Billie Edwards, were engaged in conducting in the city of Pocatello the Horse Shoe Pool Hall, which contained, in addition to pool tables, a stock of tobacco and cigars. An important part of the business was an illegal traffic in intoxicating liquors; the county being at that time prohibition territory. Edwards was a partner of appellant in this illegal traffic, but had no interest in the legitimate part of the business. Associated with these two men about this time, as an assistant in their clandestine operations and as a hanger-on about the place, was a negro by the name of John L. Thomas, commonly known as "Frisco"; also another man by the name of McIlvaine. All these men, with the possible exception of Edwards, who had recently arrived in town, were already at that time in ill favor with the authorities. The appellant himself had been indicted at the March term of the district court for Bannock county upon two charges; one for maintaining a common nuisance in a prohibition district; the other for a violation of the antigambling law. To the first charge he plead guilty, and was fined \$500, which he paid. The second charge was still pending at the time of the occurrence of the events herein referred to. McIlvaine had been repeatedly arrested for bootlegging, and Thomas, according to his own testimony, was being constantly hounded by the police.

On July 21, 1913, according to the testimony of Edwards and Thomas, appellant sent a message to Thomas by Edwards that he would like to see him at the pool hall about midnight of that day. In the interview between appellant and Thomas at that hour in the back room of the pool hall, Edwards was present part of the time, passing back and forth, drinking with Grant and Thomas, and listening to much of their conversation. In this conversation Grant offered Thomas \$100 if he would burn the residence of the prosecuting attorney, C. D. Smith, stating as a reason that he wanted to teach him a lesson

for interfering too zealously with the bootlegging business. After some parley, Thomas agreed to commit the crime for that sum, and it was agreed that on the following day appellant should show Thomas where Smith lived. On the afternoon of July 22d Thomas met Edwards and Grant at the pool hall, and started with them to go to Smith's house, which was in another part of the city. On their way, however, they saw a policeman at a distance, and the members of the party separated. Later on in the afternoon Thomas again joined appellant, and the two proceeded to the locality of Smith's house, which was pointed out to Thomas by appellant. During the evening of that day Grant, Edwards, Thomas, and McIlvaine met in the back part of the pool hall, and arrangements were completed, not only for the burning of Smith's house by Thomas, but for the burning of a policeman's house on the other side of the city by McIlvaine, with the avowed purpose of having the fires occur at the same time, so as to embarrass the fire department in controlling them. At this interview also the parties partook freely of liquor to brace their nerves and make bigger fools of themselves than they usually were.

At about 2:30 on the morning of the 23d Thomas made two attempts to carry out his part of the program. The first time the fire went out before getting well started. On returning to the pool hall he met Grant and Edwards there. Grant accused him of not having made a good job of it because no alarm had sounded. In about half an hour he started out again and made a second attempt, after which he returned to the pool hall, finding Grant and Edwards still there. On this occasion the fire got quite a start, an alarm was given, and the conflagration was extinguished by the fire department. No alarm was heard at the pool hall, and Grant again accused Thomas of having made a bad job of the undertaking. Shortly after the parties separated. Later on in the same day and towards evening they met again in Edwards's lodgings. Thomas demanded pay for his services. Edwards said that he ought to receive something, and Grant thereupon gave him \$5.

[1] Other evidence was introduced by the state, mostly in the way of corroboration of the statements made by Thomas and Edwards. Concerning this evidence, it is sufficient to observe that, although Thomas and Edwards are corroborated in minor details by credible witnesses for the state as to circumstances attending the commission of the crime, the circumstances testified to can hardly be deemed to connect the defendant with the crime. *State v. Knudtson*, 11 Idaho, 524, 83 Pac. 226.

It was shown, among other things, that he had a motive for ill will against the prosecuting attorney, and it was testified that he

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had made a threat against him several months before. But, on the whole, such corroboration was not sufficient, and his conviction must be considered to depend upon the evidence of the witnesses Thomas and Edwards, the first of whom is a self-confessed accomplice. Section 7871, Rev. Codes, is as follows:

"A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

The trial judge instructed the jury as follows:

"You are instructed that an 'accomplice' is one who is concerned in the commission of a crime or connected with the crime committed, either as principal offender or as one who advises, aids, or assists in the commission of the unlawful act. If you find from the evidence that on or about the 23d day of July, 1913, the place of residence of C. D. Smith, of Pocatello, was burned, and that the witnesses W. M. Edwards and John L. Thomas were concerned in the burning of said building—that is to say, that said Edwards and Thomas were accomplices in the commission of said crime—and if you further find that the evidence connecting the defendant, Grant, with the commission of said crime is the testimony of said Edwards and Thomas, uncorroborated by other evidence, which in itself, and without the aid of the testimony of said Edwards and Thomas, tends to connect said defendant with said crime, then you are instructed that you must find the defendant not guilty."

Inasmuch as the jury found the defendant guilty with this instruction before them, they must have concluded, either that there was corroborating evidence connecting Grant with the commission of the crime, independent of the evidence of Edwards and Thomas, or that the witness Edwards was not an accomplice.

[2] Our statute (section 7871), requiring the evidence of an accomplice to be corroborated, is taken verbatim from the California Penal Code, § 1111, and has been repeatedly construed by the California court.

In *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082, that court says:

"It must be assumed from the verdict that, upon the evidence before them, the jury found that he was not an accomplice, and, if this evidence was properly received, their verdict must be accepted as conclusive of the fact."

And in the case of *People v. Coffey*, 161 Cal. 433, 119 Pac. 901, 39 L. R. A. (N. S.) 704, the same court observes:

"When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. *People v. Kraker*, 72 Cal. 459, 14 Pac. 186, 1 Am. St. Rep. 65."

The court continues further:

"Whenever the facts themselves are in dispute—that is to say, wherever the question is whether the witness did or did not do certain things, which admittedly, if he did do them, make him an accomplice—the jury's finding, up-

on familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice."

And in *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 304, it is stated in the syllabus as follows:

"Before a conviction for crime can be set aside for want of evidence corroborating the testimony of an accomplice, as required by Penal Code, § 1111, \* \* \* it must appear, without substantial conflict in the evidence, that the witnesses who gave corroborative evidence were also accomplices, and, where there is a conflict on that question, it will be presumed in aid of the verdict that the jury found that such witnesses were not accomplices."

We believe that this correctly states the law.

[3] In the first place it will be noted that Edwards is not alleged to have participated in the actual commission of the crime by the man Thomas, but to have aided, abetted, and encouraged its commission in association with the appellant, Grant. It is admitted that he had a complete knowledge of what was going on; he was familiar with every step of the conspiracy; he was present at the successive interviews at which the crime was planned. Counsel for appellant have set forth in their brief at length those passages from the testimony which they claim show his criminal participation. But, taking all this at its face value, none of the evidence cited shows active participation on the part of Edwards. He was present at these interviews, but he had a right to be on the premises in the pool hall where they occurred, being a partner in business with Grant.

It is charged that his actions indicate he kept watch on customers or others entering the premises, in order that appellant and Thomas might not be disturbed or overheard by others in the discussion of their nefarious undertaking. But this is not conclusive; the testimony shows that liquor was constantly in evidence at all these interviews in the back room of the pool hall, a condition of itself to be guarded from prying eyes in prohibition territory and on behalf of men who were already known violators of the law. On the other hand, it was brought out in the cross-examination of Thomas that Edwards at a certain stage of the conspiracy expressed strong disapproval of this plot, which circumstance Edwards also states in his own testimony. Asked upon cross-examination why he did not interfere to prevent it, or notify any one, he replied: "I didn't think that he would do it; I thought that it was whisky talk."

But, granting counsel's contention to the extent that the attitude of Edwards was, on the whole, an attitude of acquiescence, that he was quite willing the crime should be committed, that he knew all that was going on, and still concealed his knowledge from the officers of the law and the party against

whom the crime was concocted, does that attitude make him an accomplice?

As we have seen, the trial court defined the meaning of the term "accomplice," in his instruction to the jury in this case, as "one who is concerned in the commission of a crime or connected with the crime committed, either as principal offender, or as one who advises, aids, or assists in the commission of the unlawful act." While this definition might perhaps have been made more explicit, it properly advises the jury that an accomplice must at least be "one who advises, aids, or assists." The evidence does not show that Edwards was anything more than an interested listener at these interviews, not present at all the conversation, taking little part in it himself, not encouraging in any way the commission of the crime. The most overt act of which he can be accused, so far as disclosed by the record before us, was accompanying the appellant and Thomas on the occasion when appellant proposed to show Thomas where Smith's house was.

Now a mere mental state of uncommunicated consent or acquiescence on the part of a bystander, where a crime is being instigated, is not sufficient to make him an accomplice in its commission. Some aiding, abetting, or actual encouragement on his part is essential. 12 Cyc. 186. As said in the leading case of *Levering v. Commonwealth*, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192, 19 Ann. Cas. 140:

"To constitute one either a principal, an accessory, an aider and abettor, or an accomplice, he must do something; must take some part, must perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence or acquiescence in, or silent consent to, is not, in absence of duty to act, legally sufficient, however reprehensible it may be, to constitute one a principal, or an accessory, or an aider and abettor, or an accomplice."

See, also, on this point, *Moore v. State*, 4 Okl. Cr. 212, 111 Pac. 822; *Chandler v. State*, 60 Tex. Cr. R. 329, 131 S. W. 598; 1 Am. & Eng. Ency. Law, 391.

Edwards held towards Smith, the prosecuting attorney, no such relation as would make the failure on Edwards' part to endeavor to prevent the execution of a plot to burn Smith's house evidence of Edwards' guilty agency in the perpetration of the crime. Wharton on Criminal Law (11th Ed.) § 171; *Levering v. Commonwealth*, supra.

[4] Nor does the failure to disclose facts regarding the commission of a crime render a person having knowledge of such facts an accomplice of the one who committed the crime. *Bird v. United States*, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. 100; *Melton v. State*, 43 Ark. 367; *Cruse v. State* (Tex. Cr. App.) 77 S. W. 818; *Alexander v. State*, 49 Tex. Cr. R. 93, 90 S. W. 1112.

[5] It is further contended by counsel for appellant that the judgment of conviction in this case is illegal, in that appellant was given a sentence of not less than 25, nor more

than 50, years. The penalty provided by our statute for the crime of arson in the first degree is a minimum of 2 years, which may be extended to life. Section 7008, Rev. Codes. This court held in the case of *In re Setters*, 23 Idaho, 270, 128 Pac. 1111, that, under section 1 of the Indeterminate Sentence Act of 1909, where the minimum sentence is fixed by law, the court is not authorized to fix a different minimum. In the case at bar, however, the defendant was sentenced under the provisions of section 1, c. 200, of the Laws of 1911 (Sess. Laws 1911, p. 664), amending section 1 of the Indeterminate Sentence Act of 1909, in which amendment the following language occurs:

"The court imposing sentence shall not fix a definite term of imprisonment but shall fix a minimum term of imprisonment which shall be not less than the minimum prescribed by law, nor less than six months in any case \* \* \* the minimum term of imprisonment fixed by the court shall not exceed one-half of the maximum term of imprisonment fixed by statute: Provided further, that in all cases when the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing the sentence shall fix a maximum sentence."

Under this provision of the amended statute the appellant was lawfully sentenced.

Appellant also assigns as error the overruling of his motion for a new trial, and the overruling of his motion to strike the counter affidavits filed by the state. The affidavits submitted by defendant upon this motion purport to make a showing of newly discovered evidence. The two principal affidavits are made by George Charles Edwards and Barney Horgan, both inmates of the county jail and convicted bootleggers. The first sets forth various conversations overheard by affiant between Billie Edwards and the negro, Thomas, who were at the same time confined in the county jail, from which it is made to appear that the conviction of appellant was the result of a conspiracy between Edwards and Thomas to give perjured testimony against appellant at his trial. Horgan's affidavit alleges admissions made by the witness Edwards as to appellant's innocence.

[7] The state filed a number of counter affidavits, and, among others, two by other inmates of the county jail, stating that they were offered \$50 by the affiant Horgan, if they would make affidavits on behalf of appellant. The state also filed an affidavit by R. W. Jones, court reporter, setting forth a conversation between Thomas and Edwards long subsequent to the commission of the crime. It is difficult to see the materiality of this last affidavit as a part of the state's counter showing, and the trial court might properly have stricken it from the files, but it is not shown how its being allowed to remain there has prejudiced appellant.

[6] The trial court, in denying the motion for new trial on the ground of newly discovered evidence, doubtless viewed with some suspicion the source of the showing made,



and, under the circumstances, would have been justified in distrusting the credibility and disinterestedness of the affiants, George Charles Edwards and Barney Horgan. A wide discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for a new trial, and we do not think that discretion was abused by the trial judge in this instance.

Counsel for appellant in his argument before this court made certain statements of fact de hors the record, accompanied by the explanation of peculiar exigencies, which, in his opinion, made it his duty to do so, and at the same time informally presented to the court an unauthenticated report of the testimony of the witness Thomas upon the later trial of the witness Edwards for the same offense of which appellant was convicted; such testimony having been given at a date subsequent to the filing of the transcript in the case at bar in this court. We sympathize with the zeal displayed by counsel on behalf of his client, and may here properly observe that the client is in no respect going to suffer from any lack of diligence on the part of his counsel. We have, however, examined this purported testimony of Thomas at the trial of Edwards, from which it appears that Thomas avers his testimony upon the trial of appellant, Grant, with regard to the non-complicity of Edwards, to have been false and perjured, and that in giving that testimony he purposed to shield Edwards, whom he now charges to have been equally culpable with appellant in the commission of this crime. But his testimony on the later trial in no way tends to relieve the appellant, Grant, from the stigma of guilt. Furthermore, the jury may as well have believed the original testimony given by the witness, as that upon the second trial wherein he testified that his first story was false.

The matters thus presented might possibly afford ground for the exercise of executive clemency, but this court in determining any case submitted to it upon appeal is necessarily confined to a consideration of such facts as are made to appear from the record.

Under the well-known rule, the jury, who heard the witnesses in this case and observed their demeanor on the stand, were the exclusive judges of the weight to be attached to their evidence. They listened to the narrative of Thomas, who committed the crime at the instigation of appellant, and confessed to them in detail the manner of its instigation and perpetration. They heard the corroborating testimony of Edwards, and, under the instruction of the court, were the proper arbiters of the question as to whether his participation in the instigation of this felony was such as to make him an accomplice in the commission of it. They listened to the witnesses for the defense, each one of whom, including the defendant, is shown by the

record to have been a convicted violator of the law. It was for the jury to say whom among these witnesses they believed and whom they disbelieved, and we are not inclined to disturb their verdict.

The judgment of the lower court is affirmed.

SULLIVAN, J., concurs.

#### STATE v. CANNON et al.

(Supreme Court of Idaho. June 17, 1914.)

#### CRIMINAL LAW (§ 594\*)—CONTINUANCE—DISCRETION—ABSENCE OF WITNESSES.

Where an affidavit for the postponement of the trial of a criminal action is based on the absence of a material witness and of a document in the possession of such witness, even though the testimony of such witness and the document itself are of impeaching character, and the affidavit shows that, after being served with a subpoena in the case, such witness has left the state to answer to a charge of felony in another state, refusing to surrender such document because he deems it material in his own trial, but there is reasonable probability that he will return with the document and testify if the present trial is postponed, as requested, for a period of ten days or two weeks, and it does not appear that either the court or the state will be incommode by such postponement, it is an abuse of discretion on the part of the trial court to refuse such postponement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

Appeal from District Court, Twin Falls County; E. A. Walters, Judge.

Dwight E. Cannon and another were convicted of selling intoxicating liquor in violation of the local option law, and appeal. Reversed.

W. P. Guthrie and A. M. Bowen, both of Twin Falls, for appellants. J. H. Peterson, Atty. Gen., J. J. Guheen, E. G. Davis, and T. C. Coffin, Asst. Attys. Gen., and A. R. Hicks, Pros. Atty., of Twin Falls, for the State.

FLYNN, District Judge. Defendants were convicted of violating the local option law, under an information containing two counts; the first charging the defendants with an illegal sale of whisky on April 5, 1913, and the second charging a like sale on the following day. From a judgment of fine and imprisonment against each defendant on each count, and from an order overruling their motion for a new trial, defendants appeal.

The first assignment of error is that the trial court abused its discretion in refusing to grant a postponement of the trial for a period of ten days or two weeks. The information was filed on April 30, 1913, and defendants on the following day pleaded not guilty. Before the case was set for trial, affidavits for continuance were filed, and the case continued for the term. On October 10, 1913, the case was set for trial on October 21st. The record does not show that the case

was called or reached until October 31st, on which day it was again set for trial on November 6, 1913. At the opening of court on November 5th, defendants moved for a postponement of the trial for a period of ten days or two weeks and filed in support of said motion the affidavit of defendant Cannon. The motion was denied, and a recess was taken by the court until 1:30 p. m. of that day, at which time defendants filed a supplementary affidavit of Cannon in support of their motion for postponement, and the motion was again denied, whereupon the trial proceeded, with the result above stated.

Without desiring to countenance a practice which might permit or encourage attorneys to fire one charge of legal ammunition at a trial court and await results before firing again, we think that these two affidavits should be considered as a whole in determining whether there was error in denying the postponement prayed for. The first of these two affidavits recites that on October 11, 1913, affiant caused a subpoena to issue, which was served on one Hutto, a necessary and material witness for defendant; that Hutto agreed to be present and testify, but that, through no fault of affiant or of his own, Hutto is compelled to be absent from the state, for the reason that Hutto is under bail to appear before the district court of Elko county, Nev., on an indictment for a felony therein pending, the trial of which has been set for November 10, 1913; that said Hutto has been compelled to go to Nevada to answer to said indictment and to properly defend himself to the charge therein; that without affiant's knowledge, and notwithstanding the service of said subpoena, Hutto left the state of Idaho and refuses to return until after his own trial in Nevada; that Hutto agrees to be present and will be present and testify on behalf of defendant if this cause is postponed to another day of the present term. The affidavit states that Hutto will testify that on and prior to May 10, 1913, T. F. McConvill, the prosecuting witness against this defendant on the charge herein, stated to Hutto that he (McConvill) had never purchased or been given any liquor by this defendant, and that he had no relations with this defendant in regard to any matters which might constitute a violation of the liquor laws of this state; that McConvill stated that any testimony given by him against this defendant would be false, and that he considered it best to leave the state of Idaho so that he might not be compelled to take the stand; that he requested Hutto to procure a conveyance for him so that he might leave the state and go to Mexico; that he did leave the state about May 10, 1913; that in the presence of said Hutto he signed the following written statement:

"State of Nevada, County of —, ss.:

"T. F. McConvill being by me first duly sworn, upon his oath, says: I am the prosecuting witness in the criminal actions, wherein the state of Idaho is prosecuting S. W. Harris,

James T. Nelson, Fred Estes, Dwight E. Cannon and Ferdinand Schuster for illegal sale of intoxicating liquors, now pending in the district court of the Fourth judicial district of the state of Idaho, in and for the county of Twin Falls, and I am a witness for the state in each and all of said cases. I make the statement freely and voluntarily that I have never at any time bought of said parties above named, or either of them, any intoxicating liquors, and neither of said parties has at any time given me any intoxicating liquors.

"T. F. McConvill."

Cannon's second affidavit is in substance as follows: A reiteration and adoption of the statements and allegations of his first affidavit; that Hutto has the original statement alleged to have been signed by McConvill, and refuses to surrender the same, because he deems it material evidence in his own behalf at his forthcoming trial in Nevada; that if this trial is postponed until a later date of the present term, or until on or about November 17, 1913, affiant will be able to procure the said original statement from Hutto and show by an inspection thereof and comparison with other documents signed by McConvill, and also by handwriting experts and others familiar with McConvill's signature, that said statement was in fact signed by McConvill; that affiant is informed that McConvill intends to deny his signature thereto; and that affiant cannot corroborate Hutto's testimony except by production of the original document.

The prosecuting attorney objected to the postponement, but gave no reasons therefor, and admitted that, if Hutto were present in court, he would testify to the facts set forth in the first of the foregoing affidavits, whereupon the application for postponement was denied.

Defendant's bill of exceptions, certified to by the trial judge, recites:

"That it appeared to the court that said postponement would not require the cause to go over for the term of court, but that the said term would and did continue until after the 20th day of December of said year, during which time a jury would be and actually was in attendance upon the said court for the trial of any and all causes coming before the same."

Section 7795, Rev. Codes, provides that:

"When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day of the same or of the next term."

What is "sufficient cause" is a matter to be determined by the trial court, and its action in respect of the postponement or continuance can be disturbed only where the record shows an abuse of judicial discretion. This court has heretofore held that:

"To entitle the defendant to a postponement of the trial on the ground of the absence of a witness, he must show what he expects to and will prove by such witness; that such evidence is material to his defense; that such evidence is true; that the witness is not absent by his procurement or with his consent; that he has used due diligence to procure the presence of said witness at the trial, and failed to do so; and that there is a reasonable probability that he can and will procure the attendance of said

witness at the next term of the court." *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034.

It has also been decided that the provisions of section 4372, Rev. Codes, are applicable to the trial of criminal actions. That statute provides:

"A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed." *Territory v. Guthrie*, 2 Idaho (Hask.) 482, 17 Pac. 39.

Under the rules prescribed by the foregoing statutory provisions, as construed in the above decisions, did the trial court err in refusing to postpone the trial? In determining this question, we are of the opinion that the period of the postponement asked for is a very material element to be considered. Though there might be no abuse of discretion in refusing to permit a continuance which would cause the trial to go over the term, it may easily happen that, under the same showing, it would be error to deny a postponement of the trial until a later day in the same term. Trial courts are usually fully justified in refusing, not only continuances, but even temporary postponements, where such postponement would so disarrange their calendars as to leave the court and jury without cases to hear or necessitate an unreasonable retention of trial juries and the consequent expense to the county, or the prolonged detention of the state's witnesses, with the added expense and possible loss of their testimony; but none of these reasons appear here, and the record fails to show the grounds of the prosecuting attorney's objection to postponement.

The affidavits for a postponement in this case are in conformity with the rule stated in *State v. Corcoran*, supra, except that they fail to state "that such evidence is true"; but inasmuch as the affidavits state explicitly that the written statement of McConville was signed by him, that Hutto saw him sign it and would so testify and would present the statement in court for inspection, we think that the affidavits should not be held insufficient in this regard.

While we recognize and approve the rule that continuances should not be granted to secure testimony for the purpose of impeachment, we feel that the interests of justice and the right of defendant to have all the material evidence available in his behalf presented to the jury would have been better preserved by granting the postponement in this case. It does not appear that the postponement would have incommoded the court or the prosecution, and it is shown that

defendants were diligent in their efforts to obtain the absent evidence; that the evidence was material; that there was a reasonable probability of securing it within ten days or two weeks. Keeping in mind the fact that there is a difference between an application for a continuance over the term and a short postponement within the term, we feel that where an affidavit for the postponement of the trial of a criminal action is based upon the absence of a material witness and of a document in the possession of such witness, even though the testimony of such witness and the document itself are of impeaching character, and, after being served with a subpoena in the case, such witness has left the state to answer to a charge of felony in another state, refusing to surrender such document because he deems it material in his own trial, but there is reasonable probability that he will return with the document and testify if the present trial is postponed, as requested, for a period of ten days or two weeks, and it does not appear that either the court or the state will be incommoded by such postponement, it is an abuse of discretion, on the part of the trial court, to refuse such postponement.

This determination renders it unnecessary to pass on the other assignments of error. It is therefore ordered that the judgment of the trial court be reversed, and that a new trial be granted to defendants.

No oral argument has been made in this case, and the foregoing conclusion has been reached solely from an examination of the record and briefs on file in this court.

AILSHIE, C. J., and SULLIVAN, J., concur.

#### PEAVY v. McCOMBS et al.

(Supreme Court of Idaho. May 29, 1914.)

#### 1. STATUTES (§ 225¼\*)—CONSTRUCTION—STATUTES ADOPTED AT SAME SESSION.

The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; they are to be construed together, and should be so construed, if possible, as to harmonize and give force and effect to the provisions of each.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 304; Dec. Dig. § 225¼.\*]

#### 2. STATUTES (§ 161\*)—IMPLIED REPEAL—GENERAL AND SPECIAL.

Where two statutes passed at the same session of the Legislature are necessarily inconsistent, that one which deals with the common subject-matter in a more minute and particular way will prevail over one of a more general character.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

#### 3. STATUTES (§ 159\*)—IMPLIED REPEAL—EMERGENCY CLAUSE.

Where two conflicting acts upon the same subject-matter are passed at the same session of the Legislature, and their conflict is such that they cannot be harmonized, and one of

them contains an emergency clause and the other does not, and the one containing the emergency clause was passed by both houses of the Legislature and approved by the Governor later than the other, *held*, under the circumstances the act containing the emergency clause repeals the other to the extent of the inconsistency between them.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.\*]

4. STATUTES (§§ 262, 263\*)—CONSTRUCTION—RETROACTIVE EFFECT.

No act of the Legislature shall be construed to be retroactive or retrospective unless the intention on the part of the Legislature is clearly expressed. The word "retroactive" need not be used in the statute, but the intent of the Legislature may be gleaned from any language which appropriately expresses such purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 343, 344, 349; Dec. Dig. §§ 262, 263.\*]

5. COUNTIES (§ 173\*)—ISSUANCE OF BONDS—PURPOSE OF STATUTE.

Section 99, c. 58, Sess. Laws 1913, was passed in obedience to the mandate of section 15, art. 7, of the Constitution. By said provision the Legislature declared its purpose to place the counties of the state upon a cash basis.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 261, 262, 266, 267, 275, 276; Dec. Dig. § 173.\*]

6. COUNTIES (§ 175\*)—ISSUANCE OF BONDS—STATUTE—RETROACTIVE OPERATION.

By section 99, c. 58, Sess. Laws 1913, the power of the board of county commissioners to issue bonds for the payment or redemption of outstanding county warrants is abrogated. This applies to warrants which were issued before said law went into effect, as well as to warrants which were issued after it went into effect.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 263; Dec. Dig. § 175.\*]

7. COUNTIES (§ 175\*)—ISSUANCE OF BONDS—REPEAL OF STATUTE.

Section 99, c. 58, Sess. Laws 1913, repeals section 1960 of the Revised Codes as amended by chapter 33 of the Laws of 1913, so far as said section 1960 empowers the county commissioners to issue county bonds to pay or redeem outstanding warrant indebtedness.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 263; Dec. Dig. § 175.\*]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by O. L. Peavy to enjoin George McCombs and others from issuing, signing, and delivering certain county bonds of Bonner county to pay and redeem certain outstanding warrant indebtedness. From judgment for plaintiff, defendants appeal. Affirmed.

William J. Costello, of Sandpoint, for appellants. Herman H. Taylor, of Sandpoint, for respondent.

MCCARTHY, District Judge. The following are the material facts of this case as they appear from the allegations of the complaint: The plaintiff is a resident and taxpayer of Bonner county, Idaho, and the defendants, George McCombs, John C. Nagel, and Don C. McColl, are now and were at all times concerned in this action the county commissioners of Bonner county, Idaho. The de-

fendant Andrew Christensen is and was at all times concerned in the action the clerk of said board of county commissioners. In April, 1912, the board of county commissioners of Bonner county, in accordance with the provisions of the revenue law in force at that time, appropriated by resolution for the current expenses of said county for the fiscal year beginning on the second Monday in April, 1912, the net sum of \$76,967. To raise the money required by this appropriation the board levied a tax of three mills, which would produce only \$30,913.38, or less than one-half of the amount required by the appropriation. As a consequence there were outstanding and unpaid in July, 1913, warrants drawn on the current expense fund for the fiscal year 1912-13 in the amount of \$43,759.04. In addition to these warrants there were other warrants of the county outstanding and unpaid which brought the total amount of warrant indebtedness up to the amount of \$100,000. On July 18, 1913, at an adjourned regular session, the board of county commissioners resolved to issue negotiable coupon funding bonds of the county in an amount sufficient to redeem or pay the outstanding warrant indebtedness, and at a later session ordered the clerk of the board to cause to be published according to law a notice of their intention. The notice has been published and the bonds have been awarded, and the defendants, unless restrained, will make, execute, and deliver the negotiable coupon bonds of the county in an amount in excess of \$100,000 for the purpose of redeeming or paying the warrant indebtedness. The defendants demurred generally to the plaintiff's complaint upon the ground that the facts set forth in it and outlined above are not sufficient to constitute a cause of action. This demurrer was overruled by the trial court, and the defendants elected to stand upon their demurrer. The trial court then rendered judgment in favor of the plaintiff and against the defendants, permanently enjoining and restraining the latter from proceeding further in the matter of the execution of negotiable coupon funding bonds of Bonner county, for the purpose of redeeming or paying outstanding warrants of the county, or from signing, executing or delivering bonds of the county to pay or redeem outstanding warrants. From this judgment of the trial court the defendants appeal to this court.

An examination of this case involves the consideration and construction of certain provisions of the state Constitution and of the statutes. Section 15 of article 7 of the Constitution of the state of Idaho reads as follows:

"The Legislature shall provide by law, such a system of county finance, as shall cause the business of the several counties to be conducted on a cash basis. It will also provide that whenever any county shall have any warrants outstanding and unpaid, for the payment of which

there are no funds in the county treasury, the county commissioners, in addition to other taxes provided by law, shall levy a special tax, not to exceed ten (10) mills on the dollar, of taxable property, as shown by the last preceding assessment, for the creation of a special fund for the redemption of said warrants; and after the levy of such special tax, all warrants issued before such levy, shall be paid exclusively out of said fund. All moneys in the county treasury at the end of each fiscal year, not needed for current expenses, shall be transferred to said redemption fund."

Section 99, c. 58, Sess. Laws, 1913, provides that upon all taxable property of the county the board of county commissioners must each year levy a tax for the redemption of outstanding county warrants issued prior to the second Monday of April in said year, to be collected and paid into the county treasury and apportioned to the county redemption fund, which levy must be sufficient for the redemption of all such outstanding county warrants before the second Monday of April in the succeeding year, unless the amount of such outstanding warrants exceeds the amount that would be raised by a levy of 100 cents on each \$100 of such assessed valuation, in which case the board must annually levy a tax of 100 cents on each \$100 of such assessed valuation for the redemption of such outstanding warrants.

Section 101 of said chapter 58 provides that the county auditor must furnish the board with a statement of the amount of outstanding county warrants for the current year and for the prior years.

Section 212 provides that "all acts and parts of acts in conflict with this act are hereby repealed."

Chapter 33, Sess. Laws 1913, provides as follows:

"The board of county commissioners of any county in this state, may issue negotiable coupon bonds of their county for the purpose of paying, redeeming, funding or refunding the outstanding indebtedness of the county, as hereinafter provided, whether the indebtedness exists as warrant indebtedness, or bonded indebtedness. Said bonds shall be issued as near as practicable in denominations of one thousand dollars each, but bonds of the denominations of five hundred and one hundred dollars may be issued when necessary. Said bonds must bear interest at a rate of not to exceed six per cent. per annum, the interest to be paid on the first day of January and the first day of July in each year, at the office of the county treasurer, or at such bank in the city of New York as may be designated by the board of county commissioners; such bonds to be redeemed by the county in the following manner: Ten per cent. of the total amount issued to be paid in ten years from the date of issue; and ten per cent. annually thereafter until all of said bonds are paid. But said bonds or any part thereof may, at the option of the county issuing the same, be redeemed at any time after five years from the date of their issue, provided such time and option be stated upon the face of each bond, and each bond must be redeemed in the order it is numbered."

In this opinion chapters 33 and 58, Sess. Laws 1913, will be referred to simply as chapter 33 and chapter 58.

It is apparent that section 99 of chapter 58 was enacted and approved for the purpose

of carrying out the provisions and directions of section 15, art. 7, of the Constitution. Chapter 58 carries an emergency clause, and was approved March 13, 1913. Chapter 33 does not carry an emergency clause, and was approved February 25, 1913. The twelfth session of the Legislature, which enacted both these statutes, adjourned on March 8, 1913, and chapter 33 did not go into effect until 60 days from said date, since it did not carry an emergency clause.

Chapter 33 is amendatory of section 1960 of the Civil Code of Idaho, and makes no change in that section except to provide that the bonds may be redeemed at any time after five years from the date of their issuance, whereas section 1960 provides that they may be redeemed after 10 years from the date of their issuance. The provision empowering the board of county commissioners to issue negotiable coupon bonds for the purpose of paying outstanding warrant or bonded indebtedness was not amended or changed in the least, and in this respect chapter 33 reads just like the original section 1960 of the Codes.

The precise question involved in this action is whether or not, since the passage and approval of chapter 58, the board of county commissioners has the right to issue bonds of the county to pay or redeem outstanding warrants of the county issued prior to the time when said chapter 58 went into effect. It is a fact that the warrants, for the purpose of paying and redeeming which the county bonds in question were issued, were issued prior to such time.

The appellants concede that chapter 58 removes the power of the county commissioners to issue county bonds for the payment of warrant indebtedness which may be issued subsequent to the time when chapter 58 went into effect. They contend, however, that it was not the intention of the Legislature to make section 99 of chapter 58 relate to warrants issued before the statute went into effect, and that the Legislature intended when enacting chapter 33 to keep in effect the provisions of section 1960, Rev. Codes, which permitted the county commissioners to issue bonds to pay warrant indebtedness, so far as warrants issued before chapter 58 went into effect are concerned.

[1,2] Since it is necessary to construe several statutes passed at the same session of the Legislature, certain fundamental rules of statutory construction should be borne in mind. Chapter 33 and chapter 58 relate to revenue, and the power of the commissioners in relation to it. The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; they are to be construed together, and should be so construed, if possible, as to harmonize and give force and effect to the provisions of each. If, however, they are necessarily inconsistent, the statute which deals with the

common subject-matter in a more minute and particular way will prevail over a statute of a more general nature. These rules are so well established as to neither require nor justify any citations of authorities in support of them. Since chapter 58 contains an emergency clause, and chapter 33 does not, chapter 58 went into effect before chapter 33.

The general rule at common law seems to have been that, of two inconsistent statutes enacted at the same session of the Legislature, the one which went into effect at the later date would prevail. *Harrington v. Harrington's Estate*, 53 Vt. 649; *State v. Edwards*, 136 Mo. 360, 38 S. W. 73; *Sutherland on Statutory Construction* (2d Ed.) p. 541, § 290, note 45. At common law this was a sensible rule, because the general rule was that a statute went into effect from the date of its passage, that is, from the date of the last act necessary to complete the process of legislation and give the bill the force of law. *Sutherland on Statutory Construction* (2d Ed.) p. 308, § 172. Under our Constitution no act takes effect until 60 days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the law. Const. art. 3, § 22. Thus, except in the case of emergency acts, all acts of the Legislature go into effect at the same time. Therefore, in the great majority of cases, the common-law rule would not be an effective guide. While it is not necessary for the purposes of this case to lay down a general rule for all cases, we will say in passing that we are inclined to the opinion that, in case of an irreconcilable conflict between two acts passed at the same session of the Legislature, the one should prevail which was last approved by the Governor; the approval of the Governor being the last act in the process of legislation under our Constitution and statutes.

[3] It has been held that where two conflicting acts upon the same subject-matter are passed at the same session of the Legislature, and their conflict is such that they cannot be harmonized and stand together, where one of them contains an emergency clause and the other does not, and the one containing the emergency clause was passed by both houses of the Legislature after the other, under such circumstances the act containing the emergency clause should prevail over the other. *Hellig v. City Council of Puyallup*, 7 Wash. 29, 34 Pac. 164. The Supreme Court of Washington says in the last-mentioned case:

"The simple fact of there being an emergency clause would tend to show that the subject-matter of the act was more clearly and pointedly before the Legislature than the subject-matter of the other act."

Another reason for the decision is that the act which is passed later is the later expression of the legislative will. To the same effect see *Belding Land, etc., Co. v. Belding*,

128 Mich. 79, 87 N. W. 113; *Dewey v. City of Des Moines*, 101 Iowa, 416, 70 N. W. 605; *Board of Education v. Tafoya*, 6 N. M. 292, 27 Pac. 616.

This court takes judicial notice of the journals of the House of Representatives and Senate of this state in passing upon legislation. Section 5950, subdiv. 3, Rev. Codes; *Burkhart v. Reed*, 2 Idaho (Hasb.) 503, 22 Pac. 1. Chapter 33 passed the House and was transmitted to the Senate on February 5, 1913, and passed the Senate and was returned to the House on February 20, 1913; it was presented to the Governor on February 24th. House Journal, pp. 183, 360; Senate Journal, p. 212, printed copies. It was approved by the Governor on February 25th. Chapter 58 passed the House and was transmitted to the Senate on March 4th, was passed by the Senate and returned to the House on March 8th, and was presented to the Governor on March 8th. House Journal, pp. 503, 615; Senate Journal, p. 393, printed copies. It was approved by the Governor on March 13, 1913. It thus appears that chapter 58 passed both houses and was approved by the Governor later than chapter 33, and therefore was a later expression of the legislative will than chapter 33. The fact that chapter 58 carries an emergency clause signifies that it was considered more urgent and more important by the Legislature than chapter 33, which does not carry an emergency clause. For these reasons we think that in case of an irreconcilable inconsistency it should be held that chapter 58 repeals chapter 33 to the extent of such inconsistency.

[4] The defendants contend that to make chapter 58 apply to warrants issued before it went into effect would be to render it a retroactive or retrospective law. It is the rule that all statutes are to be considered as having only a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is clear. 36 Cyc. 1205, c, and cases cited; *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873. This rule is embodied in section 3, Rev. Codes, which provides that "no part of these Revised Codes is retroactive, unless expressly so declared." We do not think, however, that this section means that the statute must use the words, "This statute is to be deemed retroactive." We think it is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared within the meaning of section 3, Rev. Codes.

[5-7] Bearing in mind the rules of statutory construction which are outlined above, the question is, What was the intention of the Legislature in enacting chapter 33 and chapter 58 so far as the precise point which we are considering is concerned? Section 15,

art. 7, of the Constitution made it the duty of the Legislature to enact chapter 58, and it should have been enacted long before it was, in fact at the first session of the Legislature. After directing that such a law should be passed, it says:

"And after the levy of such special tax, all warrants issued before such levy, shall be paid exclusively out of such fund."

Of course the Legislature had this language in mind when it passed and enacted chapter 58.

This court held, in *Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277, that section 15, art. 7, of the Constitution was not self-executing, for the reason that it did not provide necessary machinery for its execution. However, when such machinery was provided by chapter 58, § 99, we think that the language of said section just above quoted is self-executing, and that all warrants issued before the levy of the tax for the purpose of paying warrant indebtedness must be paid out of that fund to the exclusion of any other method.

Section 99 of chapter 58 says that the board must levy a tax for the redemption of outstanding county warrants issued prior to the second Monday of April in the year in which the tax is levied. Reading this language in the light of the constitutional provision, it seems to us that it clearly refers to all warrants issued before the levy of the tax. Section 15, art. 7, of the Constitution makes it the duty of the Legislature to pass such laws as shall place and maintain the counties of the state upon a cash basis. We do not think that a law passed in obedience to such a mandate should be given a construction which would defeat in part the mandate itself.

It should be borne in mind that chapter 58 is a remedial statute, or one relating to procedure. It does not impair any existing right or indebtedness, but simply relates to the method of procedure which shall be followed in paying an indebtedness. The provision of section 101 of chapter 58 that the county auditor shall furnish the board with a statement of the amount of outstanding warrants for the current year and for prior years also enforces the conclusion that the Legislature did not mean to confine the operation of the law to warrants issued after the law went into effect. We conclude that the Legislature, when enacting section 99 of chapter 58, intended to make it apply to all warrant indebtedness, irrespective of whether the warrants were issued before or after that chapter went into effect, that there is no rule of law which prevents or inhibits such construction, and that such construction should be placed upon the statute. It follows, then, that chapter 58 repeals the provision of chapter 33, which empowers the commissioners to issue funding bonds for the purpose of paying any warrant indebtedness.

Chapter 33 is not, however, entirely repealed, but is still in effect so far as bonded indebtedness is concerned.

Counsel for both plaintiff and defendants have referred to the decision in the case of *Bannock County v. Bunting*, 4 Idaho, 156, 37 Pac. 277. We cannot see that this decision is directly in point. It, of course, holds by implication that section 15 of article 7 of the Constitution is not self-operative. Section 99 of chapter 58 makes that provision of the Constitution operative. In that case the court upholds the old law granting the commissioners power to bond not only for refunding bonded indebtedness, but also for warrant indebtedness. The court, however, had no such provision before it as the provision of section 99 of chapter 58, which, as we hold in this opinion, abrogates such power.

The judgment of the lower court should be affirmed, and it is so ordered. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

#### COOLIN v. ANDERSON.

(Supreme Court of Idaho. May 8, 1914. On Petition for Rehearing, June 16, 1914.)

##### 1. VENDOR AND PURCHASER (§ 81\*)—MISTAKE OF LAW—WHAT CONSTITUTES.

Where the original government survey of a fractional section of land, abutting on a lake, left a tract of nearly 40 acres between the meander line of said section and the water line of the lake, which tract remained unsurveyed, and was not shown on the government plat, and thereafter a dispute arose between landowners and land claimants as to whether such unplatted land belonged to the fractional section, such dispute involved a question of law which could not be determined by the parties without adjudication in the proper court.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 35-37; Dec. Dig. § 31.\*]

##### 2. VENDOR AND PURCHASER (§ 308\*)—MISTAKE OF PURCHASER—RIGHT TO EQUITABLE RELIEF.

The mistake of a purchaser as to what was included within the bounds of a legal subdivision of land cannot be the basis for equitable relief in his favor as against an action for the recovery of the purchase price, when it is not shown that any material misrepresentations were made by the vendor, and it appears that complainant himself was negligent.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 862, 877-899; Dec. Dig. § 308.\*]

##### 3. VENDOR AND PURCHASER (§ 315\*)—ACTION FOR PRICE—EVIDENCE.

Held, that the trial court committed no error in the admission or exclusion of evidence.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 928-931; Dec. Dig. § 315.\*]

##### 4. MORTGAGES (§ 581\*)—FORECLOSURE—ATTORNEY'S FEE.

Held, that an attorney fee of \$1,000, under the circumstances of this case, where the amount of \$10,181.64 was recovered against defendant in a suit for foreclosure of a mortgage,

\*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep. Indexes.

defendant having gone to trial on an answer and cross-complaint, was properly allowed by the trial court.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.\*]

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by Andrew Coolin against W. A. Anderson for foreclosure of a mortgage, and defendant filed a counterclaim. From a judgment for plaintiff, defendant appeals. Affirmed, and rehearing denied.

E. N. La Veine, of Cœur d'Alene, for appellant. McNaughton & Berg, of Cœur d'Alene, for respondent.

AILSHIE, C. J. Fractional section 7, township 51 N., range 5 W. B. M., in Kootenai county, is a strip of land containing somewhat over 200 acres, bordered on the west by the irregular meander line of Mud (or Sucker) Lake. At the north end of this section the shore line of the lake, curving sharply to the west, diverges abruptly from the meander line, leaving a tract of nearly 40 acres between the meander line and the water line, immediately south of the north line of section 7 extended. In other words, the government surveyor fixed his meander line so far inland at this point that the tract of land referred to was left outside of any legal subdivision of his survey, and therefore had no official existence on the government plat.

The nondescript status of this tract of land gave rise to the controversy adjudicated in the case of Ulbright v. Baslington, 20 Idaho, 542, 119 Pac. 292, 294, and is also the moving cause of litigation in the present case.

On July 6, 1909, A. Ulbright and Mary H. Ulbright, husband and wife, entered into a contract with W. A. Anderson, of Spokane, Wash., appellant herein. By this contract the Ulbrights agreed to convey to Anderson certain real and personal property situated in Kootenai county, including most of section 7, above referred to, in exchange for certain lands owned by Anderson in the state of Washington. The Ulbrights were also to receive the further consideration of \$10,000, to be evidenced by two promissory notes in their favor, secured by mortgage on the Idaho lands conveyed to Anderson. One of these notes was to be for \$2,000, due August 25, 1909, the other for \$8,000, to be due in five years. The notes and mortgages were to be executed and deeds exchanged as soon as certain conditions, specified in the contract, had been complied with, such as surveying the land to be conveyed by the Ulbrights, and furnishing abstract of title. The Ulbrights agreed to give possession of the property they were transferring upon the payment of the \$2,000 note.

On July 26, 1909, the parties executed the

papers called for by their contract of July 6th, although the Ulbrights had not yet complied with the terms of the contract which required them to have their land surveyed. It appears that the appellant, Anderson, was already negotiating for a sale of the Ulbright property and desired to acquire title to it without further delay. He was therefore willing to waive compliance with certain preliminary requirements called for by the contract. On this date, therefore, at the solicitation of Anderson, the deeds were executed by the parties, the notes and mortgage were signed by Anderson, and the papers placed in escrow, to be delivered upon Anderson taking up the \$2,000 note.

The original contract of July 6th excepted from the transfer of fractional section 7 about 20 acres at the south end of the section, and it contained the following provision:

"First parties agree to pay second party \$40 in cash for each acre that the land in sec. 7, herein transferred, falls short of 200 acres above the waters of Sucker Lake; said payment of cash to be made upon the termination of this contract."

On August 19, 1909, the same parties made a supplemental contract, wherein is recited the conveyance to Anderson of July 26th, and continuing as follows:

"Whereas, it was understood and agreed by and between the parties hereto that the said Anderson was to have possession of said lands on or before August 25, 1909; and

"Whereas, certain controversies have arisen between the parties of the first part and pretended owners of a portion of the lands above described; and

"Whereas, the said parties of the first part are unable to give possession of the lands in controversy and are also unable to give possession to the party of the second part of the crop of hay on the lands in controversy, at the time as agreed upon;

"Now, therefore, as a consideration for the extending of the time to the parties of the first part to obtain possession of the lands in controversy for and on behalf of the party of the second part, and as a waiver of the rights of the said W. A. Anderson as to the crop of hay now standing and growing upon said lands in controversy, the parties of the first part do hereby agree to convey to the party of the second part the following described lands, situate in Kootenai county, state of Idaho, to wit:"

Then follows a description of the 20 acres remaining in section 7 which had been excepted by the Ulbrights in their deed of July 26th, after which the agreement concludes with the following paragraph:

"It being understood, however, that this agreement does not in any way release the parties of the first part from the terms of the warranty deed first above mentioned, and from using all diligence in obtaining possession of the disputed lands for the party of the second part herein, and that said title is to be obtained by said parties of the first part for the party of the second part within a reasonable time from date hereof."

On the same day, August 19th, Anderson paid the \$2,000 note specified in the contract, though by the terms of the contract it was not due until the 25th, and the papers evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



dencing the entire transaction were delivered to the parties entitled to them, including a deed for the remaining 20 acres in section 7 not included in the original contract of July 6th.

By the terms of the mortgage given the Ulbrights to secure Anderson's \$8,000 note, the mortgagees had the option of declaring the note and mortgage due on default of any interest payment. No payments of interest were ever made. On January 9, 1912, the Ulbrights assigned the note and mortgage to one Perry Krebs, and on October 30, 1912, Krebs assigned to Andrew Coolin, the respondent in this case. Soon after obtaining this assignment Coolin began foreclosure proceedings, upon the termination of which he secured judgment in the lower court for \$10,181.84, and the further sum of \$1,000 as attorney fees, and costs, from which judgment this appeal was taken.

During the whole period of these transactions between the Ulbrights and Anderson, a dispute had been in progress between the Ulbrights and certain landowners or claimants adjoining them on the north—Basington and Wright—as to the ownership of the unsurveyed and unplatted tract of land referred to in the beginning of this opinion. The contention of appellant is that the Ulbrights concealed this dispute from him at the time he contracted for the purchase of section 7, and that Mr. Ulbright positively represented to him, at the time he showed him over the land, that the unsurveyed and unplatted tract referred to was a part of section 7, thereby inducing him to make the purchase.

In his answer the defendant admitted the execution of the note and mortgage and the nonpayment of interest, but denied that the plaintiff was the lawful holder. In his affirmative defense he recites the conditions of the contract of July 6th, and makes the following allegation:

"That at the time of said purchase of said section 7 hereinabove set forth, in order to induce the defendant herein to make said purchase, and to execute said mortgage and said notes as a part of the purchase price thereof, said above-mentioned A. Ulbright and Mary H. Ulbright, his wife, did show to this defendant said section 7 hereinabove set forth and included in said mortgage, and did, at the time of showing said lands, take this defendant upon said section 7 and show him the north line of said section 7, and show him all of the land lying south of said north line of said section 7 between said north line of said section 7 and the water line of what is known as Sucker Lake, and did, at said time, represent to this defendant that they were the owners of and possessed of all of said section 7, and did represent to this defendant that all of the land lying south of the north line of said section 7, and particularly the land lying between said north line of said section 7 and the water line of said Sucker Lake, bounded on the west by the north and south line of said section 7, which said line is the same as the west line of township 51, range 5 W. B. M., when extended into the waters of Sucker Lake, was owned by said A. Ulbright and Mary H. Ulbright, his wife, and was a part of said section 7, and did sell

the same to this defendant as a part of said purchase and sale.

"That said land so shown and represented to be owned and possessed by said A. Ulbright and Mary H. Ulbright, his wife, in said section 7, as above set forth, between the north line thereof and the said water line of Sucker Lake, was very valuable land, and this defendant, relying on the value thereof and the representations made by said A. Ulbright and Mary H. Ulbright, his wife, that they were the owners thereof, was thereby induced to purchase said lands as above set forth, and to execute said notes and mortgages set forth in the complaint."

In a succeeding paragraph he alleges his damage in the sum of \$10,000 on account of not being placed in possession of said land.

Defendant's allegations of misrepresentation on the part of the Ulbrights as to the land embraced in section 7 were not proved on the trial; in fact the preponderance of the testimony was the other way. Against the testimony of Anderson that these representations were made, is the testimony of Ulbright, to the effect that Anderson was informed, before the contract of July 6th was entered into, of the dispute in regard to the unsurveyed land. Ulbright is corroborated in this by the witness Mauser, who went with Ulbright and Anderson at the time Ulbright showed Anderson the boundaries of the land he proposed to sell to appellant. Mauser testified that Ulbright said at that time in the presence of Anderson:

"He figured about 15 or 16 acres in that meadow, but that he was not positive that that belonged to section 7."

By referring to the recitals in the agreement of August 19, 1909, above quoted, it is apparent that Anderson was at that time certainly aware of the controversy over the land in dispute, since one of the considerations for the deed of the additional 20 acres by the Ulbrights was:

"Whereas, certain controversies have arisen between the parties of the first part (Ulbrights) and pretended owners of a portion of the lands above described; and

"Whereas, the said parties of the first part are unable to give possession of the lands in controversy."

Nevertheless at this time Anderson proceeded to make the first payment of \$2,000 on the contract, and the purchase was consummated by delivery of the deeds to the property.

It is contended by counsel for appellant that language in the contract of August 19th amounts to an unconditional guaranty of title from Ulbright to the land in controversy. A reading of the contract, the material parts of which we have set forth above, will show that it does not bear out such construction. As already stated, the contract begins by reciting the conveyance made to Anderson by the Ulbrights on July 26th, and it then describes exactly, *by legal subdivisions*, the lands conveyed by the Ulbrights at that time. It specifies "and all of section seven (7) except a strip of ground," followed by the reservation already mentioned. When, there-

fore, the contract goes on to say, "Whereas, certain controversies have arisen between the parties of the first part and pretended owners of a portion of the *lands above described*," the assumption is plainly made that the lands in dispute are a part of section 7, and it is evident that only upon that assumption did Ulbright contract to use "all diligence in obtaining possession of the disputed lands for the party of the second part herein, and that said title is to be obtained by said parties of the first part for the party of the second part within a reasonable time from date hereof." The conclusion follows that, when the "disputed lands" were adjudicated not to belong to section 7, Ulbright's obligation to secure title for them to his grantee ceased.

Soon after the deal was closed between Anderson and the Ulbrights for the transfer of section 7, the Ulbrights, in accordance with their agreement of August 19th, began a suit in the district court against Baslington for possession of the disputed area. This suit was decided in Ulbright's favor in the district court and appealed to this court, in which the judgment of the lower court was reversed. 20 Idaho, 542, 119 Pac. 292, 294. By this decision it was held that:

"The appellant (Wright, intervener) is entitled to take the upland between his meander line and the lake within side or boundary lines drawn from the end of the meander line at each side of his tract of land to the center of the lake."

And Wright accordingly secured the disputed land. That controversy was thus finally settled adversely to the contention of Ulbright and his grantee, Anderson.

[2] In our opinion the vital and controlling question in this case is: Can the mistake of a purchaser as to what is included within the bounds of a legal subdivision of land be the basis for equitable relief in his favor as against an action for the recovery of the purchase price?

As above stated, the appellant entirely failed to prove at the trial that any deceit or imposition was practiced upon him by the vendor Ulbright. The evidence shows that the bargain was of appellant's seeking; his own testimony discloses that the original contract for the transfer of this property was drawn from memoranda made by appellant himself. This contract is carefully drawn, with the evident design of protecting appellant in every possible way. However, appellant did not wait for certain preliminary requirements or conditions of the contract to be performed by the Ulbrights before making the first payment and receiving his deed. Again he was the active or moving party, and, as the evidence shows, induced the Ulbrights, against their inclination, to accelerate the transaction and close the deal in advance of the time specified in the contract, in order that he might acquire title and be in a position to make another deal which he had in view. All this time he had knowledge, ac-

cording to the preponderance of the testimony, of the uncertainty existing as to the actual area of fractional section 7. Moreover, according to the abstract of title to the property, which is an exhibit in the case, he had constructive notice that a claim to the disputed area was of record in the county recorder's office at the time he signed the original contract on July 6th. When the deeds were exchanged and the transaction consummated on August 19th, he voluntarily waived the contractual requirement for the establishment of lines and corners, and it is apparent that at least a part of the consideration for the deed of the additional 20 acres which he received from the Ulbrights on that date was the relinquishment on his part of any claim to rebate on the purchase price, should section 7 eventually prove to contain less than 200 acres.

Counsel for respondent have cited in their brief a number of cases on the question of mistake in contract, most of which relate to the question of equitable relief for mistakes of fact. As held by this court in a recent case:

"Where parties are mutually cognizant of the facts acted upon, or stand upon the same footing with relation to them, and there exists no fiduciary relation between them, the law will not lend its aid to help the injured party for the simple reason that he has not himself used diligence and common sense, if the means of information is equally open to both parties, and there has been a mistake without fraud or falsehood." *Nelson v. Nudgel*, 23 Idaho, 335, 130 Pac. 85.

[1] A somewhat different question is raised in the present case. The controversy as to the legal area of fractional section 7 involves, not a question of fact, but a question of law. By no known method of investigation for the ascertainment of facts could it be determined how this question might be resolved in the courts.

Suppose, for instance, Anderson had insisted that Ulbright comply with that provision of the original contract which required of Ulbright that "all lines and corners are to be properly extended and marked according to official survey," and an expensive and elaborate survey had accordingly been made. It is apparent that the legal question as to whether the unsurveyed and unplatted tract of land in controversy belonged to section 7 would not have been affected in the least by such survey. The only means of settling that question was by judicial procedure. Ulbright appears in good faith to have promptly resorted to that mode of determination. Almost immediately after the contract of July 6th was made he began suit in the district court to have this matter adjudicated. It is obvious that neither he nor any one else could know in advance what would be the result of that suit. In other words, Anderson took his chance on the issue of this litigation. Even if the Ulbrights made the misrepresentations to Anderson in reference to this land being a part of section 7, which Anderson avers, such mis-

representations would have been statements of a proposition of law.

"A statement of a proposition of law which the defendant had just as good an opportunity to ascertain the correctness of as had the plaintiff, whether true or false, could not be used as a defense in an action upon the note." *Smith v. Smith*, 4 Idaho, 1, 35 Pac. 697.

It may, indeed, be admitted that the rule that a mistake of law does not excuse would not apply where the mistake of one party to the contract was induced by misrepresentations of the other. But, as we have seen, no such misrepresentations have been proved in this case.

It may also be conceded that where ignorance of the law on the part of both parties to a contract has conferred on one of them an unconscionable advantage, and where there has been either misrepresentation on one side nor negligence on the other, the rule will be relaxed in a court of equity. But here again we are confronted with the circumstance that appellant in this case was not an innocent purchaser. His own contract of August 19th discloses his knowledge of the doubt which clouded the title to the land in controversy; nevertheless he hastened to make his first payment and conclude the transaction.

[3] Considerable documentary evidence was introduced at the trial of this case, including the papers which evidence the transactions between the parties, and in particular a number of letters written by the appellant subsequent to the consummation of the negotiations. The latter are of slight evidentiary value, as we view the question at issue. These letters disclose an excusable endeavor on the part of Anderson to commit his grantor, Ulbright, to a guaranty of title to the land in dispute, and to hold him responsible in damages for failure to give possession. There are also appended to the deposition of the witness Golden in the transcript copies of papers entitled Defendant's Exhibits A and B for identification, the contents of which appear to be identical, purporting to be signed by Ulbright, and—

"to agree to settle in full with said Anderson for all losses which shall or may result from not having peaceable possession of said crops properly harvested and possession of said lands and buildings for the year 1910, and as long thereafter as quiet and peaceable possession of said lands and crops is disputed or denied by any person or claimant of ownership thereto."

It is not clear, however, that the originals were admitted in evidence, and their authenticity was disputed on the stand by Mr. Ulbright.

In the view which the court takes of the underlying equities of this case, it is unnecessary to discuss whether respondent was a holder in due course, or whether the successive transfers of the note were properly alleged and proved. Appellant's contention that respondent took the note subject to all defenses may be conceded; but it cannot aid defendant when his defenses fail. The trial

judge was liberal in his admission of evidence which might for any reason be material or relevant to the points at issue. We have carefully gone over the evidence, and we do not find any error in that regard. Neither do we find any prejudicial error in the rulings of the court below excluding certain offered evidence on behalf of defendant. Counsel particularly assigns as error the court's refusal to admit the files in the case of *Ulbright v. Baslington*, already referred to. The court committed no error in that respect, as the matter offered was not shown to be material to the issues, and its admission would not have aided appellant.

[4] Exception is also taken to the allowance of an attorney fee of \$1,000. Plaintiff in his complaint prayed for a fee of \$1,500, which the lower court reduced to \$1,000, and under the circumstances of this case we are not inclined to disturb the amount fixed by the trial court.

The judgment of the lower court is affirmed. Costs awarded in favor of respondent.

SULLIVAN, J., concurs.

#### On Petition for Rehearing.

AILSHIE, C. J. A petition for rehearing has been filed on behalf of appellants, from which it would appear that counsel do not clearly apprehend the grounds upon which the decision of the court was based or its legal effect. It is true, as urged by counsel, that a court of equity may properly under certain circumstances grant relief from the consequences of a mistake of law, but not when the party seeking the relief has himself been negligent in safeguarding his interests, and is charged with notice of doubtful title as regards the property he is bargaining for, before consummating the transaction of which he complains.

Counsel calls our attention to the following language in the opinion:

"Soon after the deal was closed between Anderson and the Ulbrights for the transfer of section 7, the Ulbrights, in accordance with their agreement of August 19th, began a suit in the district court against Baslington for possession of the disputed area."

And it is pointed out that this suit was started on July 22d, nearly a month previous to the contract of August 19th, and could not, therefore, have been in pursuance of that contract. The closing of the deal referred to in the sentence above quoted was evidenced by the original contract of July 6th, to which the contract of August 19th was ancillary. In any event it is immaterial whether the Ulbrights began this suit in pursuance of the contract of July 6th, or in accordance with a later understanding which was evidenced by the contract of August 19th, or independent entirely of any express agreement so to do. The record shows that, soon after the negotiations for the property were substantially closed by the contract of July 6th, they did in apparent good faith begin and

prosecute a suit for the purpose of acquiring title to the land in dispute on behalf of their grantee.

The petition for rehearing is denied.

SULLIVAN, J., concurs.

**VALLEJO & N. R. CO. v. HOME SAVINGS BANK et al. (Civ. 1117.)**

(District Court of Appeal, Third District, California. March 17, 1914. Rehearing Denied May 16, 1914.)

**1. EMINENT DOMAIN (§ 191\*)—PROCEEDINGS TO TAKE PROPERTY—COMPLAINT—SUFFICIENCY.**

A complaint alleging that plaintiff was a railroad corporation, that certain named parties were the owners and claimants of property, that the purposes for which plaintiff was incorporated were as therein set forth, that it was its specific purpose to construct and build a railroad the route and termini of which were given in detail, that a map as required by statute accompanied the complaint, that for a permanent freight and passenger depot building necessary in the operation and maintenance of the railroad it required certain described real property, that such property included the whole of an entire parcel or tract of land, that it was required for a public use to enable plaintiff to construct and maintain a railroad and operate it as a common carrier, that the property sought to be condemned would give the most practicable location, that it was necessary in the building, construction, maintenance, and operation of the railroad, and that neither such property nor any part thereof had theretofore been appropriated for a public use, complied with Code Civ. Proc. § 1244, requiring the complaint to contain the name of the corporation, the names of the owners and claimants, a statement of plaintiff's right, the location, general route, and termini, if a right of way is sought, accompanied by a map thereof, and a description of each piece of land sought to be taken, and whether it includes the whole or only a part of an entire parcel or tract.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.\*]

**2. EMINENT DOMAIN (§ 196\*)—PROCEEDINGS TO TAKE PROPERTY—SUFFICIENCY OF EVIDENCE.**

In a proceeding to condemn property for a railroad depot, evidence held sufficient to show a necessity for taking the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. § 196.\*]

**3. EVIDENCE (§ 520\*)—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.**

In a proceeding to condemn land for a railroad depot, experts were properly permitted to testify as to the amount of land required for depot purposes; this being largely a matter of technical knowledge and skill.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2329; Dec. Dig. § 520.\*]

**4. EMINENT DOMAIN (§ 58\*)—NECESSITY OF TAKING—AMOUNT OF LAND REQUIRED.**

In the determination of the size and location of lots for depots, considerable discretion must be accorded to railroad corporations serving a public purpose, subject to the qualification that their action must not be capricious or arbitrary nor unduly invade the private right of property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.\*]

**5. EMINENT DOMAIN (§ 169\*)—PROCEEDINGS TO TAKE PROPERTY—CONDITIONS PRECEDENT.**

A railroad corporation could condemn land in a city for a depot, though it had not acquired a franchise over the streets of such city for its proposed railroad.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461; Dec. Dig. § 169.\*]

**6. TRIAL (§ 46\*)—OFFER OF PROOF—RELEVANCY—SIMILAR MATTERS.**

In a proceeding to condemn land for a railroad depot, evidence as to the size and character of the depots of other railroad companies was properly excluded, where defendants made no effort or promise to show that the circumstances and conditions were similar, though the evidence was objected to on that ground.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115-117; Dec. Dig. § 46.\*]

**7. EVIDENCE (§ 358\*)—DOCUMENTARY EVIDENCE—MAPS.**

In a proceeding to condemn land in a city for a railroad depot, the general size and location of the principal streets of the city, if material, could not be proved by the introduction of a map which the city engineer testified that he did not make, but knew to be inaccurate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358.\*]

**8. TRIAL (§ 91\*)—RECEPTION OF EVIDENCE—MOTIONS TO STRIKE—NECESSITY OF OBJECTIONS.**

A motion to strike out the answer of a witness was improperly granted where no objection had been made to the question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244, 252; Dec. Dig. § 91.\*]

**9. EMINENT DOMAIN (§ 262\*)—APPEAL—HARMLESS ERROR—STRIKING OUT TESTIMONY.**

In a proceeding to condemn land, the striking out of a witness' testimony relative to the condition of a building on the land was not prejudicial, where the witness thereafter made substantially the same statement, especially where his testimony did not relate to the time of the issuance of the summons, and therefore could have been of little if any value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.\*]

**10. EMINENT DOMAIN (§ 202\*)—PROCEEDINGS TO ASSESS DAMAGES—STATUTORY PROVISIONS.**

Under Code Civ. Proc. § 1248, subd. 1, providing that the court, jury, or referee must ascertain and assess the value of property sought to be condemned and all improvements thereon and of each and every separate estate or interest, and if it consists of different parcels the value of each parcel and each estate or interest separately, evidence as to the value of improvements separate from the realty was properly excluded.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.\*]

**11. EMINENT DOMAIN (§ 195\*)—EVIDENCE ADMISSIBLE UNDER PLEADINGS.**

Where, in a proceeding to condemn land, defendants alleged that the market value of the land, together with the improvements, was a specified sum, and, though invited by plaintiff to state separately the value of the land and of the improvements, defendants declined to do so, they could not introduce evidence as to the separate value of the improvements, as their evidence must correspond with the issue tendered by them.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 524; Dec. Dig. § 195.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**12. EVIDENCE (§ 474\*)—OPINION EVIDENCE—QUALIFICATIONS OF WITNESS—KNOWLEDGE OF SUBJECT-MATTER.**

In a proceeding to condemn land, a witness engaged in business in the same city for about 50 years and familiar with the values of property in the vicinity of the lot in controversy was properly permitted to testify as to its market value, though he had not inspected the interior of the building on the lot before testifying, especially where he testified that he assumed that the building was in good condition and it was apparent that an examination of the interior would not have affected his opinion as to the market value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

**13. TRIAL (§ 349\*)—SPECIAL INTERROGATORIES—DISCRETION OF COURT.**

Under Code Civ. Proc. § 625, as amended by St. 1909, p. 193, providing that in cases other than actions for the recovery of money or specific real property the court may direct the jury to find a special verdict upon all or any of the issues and may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing and direct a written finding thereon, the submission of special issues is within the discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.\*]

**14. TRIAL (§ 350\*)—SPECIAL INTERROGATORIES—QUESTIONS TO BE SUBMITTED.**

The trial court properly refused to submit special questions which were not within the issues, involved questions of law, or were covered by the questions submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

**15. EMINENT DOMAIN (§ 198\*)—PROCEEDINGS TO TAKE PROPERTY—DETERMINING RIGHT TO TAKE.**

In a proceeding to condemn land for a railroad depot, where it was alleged that the land was necessary for plaintiff's purposes and it was a fair inference from the testimony that the lot in question was situated in a prosperous and growing city and country, the court properly charged the jury to take into consideration future demands that might fairly be anticipated on account of the future growth of the surrounding community.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. § 198.\*]

**16. EMINENT DOMAIN (§ 262\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.**

In a proceeding to condemn land for a railroad depot, an instruction to consider future demands that might fairly be anticipated on account of the future growth of the surrounding community was not prejudicial, if erroneous, where all the evidence showed that the lot was needed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.\*]

**17. EMINENT DOMAIN (§ 262\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.**

In a proceeding to condemn land for a railroad depot, an instruction cautioning the jury not to base their verdict upon what plaintiff could afford to pay, though probably unnecessary, could not possibly have damaged defendants.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.\*]

**18. TRIAL (§ 260\*)—INSTRUCTIONS COVERED BY THOSE GIVEN.**

Instructions which, so far as they were correct and applicable to the facts, were suffi-

ciently covered by the charge given, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**19. APPEAL AND ERROR (§ 762\*)—PRESENTATION OF MATTERS FOR REVIEW.**

A point made for the first time in appellants' closing brief might properly be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097; Dec. Dig. § 762.\*]

**20. EMINENT DOMAIN (§ 198\*)—VERDICT—NECESSITY OF TAKING FOR PUBLIC USE.**

Where, in a proceeding to condemn land for a railroad depot, the jury answered in the affirmative questions as to whether the taking of the property was necessary to the use of plaintiff for a permanent depot building and whether it was plaintiff's purpose and intention to build, construct, and maintain the railroad described in its complaint, there was a sufficient finding that the property was necessary for a public use as distinguished from plaintiff's use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. § 198.\*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by the Vallejo & Northern Railroad Company against the Home Savings Bank and others. From a final judgment of condemnation, defendants appeal. Affirmed.

Chas. W. Thomas, Chas. W. Thomas, Jr., and Grover C. Julian, all of Woodland, and Ernest Weyand, of Colusa, for appellants. T. T. C. Gregory, of San Francisco, Elmer W. Armfield, of Woodland, and C. J. Goodell, of San Francisco, for respondent.

**BURNETT, J.** The action was to condemn a certain parcel of land in the city of Woodland for the construction of a general freight and passenger depot. The owner was awarded the sum of \$4,500 for the property by the jury trying the action. This amount, including costs, was paid into court by plaintiff, and final judgment of condemnation was duly rendered and entered.

[1] The complaint was attacked by a general and special demurrer, and many reasons are assigned why the demurrer should have been sustained. It is stated that the map accompanying the complaint shows that the railroad company already owned two large tracts adjacent to the tract sought to be condemned, and there is no allegation that these were insufficient or inadequate for the purpose of a freight and passenger depot, there is no allegation that the road was in operation, or why this parcel is necessary, or that any necessity exists for any depot at the place, or that the plaintiff has a franchise to pass over the streets of Woodland, and the complaint is silent as to the consideration of location in a manner so as to produce "the least private injury." To these specifications an answer is found in *Rialto Irrigating District v. Brandon*, 103 Cal. 384, 37 Pac. 484, *Central Pacific Ry. Co. v. Feldman*, 152 Cal. 306, 92 Pac. 849, and *Northern*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Light, etc., Co. v. Stacher, 13 Cal. App. 404, 109 Pac. 896. An examination of the complaint here shows that it meets the requirement of section 1244 of the Code of Civil Procedure, providing what the complaint in eminent domain must contain, and the pleading is as complete as the one approved in the Northern Light Co. Case, supra.

Summarizing the complaint, it appears that the plaintiff is a railroad corporation; that certain named parties are the owners and claimants of the property; that the purposes for which plaintiff was incorporated are fully set forth; that it is the specific purpose of plaintiff "to construct and build along the routes and between the places, as hereinafter mentioned, a general railroad, having a standard gauge, and single or double or more tracks and the places from and to which the said railroad is intended to be run, and all the intermediate branches of the same, and the estimated length of the said railroad and of the said intermediate branches and the location, general route and termini of said railroad are as follows" (giving them in detail); that a map, as required by the statute, accompanies the complaint; "that for a permanent freight and passenger depot building necessary for and in the operation and maintenance of said railroad plaintiff requires that certain real property" (describing it); "that the real property herein sought to be acquired includes the whole of an entire parcel or tract of land; \* \* \* that said real property hereinbefore described and sought to be condemned is required for a public use, to wit, to enable plaintiff to construct and maintain a railroad and to operate the same and the appendages thereof as a common carrier of passengers and freight for hire; \* \* \* that said real property hereinbefore described and sought to be condemned will give and furnish the most practicable location for and the same is necessary in the building, construction, maintenance, and operation of said railroad; that neither the whole nor any part of said property hereinbefore described and sought to be condemned has heretofore been appropriated to any public use."

[2] Appellant contends that "the proof failed to show any necessity for taking this land. The most that can be said of the evidence offered by plaintiff is that it showed that plaintiff had planned to build a railroad to Woodland."

Mr. P. A. Haviland, chief engineer of the plaintiff, testified that the lot would be used "for the general purpose of a railway and passenger depot. It will have to be divided into several offices as waiting rooms for the ladies, and gentlemen's waiting room, ticket offices, telegraph offices, baggage rooms, and various other offices that are necessary for the transaction of the general business in relation to a freight and passenger depot, freight offices," and, furthermore, that the lot sought to be condemned is required and

necessary for the operation of plaintiff's railroad.

T. T. C. Gregory, the president of plaintiff corporation, also testified that this lot is "necessary for station purposes," and he assigned various reasons for his opinion, which reasons seem to be entirely plausible.

[3] Appellants objected to the method of proof, but the determination of the amount of land required for such purposes must depend largely upon the opinion of experts. It is difficult to understand how the question could be settled without such assistance. The jury must, of course, determine the issue; but the aid of experts seems especially appropriate as to how much land is required for depot purposes at the terminal point for a railroad. This is a matter largely of technical knowledge and skill, and while the jury are not bound, of course, by the opinion of the experts, such assistance is generally needed. No case has been cited in which the point was made, but the matter seems too plain to require authority. Probably in nearly every condemnation suit such evidence is received and usually without objection.

[4] It may be added that, in the determination of the size and location of lots for depots, considerable discretion must be accorded to railroad corporations serving a public purpose, subject to the qualification that their action must not be capricious or arbitrary nor unduly invade the private right of property.

[5] In answer to the contention of appellants that no proof was offered that plaintiff had a franchise over the streets of Woodland, it is sufficient to refer to California Southern R. R. v. Kimball, 61 Cal. 90, and Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 Pac. 134. In the former it is said: "Conceding that none of the public streets of San Diego can be used by a railroad company, unless the right to use the same is granted by the city, in the manner prescribed by law, it does not seem to us to follow that an action to condemn whatever right the owners of lands lying adjacent to said streets may have therein cannot be maintained until after said city has granted a right of way over said streets. If, as the appellants contend, the streets cannot be used by the plaintiff until after it has acquired the right to use them from the city, as well as from the owners of adjacent lands, we are unable to see why the grant from the city should be first obtained."

We can see no distinction in this respect between an action to condemn a right of way and one to acquire the fee for depot purposes.

[6] It is claimed that the court erred in refusing to allow defendants to prove the size and character of the buildings necessary for depot sites of other railroads. The question is presented by the ruling of the court sustaining an objection to this question: "Will you state to the jury what those measure-

ments are?"—referring to the passenger depot of the Southern Pacific Company at Woodland, and to another similar question relating to the Northern Electric depot at Eighth and J. streets, Sacramento. The questions were "objected to as incompetent, immaterial, irrelevant, not responsive to any issues in the pleadings, and it is not shown that this witness is at all an expert, not shown that the purposes of the Southern Pacific depot at Woodland are the same, it is not shown they are terminals, no connection at all between the station house of the Southern Pacific and the station house of this particular road." It is clear that appellants should have shown or offered to show that the circumstances and conditions surrounding these two instances were similar to those involved herein, and that the said areas were sufficient for the purposes of the respective companies, in order to make such evidence admissible. If such connection had been made or promised, it may be that the evidence should have been admitted as a basis for comparison in estimating the necessities of plaintiff; but, in view of the fact that plaintiff's position was fully stated in the objection and appellants made no effort nor promise to supply what was essential, we cannot hold that the ruling was erroneous.

[7] Appellants contend that "the court erred in refusing to permit defendants to show the general size and the location of the principal streets of Woodland." But, conceding the materiality of such testimony, it is apparent that appellants adopted the wrong course to prove the facts. They attempted to show them by the introduction of a certain map as to which the city engineer of Woodland testified as follows: "Q. Did you make that map? A. I did not. Q. Have you ever checked that particular map over? A. No, sir. Q. Do you know whether it is a correct and accurate map or not? A. The map is not delineated—doesn't say it is a correct and accurate map. I guess I do know, it is not. Q. It is not accurate? A. No, sir. Mr. Thomas. The map shows Main and Second streets? A. Yes, sir. Mr. Gregory. Did you ever check it over for the purpose of determining its accuracy at the corner of Second and Main streets? A. I did not."

Of course, the matters attempted to be shown by the map could have been testified to by any witness familiar with the city of Woodland; but it seems that no such available and admissible evidence was offered. Besides, we cannot say that the facts sought to be elicited would have thrown any light upon the issues before the jury.

[8, 9] One Benjamin Keehn testified that he was a carpenter and contractor and had lived in Woodland for nearly 21 years, and, after stating that he had made an examination of the building on the property in controversy, he was asked: "Will you state to the jury

what you found, give a description of that property?" After some colloquy between counsel, and after certain preliminary questions to the witness as to the time when he made the examination, he answered, "I found the building measured according to the measurements about 18 by 78 feet, inside the walls; and the walls seemed to be in good condition, more so comparatively than the other walls adjoining." A motion was made by respondent to strike out the answer, and it was granted. This was erroneous, since no objection had been made to the question; but the answer could have been of little if any value, as it did not relate to the time of the issuance of the summons. Besides, the ruling could have done no harm, as the witness, thereafter, made substantially the same statement as to the condition of the building.

[10, 11] Appellants sought by the same witness to show the market value of the improvements as separate from the realty; but the court held "that the testimony must go to the market value of the property as a whole." Complaint is made of this ruling, but it was strictly in accordance with the course prescribed by the Code of Civil Procedure, § 1248, subd. 1, as follows: "The court, jury or referee \* \* \* must ascertain and assess: (1) The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed." It thus expressly appears that separate assessments are to be made when there are different parcels of land, and, under the familiar rule of construction, the present case is excluded by implication.

Again, in the answer of the defendants, it was alleged "that the actual or market value of said land, together with the improvements thereon, was on the 28th day of December, 1910, the sum of \$7,000," and when invited by plaintiff to state separately the value of the land and of the improvements they declined to do so. Having thus refused to make separate issues, they could not, of course, demand that the evidence be addressed to separate valuations, but were required to have it correspond with the issue tendered by the answer.

[12] C. W. Bush, a witness for plaintiff, testified that he had resided in Woodland since 1869 and was president of the bank of Yolo and had been engaged in the banking business altogether for about 50 years, and that he was familiar with the values of property in the vicinity of the lot in controversy. He estimated the market value of the Kraft property to be \$4,000, on December 28, 1910. The objection made to his testimony was that he showed himself unfamiliar with the interior of the building; the witness admitting, "I only know of its exterior appearance." It would have been more satisfactory

if the witness had inspected the interior before testifying, as the character and condition of the improvements are manifestly important elements in the determination of the value of the property. However, the witness stated that he assumed the building was "in good condition," and it is quite apparent that an examination of the interior would not have affected his opinion as to the market value. It may be added that he was undoubtedly qualified as an expert on the question of value.

Appellants are mistaken in their assumption that the same declared infirmity appears in the testimony of L. D. Stephens, and there can be no doubt of his competency as a witness.

[13, 14] The refusal of the court to submit to the jury certain special issues proposed by defendants is characterized as a violation of the duty enjoined by section 625 of the Code of Civil Procedure. But that section, as amended in 1909 (Stats. of 1909, p. 193), changed the rule so as to clothe the court with discretion in the premises, and it cannot be said that the discretion was abused. Besides, some of the questions were not within the issues, some involved a question of law, and the others were covered by the questions which were submitted.

We find no prejudicial error in the matter of instructions.

[15, 16] Instruction No. 8 authorized the jury to take into consideration future demands "that may fairly be anticipated on account of the future growth of the surrounding community" and is within the rule as laid down in *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 532, 28 Pac. 681. The allegation that the lot is necessary for the purposes of plaintiff is sufficient to justify such consideration, and, while no specific question was directed to any witness as to the future development of the community, it is a fair inference from the testimony that the lot in question is situated in a prosperous and growing city and country. Besides, the evidence all shows that the lot is needed as set forth in the complaint. Hence, in any event, the instruction could not have been prejudicial.

[17] Instruction No. 11 does not assume that "some witness testified that the plaintiff could afford to pay a higher price for the property than it was really worth." It was probably unnecessary to caution the jury that an opinion as to the value could not be based upon what the plaintiff could afford to pay for the property, but the hortatory suggestion could not possibly have damaged defendants—assuming that the jurors were honest and intelligent men. It may be added that the instructions as to the measure of compensation were full and accurate.

[18] We deem it unnecessary to notice specifically the instructions proposed by defendants and which were refused by the court. We think as far as they embraced a correct

principle of law and were applicable to the facts they were sufficiently covered by the charge which was given.

[19, 20] The only other point worthy of notice is made for the first time in the closing brief of appellants, and it could therefore be properly disregarded. However, we have given it attention. The contention is that "it is essentially necessary that the jury should find that the taking is necessary for a public use" while "the verdict as it stands is necessary for the use of the plaintiff."

Quotation is made from the opinion of Judge Cooley, in *Mansfield, etc., R. Co., v. Clark*, 23 Mich. 519, wherein it is said: "We think also that the verdict of the jury is defective in that it does not find the necessity for the taking of this property for the public use. What they say is that 'it is necessary that said real estate and property should be taken for the purpose of said company.' This is not the finding required by the Constitution, either in form or substance."

The case here, however, is quite different. There were two questions presented to the jury besides the one as to the value of the property. These questions and the answers returned are as follows: "Question 1. Is the taking of the property described in the complaint and sought to be condemned necessary to the use of plaintiff for a permanent freight and passenger depot building? Answer: Yes. Question 2. Is it the purpose and intention of plaintiff to build, construct, and maintain the railroad described in plaintiff's complaint? Answer: Yes."

The inference necessarily follows that the land is necessary for a public use, since the use "for a permanent freight and passenger depot building" in connection with the operation and maintenance of "the railroad described in plaintiff's complaint" is fixed by the statute as a "public use." In the Michigan case, *supra*, no purpose whatever was specified, while here the purpose designated is necessarily a public purpose for which the right of eminent domain can be legally exercised.

We think no sufficient reason has been suggested for a reversal, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

ELDRIDGE v. MOWRY et al. (Civ. 1319.)  
(District Court of Appeal, First District, California. March 18, 1914. Rehearing Denied May 16, 1914.)

1. PRINCIPAL AND AGENT (§ 143\*)—ACTION BY UNDISCLOSED PRINCIPAL.

An undisclosed principal may sue on a contract entered into by an agent for his benefit.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 502-512; Dec. Dig. § 143.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



**2. PRINCIPAL AND AGENT (§ 190\*)—ACTIONS BY UNDISCLOSED PRINCIPAL—EVIDENCE—SUFFICIENCY.**

In an action by a firm of attorneys for fees for legal services performed under a contract entered into between defendants and a corporation, evidence held to show that the attorneys were the undisclosed principals of the corporation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 718-720; Dec. Dig. § 190.\*]

**3. CONTRACTS (§ 35\*)—CONSTRUCTION—WRITTEN CONTRACT—PRESUMPTIONS.**

Where a printed contract, engaging plaintiff's assignors to establish defendant's title to real property, contained a memorandum below defendant's signature, reciting that the fee fixed should not apply in case of contest, defendant is bound by that stipulation, it not being shown that the contract was signed as the result of fraud or mistake, for a party is presumed to be familiar with all the terms of a written contract, and it is immaterial where his signature appears, except where, by statute, the contract must be subscribed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 171-185; Dec. Dig. § 35.\*]

**4. ATTORNEY AND CLIENT (§ 144\*) — CONTRACTS (§ 154\*)—CONSTRUCTION.**

The courts, in construing written agreements, follow, if possible, that construction which tends to prevent injustice, and hence will be reluctant to construe a contract for legal services as limiting the fee to an amount considerably less than the necessary expenditures made by the attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.\* Contracts, Cent. Dig. § 735; Dec. Dig. § 154.\*]

**5. PLEADING (§ 236\*) — AMENDMENTS — ALLOWANCE.**

In an action for legal services rendered by plaintiff's assignors, where the original complaint declared on an account stated, the granting of leave to file an amendment declaring upon the contract itself was not an abuse of discretion, the facts alleged being the same in both cases, and the causes of action arising out of the same transaction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

**6. APPEAL AND ERROR (§ 195\*)—OBJECTIONS —TIME FOR MAKING.**

Objections to the allowance of an amendment cannot, on the first time, be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. § 195.\*]

**7. PLEADING (§ 248\*) — AMENDMENT — NEW CAUSE OF ACTION.**

Where plaintiff, to whom a claim for legal services was assigned, first sued on an account stated, and thereafter amended his complaint and declared on the contract itself, the first assignment of the chose in action was sufficient, and a second, made just before the amendment, was unnecessary, and could not defeat plaintiff's right to amend on the theory that it introduced a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.\*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by C. F. Eldridge against Emma M. Mowry and another. From a judgment for defendants, plaintiff appeals. Reversed.

Brittain & Kuhl, of San Francisco, for appellant. Roger Johnson and R. H. Cross, both of San Francisco (Arthur H. Brandt, of San Francisco, of counsel), for respondents.

**KERRIGAN, J.** This is an appeal by plaintiff from a judgment rendered in favor of the defendants. The case grows out of the destruction of the public records by the San Francisco fire of April, 1906. Upon the adoption by the Legislature of the act of June 16, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records" (Stats. 1906 [Ex. Sess.] p. 78), commonly referred to as the McEnerney Act, Tobin & Tobin, a copartnership of attorneys at law, took steps for the handling of suits brought under said act. Among their clients was the Hibernia Savings & Loan Society, many of whose depositors intrusted to Tobin & Tobin the work of establishing the record title to their real property. For convenience in the transaction of its business Tobin & Tobin maintained their offices in the Hibernia Savings & Loan Society building, and created a department therein specially devoted to the title restoration branch of their practice. They formed a corporation under the name of the Hibernia Title Restoration Company. This company's name, or the prominent words thereof, were placed on the door of one of the offices occupied by Tobin & Tobin; its entire capital stock was issued to and was owned by members of the Tobin family and two employes of the copartnership. The corporation, after its organization, so far as is disclosed by the record, never performed any corporate act. It conducted no business other than to receive applications to restore record title to real property, made no expenditures, and never brought or defended a suit. In short, its sole purpose seems to have been one of convenience to the copartnership. Emma M. Mowry and George B. Mowry, her husband, defendants and respondents herein, were borrowers from the Hibernia Savings & Loan Society, the loan being secured by mortgage on property belonging to Emma M. Mowry, valued at about \$24,000, and situated at Grove and Buchanan streets in the city and county of San Francisco. In April, 1907, George B. Mowry called at the offices of Tobin & Tobin, in the room where the work of preparing the papers in suits to restore title to real property was being carried on, and there signed a contract with the Hibernia Title Restoration Company to have the title to the property mentioned restored. Thereupon Tobin & Tobin prepared the necessary papers, and instituted the necessary action in the name of Ella M. Mowry. An answer to this action was filed by the trustee in bankruptcy of one Charles Alpers, who claimed ownership of the property. The case was tried before a jury, and after a vigorous contest of some three weeks'

duration, a verdict was rendered in favor of the plaintiff therein. At the conclusion of the case Tobin & Tobin rendered a bill to Mowry and his wife for the costs they had expended during the trial and in connection with the action, amounting to the sum of \$594.61, and also made a charge of \$1,000 for their services in maintaining the action. As against this amount credit was given for the sum of \$75 already paid by the defendants, leaving a balance alleged to be due of the sum of \$1,519.61. The defendants refused to pay this amount for the reasons herein-after stated, and the present action was brought for its recovery by the assignee of Tobin & Tobin.

At the trial the defendants resisted the action upon two main grounds: First, that the contract sued upon was not entered into by them with Tobin & Tobin, to whom they denied any indebtedness, but with the Hibernia Title Restoration Company; and, second, that such contract limited their liability to the sum of \$75.

To meet the first proposition, appellant takes the position that the Hibernia Title Restoration Company was a mere agency of Tobin & Tobin, though that agency was not disclosed to the defendants, and that the assignment to plaintiff by Tobin & Tobin was sufficient to support the action. The defendants contend that no such relationship existed between the attorneys and the corporation, either in law or in fact. If this position be correct, obviously no action could be maintained by Tobin & Tobin's assignee, and the judgment of the lower court should be affirmed.

[1, 2] It is conceded that in the majority of jurisdictions, including California, an undisclosed principal may sue on a contract entered into by an agent for his benefit. The record here does not disclose any express contract of employment or agency; and, if the latter relation existed between the corporation and Tobin & Tobin, it must be inferred from the circumstances surrounding the situation and transaction. We are satisfied that a consideration of those circumstances compels the conclusion that such relationship did in fact exist. The uncontradicted testimony shows that Tobin & Tobin organized the corporation and owned practically all of its capital stock; that it controlled and dictated its management; that the corporation had no office, and no employes; never brought a suit in its name; that the room on the door of which was the corporation's name, or the prominent words in that name, was but one of the offices of Tobin & Tobin; that in fact the only appearance made by the corporation on the scene in any title restoration litigation was in the printed form of contract furnished by Tobin & Tobin to applicants for title restoration; in some advertising literature, and in a receipt given by an employe of Tobin & Tobin to George B. Mowry for the payment of \$75

hereinbefore referred to. From these facts it seems to us to conclusively follow that the Hibernia Title Restoration Company was a mere tool or instrumentality of Tobin & Tobin in the conduct of a particular branch of its business; that it was in fact a mere agency by which the copartnership solicited and received applications from the public to restore record title to real property, although such agency was not disclosed to persons dealing with the company. Precedent is of little value in determining this question of agency, as each case must necessarily depend upon its own particular circumstances. It is difficult, in our opinion, to conceive of a state of facts from which agency could be more conclusively inferred.

[3, 4] This brings us to the second ground relied upon for a reversal of the judgment.

The contract sued upon was brief in its terms and conditions, and it may not be amiss to incorporate it herein. Omitting certain data relative to the condition of the title, it is as follows:

"Application of Emma M. Mowry (married) San Francisco, April 4, 1907. To the Board of Directors of the Hibernia Title Restoration Company. Gentlemen:—I hereby request your company to take all necessary proceedings to establish my title to all that real property situate in the city and county of San Francisco [here follows description]. In consideration of your services relative to above I hereby agree to pay you \$—— for attorney's fees and all costs of suit not to exceed \$75, and I hereby pay on account \$——. [Signed] Emma M. Mowry, Owner, by G. B. Mowry. Address, 620 Ivy Ave., S. F.

"The above fee shall not apply in case of contest in the superior or appellate court."

Plaintiff contended at the trial and here maintains that the printed addendum appearing just below the signature of the applicant, and providing that the sum limited in the contract should not apply in case of contest, constituted a part of the agreement. The trial court specifically found that the parties did not intend or contemplate that it should, or that it was a limitation or a condition on the terms embodied therein. If the evidence is sufficient to sustain this finding of the trial court, it is obvious that, irrespective of the question of agency, plaintiff is not entitled to recover the amount he claims. It is well established, as asserted by the defendants, that in ascertaining the intention of the parties with reference to written contracts, courts are not always confined to the mere face of the writing, but should take into consideration the situation and relation of the contracting parties, and the circumstances surrounding the execution of the instrument. With this object in view, the trial court permitted evidence to be introduced as to what occurred at the time this agreement was executed. Such testimony is very brief, and is as follows: G. B. Mowry

testified that he had spoken to his attorney, Mr. Johnson, who had agreed to perform the services for \$75; that thereafter he received a notification from the Restoration Company, requesting him to call at its office concerning this very matter, and that he saw a gentleman to whom he told what Mr. Johnson's charges would be; that he was informed by this gentleman that the amount was the same as the Restoration Company would charge. Mowry then stated that he would consult his wife, the owner of the property, and give an answer on the following day. This he did, informing the party with whom he had consulted on the previous day that the company could go on and perform the services. He testified that he was then asked to sign the contract heretofore recited, which he did. He claims that he read no portion of it, and that his attention was not called to the printed matter below the signature, nor to any terms of the contract providing for a larger fee in the event of a contest of the suit, and that he did not know that there were any other terms in the contract than those which the agent had stated.

W. B. Ryder, an employé of Tobin & Tobin, and the person referred to by Mr. Mowry as the person with whom he had conducted his negotiations, testified substantially to the same effect.

The above constitutes all the important evidence as to the circumstances under which the contract was executed. It will be observed that in the conversations had between Ryder and Mowry no mention was made of that portion of the contract which provided that the stated fee should be applied in case of a contest. But a party is presumed to have assented to all the terms of a written contract when he signs it, and the place of the signature is immaterial except in cases where an instrument is required by law to be subscribed. In the absence of fraud the positive terms of a contract cannot be lightly set aside. No fraud was pleaded, nor did the defendants pray for a reformation of the contract on the ground of mistake. No such issues are here presented. Clearly the evidence here presented to avoid the terms of the contract is insufficient for that purpose.

Irrespective of what we have said, the so-called addendum appeared just below and so near to the signature that it seems improbable that it could possibly escape the notice of the signer. Moreover, in construing agreements, courts follow, where it is possible, that construction which prevents a failure of justice. The amount that the defendants seek to limit appellant to in payment of the services of Tobin & Tobin is but a small portion of the actual outlay in costs alone.

[8, 9] It is further claimed that the trial court abused its discretion in permitting the addition of the second cause of action in the second amended complaint; and also that the assignment upon which the second cause of action was based was executed sub-

sequent to the commencement of the action. The original complaint was filed April 11, 1910, and was brought on the theory of an "account stated," the complaint being entitled "Complaint on account stated." Subsequently, and after a demurrer had been interposed, an amendment was filed. This document was entitled "Amended complaint on account stated," and set out substantially the same facts that had been included in the original complaint. To this amended complaint an answer was filed, and it was upon the issues tendered by those pleadings that the case first went to trial. Evidence was taken, and the case submitted. Thereafter plaintiff filed and served a notice of motion to set aside the order of submission that had been entered, and asked for leave to file a second amended complaint. The motion was granted, and a second amended complaint filed, which included a new count, viz., the cause of action now relied upon by plaintiff. An answer was filed by the defendants, and upon the issues thus formed the case was finally tried.

The original pleadings were inadvertently omitted from the transcript, though included in the judgment roll, and by stipulation they have been certified to this court by the clerk of the superior court.

It is claimed by defendants that the motion, asking permission to amend and set up the second cause of action and the second amended complaint, was made over their objection, and that the amendment should never have been permitted by the court, for the reason that it set up an entirely new and separate cause of action from that already pleaded. The record does not contain anything indicating any objection to the filing of the second amended complaint, nor any motion to strike it out in whole or in part; nor is there a bill of exceptions before this court on any ruling affecting the granting of a motion to amend or denying a motion to strike out. Aside from the question that the point not appearing in the record cannot for the first time be made on appeal (*Groom v. Bangs*, 153 Cal. 456, 459, 96 Pac. 503), no new cause of action was stated. The action was brought for the purpose of recovering an obligation claimed to be owing to Tobin & Tobin by the defendants. Whether the plaintiff sued on an account stated, or on the contract, the transaction out of which the action arose was one and the same; and the court was justified in granting the right to amend to meet the established facts. *Third St. Imp. Co. v. McLelland*, 137 Pac. 1089.

[7] We conclude, therefore, that there is no merit in this contention; nor in the further claim that the assignment upon which the second cause of action was based was made subsequent to the filing of the complaint. It appears from the testimony of Mr. Brittain that prior to the filing of the original complaint an assignment of the account sued on was made by Tobin & Tobin to the plaintiff,

but out of an abundance of caution a second assignment was made prior to the filing of the second amended complaint. This second assignment was entirely unnecessary, as the original assignment was sufficient to show that it was the intention of the parties to pass title to the chose in action irrespective of the form in which the action was pursued. *McIntyre v. Hauser*, 131 Cal. 11, 14, 63 Pac. 69.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

# BOND v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 1165.)

(District Court of Appeal, Third District, California. March 17, 1914. Rehearing Denied May 16, 1914.)

## 1. CARRIERS (§ 246\*)—INJURIES TO PASSENGERS—EVIDENCE—SUFFICIENCY.

In an action for the death of a passenger on a street car in a collision with another car, evidence held to sustain a finding that decedent was on the car at the time of the collision.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1275, 1284, 1296; Dec. Dig. § 246.\*]

## 2. CARRIERS (§ 246\*)—PASSENGERS—PRESUMPTIONS.

A person on a street car is presumptively a passenger, in the absence of countervailing circumstances.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1275, 1284, 1296; Dec. Dig. § 246.\*]

## 3. CARRIERS (§ 316\*)—INJURIES TO PASSENGERS—PRESUMPTIONS.

Where a street car passenger was injured in a collision between cars, the presumption of actionable negligence arose, and the carrier, to escape liability, must show that the accident was without negligence on its part.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]

## 4. CARRIERS (§ 318\*)—INJURIES TO PASSENGERS—NEGLIGENCE—EVIDENCE.

In an action for the death of a street car passenger in a collision between cars, evidence held to support a finding of negligence in the operation of the cars.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

## 5. TRIAL (§§ 187, 194\*)—PROVINCE OF JURY—INSTRUCTIONS.

In an action for the death of a street car passenger in a collision between cars, an instruction that plaintiff, to recover, need only show that decedent was a passenger at the time of the collision, that a collision occurred, causing decedent's death, and that the carrier must exercise the highest degree of care, and if decedent was a passenger, and a collision occurred causing his death, a presumption of actionable negligence arose, imposing on the street car company the burden of showing freedom from negligence, merely announced a rule of evidence applicable to the case, and did not deprive the jury of the right to determine the

credibility of the witnesses, or to pass on the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413-419, 436, 439-441, 446-454, 456-466; Dec. Dig. §§ 187, 194.\*]

## 6. CARRIERS (§ 305\*)—INJURIES TO PASSENGERS—LIABILITY.

Where the negligence of the gripman operating one car colliding with another car was at least a contributory cause of the collision, and continued up to the very time of the collision, the mere fact that the action of women in passing in front of the other car was a proximate cause of the accident did not relieve the street car company of liability for the death of a passenger in the collision; but if the cars could have passed each other in safety if the women had not passed in front of the car, so as to compel the employé in charge thereof to stop it, and the gripman was not guilty of negligence, and there was no defect in the equipment of his car, and he could not prevent the accident, there was no liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1132, 1136-1139, 1245, 1246; Dec. Dig. § 305.\*]

## 7. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—MATTERS COVERED—DAMAGES.

Where, in an action for negligent death, the court stated that sorrow and mental anguish were not elements of damages, and that no damage could be awarded as a solace for wounded feelings, and other instructions emphasized the fact that pecuniary loss was the measure of the recovery, the refusal to charge that no damage could be given for sorrow or injury to feelings, or for loss of the society of decedent, was not prejudicial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Annie Bond against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal denied, and judgment affirmed.

See, also, 20 Cal. App. 124, 128 Pac. 786.

William M. Abbott and William M. Cannon, both of San Francisco, for appellant. Sullivan, Sullivan & Roche, of San Francisco, for respondent.

BURNETT, J. This is an appeal from the judgment in favor of plaintiff for \$4,500, entered in accordance with the direction of the Supreme Court, and it is a companion case to No. 1180, 140 Pac.—† involving an appeal from the order of the lower court striking from the record defendant's motion for a new trial, the opinion in which is filed herewith.

It was the theory of plaintiff that her son, Gustave Fritz, was a passenger riding on the running board opposite the rear open section of an electric car proceeding southerly on a westerly Fillmore street track, in San Francisco, on the evening of December 17, 1906, when the east-bound McAllister street cable car collided with it at the crossing of said streets, and that by reason of said collision the said Fritz received injuries from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

† Rehearing granted.

which he died on the 28th of December, 1906. This appears suitably in the complaint with the allegation of negligent operation of said cars by defendant.

1. The preliminary motion of respondent to dismiss the appeal, based upon reasons sufficiently appearing in said opinion in No. 1180, must be denied, on the authority of *Sala v. City of Pasadena*, 162 Cal. 714, 124 Pac. 589.

[1] 2. The fatality of appellant's contention as to the insufficiency of the proof that the deceased was a passenger on said car at the time of the accident is fully disclosed by the quotations made by appellants from the testimony.

Charles F. O'Callaghan, an attorney at law, who was riding on the forward end of the east-bound McAllister street car, testified as follows: "The Fillmore street car was crowded, and there were passengers standing upon the running boards on the rear westerly portion of the open section. \* \* \* My best recollection is that upon the Fillmore street car, at about the point where our car struck it, there were three or four persons standing on the lower running board and about the same number upon the upper running board. \* \* \* I observed passengers who were injured on the Fillmore street car right after the collision. After the cars collided there were a number of people spread around over the ground. \* \* \* With reference to the rear portion of the Fillmore street car, the wounded passengers to whom I have referred were on the ground alongside of the car—along toward the southwest corner of Fillmore and McAllister streets, in that direction. \* \* \* My recollection is that a number of the passengers that were standing on the westerly side of the rear section of that southerly bound Fillmore street car fell to the street. They fell as the Fillmore street car swerved away. \* \* \* As these passengers were falling, I observed the streets between the two cars, and to which these passengers fell. I saw no human being lying on that street before the passengers fell. Some of the passengers that fell got up, but three continued to lie on the street. There was a boy pretty close to the rear—that is, in about the direction that the Fillmore street car swerved from—and over there along south of him were two other persons. These passengers fell from the car and subsequently lay upon the street. \* \* \* These three people were not lying upon the street before I saw these passengers falling from the car. I saw a number of people fall from the car, and some of them got up, and these three did not get up."

The foregoing was supplemented by the testimony of F. E. Winters, a policeman, who, just prior to the accident, was standing at the southeast corner of Fillmore and McAllister streets, observing the movements of the colliding cars. He testified: "I know that a young man by the name of Gustave

Fritz was one of the injured. I remember the man well, both of whose feet were crushed at the ankles. I remember Fritz. I think I picked him up. Fritz was the first one I picked up."

Under the rule as to the credit to be accorded those witnesses, only one probable inference can be drawn, and that is that Gustave Fritz was a passenger on said Fillmore street car. Reduced to simple form, it amounts to this: One witness saw several individuals fall from the car onto a certain unoccupied space on the street. Another witness, observing the accident, immediately goes to the spot where these individuals are lying, and picks up one of them, whose legs are crushed, and who is identified as Gustave Fritz. The evidence would have no greater probative value if a witness had testified that he was personally acquainted with said Fritz and saw him fall from the Fillmore street car at the time of the accident.

[2] In addition, it may be stated, without quoting, that the testimony of Rudolph Wolf, a fellow passenger of Fritz on the Fillmore street car, and of Dr. William A. Mundell, who was sitting on the extreme front of the McAllister street car, is strongly cumulative. Having been shown to be on the car, the presumption would be that Gustave Fritz was a passenger. "A person on a train used for carrying passengers is, in the absence of countervailing circumstances, presumed to be a passenger, and rightfully there." *Louisville, etc., Ry. Co. v. Thompson*, 107 Ind. 442, 9 N. E. 357, 57 Am. Rep. 120; *People v. Douglass*, 87 Cal. 284, 25 Pac. 417. It may be, as claimed by appellant, that "the presumption, however, cannot be raised where a person is only *presumed* to have been on the car." But such is not this case. It is not a *mere presumption* that Fritz was on the car. In fact, it is no presumption at all, but a necessary inference from the facts testified to by the witnesses.

[3, 4] 3. It cannot be said that the evidence is insufficient to support a finding of negligence. The passenger having been injured as the result of the operation of defendant's cars, the presumption of negligence would arise, as the authorities hold. It was for the jury to determine whether this presumption was overcome by the explanation of the accident furnished by appellant's witnesses. Horton, the motorman of the Fillmore street car, testified: "The easterly bound McAllister street car ordinarily stops at the southwest corner of McAllister and Fillmore streets. When it did stop, it stopped some distance westerly from the westerly track of Fillmore street, the track on which my car was being operated at the time of the collision. If the McAllister street car bound in an easterly direction had stopped where it ordinarily did stop, and where it should have stopped, at the southwest corner of Fillmore and McAllister streets, it would have been some distance from my car. \* \* \* I knew that

prior to the time of this collision there had been a heavy drizzle. I also knew from my experience as a motorman that this drizzling caused the tracks to become slippery, especially downgrade." The rules of the company required those in charge, before crossing the tracks of intersecting lines, to "bring their cars to a full stop at the near crosswalks, see that the way is clear, and cross tracks at a greatly reduced speed"; and they also provided that "when an intersection occurs at a grade, or at the foot of a grade, or if they are both on the downgrade, the car on the steepest grade is to be given the right of way. But no car must proceed until after they have made a full stop."

\* \* \* When a car comes to a full stop before crossing an intersecting line, and another car is approaching at right angles, the first car must not start until the other car has come to a full stop." It appears that the McAllister street car did not come to a full stop at the intersection, neither did the Fillmore street car wait for the said McAllister street car, as the rules required. Of course, an excuse was given for the movement of each; but we cannot say that the jury was bound to accept it as satisfactory.

[5] 4. Among the instructions given by the court, the following are severely criticised by appellant: "To entitle plaintiff to recover in this case, it is sufficient to show that Gustave Fritz was a passenger on said southerly bound Fillmore street car at the time of the collision, that the collision occurred, and that said Gustave Fritz was killed as a result of injuries received in said collision. The law does not impose upon the plaintiff the duty of showing that Gustave Fritz was free from fault, or did not contribute by his own negligence to the injuries which resulted in his death." And: "A carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. If you find that Gustave Fritz was a passenger on said southerly bound Fillmore street car, with which said easterly bound McAllister street car collided on said 17th day of December, 1905, and while such passenger, said easterly bound McAllister street car collided with said southerly bound Fillmore street car, upon which he was a passenger, then and there, without fault on his part, inflicting injuries upon him from which he subsequently died, then the presumption of negligence arises, which throws upon the defendant the burden of showing that the injury was sustained without any negligence on its part, and in the absence of such evidence, your verdict must be in favor of plaintiff for such sum as under all the circumstances of the case as proven may be just."

It seems unnecessary to follow counsel in their philosophic discussion of the separate province of the court and of the jury as to

questions of law and of fact. Such considerations ought to be pretty well settled by this time. It is sufficient for us to know that the Supreme Court has held deliberately more than once that the only part of such instructions open at all to criticism is a correct exposition of the law and an accurate statement of the rule of evidence as to the burden of proof in case of injury to a passenger while being transported by a common carrier.

In *McCurrie v. S. P. Co.*, 122 Cal. 561, 55 Pac. 324, it is said: "A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part."

In *Babcock v. Los Angeles, etc., Co.*, 123 Cal. 173, 60 Pac. 780, the rule is announced as follows: "When the plaintiff showed that the defendant had assumed to carry him as a passenger upon one of its cars, and that while being so carried he had sustained an injury by reason of the manner in which the car was propelled along its tracks, a prima facie case of negligence was established, which in the absence of any other evidence entitled him to a recovery."

In *Kline v. Santa Barbara, etc., Ry. Co.*, 150 Cal. 741, 90 Pac. 125, the following instruction was approved: "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent."

The earlier cases are therein reviewed and, of course, the question involved received thorough consideration in the opinion written by the learned Chief Justice.

In said instructions there was no attempt to forestall the action of the jury in deter-

mining the credibility of the witnesses, nor was there any interference with the right of the jury to pass upon the weight of the whole evidence in the case. The court simply announced a rule of evidence in this class of cases, which, by virtue of the decisions, has all the force of a statutory enactment, and which is for the guidance of the jurors in their deliberations. In the cases cited by appellant, when properly understood, nothing can be found irreconcilable with said instructions, and we deem specific notice of them unnecessary.

[8] 5. There was no error in refusing to give the following instruction proposed by defendant: "If you find from the evidence that the gripman of the McAllister street car was negligent, but that in spite of such negligence the accident would not have occurred, had it not been that certain women ran in front of the Fillmore street car and forced it to stop in front of the approaching McAllister street car, then I instruct you that the action of those women was the proximate cause of the accident, and in such case your verdict must be in favor of the defendant, United Railroads of San Francisco."

Even if it be admitted that the action of the women in alighting from one car and in their confusion passing in front of the said Fillmore street car was a proximate cause of the injury, this would not exonerate defendant, if it was negligent as assumed in the instruction, since its negligence was at least a contributory cause, that continued up to the very time of the accident. It is only just to require railroad companies to anticipate such action of pedestrians, which is an additional element of peril likely to be encountered at street crossings. Manifestly, the action of the women was not an operative force that produced the injury, nor can it in any sense be said to have been an independent, intervening cause that relieved defendant of responsibility for its own negligence without which the accident would not have occurred.

The court presented the proper theory as to the women in the following instruction, given at the request of the defendant, the only modification—made necessary by the facts—being the substitution of the word "motorman" for "conductor" as to the Fillmore street car, and "gripman" for "conductor" as to the McAllister street car: "I instruct you that if you find from the evidence that the car of the United Railroads of San Francisco moving south along Fillmore street came to a stop at the corner of Fillmore and McAllister streets, that the conductor looked and saw the McAllister street car approaching, but a sufficient distance away to allow him to pass in safety over the track, and that he did attempt so to pass, but before he had completely passed over the track certain women getting on the car track forced him to stop his car, and that the conductor of the McAllister street car, without any negligence

on his part, or any defect in the equipment of his car, attempted to stop his car, but was unable to do so before it crashed into the Fillmore street car, causing the accident which resulted in the death of Gustave Fritz, then I instruct you that no negligence has been shown on the part of the defendant, and your verdict must be in favor of the United Railroads of San Francisco."

[7] 6. The court refused an instruction containing the direction: "I charge you that no damages can be given to plaintiff for sorrow or grief, or pain of mind, or injury to feelings, or for the loss of the society of deceased, or for his pain or suffering, or for the loss of his comfort or protection." This seems, however, to have been substantially covered by the court in reading from the decision of the Supreme Court in *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216. It was therein stated that "sorrow and mental anguish caused by death are not elements of damage. You cannot award any damage to the plaintiff, as a solace for his wounded feelings, because of the death of his boy."

Other instructions emphasized the fact that "pecuniary loss" was the measure of the damages to be recovered by plaintiff. The principle contended for by appellant must have been understood by the jury, and, indeed, we think that in the charge all necessary instructions were given for legal guidance. We discover no prejudicial error in the record.

The motion to dismiss the appeal is denied, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

# HARRIS v. LYON. (No. 1366.)

(Supreme Court of Arizona. May 21, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 39\*)—PUBLIC LANDS (§ 35\*)—ENTRYMAN—LAND AS PART OF ESTATE.

Where a widow who had made a homestead entry on public land died before she was entitled to a patent, the land did not belong to her estate, and a decree of the probate court distributing it was void; the heirs of the widow having only a preferential right, under Rev. St. U. S. §§ 2291, 2292 (U. S. Comp. St. 1901, pp. 1390, 1394), to perfect the homestead entry.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 280, 285-294; Dec. Dig. § 39;\* Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.\*]

2. COURTS (§ 97\*)—DECISIONS—PRECEDENT.

In determining the conflicting rights of a minor child of a widow who, after making entry on public land, remarried and died before she was entitled to a patent, and the second husband, the construction by the federal Supreme Court of the federal laws governing the rights of entrymen is binding on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

3. PUBLIC LANDS (§ 35\*)—RIGHTS OF HEIRS.

A widow, after filing on public land for a homestead, remarried, and before she became entitled to a patent died, leaving her second

husband and a minor child sole heirs. Rev. St. U. S. § 2291 (U. S. Comp. St. 1901, p. 1390), declares that, in case a widow makes an entry under the homestead laws, her heirs or devisees may, upon her death, make final proof, and shall be entitled to a patent. Section 2292 (U. S. Comp. St. 1901, p. 1394) provides that, in case both the father and mother shall die leaving an infant child or children, the right and fee shall inure to the benefit of such infant child or children. *Held* that, as the federal Supreme Court has construed these sections as giving the land to the minor children exclusively only when there were no other heirs, and the word "heirs" as meaning those capable of inheriting under the state laws, the widow's second husband was entitled to a life estate in one-third of the homestead after the issuance of the patent, for Civ. Code 1913, par. 1092, declares that, when any wife having title to any estate of inheritance shall die, leaving a surviving husband and children, the surviving husband shall be entitled to an estate in one-third of the land for life, remainder to the child or children.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.\*]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by Emma J. Harris, a minor, by next friend and guardian ad litem, Mary A. Wupperman, against William H. Lyon. From a judgment for defendant, plaintiff appeals. Affirmed.

Mary A. Wupperman, of Yuma, for appellant. Thos. D. Molloy, of Yuma, for appellee.

ROSS, J. The facts briefly stated are: May Harris, the mother of plaintiff, filed under the homestead laws of the United States on the N. W.  $\frac{1}{4}$  of section 15, township 9 S., range 23 W., G. & S. R. meridian, containing 160 acres, in October, 1903. In 1906 she married the defendant and appellee. In 1907, and before making final proof, she died, leaving surviving her the appellant daughter and appellee husband. The appellee, after the death of his wife, continued the acts of cultivation and improvement and made final proof. Final certificate was issued March 10, and patent in June, 1913, to the heirs of the deceased entrywoman. March 31, 1913, the appellee, as administrator of the estate of the deceased entrywoman, secured a decree of the superior court of Yuma county, in probate, determining and declaring that appellee and appellant were the surviving heirs of the deceased, and distributing said 160-acre homestead, two-thirds in fee to appellant, and one-third to appellee for life, with remainder to appellant. A certified copy of the decree of distribution was, on April 4, 1913, caused to be filed and recorded by appellee with the county recorder of Yuma county, in Book 88 Deeds, at page 292.

In addition to the above facts, the complaint alleges that appellant was not represented in such proceedings, and had no knowledge of them; that the court had no jurisdiction to enter the decree ascertaining

and declaring the heirs, or to make the distribution of the homestead; and that the certified copy of decree, as recorded, was a cloud upon her title. Prayer for vacation and annulment of decree.

The answer consisted of a general demurrer, some denials, and a counterclaim, in which appellee set forth the nature and extent of his title to one-third of the land and premises, and asked that his title to such one-third be quieted. In short, appellee claims a life estate in one-third of the land as one of the donees or patentees, just as appellant is the donee of the other two-thirds, and the other one-third subject to appellee's life estate. The case was tried to the court without a jury, and judgment entered in favor of appellee quieting his title to a life estate in one-third of the homestead. The appeal is from this judgment.

The appellant in her brief says that the question as to whether the appellee "is the owner of and entitled to an estate for life in an undivided one-third of the real property" is "the meat of the case." That is the question to which both parties have principally directed their briefs, and for that reason we shall overlook other minor points affecting the procedure, and decide the case finally on its merits.

[1] The decree of the superior court in probate distributing the real property as part of the estate of the entrywoman was void for the reason that it was no part of her estate. The court was without jurisdiction to make the order. *Demars v. Hickey*, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705; *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 76 N. W. 233, 66 Am. St. Rep. 679. In this case, in speaking of the rights of the deceased entrywoman, the court said: "The land sold did not belong to the estate of Olla Mikkleson, deceased. She filed upon it as a homestead in her lifetime; but she died before the patent was issued, and even before her right to demand a patent had accrued. The law gave her no such interest in the land as could be transmitted by her to her heirs. Upon her death all her rights in the land under her homestead entry ceased, and her heirs became entitled, under the statute, to a patent, not because they had succeeded to her equitable interest, but because the law gave them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. It is apparent from the statute (section 2291, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1390]) that Congress did not intend to vest in the homesteader an interest which could be inherited under the laws of the state where the real estate might be situated, the same as other real estate, but to withhold from him such interest, and specifically designate the persons who, on his death, should be entitled to secure the right which the original entryman would have obtained had he survived. What authority

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



there is on the point supports our view. See *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244 [37 L. Ed. 152]; *Chapman v. Price*, 82 Kan. 446, 4 Pac. 807; *Bernier v. Bernier*, 72 Mich. 43, 47, 40 N. W. 50. In *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244 [37 L. Ed. 152], the court say: "The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining the patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claim may be perfected, and a patent obtained, and these conditions differ with the different positions in which the family of the deceased is left upon his death."

Section 2291, referred to, provides that, in case a widow makes an entry under the homestead law, her heirs or devisees, in case of her death, may make final proof as therein prescribed, whereupon they shall be entitled to a patent, as in other cases.

Section 2292 provides that, in case both the father and mother should die, "leaving an infant child or children under 21 years of age the right and fee shall inure to be benefit of such infant child or children. \* \* \*". In *Bernier v. Bernier*, supra, it is said: "Section 2292, in providing only for minor heirs, must be construed, not as repealing the provisions of section 2291, but as in harmony with them, and as only intended to give the fee of the land to the minor children exclusively when there are no other heirs."

[2, 3] This construction of sections 2291 and 2292 is binding upon this court, and if, under the laws of Arizona, the appellee, as the surviving husband of the deceased entrywoman, is an heir entitled to a heritable interest in any estate belonging to the intestate, the portion of the homestead passing to him as such heir is measured by the share he would have inherited had the homestead been an asset of the estate. That is, he is made, by the federal law, the donee to that extent. Section 2291 says, in effect, that, if a widow having filed on land shall die before final proof and patent, her heirs or devisees shall be entitled to the patent upon a compliance with the law. The patent in this case was issued to the heirs generally, the entrywoman having died intestate, and the matter of determining who are the heirs and their respective shares of the homestead was left open to be decided by the law of the state. This is the view adopted by the Secretary of the Interior in the case of the Heirs of May Lyon (this case) 40 Land Dec. Dept. Int. 489.

In *Hutchinson Investment Co. v. Caldwell*, 152 U. S. 65, 14 Sup. Ct. 504, 38 L. Ed. 356, Chief Justice Fuller, in discussing the word "heirs" as it occurs in the pre-emption laws, and in context, as in section 2291, said: "Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of in-

heriting; but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the state which was both the situs of the land and the domicile of the owner. The object sought to be attained by Congress was that those who would have taken the land on the death of the pre-emptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. In other words, Titus intended to acquire the title, and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it, and by this statute that right could be perfected after his death for the benefit of those who would have been entitled if his death had occurred after patent instead of before. If the provision admitted of more than one construction, that one should be adopted which best seems to carry out the purposes of the act. *Bernier v. Bernier*, 147 U. S. 242 [13 Sup. Ct. 244, 37 L. Ed. 152]."

According to the rule here laid down, the appellant and appellee should receive interest in the homestead in the manner and proportion as defined in section 1092, R. S. Arizona 1913, which reads as follows:

"Where any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows:

"(1) If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the separate personal estate of deceased, and the balance of such separate personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants."

The decree in the superior court in probate distributed the real property in accordance with the provisions of this section, and, while the court had no jurisdiction of the subject-matter, and was without power to enter the judgment, still its record would not be a cloud on appellee's title, as it was a useless and meaningless paper correctly describing the respective interests of the appellant and appellee.

The judgment appealed from correctly decreed to appellee a life estate to one-third of the 160 acres, with remainder to appellant.

Judgment is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

Ex parte SILVAS.  
SILVAS v. STATE.  
(Cr. 364.)

(Supreme Court of Arizona. May 21, 1914.)

1. HABEAS CORPUS (§ 30\*)—FUNCTION OF WRIT.

A writ of habeas corpus is not available to correct mere errors or irregularities in procedure in a case where the court has jurisdiction of the person and of the offense charged.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.\*]

2. CRIMINAL LAW (§ 258\*)—PUNISHMENT.

Civ. Code 1913, par. 3829, makes it a misdemeanor to sell or give away intoxicating liquor in a local option district, but provides no punishment. Pen. Code 1913, § 19, provides that, where no punishment is prescribed, every misdemeanor is punishable by imprisonment in the county jail not exceeding six months or by a fine not exceeding \$300, or by both. Chapter 22, § 1329, entitled "Proceedings in Justices', Police and Recorders' Courts," provides that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine. *Held*, that a justice's judgment for selling intoxicants in a local option district which imposed a fine of \$250, and, in default of payment, imprisonment for 60 days, was legal and valid; accused being entitled to \$4.16% credit for each day of imprisonment, and the court being authorized to allow a larger credit than \$1 a day.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 545-561; Dec. Dig. § 258.\*]

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge.

Application by Jose Silvas for a writ of habeas corpus. From a judgment dismissing the application, petitioner appeals. Affirmed.

J. B. Woodward, of Phoenix, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

ROSS, J. The petitioner was tried and convicted in the justice's court of Glendale precinct, Maricopa county, March 14, 1914, on four separate and distinct complaints charging him with four separate and distinct misdemeanors in selling intoxicating liquors in a local option district, to wit, Glendale. In each case he was adjudged to pay a fine of \$250, and, in default of the payment of said sum of money, to be imprisoned in the county jail of Maricopa county for 60 days.

The application for writ of habeas corpus was first made to the superior court of Maricopa county, and by that court, on final hearing, dismissed as without merit. It is here on appeal.

The petition for writ assigns several reasons why petitioner's imprisonment is illegal, but he argues only three reasons in his brief: First, that the judgment of conviction is void, in that it fails to specify the number of dollars per day that defendant should be credited with for each day of his confinement; second, that the fine imposed was in the nature of a debt due from petitioner to the state, and that imprisonment therefor is

in violation of section 18, art. 2, Constitution, which prohibits imprisonment for debt except in cases of fraud; third, that the sentence is cruel and unusual.

[1] It is well-settled law that the writ of habeas corpus may not be substituted for writs of error and appeals. It is not one of its functions to correct mere errors or irregularities in procedure. If a court having jurisdiction of the person and the offense charged commits errors in the procedure or the administration of the law, or if irregularities occur in the course of the trial, such errors and irregularities, if they affect the substantial rights of the prisoner to his prejudice, on appeal, under the laws of Arizona, may and should be corrected. In this proceeding, however, upon a determination that the trial court possessed jurisdiction of the person and the offense and power to inflict the particular judgment or sentence given, under the well-settled law, no relief can be afforded. We cannot correct errors or irregularities on a petition for a writ of habeas corpus. If any such occurred in the trials, an appeal was open to petitioner, and the remedy therein ample to protect his rights. *Bailey on Habeas Corpus*, § 30; *Sennott's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *State v. Klock*, 48 La. Ann. 67, 18 South. 957, 55 Am. St. Rep. 259, and note at pages 264-275; *Savin Petitioner*, 131 U. S. 267, 9 Sup. Ct. 609, 33 L. Ed. 150; 21 Cyc. 285.

[2] Section 3829, R. S. 1913, makes it a misdemeanor to sell, exchange, or give away, with the purpose of evading the law, any intoxicating liquor whatsoever in a local option district, but affixes no punishment.

Section 19, Penal Code 1913, provides that, in cases where no punishment is prescribed, every misdemeanor is punishable by imprisonment in the county jail not exceeding six months or by a fine not exceeding \$300, or by both. The punishment of which petitioner complains was in each of the four cases considerably less than the law permitted.

Section 1329, c. 22, Penal Code 1913, entitled "Proceedings in Justices', Police and Recorders' Courts," provides that: "A judgment that a defendant pay a fine may also direct that he be imprisoned until the fine is satisfied in the proportion of one day's imprisonment for every dollar of the fine." It is the contention of petitioner, under this section, that the judgment should have recited a credit in dollars for each day's confinement. It has been decided by the California courts, from which this section is taken, that the trial court can, in its discretion, allow a larger credit per day than \$1. He may allow as many dollars per day as he thinks right as a credit upon the fine. We quote from the syllabus in *Ex parte Soto*, 26 Pac. 530 (88 Cal. 624): "Directing imprisonment until the fine be satisfied, at the rate of one

day for \$2 of the fine, does not render the judgment void, and therefore authorize the discharge of the prisoner on habeas corpus."

In the present case the fine imposed was \$250, and, in default of its payment, imprisonment for 60 days. The only difference in this sentence and the sentence in the Soto Case is that in the latter the provision was made that the prisoner should receive credit at the rate of \$2 for every day he was confined, and in the former the credit allowed for each day's imprisonment was left to calculation. It is quite definite, however, that the petitioner is entitled to \$4.16% credit for each day of his imprisonment.

Section 1308, Penal Code 1913, provides that justice's courts have jurisdiction of "all misdemeanors punishable by fines not exceeding three hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." By this section the jurisdiction of the justice of the peace to hear and determine the offenses charged against the petitioner is made plain. It is also clear that the punishment inflicted was within the terms of the law. The judgment may be subject to criticism in not more explicitly providing per diem credit for each day's imprisonment of the petitioner and for his discharge from custody upon full payment of fine with cash, or imprisonment credit, or both, but the judgment is not void entitling the petitioner to his discharge in this proceeding.

The prohibition in the Constitution against imprisonment for debt only applies to debts arising from contract, either express or implied. It has no application to fines imposed in criminal proceedings for violations of the criminal laws of the state. 8 Cyc. 879, 881.

The last point made by petitioner that his punishment is cruel and unusual does not appear to be entitled to consideration for two very good reasons: First, it is without merit; and, second, it cannot be raised in this proceeding.

Judgment is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J.,  
concur.

### CUNNINGHAM v. FRIENDLY.

(Supreme Court of Oregon. April 21, 1914.)

#### 1. TRIAL (§ 53\*)—RECEPTION OF EVIDENCE—EFFECT OF ADMISSION.

An exhibit admitted in evidence may be considered for what it contains, regardless of who introduced it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 124, 129; Dec. Dig. § 53.\*]

#### 2. BROKERS (§ 82\*)—ACTIONS FOR COMPENSATION—ISSUES.

In an action by a broker for commission on a sale of real estate, which failed because of alleged insufficiency of the abstract furnished by defendant, any defects in the title offered must be made specific issues and tried by the

court, and plaintiff must allege in what respects the abstract is defective.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82.\*]

#### 3. BROKERS (§ 51\*)—RIGHT TO COMPENSATION—PERFORMANCE OF CONTRACT.

Where a broker is employed "to make sale of the real property \* \* \* and to execute a binding contract of sale," the fact that he brought the owner and a purchaser together, and that the latter made a payment, does not entitle the broker to his commission when the sale is not consummated because of refusal of the purchaser to accept a title which is good in law.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 69; Dec. Dig. § 51.\*]

#### 4. FRAUDS, STATUTE OF (§ 129\*)—OPERATION AND EFFECT—PART PAYMENT.

Though a part payment binds a contract of sale of personalty, it does not bind a purchaser of real estate; either a contract in writing or such part performance as takes it out of the statute being essential.

[Ed. Note.—For other cases, see Frauds, Statute of; Cent. Dig. §§ 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. § 129.\*]

On petition for rehearing. Denied.

For former opinion, see 139 Pac. 928.

EAKIN, J. [1] It is not a matter of importance who introduced defendant's Exhibit 1. It was here for the consideration of what it contained, regardless of who offered it. Jennings v. Trummer, 52 Or. 149, 96 Pac. 874, 23 L. R. A. (N. S.) 164, 132 Am. St. Rep. 680, and cases there cited; Patton v. Women of Woodcraft, 65 Or. 33, 131 Pac. 521. It is objected that the law does not make the court the searcher of the record as to the abstract of title. That may be true, but the law does make the court the judge of whether the abstract is sufficient; and there is no question here as to the sufficiency of the title.

[2] If there be defects in the title, they must be made specific issues and tried by the court; and if plaintiff objects to the abstract as suspicious or defective, he must allege what is defective and in what respects. He cannot call an expert to decide the matter for the court, and custom or practice of attorneys or abstractors will not determine the title, nor the rule of evidence in relation thereto. A complete abstract of title does not mean the complete evidence of the title, but a synopsis of the data as to the title.

[3] The plaintiff was not employed to find a purchaser for the lots and to bring the purchaser and seller together, but "to make sale of the real property \* \* \* for the price of \$25,000 \* \* \* and to execute a binding contract of sale on our behalf. In case the above property is sold or disposed of, \* \* \* you shall have \* \* \* \$675 commission on the above price." This case does not come within the rule announced in Henry v. Harker, 61 Or. 276, 118 Pac. 205, 122 Pac. 298. No specific objections are made in the pleadings or in the evidence to the title to the property; and the whole controversy

therein is as to the sufficiency of the abstract. Plaintiff relies upon the fact that he brought Rocky and Friendly together, but that does not bring plaintiff within his contract to sell; neither does Rocky by his letter (Plaintiff's Exhibit E) agree to buy.

[4] A deposit on the price does not bind the purchaser to buy. There must be a contract in writing or such part performance as takes the case out of the statute. A part payment binds a contract of sale of personal property, but not of real estate. See *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 295.

The petition is denied.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

McDANIEL v. LEBANON LUMBER CO. †  
(Supreme Court of Oregon. April 21, 1914.)

1. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for the death of a servant in a sawmill, where a factory certificate to the effect that the factory act has been complied with, is introduced in evidence, and a deputy labor commissioner testifies that he inspected the premises before its issuance, but also testifies that he did not know of defects in the machinery shown by the evidence, an instruction that the purpose of the factory certificate as evidence is to aid in discovering the motives of the deputy labor commissioner, that the factory act is not the law under which the action is brought, and the labor commissioner is not the official to determine whether plaintiff has proven her case, but that is exclusively for the jury in the light of the instructions, is not error, though L. O. L. § 5046, makes the factory certificate prima facie evidence of compliance with the act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

2. TRIAL (§ 199\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY—SUBMISSION OF QUESTIONS OF LAW.

In an action for death of a servant, an instruction as to decedent's assumption of risk, if the jury find that defendant had not violated any statute relative to its machinery, without a statement of the obligations put upon an employer by statute, is properly refused as a submission of a question of law to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 467-470; Dec. Dig. § 199.\*]

3. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—STATUTORY PROVISIONS.

Employers' Liability Law (Laws 1911, p. 16) § 1, requiring persons having charge of any work involving risk to employes to use every device, care, and precaution practicable, limited only by the necessity for efficiency, and without regard to cost, and section 3, imposing penalties for failure to comply with the act, eliminates the defense of assumed risk in actions within it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

4. DEATH (§ 96\*)—ACTIONS FOR CAUSING DEATH—MEASURE OF DAMAGES.

Whatever rule of damages may have applied under L. O. L. § 380, giving a right of

action for wrongful death to the personal representatives of the decedent, the same does not apply to an action under Employers' Liability Law (Laws 1911, p. 16), giving a right of action for death caused by violation of that law to certain persons, excluding the estate of the decedent, except where none of the persons named is in existence, or the person entitled resides in a foreign country so remote as to render it extremely difficult to prosecute the action, and in other cases the damages are measured by the pecuniary loss of the person entitled to them.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 122; Dec. Dig. § 96.\*]

Department 1. Appeal from Circuit Court, Linn County; Percy R. Kelly, Judge.

Action by Nellie McDaniel against the Lebanon Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by Nellie McDaniel against the Lebanon Lumber Company, a corporation, to recover damages resulting from the death of her husband, Warren McDaniel January 4, 1912, while he was employed in the defendant's sawmill. The negligence set forth in the complaint and relied upon as forming a basis for the recovery consists briefly in the alleged carelessness of the defendant in providing and using in its mill a defective canting gear; in furnishing headblocks that were not of sufficient height; in not supplying guards to prevent logs from being thrown over the headblocks and upon the saw carriage; in placing a hook in a dangerous situation on the carriage; in not warning the deceased of dangers that were not apparent to him; and in failing to instruct him as to the duties demanded of him, and of which he was ignorant, as the defendant well knew, by reason whereof a chain attached to the canting gear, and encircling a log, was fastened to a hook on the back side of the saw carriage, causing the log when the power was applied to be hurled violently over the headblocks and to the rear of the carriage, where McDaniel, who was employed as a ratchet tender, was stationed, thereby striking and immediately killing him. The answer admits that plaintiff is the widow of the deceased, and that the defendant is a corporation, but denies the other averments of the complaint. For a separate defense it is substantially alleged that the death of McDaniel resulted from his own contributory negligence combined with the carelessness of his fellow servants; that he recklessly took an unsafe position too near a log which swinging caused the injury; that the accident was unavoidable; and that he had been instructed as to his duties, knew the dangers incident thereto, and assumed the risks pertaining to his employment. The reply put in issue the allegations of new matter in the answer, whereupon the cause was tried, resulting in a verdict and judgment for the plaintiff for \$6,500, and the defendant appeals.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied June 2, 1914.

R. W. Wilbur, of Portland (Hewitt & Sox, of Albany, Or., and Wilbur & Spencer, of Portland, on the brief), for appellant. Mark Weatherford, of Albany, Or. (Weatherford & Weatherford, of Albany, Or., on the brief), for respondent.

MOORE, J. (after stating the facts as above). It appears from a transcript of the testimony, given at the trial, that the defendant owns and operates at Lebanon, Or., a mill in which lumber is manufactured. For that purpose logs are hauled from a pond in which they are stored into the mill, where they are arranged in a row on a platform, one edge of which is near the track of the carriage. In order to put thereon a log, or to turn one after a slab has been sawed therefrom, an overhead canting gear is employed. This mechanical appliance consists of an iron spool, having at one end a pulley with which a friction pulley engages by a lever operated by the sawyer. Attached to the spool is a chain, one end of which descending is placed several times round a large log and fastened to an iron dog or sharp hook driven therein. If the log is small, however, the chain is generally placed beneath it and carried over and fastened to a hook on the rear side of the carriage. When thus prepared the sawyer shifts a lever bringing the friction pulley in contact with the pulley at the end of the spool whereby the chain is wound up, rolling a large log from the platform, or pushing a small one to and upon the carriage against the headblocks, to which it is fastened by iron dogs. When thus secured the log is pushed by the headblocks towards and in line with the saw by the movement of a ratchet lever operated by an employé who for that purpose rides the carriage which is moved forward along the track, and against the teeth of the saw, a distance equal to the length of the log. The carriage is then brought back, and, if the log is not turned by the canting gear so as to form a right angle with the line thus cut, the ratchet setter by a signal from the sawyer operates the lever forcing the log out the requisite distance to saw as indicated a board, a plank, or a cant, when the carriage is again returned, and the process continued until the log is manufactured into lumber.

The plaintiff's husband, who, when he was injured, was 28 years old, had been employed by the defendant at its mill yard 2½ months when, without any previous experience, he was put to work as ratchet setter on the log carriage, and had been so employed 5 or 6 days when the accident occurred. In undertaking to move a small log about 18 inches in diameter and 18 feet in length from the platform to the carriage, McDaniel passed round the log the end of the chain leading from the canting gear, carrying it to the rear side of the carriage, where it was made fast to a hook placed there for that purpose. At his signal the sawyer applied the power to

the friction pulley connected with the canting gear; but the chain, not being perpendicular, caused the spool to be pressed by the weight of the log and the angle of the draw chain so firmly against the other pulley that the lever by which the mechanism was operated could not be released, whereupon the log was violently hurled over the top of the headblocks towards the rear side of the carriage, where McDaniel was stationed, striking him upon the breast and inflicting the injury mentioned.

W. O. Robertson, who had been employed in defendant's mill nearly 4 years as sawyer, but who was not thus engaged at the time of the accident, testified, as plaintiff's witness, that the friction gear had been caught and bound several times, in consequence of which the chain referred to had been broken.

L. W. Anderson, who had also been employed in that mill and worked on the carriage about 2 months prior to the injury, testified that during such interval the friction gear had been caught several times, thereby breaking the chain connected with the canting gear.

W. B. Chance, a deputy labor commissioner, as defendant's witness, testified that a day or two before the accident he examined the defendant's mill, and, concluding from the investigation that the machinery and appliances therein conformed to the requirements of the statute relating to factory inspection, he caused a certificate to that effect to be issued. This credential is dated February 16, 1912, recites that unless sooner revoked it will be in force and effect for one year from May 8, 1911, and over objection and exception of plaintiff's counsel the certificate was received in evidence. On cross-examination this witness was asked: "At the time that you gave this certificate was you aware that the chain had been catching and stopping the canting gear, so that it would not be operated?" He answered: "No, sir." An objection was interposed by defendant's counsel on the ground that the inquiry was incompetent, irrelevant, and immaterial, and not proper cross-examination. Replying thereto, the court said: "The witness has already answered it." No motion was made, however, to strike out the answer.

[1] An exception having been taken by the defendant's counsel to a part of the court's charges, it is contended that an error was committed in instructing the jury as follows: "In this case there has been introduced written evidence in the form of a factory certificate issued by the state labor commissioner of Salem, Or., and the purpose of this bit of evidence is to aid the jury, if possible, in disclosing the motives of the witness Chance who testified. You heard his testimony, and the certificate is before you as a part of the evidence in the case. It is a certificate to the effect that the law known as the factory act has been complied with. The factory act is not the law under which this action has been

brought, and the labor commissioner of the state is not the official nor the tribunal to determine whether or not the plaintiff has proven her case which you are to try. That province is exclusively yours, and it becomes your duty, in the light of the instructions which I am giving you as applied to the evidence in the case, to pass upon that question; the effect and value of the certificate of the state labor commissioner being as I have indicated."

It is argued that the jury should have been told that the certificate afforded prima facie evidence of a compliance with the provisions of the act referred to, as declared therein. L. O. L. § 5046. It does not appear from the bill of exceptions that any request was made for an instruction announcing the degree of proof which such certificate imparts, and, this being so, can it be said that the portion of the charge hereinbefore quoted was an incorrect statement of the law as applied to the facts involved? It was certainly the prerogative of the jury to determine from the evidence produced whether or not the defendant had been negligent, and, if so, whether its carelessness was the proximate cause of the injury. What the court said with respect to disclosing the motive of the witness Chance, the deputy labor commissioner, may have alluded to his lack of information as to the condition of the pulleys and the breaking of the chain, of which facts he had no knowledge when he issued the certificate. But, however this may be, the challenged instruction in its entirety appears to be a correct narration of the legal principles applicable to the testimony on this branch of the case.

[2, 3] An exception was taken to the court's refusal to give the following requested instruction, and it is maintained that an error was committed in declining to charge the jury as follows: "If in this case you should find that the defendant had not violated any statute relative to its machinery, then I instruct you that, if a servant voluntarily continues, however, without complaint or objection, after knowledge or notice of existing risks, under conditions by which he is chargeable with an appreciation of the danger, and where ordinary prudence would require of him a different course, he is held also to take upon himself the responsibility entailed by the risk he continues to incur."

Section 1 of the Employers' Liability Act enumerates the kinds of construction, improvement, etc., and the classes of business to which the statute relates. It also contains a clause which reads: "And generally all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the struc-

ture, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 3 of the act puts upon the persons thus indicated the duty to see that the requirements of this statute are complied with, and for any failure in this respect such individual, when found guilty of a violation thereof, shall be fined or imprisoned, or both penalties may be imposed. Gen. Laws Or. 1911, c. 8.

The testimony of the plaintiff's witnesses establishes the fact that before McDaniel was killed the friction pulleys of the canting gear in the defendant's mill occasionally became locked and could not be released by the lever with which they were usually controlled, because the chain leading from the spool was drawing at an angle forcing one pulley against the other and at times breaking the chain. It also appeared from such testimony that in other sawmills in Oregon, having similar canting gear, a block and sheave, iron rolls, or other mechanism was in use whereby the chain passing over such appliance was necessarily wound upon the spool in such manner as not to force it forward or back on its spindle, thereby either locking the friction pulleys or forcing them apart, so that they would not engage, and that such attachments could have been installed in the defendant's mill with but little expense, and without diminishing the efficiency to manufacture lumber.

The instruction requested was predicated upon the theory that, if the jury "should find that the defendant had not violated any statute relative to its machinery," then they should determine that certain consequences would necessarily follow. The fault of this proposed instruction lies in the fact that it does not state any of the obligations put upon an employer by statute, thereby designing to have submitted to the jury a question of law. If the requested instruction had been free from the objection adverted to, it would have been inappropriate, for in *Schulte v. Pacific Paper Co.*, 135 Pac. 527, Mr. Justice Eakin, in referring to the Employers' Liability Act, says: "The effect of the statute is to eliminate the defense of the assumed risk in the actions within it." See, also, *Dorn v. Clarke-Woodward Drug Co.*, 183 Pac. 351. No error was committed in refusing to charge as requested.

[4] The court also refused to give the following requested instruction: "The manner in which you shall assess damages, if you assess any, must be, not what the deceased would have earned had he lived for the balance of his expectancy, but what he would have saved or probably left as an estate, as represented by his net savings, and which would have gone for the benefit of his estate; and, in ascertaining what the deceased would have saved, I instruct you that you should take into consideration his age, his

ability, his disposition to labor, his habits of living, and his expenditures, and you should base your decision upon this and nothing else, so far as damages are concerned."

An exception having been taken to the action of the court in this respect, it is insisted that an error was thereby committed. Whatever may formerly have been the rule in Oregon as to the manner of ascertaining the measure of damages sustained by the death of a person when caused by the wrongful act or neglect of another can have no application to the statute now in force. Under the prior enactments of this state the injury thus occasioned constituted a damage to the estate of the deceased for the recovery of which an action could be maintained only by his personal representatives. L. O. L. § 380. The Employers' Liability Act gives to certain enumerated persons the damages thus sustained, thereby necessarily excluding the decedent's estate, unless there is in existence none of the relatives named, or the residence of the person entitled to the damages is in some foreign country so remote as to render it extremely difficult for him to prosecute an action, amounting almost to a denial of justice, in which case a personal representative can maintain an action under section 380, L. O. L. Stats v. Twohy Bros. Co., 61 Or. 602, 123 Pac. 909. The cause herein is prosecuted by the widow of the person killed, who alone is entitled to the recovery which is unlimited in amount, and not restricted by the damages which the decedent's estate may have sustained, but is to be measured by the pecuniary loss suffered by the person entitled thereto. *McFarland v. Oregon Elec. Ry. Co.*, 138 Pac. 458; *McClagherty v. Rogue River Electric Co.*, 140 Pac. 64.

No error was committed in refusing to give such instruction. Other errors are assigned; but a careful examination of the entire testimony which is attached to the bill of exceptions convinces us that a proper verdict was rendered. The judgment entered thereon should be affirmed, and it is so ordered.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

#### STATE v. McDANIEL et al.

(Supreme Court of Oregon. April 21, 1914.)

#### 1. CRIMINAL LAW (§ 673\*)—RECEPTION OF EVIDENCE—RESTRICTION TO SPECIAL PURPOSE.

On a trial of two defendants for murder, the refusal to restrict evidence of declarations made by one of them after the murder in the absence of the other to the declarant is error.

[Ed. Note.—For other cases,\* see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.\*]

#### 2. CRIMINAL LAW (§ 636\*)—TRIAL—PRESENCE OF DEFENDANT.

The trial court has the power to make a nunc pro tunc order in the absence of defendant

for the entry in the journal of a record of a verdict of conviction, but the practice is not to be commended.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. § 636.\*]

#### 3. CRIMINAL LAW (§ 995\*)—RECORD—PRESENCE OF DEFENDANT.

The record case should affirmatively show that defendant was present when a verdict of conviction was received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2526, 2528½, 2530, 2536-2543; Dec. Dig. § 995.\*]

Department No. 1. Appeal from Circuit Court, Crook County; W. L. Bradshaw, Judge.

Gaylord McDaniel and another were indicted for murder, and from a conviction of defendant McDaniel alone, he appeals. Reversed and remanded.

The defendant was indicted and tried jointly with Fannie C. Poch for the murder of Herman Poch. Upon the trial evidence was offered of certain declarations and admissions of Fannie C. Poch, which were made after the killing, but not in the presence of McDaniel, tending to incriminate herself and her codefendant. The defendant McDaniel objected to this testimony as affecting himself, and moved that the statements should be withdrawn from the jury so far as they affected him; but both the objection and the motion were overruled by the court. The jury returned a verdict of guilty of murder in the second degree against him and acquitted Mrs. Poch. The verdict was received and filed, but not recorded, and the defendant was sentenced to imprisonment for life. Subsequently, and at the next term, a nunc pro tunc order was made by the court in the following language: "In the Circuit Court of the State of Oregon for Crook County. The State of Oregon, Plaintiff, v. Gaylord McDaniel and Fannie C. Poch, Defendants. Now at this time this case coming on for hearing, for an order to have the journal entry of the return of the verdict of the jury in the above-entitled case entered in the journal of this court as of the 21st day of May, 1913, the day on which it was returned into court by the jury, and it appearing to the court that the jury in the above-entitled case returned its verdict into court on the 21st day of May, 1913, and was filed therein on said day, that the clerk by oversight neglected to enter the same in the journal of this court on said day or at all. It is therefore ordered and adjudged by the court that an entry of the return of said verdict of said jury in the above-entitled case be entered now as of the 21st day of May, 1913, in the journal of this court, by the clerk. Dated this 14th day of June, 1913. W. L. Bradshaw, Judge. Be it remembered that at a regular term of the circuit court of the state of Oregon, for the county of Crook, begun and held at the courthouse, in Prineville, in said county and state

on Monday the 5th day of May, A. D. 1913, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court, when were present: The Hon. W. L. Bradshaw, Judge, Presiding. W. A. Bell, District Attorney. Warren Brown, Clerk. Frank Elkins, Sheriff. When, on Wednesday the 21st day of May, A. D. 1913, or the fifteenth judicial day of said term, among others, the following proceedings were had to wit: State of Oregon, Plaintiff, v. Gaylord McDaniel and Fannie C. Poch, Defendants. Now, on this 21st day of May, 1913, comes on this cause to be heard, the jury heretofore impaneled and sworn, return into open court their verdict, which reads as follows, to wit: 'In the circuit court of the state of Oregon for the county of Crook. State of Oregon, Plaintiff, v. Gaylord McDaniel and Fannie C. Poch, Defendants. Verdict. We, the jury impaneled in the above-entitled cause, find the defendant Gaylord McDaniel guilty of murder in the second degree and the defendant Fannie C. Poch not guilty as charged. C. R. McLallin, Foreman.' Said verdict was read in open court and ordered filed by the clerk. Whereupon the defendant Gaylord McDaniel was remanded to the custody of the sheriff of Crook county, Or., and the jury was discharged from further consideration of the case."

N. G. Wallace, of Prineville (G. L. Bernier, of Prineville, on the brief), for appellant. W. H. Wirtz, Dist. Atty., of Prineville (W. A. Bell, of The Dalles, on the brief), for the State.

McBRIDE, C. J. (after stating the facts as above). [1-3] The court erred in refusing to restrict the evidence of the declarations of Mrs. Poch made after the killing and not in the hearing of her codefendant. Declarations of an alleged conspirator made after the termination of the conspiracy are not admissible against a co-conspirator. 8 Cyc. 680 B, and cases there cited. A conspiracy is in the nature of a criminal partnership to do an unlawful act, and as in cases of ordinary partnerships each partner is bound by the acts and declarations of his fellow partners made or done in furtherance of the common object; so in conspiracy each conspirator is bound by the acts, declarations, and admissions made by a fellow conspirator before the termination of the conspiracy, but, when the unlawful object has been accomplished, the conspiracy is at an end—the criminal partnership is dissolved—and no member of it can bind the others by his own acts, admissions, or declarations. The court should have expressly directed the jury that, while the evidence in question might be considered as tending to prove anything against defendant McDaniel. While we are of the opinion that the court had a right to make the

nunc pro tunc order in the absence of the defendant, it is a practice not to be commended. Neither the nunc pro tunc order nor the record of conviction or judgment shows that the defendant was present when the verdict was received. This was a grave irregularity to say the least. The defendant had a constitutional right to be present at every stage of the proceedings, and the record should affirmatively show that he was present. 12 Cyc. 686, and cases there cited; Bishop, New Criminal Procedure, § 1001; State v. Walton, 50 Or. 142, 91 Pac. 490, 13 L. R. A. (N. S.) 811; People v. Jung Qung Sing, 70 Cal. 469, 11 Pac. 755. While we are not prepared to say, in the absence of a statute requiring the presence of a defendant to be noted, that a failure to record the fact of his presence would render the trial nugatory, yet the practice of doing so has been so nearly universal and immemorial that it is better not to deviate from it.

Other objections are urged, but we deem them without merit.

The admission of the declarations of Mrs. Poch without limitation of their effect was so prejudicial to defendant that it necessitates a reversal of this case.

The judgment will therefore be reversed, and a new trial granted.

MOORE, BURNETT, and RAMSEY, JJ., concur.

JONES et al. v. McGINN, Circuit Judge. (Supreme Court of Oregon. April 21, 1914.)

1. CONTRACTS (§ 266\*)—RESCISSION—RESTORATION OF CONSIDERATION.

The general rule that a party seeking to rescind a contract for fraud shall restore the consideration does not apply where the property has been destroyed, is worthless, or is taken from him without his fault.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.\*]

2. CONTRACTS (§ 274\*)—"RESCISSION."

"Rescission" means that both parties to a contract shall be wholly released, as though it had not been made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1202-1206; Dec. Dig. § 274.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6139.]

3. CONTRACTS (§ 266\*)—RESCISSION—RESTORATION OF CONSIDERATION.

When courts cannot place the parties in statu quo, they are not precluded from granting relief from fraud; damages being given if either party cannot restore the property, and inability to restore resulting from the course of complainant when not aware of the fraud not preventing relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.\*]

4. SALES (§ 124\*)—RESCISSION—RESTORATION OF CONSIDERATION.

Where a buyer offers to restore the goods received under a sale induced by fraud, and the seller absolutely refuses to receive them, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



buyer will be relieved from the duty of actually returning or tendering them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312; Dec. Dig. § 124.\*]

**5. CONTRACTS (§ 266\*)—DISPOSITION OF CAUSE—PROCEEDINGS IN LOWER COURT—SUFFICIENCY OF DECREE.**

Where plaintiff received, under a contract with defendants, a lease of an apartment house and the furniture contained therein, incumbered by a chattel mortgage, and in a suit to rescind for fraud tendered the property into court and paid the rent till a decree in her favor for rescission, after which she refused to continue the payments, and the mortgage was foreclosed, and on appeal the decree was simply affirmed, the trial court, on receiving the mandate, properly entered a decree requiring defendants to surrender plaintiff's notes and mortgage for cancellation and reconvey the land received by them, though it had become impossible for plaintiff to place them in statu quo.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.\*]

Department 2. Original proceeding by Minerva A. Jones and another for mandamus against Henry E. McGinn, Judge of the Circuit Court for the Fourth Judicial District. Denied.

Sam White, of Portland (Manning, White & Hitch, of Portland, on the brief), for plaintiffs. Allan R. Joy and John F. Logan, both of Portland, for defendant.

**PER CURIAM.** This is an original proceeding in this court by writ of mandamus against the defendant, as judge of the circuit court of Multnomah county, to require him to enter decree in that court in accordance with the mandate of this court in the case of Owen v. Jones, issued the 20th day of November, 1913. The controversy arose under the following condition of the last-named case: It was brought here on appeal by the defendants, and the decree of the circuit court was affirmed. The opinion is reported in 136 Pac. 332. The defendants were owners of a lease upon an apartment house and of the furniture contained therein, and made a contract with the plaintiff to exchange the same for plaintiff's dwelling and two lots in Portland and certain promissory notes. That many false representations were made to the plaintiff by the defendants and their agent, and frauds perpetrated upon her, was fully established at the trial, being recited in the answer to the writ in this case. Immediately after plaintiff had completed the exchange, she learned of the misrepresentations and frauds of the defendants, and rescinded the trade, giving defendants notice thereof, and brought suit in the circuit court of Multnomah county to retract the trade, to recover her property, and to have canceled the notes she had given in the sum of \$1,075, and to have defendants adjudged to take back their property. For that purpose plaintiff tendered the property into court. The furniture and the lease of the apartment house had been incumbered by the defendants by a chattel mort-

gage in the sum of \$500, as security for the payment of the rent of \$130 per month, which Owen paid until decree of the circuit court was rendered, covering a period of about seven months, when she refused to make further payments thereof, and tendered the property to the defendants. The rent thereafter being unpaid, the mortgagee foreclosed the chattel mortgage and sold the furniture, delivering it to the purchaser. The mandate of this court was simply an affirmance of the decree of the circuit court; namely, that the contract be rescinded. When the mandate was received by the circuit court, conditions had changed, and the property in the rooming house was no longer in the possession of the plaintiff, through no act of hers, and could not be returned by her to the defendants. The circuit court, after a recital of the conditions, rendered a decree upon the mandate to the effect that the contract be rescinded, and, it appearing that Edith Owen, since the commencement of the suit, had at all times while the property was in her possession, and until the same was taken from her possession by process of law, been ready and willing to turn it over to the defendants, and had at all times tendered back said property, ruled that the deed by Owen to Jones be canceled, and defendants ordered to execute and deposit with the clerk of the court a deed of conveyance to Owen of said lots 6 and 21, and to surrender for cancellation the Owen notes and the mortgage securing the same, together with possession of said lands. Defendants objected to said decree, insisting that, if Owen did not place defendant in statu quo by the redelivery of the rooming house and contents free from charge, she was not entitled to rescind the contract, and applied for this writ of mandamus to require the circuit court to enter the decree affirmed by this court. The judge of the circuit court answered the writ setting up the facts, to which a demurrer was filed. The foregoing constitutes the issue before us.

[1] Plaintiff in this proceeding insists there is no exception to the rule that there can be no rescission of a contract unless the plaintiff in the suit for that purpose places the defendants in statu quo. The general rule for rescission of a contract for fraud requires that the party seeking to rescind shall restore the consideration he has received under the contract; but there are exceptions to this rule, many of which are given in 9 Cyc. 439; namely, where the property has been destroyed, is worthless, or is taken from him without his fault. In *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449, it is expressly mentioned that if the property is taken on a prior existing lien he is not required to restore it. Thus, in *Hammond v. Pennock*, 61 N. Y. 145, it is held the same property need not be returned. It is in the discretion of the equity court to decree what return shall be made.

The same is held in *Jervis v. Berridge*, 28 L. T. Rep. (N. S.) 481.

[2] Rescission means that both parties shall be wholly released from the contract as though it had not been made. The common law requires: First that the parties seeking to rescind must return the consideration received before he can reclaim what he parted with; but this is not the only rule in equity, but the bill should offer to return if the court should so decree. It is said in note 95, p. 441, of 9 Cyc.: "The best-considered cases in equity go far to bear out the proposition that there is a remedy in equity to ask the court to rescind without requiring an absolute return before suit, wherever such a return would operate to enhance the completeness of the fraud or abandon the little indemnity that already exists." This was the theory in *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858. It is said in the text of 9 Cyc. 441: "Since the doctrine that one must restore what he has received is so frequently used to shield the party guilty of the fraud, it is not strange that the courts have endeavored to put some limits to the doctrine itself."

[3] When the courts cannot place the parties in statu quo, they are not precluded from granting relief from fraud. *Myrick v. Jacks*, 33 Ark. 425. Equity courts can go more on presumptive evidence than law courts. If either party cannot restore the property, damages may be given; and, if the inability to restore happens by the course of complainant, it should not prevent his obtaining relief if he was not aware of the fraud. *Warner v. Daniels*, 29 Fed. Cas. 17,181. The complainant is entitled to rescission because of fraud, and it is immaterial that statu quo cannot be literally restored. *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 186, 21 L. R. A. 206; *Scott v. Perrin*, 7 Ky. (4 Bibb) 360; *Mincho v. Bankers' Life Ins. Co. of City of New York*, 124 App. Div. 578, 109 N. Y. Supp. 179; *Placer County v. Freeman*, 149 Cal. 739, 87 Pac. 628.

[4] It is further held that, if the buyer offers to restore the goods received by him under a sale induced by fraud, and is met by an absolute refusal of the seller to receive them if tendered, he will be relieved from the duty of actually returning or tendering them. *Milliken v. Skillings*, 89 Me. 180, 183, 36 Atl. 77; 9 Cyc. 441, n. 96.

[5] Here the defendant has continuously and strenuously resisted a rescission. It appears that the plaintiff in the suit for rescission paid the rent on the house until the day of the decree of the circuit court in her favor, and then demanded that the property be redelivered at once, and that she be relieved of further liability. It was thereafter, in May, 1913, that the property was taken on foreclosure; Mrs. Owen contending that the house could be run only at a great loss, and was therefore worthless; and, the decree so requiring the rescission of the contract,

plaintiff made no further claim to the property, contending that it was thereafter at defendant's risk. Defendants by the appeal delayed the execution of the decree for more than a year, thus attempting to require plaintiff to run the apartment house in the meantime, which, it is alleged, would have been at a loss of more than \$100 per month. This condition was created by the defendants' appeal, which, we agree with Judge McGinn, equity should not require. There is no question in this case but that defendants secured the contract sought to be rescinded by gross imposition and fraud, and to adopt defendants' theory of the case would be to impose upon Mrs. Owen a loss greater than the value of the whole property she thought she was to receive. She has cared for the property and paid all expense therefor until the decree was rendered in her favor in the circuit court in November, 1912, which is all that should be required. The situation is not an ordinary one in which rescission is sought. In this case evidently the good will of the business and the lease of the house in which it was conducted were the principal values passing. The furniture had but little value if removed from the house. The payment of the rent, gas bill, light bill, expense of scavenger, and cost of heating were all frequent, inevitable, and relentless as incident to the business. It was in the power of the defendants to delay the time to assume them, and thus work a hardship upon the plaintiff, if not actually to render her bankrupt, making it impossible for her to retain the property for redelivery. These are matters not involved in the ordinary sale of personal property, and litigants must act at their peril in such cases as a mistake may result in great loss. It is held in *Neblett v. Macfarland*, 92 U. S. 101, 23 L. Ed. 471: "A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing the bill; \* \* \* the party, in substance, redelivering the bond as a condition of obtaining such reconveyance, it would seem that a defense of this character could not be a good one. But of this the appellant must take his chance. If the bond has become thus impaired, it is no worse than the loss of a perishable article, or the forfeiture of shares during the litigation. These circumstances do not alter the rule of law."

The contract must be rescinded in toto; that is, the parties must be wholly released from it, though not necessarily placed in statu quo. That is often impractical and would render rescission impossible in many cases. See *Gatling v. Newell*, 9 Ind. 572; *Smith v. Love*, 64 N. C. 439. So equity adapts itself to the circumstances of the case in rescission. *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436. Defendants had ample opportunity while the property was intact to protect themselves—namely, after the decree in plaintiff's favor in the circuit court—and equity should require that the de-

may caused by defendants should be at their risk. Therefore we find that there was no error in the decree entered by the circuit court on the 24th day of January, 1914, which is as follows:

"It is hereby ordered, adjudged, and decreed that the contract and transaction of sale, trade, or exchange entered into between plaintiff and defendant Minerva A. Jones on or about April 9, 1912, be and the same is hereby declared fraudulent and void, and the same is hereby rescinded, canceled, annulled, and held for naught; and it further appearing to the court that the plaintiff, Edith Owen, since the commencement of this suit, has at all times, while the property was in her possession and until the same was taken from her possession by process of law, been ready and willing to turn over and deliver back to the defendants all property received from defendants in the above-mentioned transaction of exchange, and has at all such times offered and tendered back the said property in the same good order and condition in which it was received, reasonable use and wear thereof excepted, and that such offer and tender was made in open court upon the trial of this cause, and has never been accepted by the defendants; and it further appearing to the court that, since the decree of this court was entered herein, and while this cause was pending in the Supreme Court of the state of Oregon upon appeal from this court, a certain mortgage placed upon the said rooming house and furnishings by the defendants prior to the date of the fraudulent transfer of the said property to this plaintiff and existing on the date thereof became due and was foreclosed in this court by suit in equity, and that these defendants were duly served with summons and complaint in said foreclosure suit, and made no appearance therein, but suffered the said mortgage to be foreclosed as by default; and it further appearing that said rooming house and furniture therein was taken from the possession of plaintiff by due process of law under said foreclosure proceedings, and was duly and regularly sold under the decree of this court in accordance with the laws of the state of Oregon in such cases provided to satisfy the said mortgage so placed upon the property by these defendants, as aforesaid, and that the defendants made no effort or attempt to redeem the said property or to protect their rights therein, if any they had or claimed, but knowingly waived the same, and that the said rooming house and the furniture therein has passed into the hands of innocent purchasers, and that, by reason of the premises, and without any fault or neglect upon the part of plaintiff, it has become and is impossible for plaintiff at this time to deliver over to the defendants the said rooming house or contents, and that plaintiff, Owens, has never incumbered said property in any manner, save and except her chattel mortgage given to defendants for the pur-

chase price thereof, which said chattel mortgage has been and is hereby canceled.

"(2) That the deed executed by the plaintiff, Edith Owen, to the defendant Minerva A. Jones on or about the 9th day of April, 1912, for lots six (6) and twenty-one (21) in block three (3) of Cloverdale tract, in Multnomah county, Or., be, and the same is, hereby canceled of record, and the said defendant Minerva A. Jones is hereby ordered and directed forthwith to execute and deposit in this court a reconveyance with full covenants of warranty, reconveying to the plaintiff, Edith Owen, the said lots six (6) and twenty-one (21) in block three (3) of said Cloverdale tract, free from all debts, liens, incumbrances, or damage done, made, or suffered by the said defendants, or either of them, or any person acting under, by, or through them, and the clerk of this court is hereby directed forthwith to deliver the said deed of conveyance to the said plaintiff, Edith Owen.

"(3) That the said defendants, Minerva A. Jones and C. M. Jones, forthwith deposit in this court the 27 promissory notes so executed by the said plaintiff, Edith Owen, to the said defendant Minerva A. Jones on the 9th day of April, 1912, the same being 25 promissory notes for \$40 each and one note for \$55 and one note for \$20, bearing interest at 8 per cent. per annum, and payable 30 days apart, the first note being payable May 9, 1912, and that thereupon the clerk of this court is directed to cancel the same and to return the said canceled notes to the plaintiff, Edith Owen, and that a certain chattel mortgage executed by Edith Owen to the said Minerva A. Jones on the 9th day of April, 1912, to secure said 27 notes, and covering the furniture and fixtures then and now being in the said apartment house at 927 Union avenue, Portland, Or., be, and the same is, hereby canceled, annulled, and discharged of record; and it is further ordered that the county clerk of Multnomah county, Or., make the proper entries canceling upon the records of Multnomah county, Or., the said chattel mortgage and the above-described deed from Edith Owen to the said Minerva A. Jones for the said real property, to wit: Lots six (6) and twenty-one (21) in block three (3), Cloverdale.

"(4) It is further ordered and decreed that the said defendants, Minerva A. Jones and C. M. Jones, forthwith deliver up possession of the said lots six (6) and twenty-one (21) in block three (3), Cloverdale tract, with the dwelling house thereon, to the plaintiff, Edith Owen, and also deliver to the said Edith Owen all furniture left therein by Edith Owen on the 9th day of April, and taken possession of by these defendants, or either of them, all in good order and condition, reasonable use and wear thereof excepted.

"(5) It is further ordered and adjudged that the plaintiff, Edith Owen, have and recover of and from the defendants, Minerva A. Jones and C. M. Jones, and from their sure-

ties an appeal, to wit, the Globe Indemnity Company of New York, her costs as taxed in the circuit court, to wit, the sum of \$35.35, with interest at 6 per cent. thereon from November 12, 1912, together with her costs and disbursements taxed in the Supreme Court herein, amounting to the sum of \$43, and that execution forthwith issue out of this court in favor of the plaintiff, Edith Owen, and against the defendants, Minerva A. Jones and C. N. Jones, and the Globe Indemnity Company of New York (defendants' sureties on appeal) therefor. Dated January 24th, 1914. [Signed] Henry E. McGinn, Judge."

The demurrer to the return is overruled, and the writ is dismissed.

### POWELL v. SUTHERLIN LAND & WATER CO.†

(Supreme Court of Oregon. April 21, 1914.)

#### 1. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

In an action against an employer for injuries from the falling of an electric light pole on which plaintiff was climbing, it was a question for the jury whether it was negligence of the employer to permit a switch to be out of repair or removed from the pole, or to permit old poles to remain in use at the time of the accident without testing or repair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

#### 2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

In an action against an employer for injuries from the falling of an electric light pole on which plaintiff was climbing, evidence held to present a question for the jury whether plaintiff knew or ought to have known of the defective condition of the pole.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

A motion for an instructed verdict for defendant, based on the defense that plaintiff was the foreman in charge of the poles and switch which caused the injury, upon which there was a dispute in the evidence, was properly denied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 4. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

The refusal of instructions that, if plaintiff knew that the pole on which he was injured was so dangerous that a prudent person would not climb it, or if an inspection would have disclosed such condition, he cannot recover, for the reason that he assumed the risk, that he is bound by allegations in the complaint that he is an electrician and lineman, and must be conclusively presumed to have known of the danger incident to that line of employment, and that it is not necessary to relieve defendant from liability that plaintiff should have been employed as foreman, but it is sufficient that he was employed as a lineman whose duty it was

to discover and remedy defects in the line, is not error, where the grounds stated are fairly covered in the general instructions, so far as the evidence justified, the jury having been instructed that, if the plaintiff knew that defendant had no other servant to inspect its poles and continued in the employment, he assumed the duty of testing the poles, and other instructions having been given as to burden of proof of defendant's negligence, as to whether plaintiff was foreman, the defendant's duty if plaintiff was not foreman, and the risk assumed by plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Department No. 2. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Fred C. Powell against the Sutherlin Land & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for personal injuries received by the plaintiff while climbing an electric light pole, which fell with him on account of its rotten condition. There are but four assignments of error, namely: The denial of a motion for judgment of nonsuit, denial of a motion for a directed verdict in favor of defendant, and the refusal of the court to give two requested instructions. The jury found a verdict in plaintiff's favor for the sum of \$5,500. From a judgment thereon, the defendant appeals.

Dexter Rice, of Roseburg (E. B. Hermann, of Roseburg, on the brief), for appellant. O. P. Coshow, of Roseburg, for respondent.

EAKIN, J. At the close of plaintiff's testimony, defendant moved for a judgment of nonsuit; and, at the close of the evidence, moved for a directed verdict. It is principally upon the denial of these two motions upon which defendant bases this appeal.

[1] The grounds for the judgment of nonsuit are that plaintiff failed to show any negligence on the part of defendant, but that the accident was the result of plaintiff's own negligence, and the risk was assumed by him. It was a question for the jury whether it was negligence on the part of the company to permit the switch on the Oakland circuit to be out of repair or removed from the pole. It was also for the jury to determine whether it was negligence for the company to permit the old poles to remain in use at the time of the accident without testing or repair. These were the issues tendered by the complaint.

[2] The answer tenders the issue as to whether the plaintiff was the foreman of the line. It was for the jury to decide whether plaintiff knew or ought to have known the defective condition of the pole. He testified that when he climbed the pole it was all right, so far as he knew, being supported by two guy wires, and that he supposed it to be perfectly safe; so that the court could

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 26, 1914.

not take the case from the jury by a judgment of nonsuit.

[3] The motion for an instructed verdict in favor of the defendant is dependent largely upon the defense set up in the answer that plaintiff was the foreman in charge of, and responsible for the condition of, the poles and switch upon which there was a dispute in the evidence, and therefore defendant was not entitled to a directed verdict.

[4] Error is also assigned in the refusal of the court to give requested instructions as follows: "No. 4. If you find from the evidence that the plaintiff knew that the pole upon which he was injured was so dangerous that a prudent person would not climb it, or if an inspection of the pole would have disclosed such dangerous condition, then the plaintiff cannot recover in this action, for the reason that he assumed the risk incident to climbing such dangerous pole. \* \* \* No. 6. The plaintiff has alleged in his complaint that he is an electrician and lineman. He is therefore bound by this allegation, and cannot now be heard to say that he did not possess the knowledge and efficiency of the ordinary electrician and lineman, and must be conclusively presumed to have known and appreciated the danger incident to such line of employment. In this connection I also instruct you that it is not necessary to relieve the defendant from liability that plaintiff should have been employed in the capacity as foreman. It is enough that he was employed as a lineman whose duty it was to discover and remedy defects in the line even though he did not hold the position of foreman."

The court in its general instructions to the jury very fairly covered the grounds stated in these two requests so far as the evidence justified. He instructed the jury to the effect that, if the plaintiff was employed by the defendant to carry on the electric plant, not including the duty of keeping the poles in repair, then it would have been the duty of the defendant to have done so. Also he instructed them: "If you find \* \* \* that the plaintiff knew the defendant had no other servant whose duty it was to inspect its poles and continued in the employment, \* \* \* he assumed the obligation and duty of testing the poles himself. \* \* \*" Many other instructions were given as to the burden of proof upon plaintiff concerning the negligence of the defendant, as to whether plaintiff was the foreman of the line, his responsibility therefor if he was such foreman, and the defendant's duty if the plaintiff was not foreman of the line, and as to the risk assumed by plaintiff in accepting the employment.

We find no error in the refusal of the requested instructions.

The judgment is affirmed.

McBRIDE, O. J., and BEAN and McNARY, JJ., concur.

# TAYLOR v. TAYLOR.†

(Supreme Court of Oregon. April 21, 1914.)

## 1. MARRIAGE (§ 62\*)—ANNULMENT—ALIMONY.

The allowance to the wife of money for her living expenses and for a surgical operation pending a suit to declare the marriage void is not authorized by L. O. L. § 512, authorizing the court, pending suit, to order that the husband pay, or secure to be paid, to the clerk of court, such an amount as may be necessary to enable the wife to prosecute or defend the suit, section 513, providing for alimony after decree declaring void or dissolving the marriage contract, section 511, providing that when a marriage shall be declared void or dissolved the court shall grant to the person in whose favor the decree is rendered an undivided one-third of the real property of the other, nor sections 7040 and 7041, authorizing suit and decree to compel the husband to contribute to the support of the wife and their minor children.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 137; Dec. Dig. § 62.\*]

## 2. MARRIAGE (§ 62\*)—ANNULMENT—ALIMONY.

The right to alimony is solely statutory, and the court has no authority to order the payment of a sum for the support of the wife pending suit to have a marriage declared void, in the absence of statutory provision therefor.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 137; Dec. Dig. § 62.\*]

## 3. DISMISSAL AND NONSUIT (§ 37\*)—VOLUNTARY DISMISSAL—NATURE AND EXTENT OF RIGHT.

The right to dismiss an action or suit is not an absolute one that plaintiff can exercise without leave of court, and the court can compel the plaintiff to pay the costs of an action or suit before dismissing it.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 68, 72, 73; Dec. Dig. § 37.\*]

## 4. MARRIAGE (§ 62\*)—ANNULMENT—ATTORNEYS' FEES.

When, in a suit to have a marriage declared void, the wife has incurred liabilities for attorneys' fees and other expenses of the suit, the court may compel the husband to advance the money to pay them, and refuse him a nonsuit till he has paid them, though the order be made after the services have been rendered.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 137; Dec. Dig. § 62.\*]

## 5. MARRIAGE (§ 62\*)—ANNULMENT—ATTORNEYS' FEES.

In a suit to have a marriage declared void, where defendant, living 1200 miles from the place of suit, was served by publication and did not hear of the suit till a decree had been entered declaring the marriage void, after which she employed counsel to have the decree set aside, which was done after a hard contest, including an appeal for which plaintiff advanced the fees for the attendance of defendant's counsel, an allowance thereafter, at the same hearing at which the court dismissed the suit on motion of the plaintiff, of \$2,500 attorneys' fees, the plaintiff being worth a million dollars, is not an abuse of the court's discretion.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 137; Dec. Dig. § 62.\*]

## 6. APPEAL AND ERROR (§ 984\*)—REVIEW—DISCRETION OF TRIAL COURT.

The Supreme Court can review the action of trial courts in making allowances of attor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 2, 1914.

neys' fees in suits to have marriages declared void only for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881-3888; Dec. Dig. § 984.\*]

In Banc. Appeal from Circuit Court, Clackamas County; J. A. Eakin, Judge.

Suit by Charles D. Taylor against Minnie N. Taylor to declare void a marriage contract for fraud. From an order granting defendant \$8,665 as alimony, and \$2,500 as attorneys' fees, plaintiff appeals. Modified.

See, also, 61 Or. 257, 121 Pac. 431, 964; 134 Pac. 1183.

John F. Logan and I. N. Smith, both of Portland, for appellant. Flegel & Reynolds, of Portland, for respondent.

RAMSEY, J. On July 27, 1910, the plaintiff commenced a suit in the circuit court of Clackamas county to obtain a decree declaring void the marriage contract between the plaintiff and the defendant for alleged fraud. The parties were married in Portland, Or., on August 26, 1905. They lived together as husband and wife until November 20, 1909, but no children were born to them. The complaint charges that the defendant made to the plaintiff certain false and fraudulent representations as to her character and life, to induce him to marry her, and that he believed these representations, acted upon them, and married the defendant, etc. The defendant was a resident and inhabitant of the state of California, and the summons was served upon her by publication. After the expiration of the time allowed for answering, the plaintiff obtained a decree annulling said marriage contract. Within the time allowed by law for that purpose, the defendant applied to the court below for an order setting aside said decree, and permitting her to file an answer. This application was strongly opposed by the plaintiff; but the court below allowed said application, set aside said decree, and permitted the defendant to answer. From this order the plaintiff appealed to this court, and this court dismissed the appeal for the reason that said order was not appealable. See *Taylor v. Taylor*, 61 Or. 257, 121 Pac. 431, 964.

On May 21, 1912, the defendant filed in the court below a motion asking for an order requiring the plaintiff to pay, or secure to be paid to the clerk of the court below, the sum of \$7,000, to enable the defendant to defend said suit, and \$2,500 for the support of the defendant during the pendency of said suit, and a like sum each month, since the filing of the defendant's former motion (on October 11, 1911), and for such other provision for the defendant's expenses in said suit, and for her support pending said suit, as to said court seemed just and equitable. The motion for alimony and expense money filed in October, 1911, does not appear to be in the record. The motion for an allowance

for alimony and suit money was based upon the affidavits of the defendant, A. F. Flegel, R. Y. Williams, and J. M. Barlew, and upon the records in this case, and said motion was opposed by the affidavits of the plaintiff and John F. Logan and certain record evidence. On the 7th day of January, 1913, before the court passed on said motion for said allowances, the plaintiff filed in the court below a written motion for a decree of said court dismissing said suit. The court below heard said motion for an allowance for alimony and suit money, and the motion for the dismissal of said suit, at the same time, and allowed both motions in the same entry; but the motion for alimony and suit money was granted first, and the suit was dismissed immediately after said motion was allowed. Before said motions were heard, the attorneys for the defendant served on the attorneys for the plaintiff notice that the court below would hear the defendant's motion for alimony and suit money, and the motion of the plaintiff for a dismissal of said suit, together at the same time, at Oregon City, on the 10th day of January, 1913, at 7 o'clock p. m., and that the counsel for the defendant would then move the said court to allow the defendant alimony from the time of the filing of the first motion therefor to the date of the dismissal, and that the court allow counsel fees to the date of the dismissal, for services rendered by counsel for the defendant, and for money expended by said counsel in the defense of said suit, and that counsel for defendant would oppose the allowance of the motion for the dismissal of said suit until the granting of the motion for said allowances. On the 10th day of May, 1913, the court below granted said motion for alimony and suit money, and allowed to the defendant for her living expenses the sum of \$5,665, and \$3,000 to pay for a surgical operation. The total allowance to the defendant for said two purposes was \$8,665; and the court allowed, also, at the same time, the defendant the additional sum of \$2,500 for attorneys' fees in said suit, and then dismissed said suit. The total allowance for the defendant and her attorneys was the sum of \$11,165. The case was not tried on its merits, and no decree was rendered dissolving or annulling the marriage contract.

[1] 1. The first question for consideration is whether the court below had authority to allow the defendant anything on said motion for her living expenses or for a surgical operation. The court below entered an order in her favor for \$8,665 for said purposes. The defendant denies that the court below had authority to allow her anything for said purposes.

Section 512, L. O. L., is the only section of our statute that authorizes the court, before the final decree to require the husband in a suit for divorce or to have declared void the marriage contract, to make provision for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

expenses of the suit, or for the maintenance of any one. It is as follows: "After the commencement of a suit, and before a decree therein, the court or judge thereof may, in its discretion, provide by order as follows: (1) That the husband pay, or secure to be paid, to the clerk of the court, such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, as the case may be; (2) for the care, custody, and maintenance of the minor children of the marriage during the pendency of the suit."

Section 513, L. O. L., provides what the court can do, when a final decree is rendered, declaring void or dissolved the marriage contract, and said section is as follows: "(1) For the future care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper, giving the preference to the party not in fault; (2) for the recovery of the party in fault, and not allowed the care and custody of such children, such an amount of money, in gross, or in installments, as may be just and proper for such party to contribute towards the nurture and education thereof; (3) for the recovery of the party in fault such an amount of money, in gross or in installments, as may be just and proper for such party to contribute to the maintenance of the other; (4) for the delivery to the wife, when she is not the party in fault, of her personal property in the possession or control of the husband at the time of giving the decree; (5) for the appointment of one or more trustees to collect, receive, expend, manage, or invest, in such manner as the court shall direct, any sum of money decreed for the maintenance of the wife or the nurture and education of minor children committed to her care and custody."

Section 511 L. O. L., provides that when a marriage shall be declared void or dissolved, the court shall grant to the person in whose favor the decree is rendered an undivided one-third part in fee of the real property owned by the other party.

Sections 7040 and 7041, L. O. L., authorize any married woman, whose husband is able to support her, but neglects to do so, to maintain a suit against him to obtain a decree compelling him to contribute to her support and the support of their minor children. The sections of our statute set out or referred to supra, are all of the statute law that we have relating to the questions in controversy in this suit.

Section 512, supra, is the only statutory provision that authorizes the court in which a suit for divorce is pending, before a final decree is entered, to require the husband to make any provision for the wife, or their minor children. In this case there are no children. Subsection 1 of said section 512 is the only part of said section that applies to

this case. This subsection authorizes the court to require "that the husband pay or secure to be paid, to the clerk of the court, such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, as the case may be." Under this subsection, the husband could be required to pay to the clerk a sufficient sum to cover attorneys' fees, witnesses' fees, and necessary expense of traveling in attending to the case; but it does not authorize the court to compel the husband to support the wife or pay surgical bills during the pendency of the suit. Possibly, the husband may be liable for such expenses, but payment thereof cannot be enforced under said section 512. The defendant never resided in this state. She resides in California, and the plaintiff may be liable under the laws of that state for her support, and for her surgical bills; but, as to that, we do not know.

It seems clear to us that section 512 confers no authority upon a court to compel the husband, during the pendency of a suit for divorce and before decree therein, to pay the wife alimony for her support or for medical or surgical attendance. In a suit brought by the wife for that purpose, courts of equity may compel the husband, in a proper case, to provide for her support; but relief of that sort cannot be obtained under section 512, supra.

Section 513, supra, applies to suits for divorce, when a decree is granted, dissolving or declaring void the marriage contract, and under that section the court has ample power to grant alimony, etc. But in this case no divorce was granted, and hence said section has no relevancy to the question for decision in this case.

[2] We find no statutory authority for allowing the wife alimony for her support or surgical bills in a suit for divorce, excepting when a decree of divorce is granted. The question arises: Is there any authority in this state, independent of the statute, for granting such alimony? Our statute expressly provides that certain stated things may be done in a divorce suit, before a decree is entered, and that certain other things may be done when a decree of divorce is granted. Can alimony pendente lite be granted for the support of the wife without statutory authority?

In the case of *Weber v. Weber*, 16 Or. 164, 17 Pac. 866 the court says, *inter alia*: "It was conceded upon the argument by both parties that the power to grant a divorce, and such other relief as is usually incident thereto, is purely statutory." The court in that case adopted the view that the powers of the court in divorce cases are statutory.

In *Huffman v. Huffman*, 47 Or. 615, 86 Pac. 594, 114 Am. St. Rep. 943, Justice Moore, delivering the opinion of the court, says: "A few courts of last resort in the United States have maintained that a grant of power to sever the marital relation carries with it.

by necessary intendment authority to allow permanent alimony in the absence of any enactment to that effect. \* \* \* The great weight of judicial utterances, however, is to the effect that all authority to award alimony on decreeing a dissolution of the marriage must be found in the statute expressly conferring the right, which legislation is in general declaratory of the ecclesiastical law."

In *De Vall v. De Vall*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705, the court says: "The authority to grant divorces and to award alimony, though conferred upon a court by statute, carries with it such powers as are expressly given and also such as may necessarily be incidental to its exercise."

In *Rowell v. Rowell*, 68 N. H. 225, the court says: "The question is whether an order can be made granting the libelee an allowance for her support during the pendency of the libel. It is claimed that such an order is authorized by section 12, c. 182, Gen. Laws, which provides that, 'upon any decree of nullity or divorce, the court may restore to the wife all or any part of her estate, and may assign to her such part of the estate of her husband, or order him to pay such sum of money, as may be deemed just, and may compel the husband to disclose, under oath, the situation of his property, and, before or after such decree, may make such orders and use such process as may be necessary.' \* \* \* No other provision for the maintenance of the wife, or for alimony, by a decree of this court, has been known, except the provision authorized by this statute, unless a small sum, sometimes ordered to be paid to the wife to enable her to defend against the application of the husband for a divorce, may be termed an allowance for her support. \* \* \* The order asked for is for alimony before there has been a decree of nullity or divorce. It is contrary to the construction of the statute, settled by long and uniform practice."

In *Harrington v. Harrington*, 10 Vt. 505, the court says: "The statute gives this court, which, in applications for divorces, acts as a court of law, no power to grant alimony, except after divorce granted."

In *Shannon v. Shannon*, 68 Mass. (2 Gray) 287, the Supreme Court of Massachusetts says: "By the English law, alimony pendente lite may be granted. And the argument for the petitioner is that, by conferring jurisdiction in cases of divorce and alimony, authority was conferred to grant all such alimony as the English courts could grant. But we are of opinion that the authority to grant alimony \* \* \* is confined to the cases expressly mentioned in the statutes. And we find that, since the Constitution was adopted, all the statutes, which authorize the granting of alimony, authorize it only after a decree of divorce. \* \* \* If the power, which the petitioner now invokes, ever existed in any tribunal in Massachusetts, either during the time of the colony or the province (of

which no evidence has been submitted to us), we are of the opinion that it ceased, when jurisdiction of divorces and alimony was transferred to this court, and the cases in which it might decree divorces and alimony were specified."

In *Therkelsen v. Therkelsen*, 35 Or. 77, 54 Pac. 886 (a suit for alimony only and not for divorce), the court, discussing the power of the court in divorce cases to make allowances pending the suit, says: "The power of the court to make allowances for the wife during the pendency of the suit for divorce is statutory, and may be exercised: (1) To enable the wife to prosecute or defend the suit, as the case may be; (2) for the care, custody, and maintenance of the minor children of the marriage." It will be noticed that, in stating for what purpose allowances can be made pendente lite, the court in the case just cited did not include allowances for support of the wife."

In *Wilson v. Wilson*, 19 N. C. 378, the court says: "There is no enactment which expressly confers the power (to allow the wife for support pendente lite), and those which are express on the subject of alimony seem rather to deny than grant it; \* \* \* but whatever may be the course dictated by policy, until the Legislature shall have otherwise provided, we think the courts are not authorized to make allowances for alimony, before the complaint of the wife shall be finally tried."

In 1852 the Legislature of North Carolina amended the law of that state as to allowing alimony, and in *Reeves v. Reeves*, 82 N. C. 351, referring to this law, the court says: "And while the act of 1852 was partly declaratory of the common law, it was in one sense a restrictive statute. It only gave alimony to the wife, pendente lite, when she was the petitioner in a proceeding for divorce, and impliedly repealed the doctrine of the common law, which gave the courts power to allot it to her when she was a defendant," etc.

In *Morton v. Morton*, 33 Mo. 617, 618, the court says: "The right of the wife to alimony pendente lite, whether she stood in the position of plaintiff or defendant, was an acknowledged common-law right in England, enforced there by the ecclesiastical courts, who had exclusive jurisdiction of all controversies matrimonial; and, we having adopted the common law, it is likewise a common-law right here, unless the common law in this respect is modified by the section of the act we have quoted. If the statute concerning divorce had been silent on the subject of alimony, we would not hesitate to say that, upon common-law principles, the power of the circuit court \* \* \* was ample to order the allowance in this court; but as the act, in giving the power to award alimony pendente lite, gives it expressly where the wife is plaintiff, it must be understood as an expression of the legislative will that the power



shall be withheld when the wife is defendant. Upon any other supposition, the provisions of the act under consideration would be without meaning or operation."

There is a conflict in the decisions as to whether the common law, in relation to divorces and the granting of alimony, is in force in the United States, in the absence of statutes covering those subjects. This court held, in *Huffman v. Huffman*, supra, that "the great weight of judicial utterances, however, is to the effect that all authority to award alimony on decreeing a dissolution of the marriage must be found in the statute expressly conferring the right, which legislation is in general declaratory of the ecclesiastical law." We conclude that it is the established rule in this state that all claims to alimony and allowances in suits for divorce are to be determined by our statute on that subject. This statute should be reasonably construed. We believe that the question whether our courts have authority to allow pendente lite a wife alimony for her support or medical treatment has never been determined by this court. In a case or two the court has referred to such allowances, but we believe such references were mere dicta. The question for decision depends upon the meaning of section 512, supra. The only allowances authorized by said section to be made are: (1) "That the husband pay, or secure to be paid, to the clerk of the court such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, as the case may be;" and (2) "for the care, custody and maintenance of the minor children of the marriage, during the pendency of the suit." This section authorizes the court to require the husband to provide funds to enable the wife to prosecute or defend the suit as the case may be, and for the maintenance of the minor children during the pendency of the suit; but nothing is said in said section concerning the support of the wife pendente lite. Section 513, supra, authorizes the court, when a decree of divorce is granted, inter alia, to grant a decree "for the recovery of the party in fault, \* \* \* such an amount of money, in gross or in installments, as may be just and proper for such party to contribute \* \* \* to the maintenance of the other." Section 512, supra, expressly authorizes the court to require the husband to provide funds to enable the wife to maintain or defend the suit, and for the maintenance of minor children; but it omits to authorize the court to require the husband to provide for the maintenance of the wife pendente lite. Section 513, supra, expressly provides that by the decree of divorce the court may provide for the recovery of money from the party in fault for the support of the other party. 86 Cyc. p. 1122, says: "In accordance with the maxim 'expressio unius est exclusio alterius,' when a statute enumerates the things upon which it is to operate, or forbids certain things, it is

to be construed as excluding from its effect all those not expressly mentioned." We conclude that the Legislature did not intend that a husband should be required to provide support for his wife pendente lite and intended that that matter should not be passed upon until a decree of divorce should be granted. The wife could proceed under sections 7040 and 7041, supra, to obtain support pendente lite, and under our statute (section 7039, L. O. L.) the husband is liable for the support of the family. Probably the wife might exonerate him from this liability by misconduct. We hold that the court below exceeded its authority in allowing the defendant \$8,665 for her support pendente lite, and for a surgical operation. The court below allowed the plaintiff also \$2,500 as attorneys' fees in said suit.

[3, 4] 2. The plaintiff contends that the court below had no authority to make said allowance, and, also, that the amount allowed is excessive. Said suit was not tried on the merits, and, before the court below made said order of allowance, the plaintiff filed his written motion for a dismissal of the suit. The motion for said allowance was filed quite awhile before the filing of the motion for the nonsuit. Both motions were heard at the same time, and the motion for the allowance was allowed first, and the case was dismissed immediately after the granting of the allowance. The plaintiff contends that the court had no right to make any allowance after the motion to dismiss was filed, and that allowances can be made only for future services or expenses. The motion for the allowance was filed on May 12, 1912, and the motion to dismiss the suit was filed on January 7, 1913, more than seven months after the motion for the allowance was made.

The right to dismiss an action or a suit is not an absolute one that the plaintiff can exercise without leave of the court. The court can compel a plaintiff to pay the costs of an action or a suit before dismissing it. *Mitchell v. Downing*, 23 Or. 450, 32 Pac. 394.

This court held, in *Jones v. Jones*, 59 Or. 314, 117 Pac. 414, that, in a divorce case, when an order for suit money had been made, and the money had not been paid, and the parties had settled the case, and asked that the case be dismissed, the court could render such judgment or order for suit money as should be reasonable and proper, before dismissing the case. When, in a divorce case, the wife has incurred liabilities for attorneys' fees, and other expenses of the suit, the trial court may, after such expenses have been incurred, by order, compel the husband to advance the money to pay them, in a proper case, and may refuse to grant the husband a nonsuit until he has paid them. *Schulz v. Schulz*, 128 Wis. 28, 107 N. W. 302; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914; *Woodward v. Woodward*, 84 Mo. App. 328; *Lamy v. Catron*, 5 N. M. 373, 23 Pac. 777; *Waters v. Waters*, 49 Mo. 385; *Jones v.*

Jones, 111 Ill. App. 396; Thorndike v. Thorndike, 1 Wash. T. 175.

[5] There are cases holding the reverse of the above proposition, but we think that the rule stated supra is the better one. A wife, sued for divorce, may employ counsel to attend to the case for her, and, at any time before the final decree in the case is granted, the court may, in its discretion, require the husband to pay for the services so rendered, although the order requiring such payment be granted after the services of counsel have been rendered. We hold that the court below had authority to allow to the defendant the amount of money necessary to pay all the reasonable expenses that she was subjected to in making her defense. The plaintiff is worth about a million dollars, and is able to pay all expenses of said suit. It seems that he and the defendant lived together a little more than four years, and the defendant swears that they spent about \$3,000 per month while they lived together. He gave the defendant more than \$30,000 during the time that they lived together; but the defendant testifies that she has practically nothing left except some jewelry and clothing, and hence she contends that the plaintiff should be compelled to pay all the expenses of her defense.

The defendant was never a resident of this state, and, at the time that this suit was commenced, and for a long time prior thereto, she resided in California, about 1,200 miles from the place where this suit was commenced. The summons was served by publication, and a decree declaring the marriage contract between the parties void was obtained by the plaintiff without the defendant's having received knowledge that any suit had been brought. The defendant learned of the rendition of said decree, and employed counsel and applied to the court below to have said decree set aside, and be permitted to answer. After a hard contest, the court below set aside said decree and allowed her to answer. The plaintiff then applied to the court below for a reconsideration of the motion to set aside the said decree. This application was denied. The plaintiff then appealed to this court, from the order of the court below setting aside said decree and permitting the defendant to answer. This court, as stated supra, dismissed said appeal. It seems that the plaintiff advanced funds to pay the defendant's counsel for their services in attending said cause in the Supreme Court, and hence their services on that appeal will not be considered in passing on the allowance made by the court below for counsel fees.

[6] In her affidavit for an allowance, the defendant says that, by reason of the great distance from her home to the place where this suit was brought, she has spent in traveling and other expenses, in attending to her

defense, \$1,000. The plaintiff in his affidavit denies that she spent \$1,000; but he does not deny that she spent any amount less than that. The proceedings in this case were all had in the court below, and that court was in a better position to judge of the value of the services of the defendant's counsel than this court is. The court below had knowledge of all the services that were rendered in that court. The mass of papers printed in the abstract shows that a large amount of work was done by the defendant's counsel. The court below allowed the defendant for attorneys' fees the sum of \$2,500, but did not allow her anything for money spent by her for traveling and other expenses connected with her defense. The amount allowed for attorneys' fees appears to be very large. The statutes vests the authority in the trial courts to make allowances in their discretion. This court can review the action of trial courts in making such allowances only for abuse of discretion. Trial courts should be careful in passing on such matters, and should in no case allow more than a reasonable sum, whether the husband be rich or poor. Taking into consideration all the facts of this case, we are unable to say that the trial court abused the discretion vested in it in making said allowance.

The order of the court below is modified so as to allow the defendant \$2,500 as attorneys' fees and disallow the whole of the \$3,665 for her support and for the surgical operation.

#### OLDS, County Treasurer, v. LITTLE HORSE CREEK CATTLE CO. (No. 782.)

(Supreme Court of Wyoming. May 15, 1914.)

##### 1. TAXATION (§ 177\*)—ASSESSMENTS—NATURE OF ASSESSMENTS.

In view of the statutes requiring real property to be listed to the owner and assessed at its true value in money, a general assessment against school lands which had been sold under a certificate of purchase, but title to which had not yet passed, made in the usual manner of assessing lands, is a tax on the land as such, and not a tax on the interest of the purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 302, 303; Dec. Dig. § 177.\*]

##### 2. TAXATION (§ 247\*)—EXEMPTIONS—PERSONS LIABLE FOR TAXES.

The rule that a vendee in possession under a contract to purchase is liable for taxes cannot be applied so as to permit the taxation of property which is declared exempt by the Constitution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 326-330; Dec. Dig. § 247.\*]

##### 3. TAXATION (§ 79\*)—PERSONS LIABLE—VENDOR IN POSSESSION.

One in possession under an option to purchase, or to complete a purchase, is not liable for taxes under the rule that a purchaser in possession must discharge the taxes, for, if the purchaser is not bound to pay the purchase money, the vendor cannot be treated in equity as the owner of the money and the purchaser the owner of the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 139, 166; Dec. Dig. § 79.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

**4. TAXATION (§ 177\*)—PERSONS LIABLE FOR TAXES—PURCHASERS—"PROPERTY."**

A vendee in possession under a contract of purchase is liable for taxes upon the theory that the vendor is the beneficial owner of the purchase money, and the vendee of the land, and hence if the state in selling public lands on installments occupies no better position than that of an ordinary vendor, yet having retained the title, as security for the unpaid purchase money, it has an interest in the land that is "property" within Const. art. 15, § 12, exempting from taxation state property, and the land cannot be taxed in such a manner as to imperil that interest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 302, 303; Dec. Dig. § 177.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5723; vol. 8, pp. 7768-7770.]

**5. TAXATION (§ 177\*)—PROPERTY SUBJECT—STATE LANDS.**

Const. art. 18, § 1, provides that the state may dispose of its school lands at public sale only and for not less than \$10 per acre. Comp. St. 1910, §§ 634, 637, 638, respectively, provide that, when any state lands shall have been purchased according to law, the board shall make and deliver to the purchaser a certificate of purchase, that whenever the purchaser has complied with the conditions of law prescribed for the sale, and has paid all of the purchase money with interest, he shall receive a patent for the land purchased, and that when the purchaser shall have been delinquent for one year in making the stipulated payments, the board may again sell the land. Const. art. 15, § 12, exempts from taxation the property of the state, but the revenue law makes no distinction affecting the interest conveyed upon a sale of land for delinquent taxes between the property of an individual and that held by an individual under a contract of purchase from the state. *Held* that, as the state retains an interest in land upon which a purchaser enters under a contract of purchase, such land may not be assessed for taxes as such, though the purchaser's interest may be assessed; for a sale of the property for delinquent taxes might indirectly destroy the state's interest and violate the constitutional provision fixing the minimum price for the sale of state lands.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 302, 303; Dec. Dig. § 177.\*]

**6. TAXATION (§ 607\*)—ASSESSMENTS—PERSONS ENTITLED TO OBJECT.**

A purchaser of state lands under a contract providing for payment in installments and retention of title by the state may object to a tax on the land as land, on the ground that the entire property, instead of his interest, was illegally assessed against him.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1230; Dec. Dig. § 607.\*]

Error to District Court, Laramie County; William C. Mentzer, Judge.

Action by the Little Horse Creek Cattle Company, a corporation, against Ray K. Olds, County Treasurer. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Samuel M. Thompson and Wilfred O'Leary, both of Cheyenne, for plaintiff in error. Thomas T. Hunter, of Cheyenne, for defendant in error.

POTTER, J. This is a proceeding in error for the review of a judgment in an action brought by the Little Horse Creek Cattle

Company, a corporation, against the county treasurer of Laramie county, enjoining the defendant therein, as said treasurer, from selling the south half of the south half of section 16 in township 18 north, of range 62 west of the Sixth Principal meridian, for taxes levied upon the same for the year 1912, and also restraining the performance by the defendant of any and all acts which might tend to enforce the payment of such tax by the plaintiff.

The land in question is state school land, that is to say, it comes within the description of lands granted to the state for the support of common schools, and the plaintiff is the owner of a certificate of purchase executed by the proper state officers reciting a sale of the land to the plaintiff on December 23, 1911, under and subject to the laws providing for the sale of state lands, for the sum of \$1,920, and among other terms and conditions of the sale that the purchaser had paid \$192, leaving a balance due of \$1,728, payable in 18 annual installments with interest thereon at a stated rate payable annually; and that the purchaser may pay any installment at any time if interest is paid thereon to the time of the next annual payment. It is conceded that no part of said balance had been paid when the land was assessed for taxation except the installment or installments that had become due. The cause was submitted upon the pleadings and an agreed statement of facts, the latter reciting with reference to the tax proceedings that the land was assessed for taxation as land, and in the same manner as all other lands in the same vicinity; that the assessment was in no respect an assessment of the interest or equity of the purchaser; and that the tax is a tax on the land as land, and not a tax on the interest or equity of the plaintiff in the land. The only question discussed by counsel and deemed by them to be presented for consideration upon the facts is whether the land as such was subject to taxation in 1912, or, stated generally, whether before the amount of the purchase price of state land has been paid in full, and the purchaser has thereby become entitled to a patent conveying the title to him, the land is taxable as land as the property of the owner of the certificate of purchase.

By the terms and conditions of the grant and the provisions of the Constitution accepting it, the state may dispose of its school lands only at public sale, and for not less than \$10 per acre. Act of Admission, §§ 5, 11; Const. art. 18, § 1. These restrictions as to price and manner of sale are recognized by the statute authorizing and regulating the sale of school and other state lands by providing that said lands shall be sold only at public auction to the highest responsible bidder at not less than three-fourths of the appraised value, and not less than \$10 per acre, except that a preference

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

right to purchase a certain quantity of land at its appraised valuation is given to an actual and bona fide settler thereon at the time of the adoption of the Constitution; the statute following the Constitution in that respect. But the statute provides, as to terms of payment, that not less than 10 per cent. of the purchase price shall be paid in cash on the day of the sale, and the balance is not to exceed 18 equal annual payments with interest thereon at the rate of 4 per cent. per annum and 6 per cent. per annum on all amounts not paid when due; that interest on all deferred payments shall be paid annually; and that the purchaser may pay in full at the time of sale, or may pay any annual installment at any time if interest is paid on the same to the time of the next annual payment. Comp. Stat. 1910, § 634, as amended by chapter 25, Laws of 1911. The other material provisions of the statute relating to such sales are substantially as follows: When any state land shall have been purchased according to law, the board shall make and deliver to the purchaser a certificate of purchase containing the name of the purchaser, a description of the land, the sum paid, the sum remaining unpaid, the amount of annual payments including the accrued interest, and the date on which each deferred payment falls due; such certificate to be signed by the Governor and countersigned by the commissioner of public lands. Comp. Stat. 1910, § 637. Whenever the purchaser, or his assign, has complied with all the conditions of the law providing for the sale, and has paid all the purchase money, together with the lawful interest thereon, he shall receive a patent for the land purchased; such patent shall run in the name of the state, and shall be signed by the Governor, countersigned by the commissioner of public lands, and attested by the seal of the proper land board, and shall convey a good and sufficient title to the person therein named in fee simple. Id. § 638. Whenever any purchaser shall fail to make any of the payments stipulated in the certificate of purchase, and the same remains unpaid for one year after the time when it should have been paid, "the board may sell such land again. In case of such sale, all previous payments made on account of such land shall be forfeited to the state; such land shall revert to the state, and the title thereto shall be in the state as if no sale thereof had ever been made." Id. § 639. The board may require of each purchaser of state lands a bond, upon such conditions as the board may determine. Id. § 642.

It does not appear that any bond was required of the plaintiff as the purchaser of the land in question. The certificate of purchase, after reciting the terms of payment, states the conditions of the sale as follows: "Now therefore, the said Little Horse Creek Cattle Company, its successors or assigns, will be entitled to a patent from the state

of Wyoming to the land aforescribed, upon the surrendering of this certificate of purchase and fully complying with all the provisions of the statute in such case made and provided, and upon the payment of the said sum of one thousand seven hundred twenty-eight dollars, the balance due, with interest thereon as above provided. Time is an essential element in the premises, and the purchaser herein agrees, in accepting this certificate of purchase, to make the payments as above specified, or, on failure so to do, to immediately vacate said premises; thereafter remaining in possession of said property shall be unlawful, and the occupier may be summarily ejected, and the right of possession shall revert to the state of Wyoming, and previous payments made on account of such land shall be forfeited to the state, and the title thereto shall be in the state, the same as if no sale had been made."

[1] We have previously stated what counsel concede to be the only question presented upon the agreed facts, viz., whether state land sold as this land was sold is subject to taxation as land as the property of the purchaser, before the latter has become entitled to a patent for the land by paying the full amount of the purchase price. Counsel not only concede but insist that this eliminates any question as to the right to assess and tax the interest or equity of the purchaser in the land; and it was clearly intended by the agreed statement to show that the taxing authorities do not claim that this assessment and tax might be sustained in whole or in part as an assessment of or a tax upon the purchaser's interest or equity. While the statement that such interest was not assessed or taxed seems to involve a conclusion as to the legal effect of the assessment, we are not disposed to dispute its correctness, since there is no other showing as to the form and manner of listing the property. And, in view of the statutory provisions regulating the assessment of property for taxation, which proceed, as was said in *Hecht v. Boughton*, 2 Wyo. 385, "wholly upon the idea that property shall be listed to the owner," and require that real property shall be assessed at its true value in money at private sale, the general language of the statement certainly permits the inference that the land itself was assessed by its proper description at its true value as land, and not otherwise, and that the intent and purpose of the assessment was to assess the entire interest which would ordinarily be covered and bound by an assessment of land to the owner; that is to say, the full ownership—the fee or what is equivalent to it. See *Colorado Company v. Commissioners*, 95 U. S. 259, 265, 24 L. Ed. 495; *Wright v. Cradlebaugh*, 3 Nev. 341.

The objection to the tax is based upon the provision of the Constitution declaring that the property of the state shall be exempt from taxation, it being contended that the land in question is property of the state with-

in the meaning of that provision. The section of the Constitution declaring the exemption reads as follows: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide. Article 15, § 12. It is contended in support of the assessment and tax that the state retains the legal title merely as security for the deferred payments, and that for the purpose of taxation the property belongs to the purchaser, citing *Courtney v. Missoula County*, 21 Mont. 591, 55 Pac. 359, and *Edgington v. Cook*, 32 Neb. 551, 49 N. W. 369; and citing also cases to the effect that a vendee in possession of land under a contract of purchase is liable for the taxes, although the legal title remains in the vendor until the purchase price shall be fully paid. For reasons which will be explained before closing the discussion, we think the cases thus cited are clearly to be distinguished from the case at bar, with the exception of *Edgington v. Cook*. That case was decided in Nebraska in 1891 and held, contrary to the well-established rule on the subject, that land purchased from the United States was taxable as the property of the purchaser, while the government held the legal title, and part of the purchase price remained unpaid, and before the purchaser had become entitled to a patent. But the case was overruled in 1894 by the case of *Graff v. Ackerman*, 38 Neb. 720, 57 N. W. 512, involving precisely the same question, wherein the court not only concluded that until the purchase price was paid in full the land was not taxable, but said that, having so concluded, "the case of *Edgington v. Cook* cannot longer be accepted as authority."

[2] The cases cited upon the general proposition that a vendee in possession must pay the taxes, although the vendor is not bound to convey until the payment of the purchase price, are cases determining such liability as between the vendor and vendee, where the property would be subject to taxation whether regarded as the property of either party; and that may be a proper rule in the absence of a provision in the contract or statute to the contrary. As suggested, such rule assumes that the property is subject to taxation, and it may not be important whether it is assessed to the vendor or vendee, though that matter usually depends upon the statute. See 1 *Cooley on Taxation* (3d Ed.) 721, 726-731, 739. Without stopping to inquire whether under our statutes the property could properly be assessed to the vendee, or whether the rule holding the vendee liable for the taxes would be applicable at all, it cannot properly be applied so as to allow the taxation of property or an interest in property declared

to be exempt by constitutional provision, or by some principle putting it beyond the power of the Legislature to authorize its taxation. *Mass. Gen. Hospital v. Boston*, 212 Mass. 20, 98 N. E. 588. And it is at least doubtful whether the rule would apply upon the facts in this case as to the terms and conditions of the contract.

[3] So far as the rule making the vendee liable for the taxes rests upon judicial decision it results from the application of the doctrine of equitable conversion respecting contracts for the sale of land prior to the conveyance of the legal title, whereby, in equity, the vendee is treated as the beneficial or equitable owner of the land, and the vendor as the owner of the purchase money, and the vendor becomes, as to the land, a trustee for the vendee, subject to the performance of the latter's obligations, and the vendee, as to the purchase money, a trustee for the vendor, who has a charge or lien on the land or the equitable estate of the vendee therefor. This rule, for many purposes, determines in equity the rights of the parties and others who have succeeded to the interest of either party by transfer or otherwise; and the rule is itself but the consequence of the familiar doctrine of courts of equity that for many purposes things agreed to be done are treated as if they were actually done, and necessarily refers to a valid contract—one binding upon both parties, containing not only an obligation on the part of the vendor to convey upon payment of the purchase price, but an obligation on the part of the vendee to purchase and pay the purchase money, and has no reference to a mere option to purchase or to complete the purchase. 3 *Pomeroy's Eq. Juris.* (3d Ed.) §§ 1260, 1261, and note; *Lysaght v. Edwards*, 2 L. R. Ch. Div. 499; *Milwaukee v. Milwaukee County*, 95 Wis. 424, 69 N. W. 796; *People v. Shearer*, 30 Cal. 645, 648. It is evident that, if the purchaser is not obligated to pay the purchase money, the vendor cannot be treated even in equity as the owner of the money, and therefore, in such case, there would be no ground for applying the doctrine of equitable conversion. In *Milwaukee v. Milwaukee County*, supra, it appeared that, without incurring any corporate liability, the city of Milwaukee was entitled under a contract to the possession of certain lands upon making the first payment provided for in the contract, and would be entitled to a conveyance upon paying the balance of the purchase price within a specified period, and the question was whether the lands were exempt from taxation under a statute declaring all property owned exclusively by any city to be exempt, or another statute providing that the city may lease, purchase, and hold real or personal estate sufficient for the convenience of the inhabitants thereof free from taxation. It was held that the principle, that the vendee in possession under a contract of pur-

chase binding him to pay the purchase money is the equitable owner, and, in the absence of express agreement, must pay the taxes, had no application, and the court said: "The city may choose to acquire the title by paying the sums named in the contract, or it may choose to cease paying, and forfeit its option. It now has possession under an option, but it has no lease, and certainly has no title, much less an exclusive title."

It is not clear that our statutes require a purchaser of state lands to bind himself to complete the purchase by making the payments provided for. The certificate of purchase provides that the purchaser agrees, in accepting the certificate, "to make the payments as above specified, or, on failing so to do, to immediately vacate said premises." A provision like the one quoted in a certificate of purchase under a similar statute in Colorado, in connection with a bond which had been given by the purchaser conditioned for the payment of the purchase price at the times and in the manner provided in the certificate of purchase, was construed in that state, and it was held that such condition of the bond would be satisfied by a prompt vacating of the premises. *People v. Clough*, 16 Colo. App. 120, 63 Pac. 1066.

[4] But under the rule in equity aforesaid defining the position of the parties to a contract for the sale of land, while the vendee is spoken of as the equitable owner of the land, and the vendor as the owner of the purchase money, and trustee of the land or the title for the purchaser, the vendee does not have the complete equitable title, for he is trustee of the purchase money, and his estate is subject to the equitable interest of the vendor usually referred to as a charge or lien upon the property for the unpaid purchase money. And he does not acquire a complete equitable title until upon paying the purchase money and complying with the other conditions precedent he has become entitled to a conveyance. 15 Cyc. 1087; *Diver v. Friedhelm*, 43 Ark. 203; *Dorn v. Baker*, 96 Cal. 206, 31 Pac. 37; *U. S. v. Milwaukee* (C. C.) 100 Fed. 828; *Ry. Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Sargeant v. Herlick*, 221 U. S. 404, 31 Sup. Ct. 574, 55 L. Ed. 787; *Thygerson v. Whitbeck*, 5 Utah, 406, 16 Pac. 403; *Joy v. Midland State Bank*, 28 S. D. 262, 133 N. W. 276; *McCaslin v. State*, 44 Ind. 151, 175. Nor is the vendor prior to the full payment of the purchase price a mere trustee. He is such trustee subject to the performance of the vendee's obligations, and until those obligations are performed the vendor not only holds the legal title but has a substantial interest in the property. In *Pomeroy's Equity Jurisprudence* (3d Ed.), in section 1260, it is said to be misnomer to call the vendor's title a lien; that he has no need of a lien, since his legal title is a more efficient security. And in section 1261 it is said: "The so-called lien of the vendor is only another mode of expressing his equi-

table interest thus arising from the doctrine of conversion; and, so far as it has any distinctive signification, it simply means his right to enforce his claim for the purchase money against or out of the vendee's equitable estate by means of a suit in equity."

It was said by Lord Cairns in a leading English case on this subject, explaining the position of the parties to a contract of sale: "The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee; he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest, if anything should be done in derogation of it. The relation therefore of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." *Shaw v. Foster*, L. R. 5 H. L. 321, 27 L. T. Rep. (N. S.) 281, 283. In the earlier case of *Wall v. Bright*, 1 Jacob & Walker, 494, 37 Eng. Reprint, 456, it was said: "The vendor is therefore not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate." The learned judge had previously explained some of the distinctions between a mere trustee and one made a trustee constructively by entering into a contract to sell, as follows: "A mere trustee is a person who not only has no beneficial ownership in the property, but never had any; and could therefore never have contemplated a disposition of it as of his own. In that respect he does not resemble one who has agreed to sell his estate, that up to the time of the contract was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was at one time both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract; and, in the interim between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee sub modo, and provided nothing happens to prevent it. \* \* \* The agreement is not for all purposes considered to be completed. Thus, the purchaser is not entitled to possession, unless stipulated for; and, if he should take possession, it would be a waiver of any objection to the title. The vendor has a right to retain the estate in the meantime,

liable to account if the purchase is completed, but not otherwise. Till then it is uncertain whether he may not again become sole owner; the ownership of the purchaser is inchoate and imperfect; it is in the way to pass, but it has not yet passed." When the purchase price has been paid, the vendor is then a mere trustee of the legal title, but where there has been only part payment he is a trustee to the extent of the money paid. *Rose v. Watson*, 10 H. L. Cas. 678, 10 L. T. Rep. (N. S.) 106; 1 *Perry on Trusts* (6th Ed.) § 231; *Winslow v. Crowell*, 32 Wis. 639; *U. S. v. Milwaukee* (C. C.) 100 Fed. 828.

[5] Therefore, if the state occupies no better position than that of a vendor under an ordinary contract of sale, it has an interest in the land, and that interest clearly is property within the meaning of the provision of the Constitution exempting the property of the state from taxation, and the exemption certainly prevents the taxation of the land in such a manner as to include or imperil that interest. In some of the states provision seems to be made for taxing state lands in a manner intended to avoid a conflict with a constitutional provision exempting state property from taxation; such provisions usually protect the interest of the state either by authorizing merely the interest of the purchaser to be assessed and taxed and stating a rule for its valuation, or requiring the lands to be assessed to the purchaser the same as other lands, but declaring that for nonpayment the interest of the purchaser only shall be sold, and reserving to the state all its rights under the contract of sale. Statutes not so clear in other states have been construed as having the same effect; and it has come to our notice that in at least one state lands conditionally sold by the state are, by statute, expressly exempted from taxation until the price is fully paid. Our statutes contain no provision expressly referring to the matter of taxing state lands after a conditional sale and while the purchase price remains unpaid, nor does the revenue law make any distinction respecting the title or interest to be sold or conveyed upon a sale of land for delinquent taxes, but seems to provide for a sale of the fee in all cases, subject only to the rights of redemption provided by law. And the certificate of purchase makes no provision for the payment of taxes. In these respects, as well as in respect of the right of the purchaser to a patent only upon complying with all the conditions of the purchase, the situation is analogous to that of lands disposed of by the United States under the public land laws, or sold or granted under an act of Congress requiring the payment of the purchase price or the compliance with certain conditions before the issuance of a patent.

Under the familiar doctrine that the property of the United States situated within the limits of a state is exempt from state taxation, it is conclusively settled that the ex-

emption continues until the grantee or purchaser becomes entitled to a patent through the performance of all the conditions upon which the issuance of a patent is made to depend, but when such conditions have been fully performed, so that the government holds nothing but the naked legal title, the exemption ceases, and the property may then be taxed to the person who has acquired the complete equitable title. *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Ry. Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Colorado Co. v. Commissioners*, 95 U. S. 259, 24 L. Ed. 495; *Van Brocklin v. Tennessee*, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845; *Sargeant v. Herrick*, 221 U. S. 404, 31 Sup. Ct. 574, 55 L. Ed. 787; *U. S. v. Southern Oregon Co.* (C. C.) 196 Fed. 423; *Young v. Charnquist*, 114 Iowa, 116, 86 N. W. 205; *Copp v. State*, 69 W. Va. 439, 71 S. E. 580, 35 L. R. A. (N. S.) 669; *Mint Realty Co. v. Philadelphia*, 218 Pa. 104, 66 Atl. 1130, 11 Ann. Cas. 388; *Mariner v. Oconto Land Co.*, 142 Wis. 531, 126 N. W. 34; *People v. Shearer*, 30 Cal. 645; *Cent. Pac. R. R. Co. v. Howard*, 52 Cal. 227; *Iverson v. Hance*, 1 Wyo. 270; *Board of Com'rs v. Shaffner*, 12 Wyo. 177, 74 Pac. 88, 109 Am. St. Rep. 971. The principle that lands sold by the United States may be taxed before the legal title has been parted with by issuing a patent "is to be understood," as said in *Ry. Co. v. Prescott*, supra, "as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right." And in the recent case of *Sargeant v. Herrick*, supra, it was said by Mr. Justice Van Devanter, speaking for the court, considering the right to tax land claimed to have been located with a military bounty land warrant: "As the state was without power to tax the land until the equitable title passed from the United States, and as that title did not pass until there was a full compliance with all the conditions upon which the right to a patent depended (*Wisconsin Cent. R. R. Co. v. Price Co.*, 133 U. S. 496, 505 [10 Sup. Ct. 341, 33 L. Ed. 687]), it is apparent that the validity of the tax title depends upon the question whether the location of the warrant, \* \* \* without more, gave a right to a patent." The principle applies not only to the disposal of lands under the public land laws, but to the sale of lands or other property of the United States on credit, where, until full payment of the purchase price, the purchaser does not become entitled to a patent conveying the legal title. *U. S. v. Milwaukee* (C. C.) 100 Fed. 828; *Copp v. State*, supra; *Mint Realty Co. v. Philadelphia*, supra; *Logan v. Board of Commissioners*, 51 Kan. 747, 33 Pac. 603.

The case of *United States v. Milwaukee* involved the right to levy city and county taxes upon premises on which the building oc-



cupied by the federal offices was located; the said premises and building having been disposed of under a contract pursuant to an act of Congress providing that the purchase price should be paid—one-fourth on January 1, 1892, and the balance in three equal annual payments, with 6 per cent. interest per annum, and that the premises should be conveyed by a quitclaim deed when the purchase money should be fully paid. In holding the property exempt from taxation while part of the purchase price remained unpaid, the court said: "It may be that the purchaser may not complete his payments, in which case the title will remain in the United States of America. And so long as the government has a monetary interest in the property, retaining the legal title, the property is the property of the United States, so far as the question of taxation is concerned. It is true, the government holds the title in trust for the purchaser, so far as he has made payments; but that is liable to be extinguished by forfeiture for nonpayment of the remainder, and until the purchase price of the property has been fully paid, and the whole equitable interest in the property vested in the purchaser, and nothing remains but for the United States to issue its patent pursuant to the agreement, in the judgment of the court that property is not subject to state taxation."

A like question was presented in *Copp v. State*, supra. We quote a few extracts from the opinion which are quite in point: "By the terms of sale the government retains title until all the purchase money is paid, and, upon payment in full, is to make a quitclaim deed to the purchasers. \* \* \* Has the United States government such an interest in the property as entitles it to be exempt from taxation by the state, for the year 1900? It has the legal title and a vendor's lien \* \* \* for three-fourths of the purchase price. None of the deferred payments were due when the taxes for that year were assessed. Do these facts not show that the government has such an interest in, or claim upon, the property as will exempt it from state taxes? \* \* \* It is insisted by counsel for plaintiffs in error that the government has parted with its interest in the property, that it is simply the holder of the legal title, and the purchasers are the equitable owners. It is true they are the purchasers and have an equitable right in the property, and under the terms of their contract are at present occupying it and receiving the rents and profits. But, notwithstanding, must they not be complete equitable owners; that is, must they not have paid all the purchase money, and must they not be in a position to demand of the government a deed for the land, before they can be regarded, in law, as such equitable owners as will make the property liable for taxes? From a careful consideration of the following decisions such seems to be the requirement of the law. \* \* \* In view of these decisions we are bound to hold

that the land purchased of the United States by C. H. Copp and his associates is not liable for state, county, or district taxes, so long as the United States has any claim upon it for any portion of the purchase money. If it were subject to taxation, it would also be liable, under our statute law, to be sold for their nonpayment, and in such case, if not redeemed, complete title to the entire interest in the land would pass to the tax purchaser. Under the West Virginia statute it is not alone the interest of Copp and his associates in the land that is taxed, but it is the entire interest and estate therein on which taxes are assessed, and to suffer it to be taxed, so long as any portion of the purchase price remains unpaid, might operate as a serious embarrassment to the government in the enforcement of the claim for the purchase money."

In *Railway Co. v. McShane*, supra, the court said in the opinion that, if the land could be sold for the taxes, "it must be valid if the land is subject to taxation, and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose." And in *Colorado Co. v. Commissioners*, 95 U. S. 259, 265, 24 L. Ed. 495, where the right was questioned to assess and tax certain lands that had been granted to the heirs of one Nolan and confirmed by an act of Congress, which provided that the confirmation should not become effective until the expense of the public surveys showing the location of the lands had been paid by the grantees, it was said by the court that the provision for the payment of the expense of surveys suspended the vesting of title in the claimants, or of any perfect right to the title until such expense was paid, and that a sale of the land under territorial authority, if held to be a sale on a valid tax, "might very seriously embarrass the assertion of the rights of the government in the premises. If the tax had been levied on the equitable claim of these holders under Nolan, whatever that is, the case might be different. But this case shows that it is the land which is taxed, and the sale would convey the title, or nothing." But the principle that the property of the United States is not taxable by the authority of a state until the complete equitable title has passed out of the government does not prevent the taxation of such possessory rights as the purchaser may have. *Cent. Pac. R. R. Co. v. Nevada*, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. Ed. 1057; *State v. C. P. R. R. Co.*, 21 Nev. 247, 30 Pac. 686; *Malish v. Arizona*, 164 U. S. 599, 17 Sup. Ct. 193, 41 L. Ed. 567; *People v. Shearer*, 30 Cal. 645; *People v. Cohen*, 31 Cal. 210. And the purchaser's improvements on the land may be taxed. *People v. Shearer*, supra.

An act of Congress providing for the sale of Indian reserve lands situated in the state of Kansas and that one-fourth of the purchase price should be paid at the time of the



sale, and the remainder in three equal annual installments with a stated rate of interest, expressly declared that nothing in the act should be so construed as to prevent the lands from being taxed under the laws of the state of Kansas, as other lands are or may be taxed in that state, from and after the time of the first payment; and it was provided in a later act as to said lands that they should be subject to taxation according to the laws of said state after the first payment, but that no sale for taxes should operate to deprive the United States of the lands or any part of the purchase price, but that, if default be made in any installment of the purchase price, the tax-sale purchaser might pay so much of the purchase price as remained unpaid, and thereupon become entitled to receive a patent for the same as though he had made due settlement thereon. By reason of such consent of Congress, it was held by the Supreme Court of Kansas, in *Logan v. Board of Commissioners*, 51 Kan. 747, 33 Pac. 603, that the lands might be taxed before final payment of the purchase price, but it was said in the opinion: "It must be conceded that, if Congress had not expressly provided that the lands referred to 'shall be [after the first payment is made thereon] subject to taxation according to the laws of the state of Kansas, as other lands are or may be taxed in said state,' the lands in dispute would not be taxable under any of the provisions of the tax laws."

The Constitution of this state declaring without qualification that the property of the state shall be exempt from taxation, and it being admitted in this case that the interest of the plaintiff, as the owner of the certificate of purchase, was not assessed or taxed, but that the land was assessed and taxed as land, and as other lands are taxed, the doctrine aforesaid of the cases involving the right of the state to tax property of the United States is clearly applicable. *Corcoran v. City of Boston*, 185 Mass. 325, 70 N. E. 197; *Corcoran v. City of Boston*, 193 Mass. 586, 79 N. E. 829; *De Moines N. & R. Co. v. Polk County*, 10 Iowa, 1; *Denniston v. Unknown Owners*, 29 Wis. 351; *Hardy v. Hartman*, 65 Miss. 504, 4 South. 545; *Witt v. Armstrong* (Ark.) 6 S. W. 225; *Zumstein v. Consolidated Coal & Min. Co.*, 54 Ohio St. 264, 43 N. E. 329; *Webster v. Board of Regents*, 163 Cal. 705, 126 Pac. 974; *McCaslin v. State*, 99 Ind. 428; *Willey v. Koons*, 49 Ind. 272; *Henderson v. State*, 53 Ind. 60; and see note to *Copp v. State*, 35 L. R. A. (N. S.) 669, 674. There can be no doubt that the payment of the purchase money as required by statute and the certificate of purchase is a condition precedent to the acquirement by the purchaser of a complete equitable title or a right to a patent conveying the legal title.

The case of *Courtney v. Missoula County*, 21 Mont. 591, 53 Pac. 359, is cited and much relied on by defendant, plaintiff in error here, particularly a statement in the opinion to the

effect that the purchaser having entered into a valid contract to pay the consideration agreed upon, and to accept title to the land, which the state on its part is bound to convey, and having taken possession and made partial payments, is the owner for the purpose of taxation. It appears by the opinion in that case that under the statutes of Montana the purchaser of state lands is required to give a bond conditioned for the payment of the residue of the purchase money, and in case of default the land board is authorized to sue upon the bond, or again sell the land for the sum due; and, if upon such sale the sum due for principal and interest should not be paid, the board is authorized to purchase the land for the state at the amount due, with costs of sale. It appears also by the opinion that the statute regulating the sale of state lands contained a provision as follows: "Any lands sold, for five years after the sale thereof, must not be assessed at any higher valuation than the estimate upon which they are sold, unless improvements within that time have been made thereon, in which case the value of the improvements must be added to the estimate." And that another provision of the statutes required the state land agent, on or before a stated date in each year, to make out and transmit to each county assessor certified lists of lands lying in his county which had been sold by the state, for which certificates of purchase, patents, or deeds had been issued during the preceding year. And that the revenue statutes of Montana define "property" as including "real estate" and define "real estate" as including the possession of, claim to, ownership of, or right to the possession of, land. It is at least doubtful whether the purchaser under our laws and by the certificate of purchase has so agreed to pay the purchase price as to incur a personal liability therefor. But, however that may be, we have no statutory provisions like those in Montana above referred to. The land board under our statute is not required to sell the land for the sum due, but is authorized in case of default in any installment of the purchase price for the period mentioned in the statute to "sell such land again," which we understand to mean, in connection with the other language of the various sections relating to the sale of state lands, that the land becomes subject to another sale to be conducted under the same limitations and regulations as if it had not previously been sold. It is to be a new sale, and not a sale for the purpose of collecting the amount due from the original purchaser; and we do not understand that any duty would rest upon the land board or the state to refund to the original purchaser the excess, if any, of the proceeds of the new sale above the amount that remains unpaid under the original certificate. The court in the case cited refers to the overruled *Nebraska* case of *Edgington v. Cook*, *supra*, as the

principal authority for the conclusion reached, and as authority for the statement that the purchaser was the owner for the purpose of taxation. We are not disposed, however, to question the correctness of the decision in the Montana case under the statutes of that state, for we think it reasonably clear that the tax was sustained as a tax merely upon the interest or equity of the purchaser. Concluding the opinion, the court say: "Under our constitutional and statutory provisions, the property of the state may not be taxed. The interest of the state in the land, anterior to payment of the full purchase price, is its property, and that interest in no wise has been affected by the assessment."

In the state of Washington the Constitution exempts the property of the state from taxation, but by statute a contract for the sale of state lands is required to provide for the payment of all taxes and assessments against the land and that if the taxes are not paid the contract may be forfeited. It is also provided by statute that property held under contract for the purchase thereof belonging to the state shall be considered for all purposes of taxation as the property of the person holding the same. Construing these statutory provisions, it was held that they were not intended to tax the land, as such, while the ownership was in the state, "because that is forbidden by the Constitution," but that the provisions were fairly to be understood as intending to charge only the interest of the contractor in the land, and that the procedure was against the land for the purpose only of fixing the amount of the assessment. That construction of the statute was said to be in harmony with the constitutional provision exempting state property from taxation, and the obligations of the federal trust as to the price to be received for school lands, and would accomplish the purpose intended by the Legislature. *State v. Frost*, 25 Wash. 134, 64 Pac. 902.

In Nebraska the property of the state, including school lands, was declared by statute to be exempt from taxation; but there does not seem to have been any constitutional provision to that effect. It was further provided by the statute that "all other property" (not declared exempt in the preceding section), "real and personal, within this state, is subject to taxation; and this section is intended to embrace lands and lots in towns, including lands bought from, or donated by, the United States, and from this state, whether bought on credit or otherwise." Under this provision of the statute it was held, in *Hagenbuck v. Reed*, 3 Neb. 17, that state school lands in possession of a purchaser were subject to taxation, although the state retained the legal title and the purchase price had not been paid. It appears that the decision was much questioned in that state, resulting in the passage of an act by the Legislature declaring that the school lands held under contract of sale from the state, the

title being in the state, were not taxable and had not been taxable for any purpose whatever, and providing for refunding all taxes that had been paid on such land. That act was held to be valid in *Washington County v. Fletcher*, 12 Neb. 356, 11 N. W. 460, 542, 855. And in *Graff v. Ackerman*, 38 Neb. 720, 57 N. W. 512, which has been referred to as overruling the case of *Edgington v. Cook*, it was said that the force of *Hagenbuck v. Reed* as authority had been greatly impaired, if it had not been overruled, by subsequent decisions, citing *Washington County v. Fletcher*.

A provision in our revenue law somewhat similar to the one construed in the Nebraska case of *Hagenbuck v. Reed*, supra, was considered by the Supreme Court of the territory in 1875 in the case of *Ivinson v. Hance*, 1 Wyo. 270. The statute did not then, and does not now, specifically refer to lands bought from the state, in that respect differing from the Nebraska statute, but immediately following the provision that the section "is intended to embrace lands and lots in towns, including lands bought from the United States, whether bought on credit or otherwise," it was provided that "buildings or improvements erected upon lands the title to which remains in the United States, or in any incorporated company," shall be subject to taxation. It was held not only that the territory was without power to tax land the title to which is in the United States, but, referring to the statutory provision aforesaid, that the Legislature had taken the same view of the question. The decision clearly construed the provision as not authorizing the taxation of lands bought from the United States on credit, before the purchaser had become entitled to a patent. The same construction was placed upon a somewhat similar statute in Oklahoma. *Topeka Com. Secur. Co. v. McPherson*, 7 Okl. 220, 54 Pac. 489.

There are several decisions in Kansas holding state lands subject to taxation while the purchase price remains unpaid and before the conveyance of the legal title, but in that state the Constitution did not exempt from taxation all the property of the state, but only all property used exclusively for state purposes; and it was said that the land held under certificate of purchase was not used exclusively for state purposes. Again, in the statute providing for the sale of school lands it was provided that land purchased under the statute shall be subject to taxation as other lands, and in case of nonpayment of the taxes the land may be sold as in other cases, but that the purchaser at the sale shall be subject to all the conditions of the bond of the original maker, and of the certificate of purchase. *Oswalt v. Hallowell*, 15 Kan. 154; *Prescott v. Beebe*, 17 Kan. 320. Thus the state was protected, and, in effect, the purchaser's interest only was taxed, though assessed by describing the land.

The case of *Wells v. Mayor and Aldermen of Savannah*, 87 Ga. 397, 13 S. E. 442, has been often cited and quoted from as authority upon the proposition that a vendee under a contract of sale is liable for the taxes, and it has been supposed to sustain a right of taxation as to public property such as is claimed in this case. But in that case the contract granted the right of possession forever, subject only to the payment of ground rent annually, and the case was decided upon the principle that one who owns the use forever, though it be on a condition subsequent, is the true owner for the time being. The question in the case was not one of constitutional or statutory exemption of city property, but involved the construction of a contract provision for the payment of the taxes by the lessee or purchaser, and a certain ordinance which it was claimed exempted the lands from taxation while held by the lessee. See *Wells v. Savannah*, 181 U. S. 531, 21 Sup. Ct. 697, 45 L. Ed. 986. The case is not in conflict with our conclusion in the case at bar.

[6] If this land in which the state retains a substantial interest may be sold for taxes, then it must be for the reason that it was lawfully taxed; and in that event the condition as to price in the act granting the lands might indirectly be violated. It may be that the plaintiff would have no right to object to the assessment and tax upon that ground, but certainly the plaintiff may object to the sale of the land which might dispose of its interest in it, on the ground that the land which was assessed and valued as such was illegally assessed as his property.

We think the threatened sale was properly enjoined, and the judgment will be affirmed.

SCOTT, C. J., and BEARD, J., concur.

## CARNEY COAL CO. v. BENEDICT. (No. 720.)

(Supreme Court of Wyoming. May 16, 1914.)

### 1. MASTER AND SERVANT (§ 153\*)—INJURIES TO SERVANT—DUTY TO WARN.

While a master need not warn of obvious dangers, yet, if a servant employed to work in a dangerous place may, because of inexperience, fail to appreciate the danger, it is the master's duty to instruct him so that he will comprehend it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.\*]

### 2. MASTER AND SERVANT (§§ 286, 289\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

In personal injury actions by servants, the questions of the master's negligence and the servants' contributory negligence are for the jury, unless the testimony is without conflict, and is of such a character that reasonable men could not differ thereon.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.\*]

### 3. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—JURY QUESTION.

Whether a servant assumed the risk is generally a question of fact for the jury, and the court cannot declare that, as a matter of law, it was an obvious risk, unless the evidence shows without conflict that an ordinarily prudent man would have noticed it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

### 4. MASTER AND SERVANT (§§ 285, 286, 288\*)—INJURIES TO SERVANT—MINING—OBVIOUS DANGERS—ASSUMED RISK.

Plaintiff, a young man, without experience as a miner, was employed by defendant. After he and his coemployé had fired a shot to loosen coal, they discovered a large piece partially loosened, with a crack in the vein. Being unable to pry the coal down with a bar, they proceeded with their work, and the piece fell and injured plaintiff. Experienced miners testified that experience and instruction in the sounding test were necessary to enable a miner to determine whether coal such as this was in danger of falling. Held that, in view of plaintiff's testimony that he believed the place to be safe, he could not, as a matter of law, be held to have assumed the risk; and hence the questions whether defendant was negligent in failing to instruct him and such negligence caused the injury were for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001-1003, 1006-1008, 1010-1033, 1035-1044, 1046-1050, 1053, 1068-1088; Dec. Dig. §§ 285, 286, 288.\*]

### 5. WITNESSES (§ 286\*)—CROSS-EXAMINATION.

In an action by a coal miner hurt by the fall of coal which was cracked from the vein by a shot he had fired, where defendant cross-examined plaintiff's witnesses as to whether experience was necessary to determine whether such coal was likely to fall, plaintiff may, on direct examination, proceed with that line of inquiry and elicit evidence that a knowledge of the sounding test was necessary to determine that question.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.\*]

### 6. EVIDENCE (§ 513\*)—OPINION EVIDENCE—ADMISSIBILITY.

Where a coal miner was injured by the fall of a piece of coal which had been cracked from the vein by a blast, opinion evidence by expert miners as to whether experience and knowledge of the sounding test was necessary to determine whether such coal was likely to fall, is admissible, despite the rule that, where all of the circumstances can be adequately described to the jury, and are such that their effect can be estimated by all men, opinion evidence is not admissible, for all men are not familiar with the operation of coal mines, or with the various conditions which might indicate danger.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.\*]

Beard, J., dissenting.

On motion for rehearing. Motion granted, former opinion overruled, and judgment affirmed.

For former opinion, see 129 Pac. 1024.

POTTER, J. This case has been heard in this court a second time, a rehearing having been granted because of doubt as to the correctness of the previous decision to the effect that the failure of the defendant com-

pany to properly warn and instruct the plaintiff was not shown to be the proximate cause of his injury, and that the district court, for that reason, erred in not giving, as requested, a peremptory instruction to find for the defendant. Because of that error, as it then appeared to the court, the judgment in favor of the plaintiff was reversed, and the cause remanded for further proceedings. See *Carney Coal Company v. Benedict*, 129 Pac. 1024. The conclusion that the failure of the company to warn the plaintiff was not shown to be the proximate cause of his injury was based upon our view at that time of the evidence that the danger was obvious. A re-examination of the question has led to a different conclusion. The court is now of the opinion that the question whether the danger was obvious and was appreciated, or should have been appreciated, by the plaintiff was, upon the evidence, a question of fact for the jury, and was properly submitted to the jury by the trial court.

There was evidence tending to show that the one who hired and discharged the miners and directed them in their work was informed by both the plaintiff and his father that the plaintiff was without experience in mining coal, and that they were promised that the plaintiff would be put to work with an experienced miner. There was also evidence tending to show that the plaintiff was inexperienced, although there was a conflict in the evidence in this respect; the conflict arising from the fact that the plaintiff had worked in a coal mine in certain capacities, and it was claimed that, because of his former work in a coal mine, he was not to be regarded as an inexperienced coal miner. The evidence upon that question, however, was properly submitted to the jury, and by their verdict they must have found that the plaintiff was inexperienced; and they must also have found that the company knew of such inexperience and had failed to give him the necessary warning and caution, as alleged in his petition.

The failure of the company to instruct the plaintiff in what is known as the sounding test, to be used in discovering the danger of falling coal, was particularly relied on as the proximate cause of the injury. The jury were justified in finding that the plaintiff knew nothing of the sounding test, and that he used such limited knowledge as he had to determine whether the projecting lump of coal was sufficiently solid to render it safe to continue at work at the place where it subsequently fell. The evidence tended to show that an experienced miner would have used and ordinarily would have detected the danger by the use of what is known as the sounding test. Several experienced miners called as witnesses described that test and the circumstances and occasions for its use, among others, a witness from whose testimony we quote for the purpose of showing the general character of the evidence on this

point produced by the plaintiff below: "Q. I will ask you what tests are employed by an experienced miner, by yourself as an experienced miner, and others of experience, in detecting and discovering dangers of falling coal? A. The first test is by means of sound. Q. Explain to the jury what that test is and how it is made. A. It is a common thing with practical miners in going in their rooms or working place to have a pick with them and test the roof and face of the coal, and sometimes the 'rubs' or sides, to see if it sounds firm and solid, or loose and liable to come in. Q. Now, as to that test, what, if any, experience is required to apply it? A. A man that was not used to that kind of work would not know. Q. You may explain what, if any, experience is required on the part of the miner to apply this test of sound you speak of. A. It requires that a man would work in the mine with a practical miner in order to get this experience. Q. How is that experience acquired? What manner? A. Well, in the first place, if a practical miner would take a green man, knowing he was not used to this work, he would naturally show him the difference in sound of the different places that were safe and unsafe in the mine. Q. I will ask you whether or not that is the best test known to miners to discover the danger of the liability of coal to fall? A. It is. Q. What other tests if any are applied? A. There is another test where you are testing rock in a mine, and that is putting your hand on the rock while sounding it. Other tests are by using a bar or wedges. If you cannot pry them loose or wedge them loose, a practical miner would consider them safe. Q. In your experience I will ask you whether or not in the case where there is a projecting body of coal in the corner of the room projecting some distance, and about which there is a slight crack, or a crack, and you use a tamping bar—a miner uses a tamping bar and tries to pry it down, and it fails to come down—I will ask you whether or not that would indicate safety, if a miner would know the danger of that coal falling? A. It does not necessarily indicate that there is danger to the man, or that there is not danger. Q. Explain that, Mr. Conoval. A. Sometimes, as I understand, the projecting piece of coal that hangs out in a working place there may be a check behind it; there may be just a wedge of coal holding it, or it may be setting firm on the bottom and the check going clear to the bottom, and different things. It would be owing to the condition it hung, the condition of the check, to say whether it would be dangerous to the man operating under it. If the check didn't go to the bottom, if there was just a small piece of coal that a practical miner would find there that held it, it would naturally show there was danger, and a practical miner would cut that and let it down. Q. Now, I will ask you whether or not, where real danger exists from a projecting lump of coal,

whether that danger is generally detected or discovered by the sounding method you speak of? A. Yes, as a rule. Q. I will ask you whether or not it requires experience to apply that test? A. I would say it did. Q. Now, I want to inquire of you, in regard to appearances in a room where a miner is at work, whether the danger is usually apparent to the eye? A. To a practical miner, as a rule, it is. Q. But one without any experience? A. It would not be. Q. What would you say as to whether or not it is necessary to have experience to discern dangers from appearances? A. It would be necessary to have experience." The evidence on the question was conflicting, and, as we are now convinced, was properly submitted to the jury.

[1-4] While the rule is well settled that a master is not required to give warning of visible and obvious dangers to a servant possessing the intelligence, understanding, and experience sufficient to comprehend and appreciate them, it is equally well settled that, if the servant is employed to do work of a dangerous character or in a dangerous place, and he is not experienced, but, because of his inexperience, may fail to appreciate the danger, it is the duty of the master before exposing the servant to such danger to give him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part. *Covelli v. Cooper Underwear Co.*, 151 Wis. 130, 138 N. W. 40. In personal injury actions, whether the defendant has been negligent as alleged or whether plaintiff has been guilty of contributory negligence are, as has often been said, peculiarly questions of fact to be submitted to the jury, "unless the testimony is without conflict and is of such character as to afford no opportunity for fair-minded men to differ upon the conclusion to be reached thereon." *Sidwell v. Economy Coal Co.* (Iowa) 130 N. W. 729. And, generally, whether or not a servant assumed the risk is a question of fact for the jury, and a court is not authorized to say, as a matter of law, that the danger was obvious, unless it is shown by the evidence without conflict that an ordinarily prudent man or one with the experience of the injured servant ought to have noticed it. *Healey v. Perkins Mach. Co.*, 218 Mass. 75, 102 N. E. 944; *Covelli v. Cooper Underwear Co.*, supra; *U. P. Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433; *Gallagher v. Lehberger*, 84 N. J. Law, 712, 87 Atl. 450; *Braddich v. Phillips Coal Co.* (Iowa) 138 N. W. 406; *Alton Paving Co. v. Hudson*, 176 Ill. 270, 52 N. E. 256; *Hosking v. Cleveland Iron Min. Co.*, 163 Mich. 533, 128 N. W. 777; *Sidwell v. Economy Coal Co.*, supra; *Bouthet v. International Paper Co.*, 75 N. H. 581, 78 Atl. 650; *Tenn. Copper Co. v. Gaddy*, 207 Fed. 297, 125 C. C. A. 41; *W. U. Tel. Co. v. Burgess*, 108 Fed. 26, 47 C. C. A. 168; *Anderson v. Daly Min. Co.*, 15 Utah, 22, 49 Pac. 126; *N. Y. Biscuit Co. v. Rouss*, 74 Fed. 608, 20 C. C. A. 555; *Hanley v.*

*California Br. & Const. Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Carnego v. Crescent Coal Co.* (Iowa) 143 N. W. 550; *Booth v. Stokes*, 241 Pa. 349, 88 Atl. 490; *Collins v. Northern Anthracite Coal Co.*, 241 Pa. 55, 88 Atl. 75; *Hanson v. Columbia & P. S. R. Co.*, 75 Wash. 342, 134 Pac. 1058.

In *Healey v. Perkins Mach. Co.*, supra, it appeared that the plaintiff, while in the employ of the defendant, received injuries by the breaking of an emery wheel during an attempt by him and a fellow workman to grind a heavy casting upon it. He was an experienced man, but the court said: "It could not have been ruled, as a matter of law, that the plaintiff assumed the risk because he continued to work a few seconds after he saw that the emery wheel was 'wabbling.' Whether he appreciated the situation and appreciated the danger in so brief a time was a question of fact for the jury."

In *Covelli v. Cooper Underwear Co.*, supra, the Wisconsin court say: "A study of the facts in evidence has convinced us that it was a question for the jury as to whether or not the danger to the plaintiff in the performance of this duty was so obvious, and his knowledge, information, and experience in respect thereto so limited, as to render it necessary that the foreman who directed him to perform this service should have instructed him of such dangers before setting him at this work, and that the court properly submitted this question to the jury." In *Union Pac. Ry. Co. v. Jarvi*, supra, it is said in the opinion by Sanborn, Circuit Judge, that "the dangers, and not the defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them in order to charge the servant with contributory negligence." And, further: "Ordinarily, in actions like the present one, questions of negligence are for the jury. \* \* \* It is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion from them, that the question of negligence is ever considered one of law for the court."

The case of *Tennessee Copper Co. v. Gaddy*, supra, is quite in point. The plaintiff, a comparatively inexperienced miner, was injured while working in a mine, assisting to break up material previously blasted, and loading it and removing it on tram cars to the shaft. He was working with three other persons in a place dimly lighted by four small lights, one of which was hooked on each of their caps. The blasting was done at a level above the place where these men worked, and while they were at dinner. Before proceeding with their work upon their return, they asked the foreman whether the blasting had been finished, and he answered that it had, and they thereupon began their work, and a little over an hour later rock fell from above and injured the plaintiff; the attention of the plaintiff and the men working with him having been aroused short-

ly before the accident by the fall of some small rock and pieces of dirt, causing them to run under a ledge some distance away and remain there a few minutes before returning. It was understood by the men that the falling of such pieces of rock and dirt usually, but not always, preceded the falling of heavier material, and consequently signified danger. The larger rock fell within about five minutes after they returned to work. It was contended that their act in so returning was sufficient to charge the deceased both with the assumption of risk and contributory negligence; and there was some evidence to the effect that there was a rule which required workmen, upon the falling of small pieces of rock and dirt, which were called "fines," not to resume work unless and until they notified the proper foreman and received assurance that all was safe, though it was not clear that deceased had notice of that rule. The court observed that the fact of running into a safe place upon the falling of the fines implied that the deceased, as well as the other men, knew that such falling signified danger, but that the action of the men more experienced than the deceased demonstrated that in their judgment the falling of the fines in that instance was a false alarm, but said: "It is hard to see how a reviewing court can say, as a matter of law, that the opinions of these miners, especially of the three experienced men, signify that Gaddy consciously or imprudently assumed the risk, or that fair-minded men might not reach different conclusions touching the question of his alleged contributory negligence."

In *Western Union Tel. Co. v. Burgess*, supra, the court say: "It will appear from a statement of the case that there was some evidence tending to show that the defendant in error was an inexperienced servant, and was changed from the work to which he had become accustomed, and set at work which involved greater danger, without any warning or instruction as to the safest mode of doing the new work. Under such circumstances, and in this state of the case, we think the question of contributory negligence was a question of fact for the jury to determine. In view of such a state of the case, if the jury should find that the defendant in error was not sufficiently experienced to enable him to do the new work, and that he was neither warned nor instructed as to the proper mode of doing the work, we conclude that it cannot be said, as a matter of law, that the servant was guilty of contributory negligence in not making an inspection of the pole for himself, and in the particular method adopted of sawing off the section of the pole. It could not be said, upon the facts of this case, that defendant in error was guilty of negligence as a matter of law if he supposed the pole was sound, and that he might safely do the work as it was done. If the pole was regarded, upon reasonable ground, as sound, it could not be said that

the method of sawing up to the time the section broke off and fell was an obvious danger to an inexperienced servant without instruction or warning."

In *Hanley v. California Bridge & Constr. Co.*, supra, the court say: "Whether the nature of the work to be done by plaintiff and the condition of the tunnel were visible facts and the dangers of the employment were known to plaintiff were questions of fact as to which there was at least some evidence which should have gone to the jury." The court say in *Collins v. Nor. Anthracite Coal Co.*, supra: "The evidence shows that, before he began work in the morning of the accident, Collins took a pick and sounded the roof to see if it was safe. It appeared to \* \* \* be safe enough to work under, and with this conclusion his helper \* \* \* agreed, although the result showed that it was a mistake. But the question of danger under the circumstances was one of fact for the jury." And in *Booth v. Stokes*, supra, the same court say: "It is true that the employer is relieved from the duty to instruct where the danger is open and obvious, and the employé appreciates the danger, and knows how to avoid it. \* \* \* Whether, under the evidence, the defendant should have instructed the plaintiff was a question for the jury."

In the brief of plaintiff in error much weight is placed upon the fact that the defendant in error saw the defect, viz., a crack about or behind the lump of coal that fell, described in the former opinion. With reference to this point it is said in *White on Personal Injuries in Mines*, § 396: "But mere knowledge of a defect in the roof or drift of a mine is not, usually, sufficient to defeat a recovery for a resulting injury under the doctrine of assumption of risk, but both a knowledge of the defect and of the resulting danger therefrom is also essential, in order to defeat a recovery from such a cause." See, also, *Gallagher v. Lehberger*, supra; *Railway Co. v. Jarvi*, supra.

Several experienced miners having testified that it would require experience to understand and appreciate the danger of the lump of coal falling under the conditions that existed immediately prior to the time that Benedict was injured, or that there was danger of the lump of coal falling after he and his fellow workman had attempted to pry it down with a tamping bar, and it seemed to be solid, and the plaintiff having testified that he believed it to be safe, or he would not have returned there to work, although the evidence as to the degree of experience necessary to understand the danger was conflicting, we are convinced that a proper application of the general rule to the facts required a submission of the case to the jury, and that neither the trial court nor this court would be authorized to determine, as a matter of law, that the danger was obvious, and that therefore the failure of the

company to properly warn and instruct the defendant in error was not a proximate cause of the injury. It seems to us impossible to say that reasonable minds could not differ upon the question.

[5] Counsel for defendant contend that it was error to admit the testimony of experienced miners to the effect that it requires experience to detect the danger of falling coal in a mine, and that it would require experience to have detected and avoided the danger of the falling of the coal which injured the defendant in error. In the first place, the plaintiff in error is not in a position to complain of the admission of that testimony; for, if error at all, it was first brought into the case by its counsel during the cross-examination of George C. Benedict, the father of, and a witness for, the plaintiff below. On the direct examination of that witness, he was called upon to testify as to the experience which the plaintiff had, and whether or not he had instructed him respecting the manner and methods to be employed in detecting the danger of falling coal. He testified, in effect, that he was inexperienced, and that he (the witness) had not instructed the plaintiff, and had not given him any instructions as to what appearances miners look for in order to detect such dangers. On cross-examination, questions were propounded and answered as follows: "Q. How much experience, in your judgment, Mr. Benedict, does it require to be able to tell that a piece of coal partly detached from the face of a vein to be dangerous in falling? A. I cannot tell you. Q. Does it require some experience? A. Yes, sir. Q. How much? A. I cannot tell you how much. Q. Wouldn't any person, even if he had never been in a coal mine, who could see a piece of coal with a crack in it hanging partly detached, know that it might fall. (The plaintiff objects to the question as irrelevant, incompetent, and immaterial, no foundation laid for it, and not proper cross-examination. Objection overruled. Plaintiff excepts.) A. I don't think so. Q. You don't believe he could? A. No, sir." This was the first time that the question as to what experience or whether any experience would be required to detect the danger of the falling of a lump of coal such as that which fell and injured the plaintiff was brought into the case. That testimony having been brought out on cross-examination, it was referred to on redirect examination, and he was asked to explain what he meant by saying that a man might not know the danger from a lump of coal from the mere fact that there was a crack. He answered: "You might see a piece of coal with a crack in it and think it might fall down, and at the same time it was solid, and you could not pull it down." The question and answer were not objected to, and they were followed, without objection, by this testimony of the witness: "Q. What test do you

apply? A. I generally take a pick and sound it, and see if you can tell by the sounds. Q. Is that the manner employed by an experienced miner to detect any danger that may exist? A. I think so. Q. Does it necessarily follow, because there is a crack in the main body of coal, there is necessarily danger? A. Well, I cannot say; I am not experienced enough myself." Then on recross-examination the witness was asked and answered a question as follows: "Q. Mr. Benedict, isn't it a fact that when you observe a cleavage or crack in a portion of the face of the vein of coal that it has been in some manner leaned from its original position in the vein and loosened to some degree? A. Certainly." This evidence having been permitted, the next witness for the plaintiff, of 40 years' experience in coal mining, was asked by plaintiff's counsel the following question: "Q. What experience is necessary, Mr. Brown, for a person to understand and appreciate the danger of coal mining?" An objection to the question was overruled, and the witness answered: "Well, sir, a man that understands anything at all in a coal mine soon understands when he is safe and when he is not." The following questions and answers of that witness then appear in the bill of exceptions: "Q. What tests are necessary in ascertaining the dangers incident to falling coal? A. Well, you could go and take a pick and knock around to see if there is any loose coal. Q. What is the fact, Mr. Brown, as to whether it requires experience and skill in order to detect those dangers? A. Well, an experienced man understands what to do. Q. It requires experience, does it not? A. Yes, sir." The last question was objected to, upon the sole ground that it was leading and suggestive, and the objection was overruled.

On cross-examination of the witness Brown, the following questions were propounded to him and answered as here stated: "Q. Mr. Brown, will you say to this jury it would require any experience at all for a person of average intelligence to put a blast in a rocky cliff and explode it, and a portion of it is cracked, to have an idea that the cracked portion is liable to fall? Do you mean to swear that requires experience? A. Yes, sir; it takes experience. Q. Assuming there would be a projected portion there and a crack in it, do you think it would require any experience for a person of ordinary intelligence to know it is liable to fall? A. No." Then immediately, upon redirect examination, the witness was asked this question: "Q. Assuming, Mr. Brown, that a piece of coal is projecting from the face, or in the corner of the face, that there is a crack there, that an effort has been made to pry it down, and, to all appearances, it would not move, what would you say as to whether or not it would not require some of the tests as usually applied by experienced coal men

to determine that is liable to fall?" An objection to the question was overruled, and the following was added to it: "It would take experience to tell whether it would fall or not?" And he answered: "It would take an experienced man."

Similar questions and answers were propounded to other experienced coal miners, some of the questions stating more or less fully the facts of the situation which confronted the plaintiff immediately before he was injured, and some of such witnesses testified that it would require experience in order to tell whether there was danger of the lump of coal falling. As said above, this sort of testimony was brought into the case by counsel for plaintiff in error, defendant below, making it proper, if it would otherwise have been improper, for plaintiff's counsel to pursue the same line of inquiry in examining other witnesses competent to speak on the subject. To have denied that right under the circumstances would unfairly have placed the plaintiff under a serious disadvantage on the trial. But, in our opinion, the testimony was not incompetent. *Silveira v. Iverson*, 128 Cal. 187, 60 Pac. 687; *Healey v. Perkins Machine Co.*, supra; *Hanley v. California Br. & Const. Co.*, supra; *Gill v. Homrighausen*, 79 Wis. 634, 48 N. W. 862; *Bouthet v. International Paper Co.*, supra; *Hamilton v. Spring Valley Coal Co.*, 149 Ill. App. 10; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 227, 71 N. E. 863; *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375; *Ake v. Pittsburgh*, 238 Pa. 371, 86 Atl. 268; *Donk Bros. Coal Co. v. Stroff*, 200 Ill. 483, 66 N. E. 29; *N. Y. Biscuit Co. v. Rouss*, 74 Fed. 608, 20 C. C. A. 555; *Blumenthal v. Craig*, 81 Fed. 320, 26 C. C. A. 427.

[6] It is true that the rule is that, where all the circumstances can be fully and adequately described to the jury, and are such that their effect can be estimated by all men, without special knowledge or training, the opinion of witnesses, expert or other, are not admissible. But the effect of such a situation in the mine as that described by the evidence and confronting the plaintiff just prior to his injury cannot be estimated or understood by all men; for all men are not familiar with the operation of coal mines or with the various conditions that might or might not indicate danger, and are not as capable as experienced miners of determining whether a situation described to them would or would not obviously indicate a danger. Referring to the general rule, the court, in *Kellyville v. Strine*, supra, say: "It is to be observed, however, that such men as usually sit upon the jury are not versed in such matters, and have no common knowledge or information concerning the hazardous employment of mining coal, or the use of timbers and the methods of looking after a roof in a mine. For this reason we are not prepared to say that experienced miners may not be

allowed to give their testimony as to matters of this kind." In *Henrietta Coal Co. v. Campbell*, supra, the court say: "Certain questions were asked expert miners as to whether, in their judgment, certain conditions as to the roadway rendered it safe or otherwise, and it is claimed this was error, as the subject was one within the common observation of all men. We cannot say such was the case. The roadways and entries of a mine and their adaptability to the use intended are not matters of common knowledge, and we perceive no error in admitting the character of evidence here objected to."

In *Blumenthal v. Craig*, supra, the court say: "One of the issues was whether the broken hood of itself warned the plaintiff of increased danger. The witness, a much more experienced boy, who saw the broken slate, in substance, said it did not so impress him. Clearly this was relevant and proper testimony." Previous to the language quoted, the court had stated that the witness referred to was permitted, against the objection of the defendants, to answer a question as to whether, with the experience he had had, he would have known the broken slate made the machine more dangerous to work upon.

In *Silveira v. Iverson*, supra, an injury was alleged to have been received through the breaking of a defective rope. An objection was raised to this question: "How can it be determined whether a rope has become rotten and unsound?" In sustaining the overruling of the objection the Supreme Court of California say: "Opinion evidence is not always objectionable even from those who are not experts. The exceptions have been often noticed. Witnesses are constantly asked as to distances, as to conditions and manner, when the answers must necessarily consist in opinion. In this case one question in controversy was whether the defendants had been negligent in furnishing proper rope and tackle. This depended to some extent upon the question whether the defect was discernible. The question might have been in different form, but it was proper to inquire whether the defect could have been discovered by the use of ordinary diligence, which was really what was done."

We remain satisfied with the conclusions stated in the former opinion upon the other material questions in the case. In view of the conclusion reached upon this rehearing that the case was properly submitted to the jury, and that no error was committed in the admission of the evidence above referred to, it follows that we find no reversible error in the record.

The judgment will therefore be affirmed.

SCOTT, C. J., concurs.

BEARD, J. (dissenting). I do not dissent from the principles of law stated in the opin-



ion of the majority, but am unable to reach the conclusion that they are applicable to the facts of this case, as I read and understand the evidence. The only persons who saw the conditions of the room in the mine where Benedict and Rotolo were working between the time the shot was fired and the happening of the accident were those two persons, and they both testified that they saw that the piece of coal which fell and injured Benedict protruded from the face of the vein, and that it was cracked therefrom. Benedict said it was a small crack, but did not state what he meant by a small crack. Rotolo said it was about three inches. Both stated it was sufficient to admit a bar of sufficient size to be used as a pry. There was therefore no question in the case as to whether or not a man of ordinary intelligence and exercising ordinary care should have discovered the condition; for they did see it. That Benedict understood and appreciated the fact that there was danger is, to my mind, clearly shown by his own testimony. While he said he did not understand and appreciate the danger, he said he attempted to pry it down partly to protect himself and partly to get the coal down. If he realized from the conditions he discovered that it was necessary to do something to protect himself, he certainly appreciated that there was danger. The sounding test is shown by the evidence to be one method, but not the only method, by which a miner is enabled to discover whether or not a shot has loosened coal from the body of the vein, but which has not fallen. Had Benedict been fully instructed in the use of that test, and had employed it in this instance, and had discovered thereby that the piece of coal had been loosened, and had then attempted to pry it down, and it did not come—and there is no evidence that in that case he would have done anything else—how much more would he have understood or appreciated the danger than he did from what he testified he actually saw? For instance, one going upon a railroad track in front of a train he sees approaching and is struck and injured by the train is hardly in a position to claim that he was injured because the whistle was not blown or the bell rung. Benedict having been warned of the danger from what he saw, and deeming that warning sufficient to require him to take steps to protect himself, is not in a position to claim that by the use of another method in which he was not instructed he could have discovered the same liability to injury.

I am convinced upon the record in this case that the evidence is entirely insufficient to establish that the failure to instruct him in the application of the sounding test was the proximate cause of his injury, and that the former opinion was just, and should be adhered to.

HARTSELL v. ROBERTS et al. (No. 3365.)  
(Supreme Court of Oklahoma. May 5, 1914.)

(Syllabus by the Court.)

CHATTEL MORTGAGES (§ 138\*)—PRIORITIES.

The uncontradicted evidence shows that plaintiff in error held a mortgage on the property in controversy executed by Bowman and Davis, mortgagors, in January, 1907; that defendant in error Roberts held a second mortgage on the same property with same persons as mortgagors, executed and duly recorded in March, 1907; that plaintiff took back the property from the defendants, the mortgagors, Bowman and Davis, on an agreement to satisfy plaintiff's first mortgage; that, while defendant in error Roberts' mortgage was in force, the plaintiff resold said property to the defendant Bowman, one of the original mortgagors, and took a mortgage on the same property to secure the purchase price. *Held* that, plaintiff's first mortgage being satisfied, his subsequent mortgage was subject to defendant in error Roberts' mortgage, and *held*, further, that the trial court committed no error in sustaining a demurrer to the evidence of plaintiff.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-238; Dec. Dig. § 138.\*]

Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Replevin by J. C. Hartsell against Isaac Roberts and others. Judgment for defendants, and plaintiff brings error. Affirmed.

This was an action in replevin brought by J. C. Hartsell against Isaac Roberts and L. C. Bowman in the district court of Jefferson county to recover two horses and damages for their detention. At the close of the evidence for plaintiff, who is plaintiff in error here, the defendants interposed a demurrer to the evidence, which was by the court sustained. Motion for new trial was overruled, and plaintiff brings the case here by case-made and petition in error.

Plaintiff in error relies upon his second, third, and fourth assignments of error, which he groups and treats under one heading. The second assignment is for errors of law occurring at the trial and excepted to; third, that the court erred in sustaining a demurrer to plaintiff's evidence; and, fourth, that the judgment of the court is contrary to the law and evidence.

The statement of the case as made in plaintiff in error's brief is as follows, at least we adopt so much of it as is pertinent, namely: There is no controversy as to what the evidence is; but the case turned upon what the effect of certain acts of the plaintiff amounted to. On the 3d of January, 1907, the defendant L. C. Bowman and one Davis executed their joint note and mortgage to plaintiff on certain property, being one of the horses involved in this suit and a mare which proved to be unsatisfactory, and the plaintiff (who was selling the horses to mortgagors) permitted them to return this mare and take in her place the other horse involved in this suit, which is described as a smutty brown

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

horse branded YO with a bar over it. This substitution of horses was just a few days after the mortgage was given to plaintiff. There was no written evidence of the substitution; but, as is contended by plaintiff, it seems to have been considered by all parties that plaintiff had a lien on this last horse, because on March 12, 1907, the same parties, Bowman and Davis, gave a mortgage to defendant Isaac Roberts in which they described the horses involved in this suit, one of them being the substituted horse, and said mortgage was taken by Roberts subject to the mortgage of plaintiff. Some time in October, 1907, Davis and Bowman turned back the two horses and turned over the crop to plaintiff, who disclaimed any actual personal knowledge of the mortgage given to Roberts, and he gave them credit on their indebtedness and kept the property until January 18, 1908, when he sold the horses back to Bowman, one of the two men who were formerly the mortgagors, and took another mortgage from Bowman to secure the note, being part of the purchase price for the horses.

The mortgage executed by Bowman and Davis in March, 1907, to Roberts was placed upon record at the proper places provided for the recording of such instruments in the Southern district of the Indian Territory, and this mortgage was in force at the time plaintiff took back the horses from Bowman and Davis in the fall of 1907, and was in force at the time plaintiff, in January, 1908, sold the same horses again to Bowman alone. These mortgages were executed during the Indian Territory days while the law of Arkansas was in force. The plaintiff did not foreclose his first mortgage of January, 1907, on the property, or take any other legal steps to assert his rights over the same, but took it back from the two mortgagors and wiped out the original indebtedness. Such is the substance of his own evidence on this point. In April, 1908, Roberts brought a suit in replevin before a justice of the peace in that county with Bowman and Davis as defendants, and at the trial of that matter it is sufficiently shown that the plaintiff in this case was present with his brother as attorney and heard the proceedings, and was present when the justice of the peace awarded the horses to Roberts, one of the defendants in error. This is practically the case as we glean from the record.

Jones & Green, of Waurika, and C. E. Davis, of Ryan, for plaintiff in error. Bridges & Vertrees and J. H. Harper, all of Waurika, for defendants in error.

RUSSELL, J. (after stating the facts as above). In addition to the statement made, an examination of the evidence in full in the case made produces the conclusion that the district court, in sustaining the demurrer to plaintiff's evidence when he rested his case, did not commit error. It was affirmatively

shown at the trial that plaintiff took no legal steps to foreclose his first mortgage, the one of January, 1907, and he had constructive notice, if not actual, of Roberts' mortgage, which was of record, and had such notice of the existence of Roberts' mortgage when he took back the property from the mortgagors regardless of the rights of Roberts, and he also had notice of Roberts' mortgage at the time he sold the same property to Bowman and took his mortgage in January, 1908. The plaintiff himself, testifying in this language, referring to the note given by Bowman and Davis, mortgagors, in January, 1907, said that, while such note was not paid in money by Bowman and Davis, yet that "they turned their stuff back to me in November, 1907, and finished their business with me on that date, and turned the stuff back to me in lieu of what they owed me. In January after that Bowman came and wanted to buy some of the property back and make a crop with me, and I sold him two horses and some other things." Further on, in answer to this question: "Q. And about November, 1908, Bowman and Davis turned you back this property? A. Yes, sir. Q. In settlement that you [meaning plaintiff] and Mr. Bowman and Davis had at the time? A. Yes, sir; let it pay for itself. Q. And you accepted the property when it was turned back to you? A. Yes, sir. Q. And then again in January, 1908, you resold this property back to Mr. Bowman and took another mortgage? A. Yes, sir. \* \* \* Q. And in January, 1908, when you took a mortgage from Bowman and Davis, the record shows that he [Roberts] had a mortgage on the property? A. Yes, sir. Q. And that is the same property in controversy in this suit? A. Yes, sir."

Section 3064, Ind. Ter. Ann. St. 1890, provides that a mortgage upon chattels creates a lien, and section 3070 of the same statute provides the manner in which the lien shall be foreclosed. In the case at bar the plaintiff did not resort to foreclosure proceedings of any kind, but voluntarily canceled the obligation that he had, a first mortgage, and released it by accepting a settlement under it, which he testifies to, and this was done at a time when defendant's mortgage was alive and in force, and therefore superior to his mortgage taken in January, 1908, after the one of the original mortgagors upon the same property; he having kept the property in his possession after the settlement with his first mortgagors for about two months.

The case is too plain for further discussion, the facts being understood to exist as they do; and the district court did not commit error in sustaining the demurrer to the evidence relied upon by plaintiff when he rested his case. The authority cited by plaintiff (Wooster v. Cavender, 54 Ark. 153, 15 S. W. 192, 26 Am. St. Rep. 31), in our judgment, is not applicable. The case of Edmisson v. Drumm-Flato Commission Co., 13 Okl. 440, 73 Pac. 958, presents a much stronger state of

facts, and in that case the Supreme Court of Oklahoma Territory, by Chief Justice Burford, affirmed the action of the lower court in sustaining a demurrer to the evidence.

The judgment in this case is affirmed. All the Justices concur.

# VANNIER v. FRATERNAL AID ASS'N.

(No. 6113.)

(Supreme Court of Oklahoma. May 5, 1914.)

## (Syllabus by the Court.)

### 1. APPEAL AND ERROR (§ 564\*)—SERVICE OF CASE-MADE—EXTENSION OF TIME.

Where time for making and serving case-made has expired, a purported order of the trial court, attempting to extend the time within which to make and serve a case-made, is a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

### 2. APPEAL AND ERROR (§ 544\*)—BILL OF EXCEPTIONS—EXTENT OF REVIEW.

Where the only errors assigned in the petition in error are: "That said court erred in overruling plaintiff in error's motion for a new trial," and "that said court erred in sustaining defendant in error's demurrer to plaintiff in error's evidence"—*held*, no assignment of error is raised which may be considered on transcript without bill of exceptions or case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

Error from District Court, Caddo County; J. T. Johnson, Judge.

Action between Nannie S. Vannier and the Fraternal Aid Association. From the judgment Vannier brings error. Dismissed.

Louie E. McKnight, of Anadarko, for plaintiff in error. A. J. Morris, of Anadarko, for defendant in error.

LOOFBOURROW, J. [1] The defendant in error moves to dismiss this appeal for the reason: "The case-made attached hereto was not served within the time provided by law or the order of the court or judge thereof." On September 20, 1913, motion for new trial was overruled, and plaintiff in error given 90 days within which to make and serve case-made; this time expired on December 19, 1913; on January 2, 1914, the court attempted to grant an extension of time to prepare the case-made. Under the provisions of section 5246, Rev. Laws 1910, this order was a nullity. See Muskogee Elec. Trac. Co. v. Howenstine, 138 Pac. 381.

[2] The only errors assigned in the petition in error are: "1. That said court erred in overruling plaintiff in error's motion for a new trial; (2) that said court erred in sustaining defendant in error's demurrer to plaintiff in error's evidence." These two assignments of error cannot be considered on a transcript, without bill of exceptions or case-made, and therefore there is nothing before

this court to review. See *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 382; *Lookabaugh v. La Vance*, 6 Okl. 358, 49 Pac. 65; *Tribal Development Co. et al. v. White Bros. et al.*, 28 Okl. 525, 114 Pac. 736; *Kingman & Co. v. Pixley*, 7 Okl. 351, 54 Pac. 494.

The appeal is dismissed. All the Justices concur.

# KOSTACHEK v. KOSTACHEK. (No. 3323.)†

(Supreme Court of Oklahoma. May 28, 1914.)

## (Syllabus by the Court.)

### 1. DIVORCE (§§ 51, 135\*)—REVIVOR OF CONDONED ADULTERY—SUFFICIENCY OF EVIDENCE.

Evidence examined and *held* to show subsequent acts of cruelty sufficient to revive condoned adultery.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 185-187, 451; Dec. Dig. §§ 51, 135.\*]

## (Additional Syllabus by Editorial Staff.)

### 2. DIVORCE (§ 48\*)—"CONDONATION."

Condonement is forgiveness conditioned on future good conduct.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 169, 170, 184; Dec. Dig. § 48.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1411-1415; vol. 8, p. 7610.]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Toney Kostachek against Joseph Kostachek, for divorce. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 124 Pac. 761.

W. K. Moore, of Ponca City, for plaintiff in error. H. B. Martin, of Tulsa, Chas. E. Bush, of Lindsay, Cal., and Jno. Y. Murry, Jr., of Tulsa, for defendant in error.

TURNER, J. On July 2, 1910, Toney Kostachek, plaintiff in error, sued Joseph Kostachek, defendant in error, in the district court of Noble county, for divorce, alleging, among other things, adultery. On July 13, 1910, there was condonement of that offense, whereupon she dismissed the suit and returned to the bed and board of defendant, where she remained until November 22, 1910, at which time she left him and brought the instant suit for divorce in the district court of Tulsa county, alleging the same offense. On December 15, 1910, defendant answered and set up as stated, filed a copy of the petition in the Noble county suit as an exhibit to his answer, and pleaded, among other things, the condonation. After issue joined by reply, in effect a general denial, there was trial to the court and a demurrer sustained to plaintiff's evidence, and judgment accordingly, and plaintiff brings the case here. There is no conflict in the testimony. The evidence discloses that the parties were married at Perry, Okla., April 15, 1909; that immediately thereafter, defendant failing to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied May 26, 1914.

arrange otherwise, plaintiff went to live with her father near that place, and defendant went to live at Tulsa, where he has since continued to reside; that, being informed that defendant was living in adultery, plaintiff went to Tulsa and ascertained the fact for herself and returned to Perry and brought suit, as stated; that thereafter they became reconciled, and plaintiff agreed to dismiss her suit and live with defendant, which she did upon a promise made her by defendant that he would quit the woman he was living with and give plaintiff a piano the woman was using and \$10,000 worth of property, all of which he failed to do; that after she had dismissed her suit, although defendant was worth some \$60,000, they, over her protest, lived together in two rooms of a poorly furnished house in Tulsa on 40 cents per day; that, while there is no direct proof of subsequent adultery, the relations existing between defendant and the woman he had been living with continued friendly, and, known to plaintiff, he continued to visit her house on one pretext or another; that all during her married life plaintiff's health was poor, and she decreased in weight from some 130 to 75 pounds, owing, as her physician told her, to her domestic troubles; that while living together in Tulsa, when importuned by plaintiff to carry out his promise concerning the property, defendant would become sullen and refuse to speak to plaintiff for a day at a time, and on one occasion solicited her to run a bawdyhouse and become a prostitute and give him an opportunity to levy blackmail on the customer; that, before bringing the instant suit, she became pregnant, but afterwards miscarried, owing to physical weakness caused by worrying over the case and the way her husband treated her. In holding, as he did, that these acts of cruelty were insufficient to revive condoned adultery, the court erred.

[2] Condonement is forgiveness conditioned on future good conduct. A repetition of the offense condoned is a revivor thereof, as is also the commission of another cause for divorce, 9 Am. & Eng. Enc. Law, 824. And subsequent acts of cruelty will revive condoned adultery, although they would not support an original suit for divorce on that statutory ground.

Greenleaf on Evid. (15th Ed.) § 53, says: "Condonement is a sufficient answer to the charge of adultery, in a libel; but it does not follow that it is a good answer to a recriminatory plea, for circumstances may take off the effect of condonation, which would not support an original suit for the same. Thus facts of cruelty will revive a charge of adultery, though they would not support an original suit for it. Condonement is forgiveness, with an implied condition that injury shall not be repeated, and that the party shall be treated with conjugal kindness; and on breach of this condition the right to a

remedy for former injuries revive. \* \* \* It must be free, for, if obtained by force and violence, it is not binding; and, if made upon an expressed condition, the condition must be fulfilled."

2 Bishop on Marriage, Divorce & Separation, § 308, says: "All condonation, especially the implied, is upon the condition both that the offense shall not be repeated, and likewise that continually afterward the party forgiven shall treat the other with conjugal kindness, whereupon a breach of the condition revives the original right of divorce."

And in giving the "why" of it, the learned author, in the next section, says: "Though in some degree this doctrine is technical, there are plainly for it various reasons. One is that the condoning party almost certainly proceeded on the assurances from the other, or on a belief otherwise induced, of repentance. Then, if the latter's conduct shows that the repentance was either feigned or ineffectual, the condonation was result of fraud or mistake, two impediments either of which, on well-recognized principles of law, invalidate any undertaking."

Further citation of authority is unnecessary. If more is desired, the same may be found by reference to the notes to those already cited. Especially do we call attention to the very able opinion of Boyd, J., in *Fisher v. Fisher*, 93 Md. 298, 48 Atl. 833, where he exhausts the subject. In the last paragraph of the opinion he says: "We will not quote the testimony on that subject, but in our opinion it establishes such cruelty on the part of the husband as, under the authorities, is at least sufficient to revive the original offense of adultery, which was condoned, and we need not discuss it as to its sufficiency to authorize a divorce a mensa et thoro."

[1] Neither will we stop to inquire whether the cruelty here complained of is up to the full measure essential to establish cruelty under the statutes for the reason that the same is unnecessary. What we hold, however, is that the facts of cruelty disclosed by the record are ample to revive condoned adultery, and that the court erred in sustaining a demurrer to the evidence.

The cause is therefore reversed, with direction to proceed in accordance with this opinion. All the Justices concur.

**FIEDEER v. FIEDEER.** (No. 3284.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 205\*)—INJURY TO WIFE—ACTION AGAINST HUSBAND.

It is the policy of our Constitution and statutes to open the doors of the courts of justice to every person without distinction or discrimination for redress of wrongs and reparation for injuries; and, under our Constitution and statutes, a married woman may maintain

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an action for injuries to either her natural or statutory rights the same as though she were a feme sole, including an action against a former husband for a tort maliciously inflicted during coverture.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744, 748-755, 970; Dec. Dig. § 205.\*]

**2. HUSBAND AND WIFE (§ 205\*)—INJURIES TO WIFE—ACTIONS.**

In an action by a wife against a former husband for injuries received from a gunshot wound maliciously inflicted by the husband during coverture, the fact that such wounds were inflicted in such manner during coverture constitutes no defense to the action.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744, 748-755, 970; Dec. Dig. § 205.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Mattie R. Fiedeer against John Fiedeer. From a judgment for plaintiff sustaining a demurrer to certain paragraphs of defendant's answer, defendant brings error. Affirmed.

Reardon and Hereford, of Oklahoma City, for plaintiff in error. Charles H. Garnett, Atty. Gen., for defendant in error.

**HARRISON, C.** This action was begun in the district court of Oklahoma county by Mattie Fiedeer against John Fiedeer for damages resulting from personal injuries, upon a petition which in part is as follows: "That on, to wit, the 28th day of February, 1911, at Oklahoma City in said county, the defendant unlawfully, violently, maliciously, and feloniously did assault the plaintiff with a shotgun loaded with powder and buckshot, and did therewith shoot the plaintiff upon the top and side of her head, and did thereby inflict dangerous and painful wounds and injuries upon the plaintiff, by reason of which plaintiff suffered great bodily and mental pain and anguish, and became and was and still is sick, injured, and disabled from working, and will continue to suffer pain and to be disabled from working for the remainder of her life, all to her damage in the sum of \$4,800, and further, by reason of which, the plaintiff was compelled to and did expend a large sum of money for nursing, medicine, and medical treatment in endeavoring to be healed and cured of the said wounds and injuries, to wit, the sum of \$200, to her further damage in the sum of \$200." She also claimed punitive damages on account of humiliation and mental suffering in the sum of \$5,000.

The defendant answered as follows:

"(1) Comes now the defendant and denies each and every allegation in plaintiff's petition.

"(2) And the defendant, further answering, says that on the 28th day of February, 1911, the said plaintiff and defendant were legally married, bearing toward one another

the relation of husband and wife under the laws of the state of Oklahoma, and during such marriage relation, existing as aforesaid, no action of damages will lie for the personal torts committed upon the other spouse during the marriage relation.

"(3) And defendant, further answering, says that on the 12th day of May, 1911, a decree of divorce was granted in the district court of Oklahoma county, which operated as a dissolution of the marriage contract as to both, and said cause is still pending, the time for appeal not having expired; but defendant further alleges that, even if the plaintiff claims she is divorced from the defendant, she can receive nothing in damages, as under the law dissolution of marriage does not permit the plaintiff to sue defendant for a tort committed upon the plaintiff during coverture"—concluding with a prayer.

Plaintiff demurred to the second and third paragraphs of the answer for the reason that they failed to state a defense to plaintiff's cause of action. The court sustained the demurrer. Defendant refused to plead further, stood upon his answer, and appealed to this court upon the one proposition that an action by neither husband nor wife will lie against the other for a tort committed during coverture. This brings us to a question which, especially under modern jurisprudence, has been the occasion of much profound reasoning and of an equal amount of sophistry. Many carefully reasoned, though we cannot say well reasoned, cases are cited in support of plaintiff in error's contention. From an examination of the authorities cited, they appear to us as in a great measure controlled by the common-law rule under which the entity of the wife was completely lost in the husband. But modern Legislatures, though vainly, it seems, have by plain, explicit, and unambiguous language attempted to break away from the common-law rule and to put the courts out of hearing of the still lingering echoes of barbaric days. The ground upon which the stronger of the more modern decisions have denied one's spouse the right to maintain an action for tort against the other during coverture have been in the main, based upon public policy, reasoning that to maintain such an action would tend to invade the holy sanctity of the home and shatter the sacred relations between husband and wife, and that therefore, for public policy's sake, such actions should not be maintained; and yet those very decisions, in support of their philosophy, hold that the civil courts are open to parties seeking divorce and alimony, and that the criminal courts are open for the prosecution of either husband or wife for assault and battery, cudgelings, or for shooting each other with shotguns. We fail to feel the force of such philosophy. We fail to comprehend wherein public policy sustains a greater injury by al-

lowing a wife compensation for being disabled for life by the brutal assault of a man with whom she has been unfortunately linked for life than it would be to allow her to go into a criminal court and prosecute him and send him to the penitentiary for such assault.

[1] Nor are we able to perceive wherein the sensitive nerves of society are worse jarred by such a proceeding than it would be to allow the parties to go into a divorce court and lay bare every act of their marriage relation in order to obtain alimony. But, aside from the philosophy on the one side or the other, it appears to us that the plain English language of our Constitution and statutes should enable us to determine what the rights of a married woman are intended to be in such cases. Section 6, art. 2, of the Constitution of Oklahoma, provides: "The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." From the language of this section of the Bill of Rights, it appears to us that the framers of our Constitution clearly intended to open the courts of justice to every person, no matter whom, for redress of wrongs and for reparation for injuries.

In furtherance of such intention, our Legislature, realizing the harsh rules of the common law in such matters, has provided section 3363, Rev. Laws 1910: "Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injuries sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone. \* \* \*"

Section 2845, Rev. Laws 1910, provides: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damage."

Section 2846, Id., defines what is meant by a detriment as follows: "Detriment is a loss or harm suffered in person or property."

The foregoing statutes, it seems to us, are sufficiently clear to define the rights of persons, without discrimination or distinction, and to enable all persons to know just what their rights are and the courts to know just how to adjudicate them. But our Legislature, possibly in contemplation of such contingencies, and in order to avoid the reading into the statutes a meaning not intended, or at least in further emphasis of its intention, has made other provisions. Section 2914, Rev. Laws 1910, reads: "Words used in any

statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained."

And in order to make itself still more clear as to its intentions, the Legislature in section 2948, Id., said: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice."

[2] Construing these statutes and constitutional provisions as a whole, we think it is clearly manifest that the legislative intent has been an endeavor to shake off the shackles of the common-law rules as to the rights of married women and to clearly define such rights. Besides, many of the more modern decisions on this question either offer an apology or give way to expressions of regret that the earlier decisions of their respective jurisdictions had announced a doctrine in which they did not fully concur but by which they felt themselves bound.

It is said in *Sykes v. Speer* (Tex. Civ. App.) 112 S. W. 422: "The adjudications which sustain this view place their holdings upon public policy which refuses to permit any liability for such conduct on the part of the husband committed under such conditions. While the law may and does provide for a criminal prosecution for such violence toward the wife, still there can be no civil liability. It would seem to the writer that if a husband can be held responsible criminally for unjustifiable assault upon one whom the law has placed under his care and protection, and who has for his sake surrendered so many of her civil rights and given up the legal status which she otherwise might sustain, certainly the same considerations of policy would permit her to recover compensation for damages which his brutality may have inflicted upon her, when sought in a proceeding after the dissolution of the marriage relation. But the holdings of the courts which we are compelled to follow have adjudged otherwise, and our duty is plain."

Also in the case of *Thompson v. Thompson*, 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, a case in which a divided court, upon a statute somewhat similar but not as well fortified and clearly defined as to its meaning as ours, denied a married woman the right to recover damages for an assault and battery upon her person by her husband. Mr. Justice Harlan, however, in dissenting from the majority opinion, whose dissenting opinion was concurred in by Mr. Justice Holmes and Mr. Justice Hughes, has this to say: "Now, there is not here, as I think, any room whatever for mere construction; so explicit are the words of Congress. Let us follow the clauses of the statute in their order. The statute enables

the married woman to take, as her own, property of any kind, no matter how acquired by her, as well as the avails of her skill, labor, or personal exertions, 'as absolutely as if she were unmarried.' It then confers upon married women the power to engage in any business, no matter what, and to enter into contracts, whether engaged in business or not, and to sue separately upon those contracts. If the statute stopped here, there would be ground for holding that it did not authorize this suit. But the statute goes much farther. It proceeds to authorize married women 'also' to sue separately for the recovery, security, or protection of their property; still more, they may sue separately 'for torts committed against them as fully and freely as if they were unmarried.' No discrimination is made, in either case, between the persons charged with committing the tort. No exception is made in reference to the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by the statute."

We are impelled to say that the philosophy of this great jurist appeals to us with more force and soundness and impresses us as more in harmony with the modern legislative intent on this question than do the reasonings of courts which hold the contrary. We think a clearly intended right would be denied to a married woman in such cases to hold that she could not recover. By this we do not mean to be understood as holding that a married woman in such cases is entitled to exemplary damages for mental anguish, humiliation, etc. We doubt whether such doctrine would be sound. These are matters which, in the very nature of things, she takes chances on, assumes the risk of, when she enters into the marriage contract and upon the marriage relations. But, upon the whole, we are unable to perceive wherein either public policy, or society, or the sanctity of the home, or the sacred relations of marriage, is better protected by denying her a reasonable compensation for injuries maliciously and feloniously inflicted upon her by a husband with a shotgun loaded with buckshot, or that either of the aforesaid sacred institutions is worse injured by allowing her a just and reasonable compensation in such cases, than to allow her to go into the criminal courts and send him to the penitentiary, or into a divorce court and publish their entire married life to the world. True, it is argued that to allow recovery in such cases would be to open the avenues to every conceivable species of fraud, deception, and perjury, through which designing women would be enabled to go into courts and recover for alleged wrongs which they had never sustained. But the answer to this argument is that the divorce courts open the same avenues in order to recover undeserved alimony. And again, should a woman, who has been crippled or maimed or disabled for life through

the malicious, wanton, and willful assault of a brutal husband, go into court and ask for alimony for her support, there is not a court in Christendom but what would award her a more liberal alimony than if she were a strong, healthy, able woman. Now, upon what theory would such additional alimony be allowed? Unquestionably it would be on the ground of the tort she had received at the hands of her husband. We can see no difference in principle in an indirect and direct recovery for tort.

We believe, therefore, that paragraphs 2 and 3 of defendant's answer stated no defense to plaintiff's cause of action, and that the demurrer thereto was properly sustained.

The judgment sustaining the demurrer is affirmed.

PER CURIAM. Adopted in whole.

#### ALBERTY v. STATE.

(Criminal Court of Appeals of Oklahoma. May 21, 1914.)

(Syllabus by the Court.)

#### 1. HOMICIDE (§ 270\*)—INSANITY—QUESTION FOR JURY.

On a trial for murder, where evidence is introduced which in any degree tends to support the defense of insanity at the time of the commission of the homicide, the issue as to whether or not the defendant was then sane or insane is a question of fact for the jury to determine under proper instructions from the court.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 564; Dec. Dig. § 270.\*]

#### 2. CRIMINAL LAW (§ 48\*)—CRIMINAL RESPONSIBILITY—CAPACITY TO COMMIT CRIME.

Section 2094 of the Penal Code provides: "All persons are capable of committing crimes, except those belonging to the following classes: \* \* \* Fourth: Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness."

Held that, under this provision, the test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where the accused has mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequence of such act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. § 48.\*]

#### 3. HOMICIDE (§§ 151, 237\*)—INSANITY—BURDEN OF PROOF.

Section 5902 of Procedure Criminal provides: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

Held, that where the defense sought to be established is insanity, that the legal presumption of sanity must be overcome by evidence which is sufficient to raise a reasonable doubt of the defendant's sanity at the time of the commission of the homicide. When that is done, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—65

presumption of sanity ceases, and the burden of establishing the sanity of the defendant is upon the state, which is then required to prove his sanity as an element necessary to constitute the crime, and if, upon consideration of all the evidence, together with all the legal presumptions applicable to the case, the jury have a reasonable doubt as to whether the defendant was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing, he should be acquitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278, 500; Dec. Dig. §§ 151, 237.\*]

#### 4. CONSTITUTIONAL LAW (§ 203\*)—HOMICIDE (§ 351\*)—EX POST FACTO LAW.

Chapter 113, Laws 1913, prescribes "the punishment of death must be inflicted by electrocution," and substitutes the penitentiary for the county jail as the place where a judgment of death must be executed, and requires the court to appoint a day for the execution not less than 60, nor more than 90, days from the time of the judgment. The former statute required the court to appoint a day for the execution not less than 30, nor more than 60, days from the time of the judgment; the punishment of death to be by hanging, or by electrocution, as the trial court might order.

Held that the changes effected by the later law relate solely to penal administration, and it was within the power of the Legislature to make them applicable to offenses committed prior to its enactment. The extension of the time within which the execution may take place after sentence is a mitigation, and not an increase, of punishment, and does not render the act ex post facto, and substituting the penitentiary for the county jail as the place where the judgment of death must be executed is not ex post facto, when applied to a person convicted of a murder committed before its enactment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.\* Homicide, Cent. Dig. § 728; Dec. Dig. § 351.\*]

#### 5. CRIMINAL LAW (§ 978\*)—JUDGMENT—VACATION—REPEAL OF STATUTE.

Under the constitutional saving clause, providing that "the repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute" (article 5, § 54; section 144, Williams), the repeal or the amendment of a statute prescribing the punishment for an offense after final judgment has been pronounced, and while an appeal therefrom is pending, does not in any respect vacate or modify such judgment, nor arrest the execution of the sentence, where the judgment is affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2484, 2485, 2487; Dec. Dig. § 978.\*]

Appeal from District Court, Wagoner County; R. P. De Fraffenried, Judge.

Jesse Alberty was convicted of murder, and appeals. Affirmed.

Plaintiff in error, herein referred to as the defendant, was convicted in the district court of Wagoner county upon an information for murder, and was awarded the death penalty by the jury. In accordance with the verdict, on February 19, 1913, the court rendered judgment, and sentenced the defendant to be hanged. To reverse the judgment, an appeal was perfected.

The count of the information on which the defendant was tried and convicted charges that the defendant, Jesse Alberty, did, in Wagoner county, on or about the 24th day of October, 1912, unlawfully and feloniously, and without authority of law, and while acting in a manner imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, did shoot and discharge certain leaden bullets into the body of one William Markham, from a certain loaded shotgun which the said Jesse Alberty then and there had and held in his hands, then and there and thereby inflicting upon the body of him (the said William Markham) a mortal wound, from which the said William Markham then and there did die.

The evidence shows that the defendant was about 21 years of age, and that the deceased was about 10 years of age; that on the night of the tragedy all the parties concerned attended a supper given at a schoolhouse in the neighborhood.

Cora Markham testified: That she was in attendance at that supper with her children, Clarence, Legus, Callie, Clementine, and Willie, the deceased. That about midnight they started home, her two daughters in a buggy with her and her three sons in another buggy. When about half a mile from the schoolhouse, the defendant and John Scrimsher rode past them on horseback, going towards the defendant's home, which was about three miles from the schoolhouse; her home being less than a mile beyond. After passing the defendant's house, she heard somebody say, "Whoa! whoa! hold up there, God damn you; I am going to kill every God damn one of you;" and she stopped her buggy to see who it was. That she saw the defendant with a shotgun, and he fired one shot. That she asked her sons who did he shoot, and they said he shot Willie. That she jumped out of the buggy and ran towards the defendant, begging him not to shoot. The defendant was on a horse, and he said, "I am going to kill the damn son of bitches," and she continued begging him not to. That her son Legus took the little boy and laid him on the ground, and the defendant said, "God damn you, I will just kill you too and be done with it," and rode up and threw the gun down on Legus, and she begged him not to kill her children. That he wheeled away from Legus, and chased Clarence around the buggy two or three times. That he then turned to Legus and said: "Hold up, God damn you; I know what you want. You want to go to the house and get your damn gun, and if you don't come back I will blow the top of your head off. Don't you run; if you do, I will kill you." And she said to him: "Jess, don't do that; you have done enough; you go on off." That about that time John Scrimsher walked up to him and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



asked him what he had done. Legus said he has shot Willie. That he was riding John Scrimsher's horse, and John Scrimsher said, "What did you take my horse and run off with it for?" and he got off of the horse, and Scrimsher said to him, "Jess, come and look and see what you have done," and they went to where the little boy was lying, and when defendant looked at the little boy he said to witness, "Go and get a doctor; I will pay the doctor's bill; I am able to pay it;" and she said to him, "Jess, you come and go with me to your house; I can't use my phone;" and he said, "All right;" and he walked with her a quarter of a mile to his house, and she went in and phoned for a doctor, and he said to her when she was leaving, "You tell them damn son of bitches not to follow me; if they do, I will kill the first one that shows up." That it was a moonlight night. That the shooting took place in Wagoner county, Okl.

The testimony of Callie Markham and Clementine Markham as to the facts of the homicide was, in substance, the same as that of their mother.

Legus Markham testified that he was 18 years old; that before they left the schoolhouse, the defendant and his brother Clarence had a scuffle, and they clinched and fell, and Pen Anderson pulled Clarence off, and he caught the defendant and said, "You boys must stop that," and they all shook hands. As to the circumstances of the shooting, his testimony was the same as that of his mother.

Clarence Markham testified: That when they were all getting ready to start home the defendant walked up and hit him, and then two or three licks passed, and they clinched, and he threw the defendant. That his brother Legus walked up and pulled him off. Pen Anderson came up and said: "There was no need of that." The defendant said, "Boys, we are all as good friends as ever;" and he and his brothers got into the buggy and started home, following their mother and sisters, who were in another buggy. That when Willie was shot he was sitting in Legus' lap in the buggy. His further testimony as to the facts and circumstances of the homicide was the same as that of his mother.

Sam Manuel testified: That he lived at the defendant's house. That at about midnight the defendant came in and lit a lamp and handed it to John Scrimsher to hold. That he then went and got his double-barrel shotgun and his father's gun. He then took the loads out of his father's gun and put the loads in his own gun. He then said, "I am ready to go home with you," and they went out. That a little later he and Mrs. Markham came back together.

Dr. C. R. Gordon testified that he was called to see the Markham boy about 2 o'clock in the morning, and found him in a dying condition; that his right arm was almost severed from his body, and some shots were

in his right side; that he lived about an hour, and died from the effects of gunshot wounds. The state rested.

On behalf of the defendant, Noah Alberty testified: That the defendant was his son, and had always lived with him. That he was acquainted with his disposition and habits, and had noticed his peculiar actions and conditions since early childhood. That the same condition existed now. These peculiar actions consisted in this: That he was very unruly, not all of the time, but just at times; that such condition did not come as the result of any action on the part of witness. He would get contrary, and he could not do anything with him. He would want to fight, or something of that kind. When he was about 15 he seemed to grow worse. That he would sometimes tell him to go to work, or something of that kind, and he would want to fight him, or be saucy to him, or something of that kind. That he was unruly about stock. That when he would drink it would make him worse. That on the day that Willie Markham was killed he met his son in Wagoner, and he had been drinking some, but was very quiet. That he was acting kind of stubborn that night, and didn't have anything to say to anybody, and refused to talk to witness. That witness had used liquor in one form or another all his life, and "had drunk right smart prior to the birth of this boy." That defendant's mother had "spells" once in a while, and would get unruly, and she would want to fight. That his wife's mother would have the same kind of "spells." That his first wife's sister was subject to those "spells," and she kept getting worse until she went crazy, and prior to statehood she was in an insane asylum for the colored, located at Talequah.

On cross-examination, he stated that he would not say that his first wife, the defendant's mother, was insane, and that the defendant would loaf around and drink whisky with the boys.

Mary Alberty testified that she was the stepmother of the defendant; had been married to his father about ten years; that in those "spells," the defendant acted like somebody that is losing his mind; that he wants to fight, and at one time he offered to fight his father.

Pleas Alexander testified that he knew the defendant's mother's sister, and that she was crazy, or something was wrong with her; that he saw her three or four times when she acted as though she was crazy.

Warren W. Phelan testified that he had taught psychology for the past ten years, and at the present time was a teacher of psychology in the state university at Norman; that he was acquainted with and knew the phases of insanity; that, of the several names applied to different forms of insanity, mania was the most common; that dementia præcox was "manifested first from the age of

10 up to 24, and the difference, that is the name given to mania, or insanity, to distinguish it for instance from paranoia, which does not come until later in life; that paranoia is more of a continuous growing condition, while dementia præcox is off and on. It has heightening periods and receding periods, and it might happen every month, or might be, say, three or four months apart or maybe longer; there is no set rule."

His further testimony, as shown by the transcript, is as follows: "Q. In the case at issue, the testimony in the case shows that this defendant has suffered since childhood with peculiar spells ranging from a week to a month, sometimes longer between these spells; that during that time he was violent, with a tendency to injure both man and beast; that during the time he was not under one of these spells, or in one of these spells, that he was quiet, manageable, and peaceable; that the mother of this boy suffered the same peculiar condition; that the grandmother of this boy was subject to the same conditions of the mind; that the sister of this boy's mother is now insane, or was four or five years ago, the evidence shows. Now, under that state of facts, would it be possible for this boy to have inherited these or this condition of the mind? A. Yes; all the authorities say so. The statement given out by all the experts in the insane asylums and most all the literature of insanity makes this statement: That where there is a father and mother that were imbecile, demented, or insane, both of them, they would in all probability have insane offspring. When either father or mother alone, followed by the grandmother, and also the—in the case you have just stated the sister, that makes it even more certain that the offspring will be insane, more even than when it is just the two parents, because it follows a general scheme or theory that has been proved by the insane asylum experts, a theory by the name of Mendellism, and that theory would say that, where just the father and mother were insane, their inheritance might have been very slight, coming down from a great number of generations, but, when for two generations before the offspring in question insanity has been fully demonstrated even on one side, as in the case you state, why then they say absolutely, actually, as a fact, that the offspring will always be insane or imbecile or demented."

Cross-examination: "Q. Professor, are you a member of the school of heredity or of environment in regard to insanity? A. I should say of heredity. Q. In other words, then, there are two theories with regard to insanity, one of environment, and the other of heredity? A. There are two theories, but that of environment is pretty well exploded. Q. And the one of heredity does not always work out? A. Those of us who believe in the heredity claim that it does. Q. I presume that on the other hand those who believe in

the theory of environment claim the same thing? A. I suspect they might, but they are in the minority."

He further stated that he had not examined defendant, and had not put any of the ordinary tests for insanity either to the defendant, his grandmother, or his mother's sister; that he based his answers solely on the facts stated in the hypothetical questions.

The defendant, Jesse Alberty, took the stand as a witness in his own behalf. After stating his name, he was asked and answered but one question, as follows: "Q. Jesse, did you know what you were doing the night Willie Markham was shot? A. No, sir."

On cross-examination, he stated that: "The last I remembered was at the schoolhouse; I remember some few who were there; I didn't know what I was doing; I just remember when the last 'spell' was; I have been that way off and on all my life; I have been in jail three months; I haven't had any 'spells' since I have been in jail; I don't remember getting the shotgun, nor going off on John Scrimsher's horse, or going down and shooting; I don't remember anything until the next morning; I was laying there asleep, and my mother woke me up and asked me if I knew what I had done. This was about 7 or 8 o'clock; went to my grandmother's and stayed there a day or two."

The foregoing is a substantial statement of all the evidence introduced upon the trial.

Joseph S. Dickey, Jr., of Wagoner, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, J. (after stating the facts as above). [1] There is no dispute as to the facts and circumstances of the homicide. The theory of the defense was excusable homicide on the ground of insanity, and the sole question presented on this appeal arises upon the refusal of the court to give the following instruction: "You are instructed that the law presumes that every person is sane, and it is not necessary for the state to introduce evidence of sanity in the first instance. When, however, any evidence has been introduced tending to prove insanity of an accused, the burden is then upon the state to establish the fact of the accused's sanity, the same as any other material fact to be established by the state to warrant a conviction. If the testimony introduced in this case tending to prove that the defendant was insane at the time of the alleged killing of Willie Markham raises in your mind a reasonable doubt of his sanity, at the time of the alleged crime, then your verdict should be acquittal." The court refused to give this instruction, and the defendant excepted. No objection was made or exception taken to the instructions given by the court.

The defendant's counsel contends that, under the rule declared by this court in the

case of *Adair v. State*, 6 Okl. Cr. 284, 118 Pac. 416, 44 L. R. A. (N. S.) 119, the refusal of the court to give the instruction requested constitutes reversible error. We think the contention is manifestly without merit.

[2] Section 2094 of the Penal Code (Rev. Laws) provides: "All persons are capable of committing crimes, except those belonging to the following classes: \* \* \* Fourth: Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." Under this provision the test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where the accused has the mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act.

In the course of the opinion in the *Adair Case*, it is said: "It is immaterial what standard scientists or medical experts may fix to determine, or by what rules they determine, that a person is in a state of insanity; the accused under this provision of the law is a lunatic, or insane, or of unsound mind, or temporarily or partially deprived of reason, to such an extent as will excuse him from criminal responsibility, only when he is incapable of knowing the wrongfulness of the act committed and charged, and incapable to understand the nature and consequence of such act, and this is a question of fact for the jury to determine under all the evidence in the case."

[3] Section 5902, Procedure Criminal (Rev. Laws), provides: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

In the *Adair Case*, it is said: "Under the statute, the rule as to the burden of proof in a homicide case, when the defense of insanity is interposed, we hold to be this: The defendant is presumed in law to be sane and capable of knowing right from wrong as to the homicidal act, and to understand the nature and consequences of such act, and, unless the proof on the part of the prosecution is sufficient to raise a reasonable doubt of the defendant's sanity at the time of the commission of the homicide, the burden is upon the defendant, in the first instance, to overcome this presumption by introducing sufficient evidence to raise a reasonable doubt of his sanity when the act was committed. When he has done this, the prosecution, in order to convict, must prove the defendant's sanity beyond a reasonable doubt; and if, on a consideration of all the evidence, the

jury entertain a reasonable doubt as to the defendant's sanity when the act was committed, he should be acquitted."

Upon a trial for murder, the presumption of innocence has been overcome when the commission of the homicide by the defendant is proven beyond a reasonable doubt; a presumption of guilt then obtains, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable. Thereupon, under this section of the statute (section 5902, *supra*), the burden of introducing sufficient evidence to raise a reasonable doubt of his guilt is upon the defendant. When he has done this, the burden of proof is upon the state to establish the guilt of the defendant beyond a reasonable doubt. Every defendant is presumed in law to be sane and capable of knowing right from wrong, and able to choose between them. This presumption, however, upon a trial for murder, is overcome whenever evidence is adduced sufficient to raise a reasonable doubt of the defendant's sanity at the time of the commission of the homicide. The law thereupon imposes upon the state the burden of establishing the sanity of the defendant the same as any other material fact necessary to warrant a conviction; that is, beyond a reasonable doubt.

In instruction No. 5 the court stated the defense of insanity, and quoted the language of the fourth subdivision of section 2094, *supra*.

Instructions Nos. 6 and 7, as given by the court, read as follows:

"VI. You are therefore instructed that, if you believe from the evidence in this case that the defendant shot and killed the deceased in manner and form as charged in the information, and you further believe that the defendant at the time of the killing was a lunatic, or an insane person, or was a person of unsound mind, or was temporarily or partially deprived of his reason, to such an extent that he was incapable of knowing the wrongfulness of his act, then it will be your duty to acquit the defendant, and you are instructed that, if you acquit the defendant on the ground of insanity, you should state that fact in your verdict."

"VII. You are further instructed in this connection that if after a full, and careful consideration of the whole case, you entertain a reasonable doubt as to the sanity of the defendant, at the time that he fired the fatal shot, you will then give him the benefit of such doubt and return a verdict of not guilty."

It will be observed that, as to the burden of proof, the requested instruction is *when any evidence has been introduced tending to prove insanity*. In the *Adair Case*, it was held that by the express provision of the statute (section 5902, *supra*), when the commission of the homicide is admitted or proven, and the defense sought to be established is the

insanity of the defendant, the legal presumption of sanity must be overcome by evidence which is sufficient to raise a reasonable doubt of the defendant's sanity at the time of the killing. When that is done, the presumption of sanity ceases, and the burden of establishing the sanity of the defendant is upon the state, which is then required to prove his sanity as an element necessary to constitute the crime, and if, upon consideration of all the evidence, together with all the legal presumptions applicable to the case, the jury have a reasonable doubt as to whether the defendant, at the time of the commission of the homicide, was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing, he must be acquitted.

The defense of insanity, or at least the existence of such mental disturbance or derangement of the mind as to render the defendant irresponsible in law for the act committed, rested largely, if not entirely, upon the testimony of his father that the defendant was subject to "spells," at which times he was very unruly, and would want to fight, and that his mother was afflicted in like manner, and that the defendant's mother's sister was insane at one time. It was not claimed that the defendant was subject to fits of epilepsy, or that he was a person of feeble mind. The evidence shows that the defendant was born and had lived all his life in that neighborhood; yet no testimony was introduced to show that he had ever acted irrational.

The expert who testified did not confine his answer to the facts as stated in the hypothetical question, but stated generally "that, where there is a father and mother that were imbecile, demented, or insane, both of them, they would in all probability have insane offspring," and, "when for two generations before the offspring in question insanity has been fully demonstrated even on one side, the offspring will always be insane or imbecile or demented." The proof in this case did not establish or tend to establish any such facts.

It is proper to say that, after a careful examination of all the testimony in regard to the mental condition of the defendant at the time of the homicide, it does not fairly permit any other conclusion than that the shooting was the willful, deliberate, and premeditated act of a person who understood perfectly well the nature and consequence of his act.

The defense of irresponsibility, at best, presents a question of fact for the jury, and when they have settled that question without passion or prejudice, in accordance with the evidence, it is not the province of this court to disturb the verdict of the jury. We think that the charge to the jury was as favorable to the defense as the law permitted, and, for the reasons stated, the instruction requested was properly refused.

We have given the case that careful consideration which its importance and its solemn consequence to the defendant demand, and we see no occasion to interfere with the execution of the judgment of death. The defendant has had a fair trial, and has been convicted upon evidence which should satisfy the fairest mind of his guilt. The judgment is therefore affirmed.

[4] It appears from the record that after the judgment was rendered and sentence of death was pronounced the law approved March 29, 1913, regulating the infliction of the death penalty, was passed. The statutes in force when the judgment was rendered provided:

Section 5967, Rev. Laws: "When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county, a warrant duly attested by the clerk, under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of the judgment."

Section 5981, Rev. Laws: "The punishment of death must be inflicted by hanging the defendant by the neck until he is dead; or his life may, under the direction of the Governor, and at the cost of the state, be taken by electricity if the court so orders."

Section 5982, Rev. Laws: "A judgment of death must be executed within the walls or yards of a jail of the county in which the conviction was had, or some convenient private place in the county. If there is no such jail or prison in the county in which the conviction was had, or if it becomes unfit or unsafe for the confinement of prisoners, or is destroyed by fire or otherwise, and the jail of another county has been legally designated for the confinement of the prisoners of the county in which the conviction was had, the judgment must be executed in manner as above."

By sections 1, 2, and 9 of chapter 113, Session Laws of 1913, it is provided:

Section 1: "The punishment of death must be inflicted by electrocution."

Section 2: "When judgment of death is rendered the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk, under the seal of the court, stating the conviction and judgment and appointing a day on which the judgment is to be executed, which must not be less than sixty nor more than ninety days from the time of the judgment and must direct the sheriff to deliver the defendant within ten days from the time of judgment to the warden of the state prison at McAlester, in this state, for execution."

Section 9: "A judgment of death must be executed within the walls of the state prison at McAlester, Oklahoma, said prison to be designated by the court by which judgment is to be rendered."

The act of 1913 took effect June 15, 1913.

It will be observed that it differs from the statute in force when the judgment and sentence of death was rendered in the following particulars: Chapter 113, Laws 1913, prescribes, "The punishment of death must be inflicted by electrocution," and substitutes the penitentiary for the county jail, as the place where a judgment of death must be executed, and requires the court to appoint a day for the execution not less than 60, nor more than 90, days from the time of the judgment. The former statute required the court to appoint a day for the execution not less than 30, nor more than 60, days from the time of the judgment; the punishment of death to be by hanging, or by electrocution, as the trial court might order.

We are of opinion that the provisions of chapter 113, Laws 1913, applied to crimes committed prior to the time said act took effect, are not repugnant to the provision of the federal Constitution declaring that no state shall pass an *ex post facto* law. Article 1, § 10, Const. U. S. It did not create a new offense, nor require the infliction of a greater or more severe punishment than the law annexed to the crime when committed. The changes effected related solely to penal administration. The act changed the place and the officer for carrying out the sentence of death, and the extension of the time within which the execution may take place after sentence is a mitigation, and not an increase, of punishment. Our conclusion is based upon the holding of the Supreme Court of the United States in the case of *Rooney v. North Dakota*, 196 U. S. 319, 25 Sup. Ct. 264, 49 L. Ed. 494, 3 Ann. Cas. 76, wherein it was held that: "A state statute changing the punishment for murder in the first degree by substituting close confinement in the penitentiary for not less than six nor more than nine months for confinement in the county jail for not less than three nor more than six months after judgment and before execution, and by substituting hanging within an inclosure at the penitentiary by the warden or his deputy for hanging by the sheriff within the yard of the county jail, is not *ex post facto*, and therefore unconstitutional, when applied to a person convicted before its enactment." In the course of the opinion it is said: "The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state, is of no particular consequence to the criminal. On such a matter he is not entitled to be heard."

In *Henry v. State*, 10 Okl. Cr. —, 136 Pac. 982, this court held that chapter 113, Laws 1913, was not an *ex post facto* law, within the inhibition of the state Constitution (sec-

tion 15, Bill of Rights), when applied to a person convicted and sentenced before its enactment, where an appeal therefrom was pending at the time the act took effect.

[5] The judgment and sentence in this case was rendered under the statute in force at the time of the homicide for which the defendant was convicted, and an appeal therefrom was pending when the act of 1913 took effect. It is apparent that the Legislature intended that the provisions of the act of 1913 should control in the rendition and execution of judgments of death in all cases wherein such judgments should be rendered after the act took effect, including cases where the murder has been committed prior thereto. However, no provision was made for cases pending on appeal where the judgment and sentence was death by hanging, if there should be an affirmance of such a judgment. In such cases we think the effect of the act of 1913 after final judgment should be determined by reference to the constitutional saving clause which provides: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." Article 5, § 54; article 144, Williams.

Under this constitutional provision, the Legislature cannot intervene and vacate or modify the judgment of the courts either directly or indirectly by repeal or by amendment of a statute under which the judgment was rendered (*Lilly v. State*, 7 Okl. Cr. 284, 123 Pac. 575), and on principle it would be an exercise of judicial and not of legislative, power.

"Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts." *Cooley, Const. Lim.* (7th Ed.) 136.

The repeal or the amendment of a statute prescribing the punishment for an offense after final judgment has been pronounced, and, while an appeal therefrom is pending, will neither vacate or modify such judgment, nor arrest the execution of the sentence when there is an affirmance of the judgment and sentence. This conclusion is to some extent opposed to that reached by this court in *Henry v. State*, supra; but, as the ground of our decision herein was not discussed or at all considered in that case, it cannot be regarded as a binding precedent, and, since Henry's sentence was by the chief executive commuted to life imprisonment, no right could be or was injured thereby.

As the day fixed for the execution of the judgment has passed, the cause is remanded

to the trial court with directions to proceed under the provisions of Procedure Criminal (sections 5979 and 5980, Rev. Laws), prescribing the procedure when a judgment of death has not been executed on the day appointed. When the defendant is brought before the court, if he should elect or request to have the judgment and sentence modified to conform to the provisions of the act of 1913, in order to avoid any possible question, the court is directed to modify said judgment in conformity to the provisions of said act. Otherwise the trial court is directed to fix another day for the execution of the judgment and sentence as set forth in the death warrant issued upon the judgment and sentence. The warden of the penitentiary is directed to deliver the defendant, Jesse Alberty, to the sheriff of Wagoner county, who is directed to safely keep the defendant in custody pending the proceedings in the trial court.

ARMSTRONG, P. J., and FURMAN, J., concur.

**BIGGS v. STATE.** (No. A-2187.)  
(Criminal Court of Appeals of Oklahoma. April 25, 1914.)

Appeal from Superior Court, Muskogee County; Farar L. McCain, Judge.

W. S. Biggs was convicted of violating the prohibitory law, and appeals. Dismissed.

W. W. Momyer, of Muskogee, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, W. S. Biggs, was convicted at the November, 1913, term of the superior court of Muskogee county on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$150 and imprisonment in the county jail for a period of 60 days. Judgment was pronounced on the 13th day of December, 1913. The appeal was filed in this court on the 12th day of February, 1914.

The Attorney General filed a motion to dismiss the appeal on the ground that the same was not filed in this court within the time allowed by the statute and the orders of the trial court. That court fixed 60 days within which plaintiff in error was required to perfect an appeal in this court. No extension of this time was shown by the record. The appeal was not filed within that time. It therefore follows that the motion to dismiss was well taken, and must be sustained. This court has no jurisdiction to determine any question raised by record on the merits.

The appeal is dismissed.

**PIERSON v. HOLDRIDGE.** (No. 18,834.)  
(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. **FRAUD (§ 59\*)—MEASURE OF DAMAGES—MISREPRESENTATION OF AUTHORITY.**

In an action for false representation by an officer of a milling company that he had authority to bind the corporation by a contract to

employ the plaintiff for life by way of settlement of a claim for personal injuries, the measure of damages is the loss occasioned the plaintiff through the failure to secure a valid contract, and not the value of the claim for personal injuries.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

2. **FRAUD (§ 31\*)—LIMITATION OF ACTIONS (§ 100\*)—COMMENCEMENT OF PERIOD—DISCOVERY OF FRAUD.**

An action for false representation of authority to make a contract is founded on tort. It is essentially an action for deceit, and the statute of limitations does not commence to run until discovery of the fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 27; Dec. Dig. § 31.\* *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

Appeal from District Court, Kingman County.

Action by Frank Pierson against T. J. Holdridge, Jr. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Jno. H. Connaughton and C. C. Calkin, both of Kingman, for appellant. Geo. L. Hay and L. F. Walter, both of Kingman, and T. A. Nofztger, of Anthony, for appellee.

**BURCH, J.** The facts furnishing the basis for this action were stated in the case of *Pierson v. Milling Co.*, 91 Kan. 775, 139 Pac. 394. After the trial of that action the plaintiff determined to protect himself against the consequences of a possible final adjudication that the milling company was not bound by the contract for life employment negotiated by T. J. Holdridge, Jr. Therefore he sued Holdridge for false representation of authority to act for the corporation. A demurrer was sustained to the petition, and the plaintiff appeals.

It is argued that the allegations of the petition are not sufficiently definite and certain to make out a cause of action. They do leave considerable to be desired, but liberally construed are sufficient to entitle the plaintiff to relief.

It is further argued that the petition fails to state a cause of action because it is framed to recover damages for loss of the contract for life employment, when the plaintiff's deprivation really consisted in loss of his right to prosecute an action for personal injuries. In this respect the theory of the petition is correct.

[1] The action is one for deceit. The claim is that T. J. Holdridge, Jr., by conduct and statements, induced the plaintiff to believe that he had authority to bind the corporation by the life employment contract. Relying on those representations, the plaintiff released his cause of action for damages for personal injuries, suffered the statute of limitations to run against it, and obtained, as he supposed, a valid contract for life employment. Under these circumstances the plain-

tiff is entitled to the benefit of his bargain. There are two rules on the subject of the measure of damages in such cases; but this court has chosen the more liberal one. *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496. The question involved was elaborately briefed and ably argued in the case of *Stroupe v. Hewitt*, 90 Kan. 200, 133 Pac. 562; but the court decided that it would adhere to the doctrine of the earlier case. The same rule was applied in the case of *Epp v. Hinton*, 91 Kan. 513, 138 Pac. 576.

The action was not based "on the contract" for life employment, and indeed could not be, since it contained nothing indicating an intention on the part of the defendant to bind himself personally.

[2] The action being essentially one for relief on the ground of fraud, the statute of limitations did not commence to run until discovery of the fraud. In some states a distinction has been made between false representation of authority and implied warranty of authority. The liability of the person who acts without authority is the same under both theories; but the remedy in one case is for tort and in the other for breach of an implied contract. To these remedies different statutes of limitation apply. The subject has been discussed chiefly with reference to the conduct of one who has acted without authority, but who in good faith believed that he was authorized. The distinction is not important in this state, where it is held that a false representation made without knowledge of its falsity may furnish the foundation for an action of tort, although no intention to deceive existed. Therefore the court inclines to the view which has been stated thus: "If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the ground of deceit, and the remedy is by action of tort." *Jefts and Wife v. York*, 10 Cush. (Mass.) 392, 395.

The judgment of the district court is reversed, and the cause is remanded for further proceedings. All the Justices concurring.

PIERSON v. KINGMAN MILLING CO.  
(No. 18,668.)

(Supreme Court of Kansas. May 9, 1914.)

On motion for rehearing. Denied.

For former opinion, see 91 Kan. 775, 139 Pac. 394.

PER CURIAM. Upon a full consideration of a petition for a rehearing the majority of the court remains of the view indicated in

the original opinion. The circumstantial evidence is deemed to warrant an inference that the president and vice president, as well as the secretary-treasurer, knew of an arrangement regarding the life employment of the plaintiff. The fact that all the stock was owned by these three officers, and by the wives of two of them, who constituted the two remaining directors, is a circumstance we think must be given weight in determining whether there was any evidence of ratification.

The petition for a rehearing is denied.

WINTERS v. MYERS. (No. 19,104.)

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS (§ 42\*)—ISLANDS—TITLE.

The title to islands formed in navigable streams since the admission of Kansas into the Union is held by the state for the benefit of all the people.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.\*]

2. NAVIGABLE WATERS (§ 42\*)—ISLANDS—TITLE—RIGHT TO RELINQUISH.

The Legislature is without power to relinquish the title to such islands to the owners of shore lands without compensation where no public benefit will result from the gift.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.\*]

3. NAVIGABLE WATERS (§ 42\*)—ISLANDS—RELINQUISHMENT OF TITLE—VALIDITY.

Section 9 of chapter 295, of the Laws of 1913, concerning islands in navigable streams, which provides for such relinquishment or gift when certain conditions exist, violates section 2 of the Bill of Rights, which declares that free governments are instituted for the equal protection and benefit of the people.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.\*]

Mason, J., dissenting.

Appeal from District Court, Reno County.

Action by F. W. Winters against James Myers. From judgment for defendant, plaintiff appeals. Reversed and remanded.

F. Dumont Smith, of Hutchinson, for appellant. O. M. Williams, of Hutchinson, for appellee.

BENSON, J. This appeal is from a judgment against the plaintiff, who claims to be a settler upon an island in the Arkansas river, which he seeks to purchase as school land. The land in controversy is situated between the banks of the river as meandered in the United States survey. The north meandered bank is 9 feet above the bed of the river, and the old channel next to the bank is from 1 to 2½ feet above the present bed of the river. This land is south of the old bank, and consists of about 56 acres. The defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant owns certain lots situated immediately north of this tract and bounded on the south by the river according to the government survey. He contends that the tract in question is not an island but is an accretion to his adjoining land. The evidence on the part of the plaintiff tended to prove the formation of an island commencing in a sand bar about the year 1875, gradually growing to a connection with the north bank of the river. On the other hand, evidence on the part of the defendant tended to prove that the defendant's land was gradually extended south by accretion until it embraced the land now in controversy. Thus a question of fact was presented whether the land is an accretion to the shore or an island formed in the bed of the river.

The statutes under which the plaintiff made his settlement are chapter 378 of the Laws of 1907, which declared: "That all islands lying in the navigable streams of this state, wherein the title to said islands is vested in the state of Kansas, may be sold according to the procedure for the sale of state school land, and the proceeds of such sale shall become part of the permanent school fund." The statute was amended by chapter 295 of the Laws of 1913, which provides that: "All islands existing in the navigable streams of this state and being actual islands therein at any time within twenty years prior to the taking effect of this act and not theretofore surveyed under the authority of the government of the United States, and entered under the laws thereof relating to the sale and disposal of public lands, and to which the title is vested in the state of Kansas, may be sold according to the procedure for the sale of state school lands; provided that any person who has heretofore settled upon any such island or any part thereof, under the provisions of the said act to which this is amendatory, but who has not made proof and received a patent therefor from the state of Kansas, or any person who may hereafter settle upon any such island or any part thereof, under the provisions of this act, shall at his own expense have an accurate survey of the lands intended to be appropriated by him under such settlement, made by the county surveyor of the county in which such land is situated.

\* \* \* Sec. 2. Any person who has heretofore settled, or shall hereafter settle upon any such island or a part thereof, for the purpose of purchasing the same as school land, shall within four months after such locating and settlement, or within four months after the taking effect of this act, present his or her affidavit of such settlement, and the plat or survey, and statement and receipt of the county surveyor as provided in section 1 hereof, to the county clerk of the county in which such island is situated, and shall at the same time furnish a bond running to the state of Kansas, signed by one or more sufficient sureties to be approved

by the said county clerk, conditioned that such settler shall pay all costs and damages that may be awarded against him or her in any of the subsequent proceedings relating thereto, in case it shall be finally determined that such claimant was not entitled to purchase such tract as school land. \* \* \*

Here follow provisions for an examination of the bond by the county attorney, notice of the settlement, and claim to be given by the county clerk by publication at the settler's expense, to adverse claimants who may protest setting up their claims to the land, upon giving bond for costs. The filing of such protest and bond is deemed an appeal, whereupon the county clerk certifies the papers to the district court, where the cause is docketed, and stands for trial as an action between the settler as plaintiff, the protestant as defendant, and the state as intervener, provision being made for intervention by the Attorney General or county attorney, who is required to appear and protect the interests of the state, which is to be considered as a party bound by the final judgment. The statute further provides: "The word 'island' as used in this act, means and shall be held to be a tract of land which is entirely surrounded by the current of the stream in which it is situated when at its ordinary low stage, and any islands which have been formed and attached to the land or banks along such streams, and which have not been islands as herein defined during the twenty years last past, are hereby declared to be accretions to and belonging to, and parts of the lots and lands to which they have become attached." Laws 1913, c. 295, § 9.

The plaintiff had settled upon the land before the passage of the amendatory act, but it is admitted that he has also complied with all its requirements. The procedure provided by that act was followed. The defendant filed a protest on the ground that he owned the land, and that it was not subject to settlement and sale as school land. The cause was docketed and tried as an ordinary action. The county attorney filed an intervening petition, and appeared at the trial; but the nature of his contention is not shown in the abstract. The district court placed the burden of proof upon the plaintiff over his objection. The verdict was for the defendant. The judgment is: "That the defendant, James Myers, is the owner of and entitled to the immediate possession of all of said lots numbered 1 and 5 and 2 and 3 of section numbered 33, township 23, range 5, Reno county, Kan., which lots extend down to the present north bank of the Arkansas river, and that the tract of land settled upon by the plaintiff, F. W. Winters, as island land in said Arkansas river, is not island land and is not subject to settlement, and that the said F. W. Winters by settlement thereon has acquired no interest in said land whatever; that the state of Kansas has no interest in said land; that all of said land



was settled upon by the said F. W. Winters as an accretion to the land of James Myers. It is further adjudged that the said F. W. Winters and the state of Kansas be barred of any right, title, or interest in and to said land; that the cost of this action, taxed at \$——, be adjudged against the plaintiff, the said F. W. Winters."

Error is assigned upon the order placing the burden of proof upon the plaintiff, and also upon instructions given and refused. As the statute provides that the settler shall be the plaintiff and the adverse claimant the defendant, it may be fairly inferred that the Legislature intended that the burden should be upon the plaintiff, as the court held. The alleged errors in giving instructions and in refusing to give those requested by the plaintiff present the vital question in this case. Following the statute of 1913, the district court instructed the jury that: "Under the laws of the state of Kansas, the Arkansas river is a navigable stream, and the law of Kansas provides that all islands existing in the navigable streams of this state and being actual islands therein at any time within 20 years prior to February 24, 1913, not theretofore surveyed under the authority of the government of the United States, and entered under the laws thereof relating to the sale and disposal of public lands and to which the title is vested in the state of Kansas, may be sold according to the procedure for the sale of state school lands." The court further instructed that: "The word 'island' means a tract of land which is entirely surrounded by the current of the stream in which it is situated when at its ordinary low stage. The law further provides that any islands which have been formed and attached to the land or banks along such streams, and which have not been islands as above defined during the 20 years, prior to February 24, 1913, are declared to be accretions to and belonging to and parts of the lots and lands to which they have become attached."

The contention of the plaintiff is: First, that by the act of 1907 islands in navigable rivers were set apart to the school fund, and could not be afterwards taken from it, because of the constitutional restriction against diminishing that fund; and, second, that even if that restriction does not apply, still, the islands being property of the state, the Legislature has no power to give them to the owners of adjacent lands, as the amendatory act in effect attempts to do, where they have been attached to the bank for 20 years.

[1] That islands, according to the usual accepted meaning of that term, formed in navigable rivers since the admission of the state into the union, were the property of the state, and remained so when the act of 1907 was passed, cannot be doubted. "In Kansas the title to the bed of a navigable river is vested in the state; private ownership in bordering

land extends only to the river's margin. \* \* \* New formations arising from the bed of a river belong to the owner of the bed, and new formations added to a bar or an island in the channel of a river by the process of accretion or reliction belong to the owner of the island or bar." *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534, syl. 2 and 5.

[2, 3] If islands were set apart as school lands by the act of 1907 and added to the lands granted by the United States for the support of schools, then they must, under the provisions of section 3 of article 6 of the Constitution, be inviolably appropriated to that use. The court, however, is divided upon the question whether they were so set apart, and we proceed to consider whether these islands, even if not appropriated beyond recall to the support of common schools, are subject to disposition in the manner provided by the act of 1913. By that act an island, although once the property of the state, if it had been attached to the shore during the 20 years preceding its passage, became the absolute property of the owner of the shore land, by being declared an accretion to that land, whether it was in fact so or not. Thus it appears that, if the act be effective in this respect, the state must lose, and the riparian owners gain, all the islands to which the statutory conditions apply. Is legislative power adequate to accomplish this?

It must be remembered that patents from the United States conveyed land only to the bank of the river. Beyond the bank grantees obtained no title to the bed of the stream or islands arising out of it. Whatever title the defendant may have in the tract in controversy, if it ever was an island, is derived solely from the act of 1913. The mere fact that the riparian owners' land joins that of the state gives him no title to that land or anything formed or growing upon it. *Wood v. Fowler*, 28 Kan. 682, 40 Am. Rep. 330; *Kregar v. Fogarty*, 78 Kan. 541, 96 Pac. 845; *Oklahoma v. Nolegs* (Okla.) 139 Pac. 943, decided March 10; *Stevens v. Paterson & Newark R. Co.*, 34 N. J. Law, 532, 3 Am. Rep. 269. The title of the state in such cases is thus defined in *State ex rel. v. Akers*, 140 Pac. 637: "Upon her (Kansas) admission (into the Union), absolute property in and dominion and sovereignty over the soils under the navigable and public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the federal government with respect to navigation." Syl. 3.

It is suggested by the defendant that, having been attached to the mainland for 20 years, many difficult questions of evidence might arise as to what part of the accretions belonged to the mainland, which evidence must be confined to the memory of living witnesses, and that in view of expense and

other difficulties the Legislature, to promote the general welfare of the state, might settle these questions once for all and declare that the title to the land should attach to that of the riparian owner after actual connection for 20 years. The proposition that to avoid trouble in maintaining its right the state should surrender to a small number of its citizens valuable property held in trust for all is not persuasive. It must be remembered that this cession is not for public purposes, such as highways or parks, but for purely private benefit and without recompense.

These considerations, however, relate only to the wisdom of the law, and the question is simply one of legislative power. If the act is within the power of the Legislature, it must be obeyed. The act does not furnish an authority for sales to riparian proprietors to the exclusion of other purchasers, but provides for relinquishment of the title to them without any consideration. It is true that the relinquishment of gift provided for is upon the condition that the land had been attached to the shore for 20 years, but when that fact exists the gift is absolute. If the power existed, it might have been exercised without the condition. If it did not exist, the condition cannot supply the authority.

The question therefore remains whether it is in the power of the Legislature to so transfer the title; in other words, to give the islands to the riparian owner. In answering this question we must start with the well-established principle that the statute is valid unless it is in contravention of some express inhibition of the Constitution, or one necessarily implied from some express affirmative provision of that instrument. *Prouty v. Stover*, 11 Kan. 235; *In re Holcomb*, 21 Kan. 628; *Riley v. Garfield Township*, 58 Kan. 299, 49 Pac. 85; *State v. Kelly*, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298; *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207; *State v. Weiss*, 84 Kan. 165, 168, 113 Pac. 388, 86 L. R. A. (N. S.) 78.

Turning to the Constitution, we find in section 2 of the Bill of Rights this provision: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." The same language is found in the Ohio Constitution, and it is similar to a clause in the fourteenth amendment to the federal Constitution. In *Atchison Street Ry. Co. v. Mo. Pac. Ry. Co.*, 31 Kan. 660, 3 Pac. 284, the suggestion that the Bill of Rights was a compilation of glittering generalities was disapproved. It was held: "The Bill of Rights is something more than a mere collection of glittering generalities: some of its sections are clear, precise, and definite limitations on the powers of the Legislature and all other officers and agencies of the state; and, while others are largely in the nature of general affirmations of political truths, yet all are binding on legis-

latures and courts, and no act of the Legislature can be upheld which conflicts with their provisions, or trenches upon the political truths which they affirm." The same subject is referred to in *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80, 87 L. R. A. (N. S.) 877, Ann. Cas. 1913A, 254.

In *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218, it was held that the same provision of the Ohio Constitution invalidated exemptions provided in an inheritance tax law of that state. That decision is cited to illustrate the broad application of this provision in that state, although it was not followed in construing our own inheritance tax law in *State ex rel. v. Cline*, 91 Kan. 416, 137 Pac. 932. The opinion in the *Ferris* Case also refers to the similar clause in the fourteenth amendment to the federal Constitution, and observes that the clause referred to is no broader than that contained in the Ohio Constitution. In *Black v. State*, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 353, also an inheritance tax case, Chief Justice Winslow uses the following vigorous language in referring to a still more general provision of the Constitution of Wisconsin: "This may be said to be somewhat vague and general, somewhat in the nature of a rhetorical flourish; but, when it is said that all men equally free have the inherent rights of life, liberty, and the pursuit of happiness, it is certain that it is not meant that some have or may have greater privileges before the law than others. The phrase must mean equality before the law, if it means anything. The idea is expressed more happily in the fourteenth amendment, where it is said that no state shall deny to any person within its jurisdiction the 'equal protection of the law.' A tax law which makes unjust discrimination—which taxes one person at one rate, and another one, within the same class and under like circumstances, at another rate, or exempts him altogether—denies the equal protection of the laws. This must be self-evident. There may indeed be classification; and if the classification be founded upon real differences, affording rational grounds for a distinction, such classification will not violate the rule of uniformity and equality. So, also, there may be exemption, but the exemption must be reasonable in amount, and founded, also, on rational grounds."

Thus it appears that in the opinion of the Wisconsin and Ohio courts, such general provisions are not mere statements of a general policy, but declaration of affirmative principles which restrict the power of the Legislature. In *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732, it was held that an exclusive right of fishing could not be granted to a shore owner, in the tideland in front of his property, when the Constitution provided that "no law shall be passed granting to any citizen any privileges or immunities which

upon the same terms shall not equally belong to all citizens." While this language is quite specific, it only guarantees that "equal protection and benefit" of the law provided for in our Bill of Rights. The court said (51 Or. page 259, 92 Pac. page 1073): "So far as this act attempted to vest in the upland or tideland owner the exclusive right to fish in the waters of Rogue river, which was formerly enjoyed and possessed by the public as of common right, we are of the opinion that it would be inoperative and void, as coming within the prohibition of the Constitution. \* \* \* Hence the grant to one of an exclusive right to fish would not only create a monopoly in one citizen by taking from others a right of citizenship, but would destroy by the same act a right of property vested in each."

In *Illinois Central Railroad v. Illinois*, 146 U. S. 387, at page 453, 13 Sup. Ct. 110, 118 (36 L. Ed. 1018), a statute of Illinois granting to a railroad company title to submerged lands adjoining the lake front in Chicago was held invalid. The opinion discussed at great length the title of the state in the beds of navigable waters and the rights that individuals and railroad and navigation companies may obtain therein. The doctrine that the state holds the title in such cases in trust for the public was affirmed, and it was said: "The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. \* \* \* The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." A note at page 488 of 76 Am. St. Rep., quoted in the *Akers Case* (92 Kan. 169, 205, 140 Pac. 637), states the same proposition in forcible terms. Cases affirming the same principles are cited in volume 8 of the *Encyclopedia of United States*

Reports, title, *Navigable Waters*. There is, however, a distinction between grants which abdicate the control of navigation and other public uses, such as fisheries and the like, and grants of land held for other purposes which would not have that effect, and this distinction is referred to in *Illinois Central Railroad v. Illinois*, supra.

Similar questions to those discussed in the opinion from which we have just quoted, and the note referred to, have been considered in Wisconsin. In deciding the effect of a statute purporting to provide for the drainage of a navigable lake, but which, it appears, would, if valid, transfer title to submerged land to individuals, it was said, in *Prieve v. Wisconsin State Land & Imp. Co.*, 103 Wis. 537, at pages 549, 550, 79 N. W. 780, at pages 781, 782 (74 Am. St. Rep. 904): "The Legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. \* \* \* The navigable waters of the state belong to the state, and the lands under them, in all situations, so far as are necessary to preserve inviolate the common right to enjoy those incidents which were not the subject of private ownership in navigable waters at common law. \* \* \*"

A like conclusion was reached in *Illinois Steel Co. v. Bilot & Wife*, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905. Many other decisions to the same effect might be cited resting, however, upon the same principle, viz., that the trust upon which such submerged lands are held for the public purposes of navigation, fisheries, and the like cannot be relinquished to individuals, at least not without some equivalent public consideration. As decided in the *Akers Case*, the state also holds the title for the benefit of all the people respecting the sand deposits. The principle may be extended to any other like beneficial purpose to which the river, its bed, or islands may be devoted. If it is not necessary to hold an island in the interest of navigation, and it remains subject to disposition, all the people have an interest of the same nature in the proceeds that they would have if the land itself were necessary to facilitate navigation. The reason the islands may be disposed of as school lands is that they may be thus made available for public benefit, but in this disposition the state necessarily holds the proceeds by the same title as it held the property. This principle was recognized by the Legislature in an act relating to the sale of sand and other natural products (chapter 259, Laws of 1913) wherein it is provided that: "Moneys which are derived from the sale of property taken from school land islands, \* \* \* shall inure to the benefit of the permanent school fund."

The trust is preserved by transference to

the proceeds. A disposition which precludes the possibility of proceeds is an abdication of the trust—a legal impossibility. It will not be claimed that the Legislature could apply money in the treasury to a use not in any sense public, but for purely private benefit resting upon no legal or equitable right. If that could be done, the loss could be made good by taxation, and by indirection taxes might be levied upon all for the benefit of one having no claims upon the public bounty.

In *State v. Township of Osakee*, 14 Kan. 418, 19 Am. Rep. 99, it was held that an act authorizing the issuance of township bonds for the purchase of seed wheat for distribution in districts where there had been a recent failure of crops was beyond legislative power, because it would result in taxation for other than public purposes, although the right of taxation for the support of the poor was conceded. Upon the same principle an act of the Legislature of this state authorizing municipal bonds to aid a manufacturing enterprise was held unconstitutional. *Loan Association v. Topeka*, 87 U. S. (20 Wall.) 655, at page 664 (22 L. Ed. 455). The court, by Mr. Justice Miller, said: "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

In *Lowell v. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39, it was held that a legislative act authorizing the issuance of bonds, the proceeds to be loaned to the owners of lands the building upon which had been destroyed in the great fire of 1872, was contrary to various provisions of the Constitution of that state, resting essentially upon a preceding declaration of rights which stated that: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

There is no real difference in principle between the transfer by taxation of the money of all the people to private benefit, and the

transfer of public property by legislative enactment for like private benefit. Indeed, the first proposition may be the more meritorious, for the taxation referred to is usually attempted in the belief that the aid thereby rendered will result in public benefit as in the cases cited, by contributing to the production of crops after a general failure; to the increase of trade and manufacture; or to the restoration of buildings greatly needed in continuing the business of a metropolis.

A statute which has the effect of thus transferring the property of all the people, without compensation or public advantage, to a few, denies that equal protection and benefit to the people for which government is instituted, as declared in the Bill of Rights. Equal protection is defeated by a gift of that which belongs to all as effectually as by compelling a contribution from all, which, as we have seen, the authorities do not permit. While this protection is usually sought by the few against the many, no reason is perceived why it may not be invoked in behalf of the people at large against legislation which would bestow their property upon the few. This provision of the Constitution, as we have seen, while declaring a political truth, does not permit legislation which trenches upon the truth thus affirmed. To this extent, at least, it must, like other constitutional provisions, be interpreted with sufficient liberality to carry into effect the principles of government which it embodies. *State v. Sessions*, 84 Kan. 856, 115 Pac. 641, 22 Ann. Cas. 796. It is concluded that section 9 of chapter 295 of the Laws of 1913, if held to be operative, would have the effect to transfer islands which are the property of the state, held in trust for the benefit of all the people, to the riparian owner without compensation, and is therefore unconstitutional. It follows that the instructions which declared the law to be as stated in the section referred to were erroneous.

Whether the tract in controversy is an island remains to be determined as a question of fact upon proper instructions.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

JOHNSTON, C. J., and BURCH, SMITH, PORTER, and WEST, JJ., concurring.

MASON, J. (dissenting). I agree that the Legislature cannot give away public property, without legal or moral consideration, merely to enrich an individual. This seems to me to be a necessary corollary of the well-established rule that a tax cannot be imposed for any but a public purpose. Money that has been produced by taxation cannot be expended for a purely private purpose, and property that could be sold, thereby lessening the amount necessary to be raised by taxation, would seem to stand on the

same footing. The Legislature, however, may expend money or convey the property of the state in recognition of moral claims of which a court could take no cognizance. The substantial effect of the statute involved is to declare that the state waives its right to claim certain land to which it may have a legal title, but which for more than 20 years, during which time its value has greatly increased, has been supposed to be private property, has been bought and sold and improved by persons acting in good faith, and held by an adverse possession that would have barred the claim of any one but the sovereign, all with the acquiescence of the public through its officers and representatives, including the Legislature. If these conditions existed, and the Legislature must be deemed to have so found, I think it was a fair question of legislative policy whether as a matter of honor and morals the state should not relinquish its claims. The Legislature may expend money in recognition of a moral obligation (37 Cyc. 723), and in any case admitting of a reasonable difference of opinion the legislative decision that such an obligation exists is not open to review by the courts. A situation quite analogous to that here presented arises where a claim against the public originates under a statute which is later decided to be unconstitutional, and the Legislature thereafter undertakes to provide for its payment. An act of Congress, appropriating money for the payment of bounties to the manufacturers of sugar, was assailed on the ground that the bounty act itself was void. The Supreme Court of the United States decided that, assuming the original act to be unconstitutional, Congress, under the granted power "to pay the debts" of the nation, could recognize these claims and provide for their payment. The case has been cited approvingly by a number of state courts. In the opinion it was said: "The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. \* \* \* In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision rec-

ognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government." *United States v. Realty Co.*, 16, U. S. 427, 440, 444, 16 Sup. Ct. 1120, 1125 (41 L. Ed. 215).

It would be unconscionable for an individual to claim property as his own, when for 20 years he had allowed others to act upon the supposition that it was theirs. I do not believe the fact that free governments are instituted for the equal protection of their people disables a state from observing in its own conduct the standard applied to individuals of fairness and honor, even to the extent of waiving a right which the law gives it.

For the reasons indicated, I am persuaded of the validity of the statute in question.

CAIN v. KINKHEAD, County Clerk, et al.  
(No. 19,847.)

(Supreme Court of Kansas. May 9, 1914.)

(*Syllabus by the Court.*)

1. MANDAMUS (§ 85\*)—STATE LANDS—ACQUISITION OF TITLE—DUTY OF CLERK OF COURT.

Under the statute providing that one seeking to acquire title to land, on the theory of its being an island belonging to the state, shall deliver certain papers to the county clerk for filing, after which steps shall be taken to cause the rights of all claimants to be determined by the district court, the clerk is not justified in refusing to file the papers upon the ground that the claim of the person presenting them is without merit on the facts.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 184-188; Dec. Dig. § 85.\*]

2. COSTS (§ 123\*)—BOND FOR COSTS—APPROVAL.

Where a surety on a cost bond makes affidavit that he is worth \$50,000 over all debts and exemptions, the officer required to pass upon the sufficiency of the security is not justified in rejecting the bond without further investigation, merely because he has no other information concerning the surety, who is a resident of another county.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 487; Dec. Dig. § 123.\*]

Application by A. W. Cain for writ of mandamus to H. N. Kinkhead, County Clerk, and others. Writ granted.

F. S. Jackson, of Topeka, for plaintiff. T. A. Scates and A. B. Reeves, both of Dodge City, for defendants.

MASON, J. A. W. Cain asks a writ of mandamus against the county attorney and county clerk of Ford county requiring the one to approve the form of, and the other to file, various papers by which he seeks to acquire title to a tract which he asserts is an island in the Arkansas river, owned by the state. The defendants resist the application and contend that it should be denied for these reasons, among others: Because the tract in question never was an island; be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause, if it ever was an island, it is not one within the meaning of the statute of 1913; because it has been occupied and improved by the city of Dodge City as a public park, and in virtue of that fact is by such statute withdrawn from settlement; because the plaintiff has never in fact made a settlement on the tract, and in other respects has not brought himself within the operation of the law; because the bond offered by the plaintiff is insufficient.

[1, 2] Whether the land involved is owned by the state, whether if so it is open to settlement, and whether the plaintiff has made settlement upon it, are questions of fact not to be tried out in this proceeding. The statute provides that after the filing of such papers as are tendered by the plaintiff steps shall be taken by which these questions and others—"the issues of fact and of law, and all claims of the respective parties to such lands"—shall be fully tried and determined in the district court. Laws 1913, c. 295, § 3. The acceptance of the plaintiff's papers for filing is not a recognition of any right or claim made by him; it merely initiates a proceeding under the statute by which his rights and those of other claimants may be determined. We think therefore that they should be approved as to form by the county attorney and filed by the county clerk, unless they are defective upon their face. No such defect is pointed out, but it is said that the only surety on the bond who qualifies is a nonresident of the county, concerning whose responsibility the clerk has no information. The statute requires sureties to be residents of the state, but not of the county. Gen. Stat. 1909, § 6345 (Civ. Code, § 749). One of the sureties makes affidavit that he is worth \$50,000 over and above all debts and exemptions. The form of the justification is defective, as it leaves out "liabilities," or contingent obligations. But in the absence of any evidence to the contrary his affidavit raises a presumption of his sufficiency as security for the costs of the proceeding. The approval of the bond will not prevent the district court from requiring further security, should occasion therefor appear.

It follows that the county attorney should approve the papers tendered by the plaintiff as to form, and that the county clerk should file them and approve the bond. The county superintendent is made a defendant, and an order is asked that she be required to appoint appraisers. This duty, however, under the present law, seems to devolve upon the county commissioners. Laws 1913, c. 274, § 1.

To prevent any possible misapprehension, it should perhaps be stated that nothing is here decided beyond the mere right of the plaintiff to institute a proceeding in which his claims may be passed upon in the manner provided by the statute. This decision confers upon him no right with respect to the

possession of the land, nor does it in any way adjudicate his claims in regard thereto. The suggestion may also be made, for whatever bearing it has on the matter, that the principle upon which the court (in *Winters v. Myers*, 140 Pac. 1033, decided at this sitting) holds a part of the "island" act of 1913 to be unconstitutional—namely, that the Legislature cannot give to individuals land owned by the state—does not apply to a gift made to a municipal corporation for public uses.

On the grounds stated, the plaintiff is held to be entitled to have his papers filed, and to the allowance of a peremptory writ. All the Justices concurring.

**ATCHISON, T. & S. F. RY. CO. v. KANSAS CITY et al. (No. 18,636.)**

(Supreme Court of Kansas. May 9, 1914.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS (§ 964\*)—TAX LEVY—EXTENT—AUTHORITY.**

Under the statutes existing in 1908, cities of the second class were authorized to levy a tax for the payment of judgments not rendered for current expenses, although the limit for general revenue purposes had been levied, provided the 40-mill limit for all general city purposes exclusive of school taxes was not exceeded.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2043; Dec. Dig. § 964.\*]

**2. MUNICIPAL CORPORATIONS (§ 1000\*)—CITY TAX LEVY—PRESUMPTIONS.**

In addition to a levy up to the limit for general revenue purposes for the year 1908, a city of the second class made a levy of one mill to pay judgments. In an action to enjoin the collection of the tax as excessive and illegal, it was not shown that the bases of the judgments in question were matters of current expense; and, in the absence of such showing, the presumption of regularity in the acts of the taxing officers must prevail, and such levy will be deemed valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2167-2172, 2198; Dec. Dig. § 1000.\*]

**3. MUNICIPAL CORPORATIONS (§ 1000\*)—TAXATION—GENERAL TAX LEVY—EXCESS—AUTHORIZATION—BURDEN OF PROOF.**

The ordinary statutory limit for general revenue purposes might have been lawfully exceeded by permission obtained from the state tax commission, or an increase could have been authorized by a vote of the electors. Section 1, c. 78, Laws of 1908. The excess was alleged to be unauthorized, excessive, and void, but no proof was offered that such consent or authority had been received. Had such consent or authority been received, the records of the state tax commission or the city clerk would so show, and the failure to prove a negative—that they did not so show—in the absence of any allegation or assertion by the defendant that either was had, is held too technical a basis for a judgment against the plaintiff, unless a claim of such consent or authority shall be really made by the defense, in which case a new trial is ordered.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2167-2172, 2198; Dec. Dig. § 1000.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Wyandotte County.

Action by the Atchison, Topeka & Santa Fé Railway Company against the City of Kansas City and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and C. Angevine, of Kansas City, Kan., for appellant. Nathan Cree and R. J. Higgins, both of Kansas City, Kan., for appellees.

WEST, J. In 1907 the city of Argentine was authorized to levy a tax of 10 mills for general revenue purposes and 5 mills for purposes of general street improvements, which on the assessed valuation would amount to \$10,998. Under the provision of chapter 78 of the Laws of 1908 the city was not authorized for that year to levy more than 2 per cent. in excess of the amount authorized for the previous year, which would be \$11,207. However, for 1908 the city in fact levied for these purposes the sum of \$12,776, \$1,569 in excess of the authorized levy for 1907, plus 2 per cent. The portion of this excess falling upon the plaintiff was \$355.09. It was alleged that in addition to this a levy of one mill for the purpose of paying judgments was made in excess of lawful authority, which produced a charge against the plaintiff of \$584.99. Having paid these charges under protest, the plaintiff brought this action against the city and county to recover back the total sum of \$939.08, in which action it is sought to recover in fact only one-half of that sum, the whole amount having been paid December 20th, bringing the case within the rule laid down in *Railway Co. v. City of Humboldt*, 87 Kan. 1, 123 Pac. 727, 41 L. R. A. (N. S.) 175. The court below sustained a demurrer to the plaintiff's evidence, and from this ruling the appeal is taken.

[1] The act of 1908, already referred to, permitted the authorized amount of the previous year, plus 2 per cent., to be exceeded, provided the state tax commission upon application and notice should prescribe a greater sum, or the electors should, by direct vote, authorize an increase. The petition did not allege anything with respect to such action by the state tax commission or by the electors. The defense insists that, under the rule of presumption and regularity so often laid down in this state the plaintiff failed to prove a cause of action. Section 2 of the act of 1908 provides that such act shall in no way limit the amount of any levy necessary to be made for the purpose of paying any judgment, or any levy made by ordinance for special purposes. We are unable to find any statute expressly authorizing a levy by a city of the second class to pay judgments, but section 1380 of the General Statutes of 1909 provides that the city council

may appropriate money and provide for the payment of the debts and expenses of the city. Section 1383 limits the total levy for general purposes, exclusive of school taxes, to 4 per cent. of the taxable property of the preceding year.

In *Phelps v. Lodge*, 60 Kan. 122, 55 Pac. 840, it appeared that the authority and limitations touching the city of the third class there involved were in effect identical with those which apply here. The full 10-mill levy had been made for general revenue, all of which was needed for that purpose, and it was sought to compel an additional levy to pay a judgment. The court, after quoting the provisions of the statute identical in effect with those governing this case, said: "Construing all these provisions together, they amount to this: That for general revenue purposes the tax levy is limited to 1 per cent. For all city purposes it is limited to 4 per cent. The 4 per cent. limitation has no reference to state, county, or any other than city taxes. The council is authorized by section 78 to provide for the payment of the debts of the city. A judgment is of course a debt." 60 Kan. 124, 55 Pac. 841. It was held that it was not only a permission, but a binding duty to provide for the payment of the judgment. See, also, *Stevens v. Miller*, 8 Kan. App. 192, 48 Pac. 439. That the 4 per cent. limit does not include state, county, and school taxes was also decided in *Waterworks Co. v. City of Columbus*, 48 Kan. 99, 28 Pac. 1097, and 48 Kan. 378, 29 Pac. 762.

In *Stewart v. Town Co.*, 50 Kan. 553, 32 Pac. 121, it was held that between the 10-mill limitation for current expenses and the 40-mill limitation for general purposes exclusive of school taxes there is no conflict. It was also said: "The city is authorized to levy and collect taxes for the payment of bonded indebtedness and the interest on the same, as well as to pay off and discharge any judgment obtained against the city; and the levies for these purposes, including that for general revenue, must not in the aggregate exceed 40 mills on the dollar." 50 Kan. 558, 32 Pac. 122. It was also held that a levy for water, electric light, and supplies for the fire department come under the head of general revenue purposes governed by the 10-mill limitation.

[2] In *Ward v. Piper*, 69 Kan. 773, 77 Pac. 699, the officers of a township had made a levy to pay bonds, and another for general current expenses. The plaintiff asked that the proceeds of these levies remaining in the treasury be applied to the payment of his judgments. It was held that in the absence of a showing that the judgments were based on a debt for ordinary township expenses, and that the levy had been more than sufficient to meet the ordinary expenses, the court must indulge the presumption that the officers had done their duty and deny the relief sought. But as to the levy for interest on bonds, it was held that this could and should

be applied on the judgments which were based on interest due on township bonds.

In *Railway Co. v. City of Humboldt*, 87 Kan. 1, 123 Pac. 727, 41 L. R. A. (N. S.) 175, the question arose whether, after levying up to the limit for general revenue purposes the city could make an additional levy to pay indebtedness incurred for the same purpose, although denominated "floating indebtedness." The liability intended to be covered by the additional levy consisted of outstanding warrants, one for a judgment whose basis was not shown, two for attorney's fees, and one for improvement of waterworks. The nature of the claims for which the others had been issued did not appear. It was said that probably all these could have been paid out of the general revenue fund, and, as the limit of levy for such fund had been reached, the one attempted to be made in excess thereof was void. It was pointed out that none of the constituent levies can exceed its own limitation, nor the aggregate go beyond the 40-mill limit; also that merging a debt in a judgment does not change its character, and that in the *Phelps-Lodge Case* it appeared to have been assumed that the judgment was not for the ordinary current expenses of the city, "and hence the question of whether it was inside or outside of the 10-mill limitation was not considered." 87 Kan. 1, 5, 123 Pac. 727, 729 (41 L. R. A. [N. S.] 175). Here there is no claim that the 4 per cent. limit was exceeded, and we are not advised as to the nature of the claims on which were based the judgments the levy was made to pay. If it were shown that they were items of current expense, the levy would be void for excess of the 10-mill levy, plus 2 per cent. But, in the absence of any showing concerning their nature, the presumption always indulged in behalf of city officers who have acted under the sanction of their official oaths applies, and, as the city had power to make a levy to pay a judgment for something outside of current expenses, we must assume that for the payment of such a judgment the levy was made, and hence in this respect and to this extent the judgment sustaining the demurrer to the evidence is affirmed.

[3] Section 1 of the act of chapter 78 of the Laws of 1908, providing that the sum produced by the maximum levy for 1907 can be exceeded by only 2 per cent., contains a proviso that a still larger sum may be permitted by the state tax commission, followed by another proviso that the electors may by vote authorize such increase. The petition alleged that the excess levy for 1908 for general revenue purposes was "unauthorized, excessive, and void," but no evidence was offered touching any consent or authority received from the tax commission, or by a popular vote, and the city contends that, in the absence of such evidence, we must presume that the city officers were acting legal-

ly, and that the levy was valid, and calls attention to the rule announced in *Kindley v. Rogers*, 85 Kan. 645, 118 Pac. 1037, and cases therein cited. The plaintiff argues that as the matter of receiving such authority is contained in provisos to the section in question, the settled rule of pleading requires that such authority be pleaded in defense, and not that the lack thereof be alleged or shown by the railway company, and numerous authorities are cited to the effect that, while an exception must be negatived, a proviso need not. But courts have become too practical—at least this court has—to care for the possible distinction between a proviso and an exception or the subtle and rarified notion that they require different treatment. Neither does the failure to prove a negative—that no consent or authority was had—appear fatal, there being no allegation in the answer or assertion anywhere that such consent or authority was received. Had it been, the records of the state tax commission or those of the city clerk would so show, and the matter could have been made clear by a telephone call had the parties seen fit to take that convenient, but informal, way to avail themselves and the court of the benefit of these public records. Assuming that no such consent or authority was had, the levy was excessive and the plaintiff would be entitled to recover. The point on which the matter hinges is so technical that neither party should be permitted to lose or gain thereby unless facts justify it.

In the interests of justice, and in order to reach the right of the case, the judgment in respect to the excess levy for general revenue purposes is reversed, with directions to enter judgment for the plaintiff thereon unless counsel for the defense shall state that such excess was authorized in one of the ways indicated, in which case a new trial as to this portion of the case is directed. All the Justices concurring.

In re MURRAY. (No. 1596.)  
(Supreme Court of New Mexico. April 26, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 753\*)—PRESENTATION FOR REVIEW—DISMISSAL.

In the absence of an assignment of errors, where the same is required by statute or rule of court, no relief is asked of the appellate court, and it will not enter upon a consideration of the case. And where the appellant or plaintiff in error has failed to file an assignment of errors, as required by section 21, c. 57, S. L. 1907, and no attempt is made to excuse the default, the appeal or writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.\*]

Appeal from District Court, Torrance County; before Justice E. L. Medler.



In the matter of Charles C. Murray, receiver of the New Mexico Central Railroad Company, petitioning for an order ratifying and approving the resolution passed by the Board of County Commissioners of Torrance County, recommending an adjustment and settlement of the taxes assessed against the said railroad for the years of 1910, 1911, and 1912, respectively. From an adverse order, the County Treasurer of Torrance County appeals. Appeal dismissed.

F. W. Clancy, Atty. Gen., for appellant.  
E. W. Dobson, of Albuquerque, for appellee.

ROBERTS, C. J. Upon petition of Charles C. Murray, receiver of the New Mexico Central Railroad Company, the district court of Torrance county entered an order approving a resolution passed by the board of county commissioners of said county recommending an adjustment and compromise of the taxes assessed against said railroad company for the years 1910, 1911, and 1912, respectively, and the county treasurer was ordered and directed to accept the amount so found to be due by the decree in full settlement of the said taxes. From this order the county treasurer appealed to this court, but has failed to file any assignments of error. For this default, appellee moves to dismiss the appeal. Both parties have filed briefs on the merits of the case, but appellant has made no offer to cure his failure to file assignments of error. If the appellant must make and file assignments of error, in order to secure a consideration of the cause on appeal, which he fails to do, it follows necessarily that the merits of the case will not be considered by this court.

Section 21, c. 57, S. L. 1907, provides: "On appeals and writs of error, the appellant and plaintiff in error shall assign errors and serve a copy of such assignment of error on the opposite party in the same manner that copies of pleadings are served, and file a copy with the clerk of the supreme court on or before the return day to which the cause is returnable, which said assignment of errors shall be written on a separate paper and filed in the cause, and shall be also copied into the brief of appellant or plaintiff in error, and each error relied upon shall be stated in a separate paragraph. In default of such assignment of error and filing the same the appeal or writ of error may be dismissed and the judgment affirmed, unless good cause for failure be shown. Unless exception is filed or taken to the assignment of error the opposite party shall be deemed to have joined in error, upon the assignment of error so filed."

From the above it will be seen that the statute contemplates that assignment of errors shall be filed in all civil cases taken to the Supreme Court by appeal, or in which a writ of error may have been sued out. The assignment of errors is, in legal contemplation, the complaint of the appellant or plain-

tiff in error. In it he sets forth the errors committed by the trial court, which he seeks to have reviewed by the appellate court. In a sense, it performs the same office as does a complaint filed in the trial court. Without a complaint the jurisdiction of the trial court cannot be invoked. In the absence of an assignment of errors, where the same is required by statute or rule of court, no relief is asked of the appellate court, and it will not enter upon a consideration of the case. Appellant contends, however, that this court should, without assignment of errors, consider jurisdictional questions. It is true perhaps that the court would, should it enter upon the consideration of a cause, upon errors assigned, upon discovering that the trial court was without jurisdiction, although such lack of jurisdiction had not been raised by the assignment of errors, notice the same, and set aside the judgment. It would do so, because otherwise it would be affirming a void judgment. But where no assignment of errors is filed the court will not enter upon the consideration of the cause, but will dismiss the same, leaving the parties in the same position as if no appeal had been taken.

The territorial Supreme Court uniformly held that, where the appellant or plaintiff in error failed to file assignment of errors within the time required by the statute, the court would upon motion of appellee or defendant in error, interposed before the default had been cured, dismiss the cause, in the absence of a satisfactory showing excusing the default. *Price et al. v. Totl et al.*, 16 N. M. 1, 113 Pac. 624; *Sacramento Irrigation Co. v. Lee*, 15 N. M. 567, 113 Pac. 834; *Martin v. Terry*, 6 N. M. 491, 80 Pac. 951; *Lamy v. Lamy*, 4 N. M. (Gild.) 29, 12 Pac. 650. These cases were followed by this court in the case of *Lund v. Gilbert*, 17 N. M. 265, 125 Pac. 602. In the case of *Ditch v. Sennott*, 118 Ill. 288, 5 N. E. 395, the facts were identical with the present case, as shown by the following excerpt from the opinion: "On the case being reached, in conference, for decision, long after the term had expired, we find it objected by counsel for appellees that no errors have been assigned upon the record; our attention being thus called to it for the first time." In that state there was no statute requiring the filing of assignment of errors, but there was a court rule in almost identical language with our statute. The court, in dismissing the appeal, quotes with approval the following excerpt from the case of *Williston v. Fisher*, 28 Ill. 43: "An assignment of errors in this court performs the same office as a declaration in a court of original jurisdiction. It would be just as regular and proper for the circuit court to render a judgment in a cause where there is no declaration, as for this court to affirm or reverse a judgment where there is no assignment of errors. We should reverse such a judgment rendered by the circuit court, and we should commit the same error to render a judgment here with-

out the necessary pleading." See, also, *Burral v. Am. Tel. & Telegraph Co.*, 217 Ill. 189, 75 N. E. 461; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635; *Jesse French Piano & Organ Co. v. Meehan*, 77 Ill. App. 577.

In the case of *State v. Echert*, 35 Ind. 283, the court say: "No errors are assigned, and we cannot therefore regard the case as properly here for any purpose."

In the case of *Benneson v. Savage*, 119 Ill. 135, 11 N. E. 66, the court say: "There having been no errors assigned on the record of the Appellate Court, there is and can be no joinder in error, and therefore no issue for this court to try."

Appellant having failed to file assignment of errors, and failing to make any showing attempting to excuse the default, the appeal will be dismissed, because as the record is now presented there is no issue for this court to try, and it is so ordered.

HANNA and PARKER, JJ., concur.

SNOW v. ABALOS et al. (No. 1626.)  
(Supreme Court of New Mexico. April 20, 1914.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 238\*)—  
IRRIGATION—CORPORATIONS—POWERS.

Chapter 1, S. L. 1895, "An act in regard to community ditches and acequias," was purely administrative, and while section 1 of said act makes community acequias corporations, "for the purpose of this act," the Legislature did not confer upon the organization thus created the power to acquire or hold title to water rights. Such corporations have no powers not expressly or impliedly granted them by the act creating them.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 238.\*]

2. COMMUNITY ACEQUIAS.

The history of community acequias considered.

3. WATERS AND WATER COURSES (§ 127\*)—  
APPROPRIATION—COLORADO DOCTRINE.

In New Mexico, the "Colorado Doctrine," as it is termed, of prior appropriation prevails. Such doctrine was established or founded by the custom of the people, and grew out of the conditions of the country and the necessities of the people. It was recognized by the courts of the territory and became the settled law.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 144; Dec. Dig. § 127.\*]

4. WATERS AND WATER COURSES (§ 143\*)—  
RIGHTS OF APPROPRIATOR.

An appropriator of water does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. § 143.\*]

5. WATERS AND WATER COURSES (§ 135\*)—  
APPROPRIATION—APPLICATION.

The intention to apply water to beneficial use, the diversion works, and the actual diver-

sion of the water, all precede the actual application of the water to the use intended, but it is the application of the water, or the intent to apply, followed with due diligence toward application, and ultimate application, which gives to the appropriator the continued and continuous right to take the water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 135.\*]

6. WATERS AND WATER COURSES (§ 238\*)—  
IRRIGATION—RIGHTS OF APPROPRIATOR.

Under a community ditch, each water user, by application of the water to a beneficial use, acquires a right to take water from the public stream or source of supply, which right is a several right, owned and possessed by the individual user, notwithstanding the fact that the ditch through which the water is carried to his land may have been constructed by the joint labor and money of the individual appropriator, in conjunction with others similarly situated, and the act of 1895, supra, did not change the status of the individual consumer.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 238.\*]

7. WATERS AND WATER COURSES (§ 238\*)—  
IRRIGATION—WATER RIGHTS.

While a ditch, through which water is carried for the irrigation of lands owned by the constructors in severalty is owned and possessed by the parties as tenants in common, the water rights acquired by the parties are not attached to the ditch, but are appurtenant to the lands irrigated, and are owned by the parties in severalty.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 238.\*]

8. WATERS AND WATER COURSES (§ 238\*)—  
IRRIGATION—WATER RIGHTS.

While section 1, c. 1, S. L. 1895, makes all community acequias corporations, for the purpose of that act, such law did not divest the individual water users of any rights of property which he thereafter owned or possessed.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 238.\*]

9. WATERS AND WATER COURSES (§ 247\*)—  
WATER RIGHTS—ADJUDICATION—PARTIES.

The right to divert and utilize water acquired by the individual water user under a community acequia, being a several right, such individual consumer is a proper and necessary party in an action for the adjudication of water rights, utilized through such community acequia.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

10. WATERS AND WATER COURSES (§ 247\*)—  
WATER RIGHTS—ADJUDICATION—WAIVER.

The fact that a water user may have entered into a contract, by which he agrees, at some future time, to convey his water right to another party, does not militate against his right to maintain an action for the adjudication of his right to the use of water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

(Additional Syllabus by Editorial Staff.)

11. WATERS AND WATER COURSES (§ 133\*)—  
"APPROPRIATION OF WATER."

The "appropriation of water" consists in the taking or diversion of it from some natural stream, or other source of water supply, pursuant to law, with intent to apply it to some beneficial use, which intent is consummated within a reasonable time by the actual applica-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion of all of the water to the use designed, or to some other useful purpose.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 146; Dec. Dig. § 133.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 473, 474; vol. 8, p. 7580.]

Appeal from District Court, Dona Ana County; before Justice Medler.

Action by Oscar Snow against Francisco Abalos and others. From judgment for defendants, plaintiff appeals. Reversed, with directions.

This action was instituted by appellant in the district court of Dona Ana county, for the purpose of securing an adjudication of the rights of all water users, taking water from the Rio Grande river below the Elephant Butte Dam, in that portion of New Mexico embracing what is known as the "Rio Grande or Elephant Butte Irrigation Project." The purpose of the action is to secure a judicial determination of the priorities of all the existing rights to the use of water within said district, in advance of the completion of said dam by the United States government. Some 7,000 claimants, or alleged claimants, are made parties defendant. The complaint, briefly summarized, was as follows:

Alleged residence of plaintiff in Dona Ana county, and his ownership in fee simple of 966.95 acres of land, which was specifically described.

Paragraph 2 alleged that such lands could not be successfully cultivated without the application of water from sources other than from natural rainfall.

Paragraph 3 alleged that the Rio Grande river is a natural stream, flowing in such manner that such waters might be diverted and made to flow to and upon the lands of plaintiff.

Paragraph 4 alleged that: "In the year 1850 the then owners and occupants of the lands of plaintiff hereinabove described, they being the predecessors in interest of plaintiff, diverted, and caused to be diverted from said Rio Grande river, sufficient of its unappropriated waters to irrigate the aforesaid lands by making a reasonable use of such waters, and which quantity was requisite and necessary for the proper irrigation of such lands, to wit, an aggregate of 690 inches, miner's measurement, as defined by chapter 49 of the Acts of the Thirty-Seventh Legislative Assembly of New Mexico, continuous flow, delivered on such lands. And thereupon and thereafter, by means of headgates, an irrigation ditch and other works constructed by such predecessors in interest of plaintiff and other owners of land in said county of Dona Ana similarly situated, who organized and composed and thereafter continuously maintained, operated, and utilized for the purposes aforesaid, what was then, ever since has been, and now is, known as the

'Mesilla Community Ditch,' plaintiff's said predecessor in interest caused the waters, so appropriated and diverted as aforesaid, to flow and otherwise to be conducted to and upon the aforesaid lands of plaintiff, whereby said lands were irrigated and rendered productive of valuable crops; that plaintiff's said predecessors in interest thereafter continued so to divert and cause to be diverted, and to conduct and cause to be conducted, said quantity of water from said Rio Grande river, requisite and necessary for the proper irrigation of the hereinabove described lands, and did continuously utilize said water in irrigating said lands, and thereby produce valuable crops thereon; that immediately therefrom and continuously thereafter, and claiming through said original owners, plaintiff and his mesne grantors from said original owners have, ever since said year 1850, continuously diverted, and caused to be diverted, from said Rio Grande river the aforesaid quantity of water, requisite and necessary for the proper irrigation of said lands, and have continuously conducted, and caused same to be conducted, to and upon said lands in the manner and by the means aforesaid, and there used the same for the irrigation and benefit of said lands ever since the said year 1850, by reason and by means whereof valuable crops have been and are being produced thereon."

Paragraph 5 alleged adverse claims by defendants.

Paragraph 6 alleged, in substance, that the lands referred to are situated within the district, the irrigation of which is contemplated by means of the irrigation system commonly known and designated as the "Rio Grande Project," contract covering the construction of which has heretofore been entered into between the United States and the Elephant Butte Water Users' Association.

In paragraph 7 plaintiff asked leave of the court to insert the names of, and to make additional parties defendant, any other persons, firms, or corporations subsequently discovered to be claimants of any right adverse to the aforesaid rights of plaintiff.

Plaintiff prayed that his right to divert the quantity of water mentioned might be established, and that the several defendants be barred and forever estopped from having or claiming any right or title in or to the use of such waters adverse to the plaintiff, and that the respective rights of the several parties defendant in and to the waters of said river might in like manner be ascertained, fixed, declared, and established. Plaintiff also asked for general relief.

Among the defendants are divers community ditches, one thereof being the Mesilla Community Ditch.

W. W. Cox, one of the individual defendants, interposed a demurrer upon the grounds: "(1) That there is a defect in the parties plaintiff, in that the complaint shows

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon its face that plaintiff has not been, and is not now, nor have his predecessors in interest been, appropriating or diverting any waters from the Rio Grande river in any quantity whatever, but it appears on the face of the complaint that whatever right or interest in and to any diversion or appropriation of waters of the Rio Grande river the plaintiff may now have, or he or his predecessors in interest may have had, is by reason of and by virtue of certain appropriations and diversions of the waters of the said Rio Grande river made by the Mesilla Community Ditch. (2) That it appears on the face of the complaint that the Mesilla Community Ditch, being a corporation under and by virtue of the laws of the state of New Mexico, and being trustee for the plaintiff, is the real party in interest in any cause or action to determine and adjudicate any rights that plaintiff may have by reason of the beneficial use of any waters appropriated and diverted as alleged in the complaint. (3) That it appears on the face of the complaint that no cause or reason exists to maintain the action; it not appearing that he has demanded of the said Mesilla Community Ditch that the action be commenced for the benefit of him, the said plaintiff, and others similarly situated."

F. J. D. Westell, another of the individual defendants, filed a demurrer upon the grounds: "(1) That the complaint does not show by what right plaintiff's alleged predecessors in interest diverted the waters of the Rio Grande river, nor that any such right to divert ever existed in favor of said alleged predecessors in interest, not that plaintiff is now the bona fide holder or owner of any right, or has any right to the present use of any of the alleged diverted water, nor what amount of water was diverted from the Mesilla Community Ditch. (2) That there is a defect in parties plaintiff, in that the complaint shows upon its face that plaintiff's alleged right to divert waters of the Rio Grande river was transferred to the Mesilla Community Ditch, and that the complaint fails to show any right to divert any water from the irrigation system of said Mesilla Community Ditch, nor that plaintiff is now the owner or bona fide holder of any such right, and therefore is not the real party in interest."

The demurrers were sustained.

The Las Cruces Community Ditch filed a motion to make the complaint more definite and certain upon 17 specific points. The motion was sustained as to the first, second, fourth, sixth, seventh, eighth, twelfth, and fifteenth of such points, which were as follows:

"First. Whether the said Mesilla Community Ditch mentioned and referred to in paragraph 4 of the said complaint is a corporation authorized and existing under the laws of the state of New Mexico governing community acequias, or ditches, and if the

said Mesilla Community Ditch is such a corporation, whether or not the plaintiff is a member of the same.

"Second. Whether the water claimed by the plaintiff for the irrigation of his said land was appropriated by the plaintiff or any predecessor or predecessors in interest of the plaintiff individually, or whether the appropriation made by the plaintiff or any predecessor or predecessors in interest was as a member or members of the said Mesilla Community Ditch."

"Fourth. Whether the plaintiff is an independent and individual owner of any water right in the said Rio Grande River for the irrigation of his said lands, and, if not such an individual owner, under what rules, regulations, and conditions the plaintiff is entitled to use water appropriated by the said Mesilla Community Ditch for the irrigation of his said lands."

"Sixth. What is the nature and character of the Elephant Butte Water Users' Association of New Mexico mentioned in paragraph 6 of the said complaint?"

"Seventh. Whether or not the plaintiff is a member of the said Elephant Butte Water Users' Association of New Mexico, and, if such a member, whether the plaintiff has executed any contracts or agreement with the said Elephant Butte Water Users' Association of New Mexico, whereby the plaintiff has agreed to surrender the control and distribution of all the waters heretofore appropriated by him or his predecessors in interest from the said Rio Grande river to the said Elephant Butte Water Users' Association.

"Eighth. Whether the plaintiff and all of the defendants in this action, save and except the several community ditches made defendants herein, have entered into any agreement or agreements touching the surrender to the said Elephant Butte Water Users' Association of the waters from the Rio Grande River claimed by the defendants, and, if so, the nature, character, and purport of the said agreement."

"Twelfth. How and by what means the water from the Rio Grande River, heretofore used by the plaintiff, for the irrigation of his said lands, has been distributed to the plaintiff."

"Fifteenth. If the plaintiff is a member of the said Mesilla Community Acequia, what is the area of lands irrigated by the said Mesilla Acequia, and what proportions do the lands of the plaintiff bear to the total area of lands irrigated by the Mesilla Community Acequia?"

Plaintiff elected to stand upon the complaint, and declined to plead further; thereupon judgment was rendered dismissing the case at plaintiff's costs as to the defendant named in the motion and as to the defendants who filed the respective demurrers. From the judgment thus rendered this appeal is prosecuted.

Holt & Sutherland, of Las Cruces, for appellant. Mark B. Thompson, of Las Cruces, for appellees Cos and Westell, Young & Young, of Las Cruces, for appellee Las Cruces Community Ditch.

ROBERTS, C. J. (after stating the facts as above). We will first consider the action of the district court in sustaining the demurrers, as our conclusion upon the legal questions raised by the demurrers will necessarily determine many of the questions raised by the motion interposed by the Las Cruces Community Ditch.

The principal contention of the demurring defendants is that the suit at bar cannot be maintained by the plaintiff for the reason that he is not the real party in interest, but that the Mesilla Community Ditch is the real party in interest, because, it is claimed by the defendants, that the said Mesilla Community Ditch was the original appropriator of the waters, the right to the exclusive use of which is claimed by the plaintiff, and by virtue of the further fact that said community ditch is the trustee for plaintiff, and that plaintiff has failed to allege demand upon said community ditch to prosecute the action for the benefit of himself and others similarly situated. Appellant claims that none of the points raised by the demurrer can properly be reached, when considered in the light of plaintiff's complaint, and can be raised only by answer; nevertheless, in view of the importance of the litigation and the desirability of obtaining an early decision of the main questions involved, we are asked to consider the questions raised upon the merits, and will therefore treat all the points discussed as properly before us for determination, without further inquiry.

Sections 20 and 21, c. 49, S. L. 1907, provide for the adjudication of the rights to the use of the water of any stream system, by an appropriate action in any district court which has jurisdiction to hear and determine the same.

[2] In order to dispose of the questions raised by the demurrer it will be necessary to consider the history, nature, and character of community ditches, and the relations which exist between the consumer, or members of such community corporations, and the corporation. Also the nature and character of the right to the use of the water of the public streams of New Mexico. Briefly stated, the question is whether the appropriation of the water was made by the community acequia, or the individual consumer.

[1] The community irrigating ditch or acequia is an institution peculiar to the native people living in that portion of the southwest which was acquired by the United States from Mexico. It was a part of their system of agriculture and community life long before the American occupation. After the territory of New Mexico was organized, the Legislature, by the act of January 7, 1852

(Laws 1851-52, p. 276), provided for the government of community acequias, and doubtless incorporated into the written law of the territory the customs theretofore governing such communities. Under the act in question, elections were to be called and held by justices of the peace of the various precincts of the territory, at which all the owners or tenants of lands to be irrigated therefrom were permitted to vote for overseers of such ditches. It was made the duty of such overseers to superintend the repairs and excavations on such ditches, to apportion the persons or number of laborers to be furnished by the proprietors, to regulate them according to the quantity of land to be irrigated by each one from said ditch, to distribute and apportion the water in the proportion to which each was entitled, taking into consideration the nature of the seed, crops, and plants cultivated, and to conduct and carry on said distribution with justice and impartiality. Further provision was made as to the repair of ditches, the calling out of laborers, the punishment of overseers for neglect of duty and of all persons obstructing or interfering with the flow of water in a community acequia. Thereafter, at almost every session of the Legislature, laws, either general or special, were enacted relative to such acequias, but no important change was made until 1895, when, by section 1, c. 1, S. L. 1895, the Legislature provided that "All community ditches or acequias, now constructed or hereafter to be constructed in this territory, shall for the purposes of this act be considered as corporations or bodies corporate, with power to sue or to be sued as such." The act in question was purely administrative. It did not confer upon the organization, in its corporate capacity thus created, the power to acquire or hold title to water rights. The words "for the purposes of this act" are words of express limitation, and such corporations, so created, have and possess no powers not thereby, either expressly or impliedly, granted them. This being true, we are compelled to resort to a consideration of the history, nature, and character of such associations, for the purpose of determining the relation of the consumer to the corporation, and the nature and character of the right to the use of water which he acquired by virtue of his membership therein.

New Mexico being in the arid region, the early settlements were established along the banks of perennial rivers, or in the mountain valleys where water from springs and creeks was reasonably certain to be available for irrigation at the needed times. As a protection against Indians, settlements were made in communities, and the people built their houses and established their towns and plazas close together, and cultivated the lands in small tracts adjacent to the settlement. When a settlement was established, the people by their joint effort would construct an irrigation ditch, sufficiently large to convey

water to their lands for the irrigation of crops. Each individual owned and cultivated a specific tract of land, sufficient to provide food for the needs of his family, and from the main ditch laterals were run to the various tracts of land to be watered. The distribution of the water and the repair of the ditch was in charge of a *mayordomo*, or officer elected by the water users under the ditch. This official would require the water users to contribute labor toward the repair of the ditch and its maintenance, and also distributed the water to the various irrigators equitably, in proportion to the land to be irrigated, as his necessities required. When a landholder under a community *acequia* conveyed his real estate, his right to the use of water as a member of the community passed with the real estate.

[3] In New Mexico, the "Colorado doctrine," as it is termed, of prior appropriation prevails. Established or founded by the custom of the people, it grew out of the condition of the country and the necessities of its citizens. The common-law doctrine of riparian right was not suited to an arid region, and was never recognized by the people of this jurisdiction. When the question came before the courts for adjudication (*Albuquerque L. & I. Co. v. Gutierrez*, 10 N. M. 197, 61 Pac. 357), the doctrine of prior appropriation was recognized by the courts and became the settled law of the territory. The judicial declaration, however, did not make the law; it only recognized the law as it had been established and applied by the people, and as it had always existed from the first settlement of this portion of the country. This construction of the law by the courts has been consistently adhered to by the Legislature of the territory, as the various acts upon the subject will show.

[11] The latest definition of the term "appropriation of water" under the Arid Region Doctrine of Appropriation, by Kinney, in his work on *Irrigation and Water Rights* (2d Ed.) § 707, is as follows: "The appropriation of water consists in the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose, and, consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose."

[4] The water in the public stream belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose. He acquires this right as above stated. Necessarily he must have some suitable ditch, or other device, to enable him to take the water from the stream. In other words, the water must be captured before it can be applied to a beneficial use. In order to apply the water, and thereby invest the appropriator with a right to continue to take and use

the same, he must have suitable appliances for conducting the water to the place of use, otherwise he would not be able to use the same.

[5] The intention to apply to beneficial use, the diversion works, and the actual diversion of the water necessarily all precede the application of the water to the use intended, but it is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives to the appropriator the continued and continuous right to take the water. All the steps precedent to actual application are but preliminary to the same, and designed to consummate the actual application. Without such precedent steps no application could be made, but it is the application to a beneficial use which gives the continuing right to divert and utilize the water.

[6] Applying these principles to a community *acequia*, and the question raised by the demurrers in this case become easy of solution. A number of people settle in a given community, each owning lands capable of being irrigated from a natural stream. A., for example, conceives the idea of irrigating his farm. He finds that his neighbors likewise desire to irrigate their lands. They agree to construct a common ditch to the source of supply. Each individual contributes his labor and money, and the ditch is constructed, capable of carrying a sufficient amount of water to irrigate the lands of all the parties. They appoint a *mayordomo* or superintendent, whose business it is to divert the waters from the stream into the irrigating ditch. This *mayordomo* is but the agent of the individual owners of the lands under the ditch, and when he turns the water in he is acting for them. The water flows down the ditch and A. takes therefrom the water to irrigate his farm. He has applied the water to a beneficial use, and by reason of such application he has acquired the right to continue to divert from the public waters a sufficient amount to irrigate his lands. The people under the community system, as stated, have no right to any specific water flowing in the river, but by the completed appropriation each has the right to continue to divert therefrom water sufficient for the purpose for which it is used.

[7] The ditch, or carrier system, having been constructed by the joint labors of all the water users, is owned by them as tenants in common; each having a common interest in the same. While this is true, each has a several right to take water from the stream system for the irrigation of his lands. After the water, the right to divert which, as stated, is vested in the several parties, has been actually diverted under such several rights, into the ditch, and reduced to possession, and by such diversion becomes intermingled, such waters are probably owned by the parties as tenants in common. Under such community systems, the water commissioners or mayor

domo had general charge of the ditch and distributing system; it was his duty to keep it in repair, assessing the labor upon the parties using the ditch. He diverted the water into the ditch, but only by virtue of rights acquired by individual users, by completed appropriations, or rights acquired to divert water. He distributed the waters equitably to the several users, in proportion to the lands irrigated, taking into consideration the nature of the crops and quantity required. No one is entitled to waste water. When his requirements have been satisfied, he no longer has a right to the use of water, but must permit others to use it.

Such being the case, we are of opinion, that prior to the enactment of the statute of 1895, supra, making such community acequias corporations, for certain purposes, each individual water user under a community acequia was the owner of a right to take water from the public stream or source from which it was drawn, which right was divorced from and independent of the right enjoyed by his co-consumer; that the fact that such water was diverted into a ditch, owned in common with other water users, did not give such other users any interest in, or control over, the right to take water, or water right, which each individual consumer possessed; that the right to divert water, or the water right, is appurtenant to specified lands, and inheres in the owner of the land; that the right is a several right, owned and exercised by the individual, and, the officers of the community acequia, in diverting the water act only as the agents of the appropriator.

Section 44, c. 49, S. L. 1907, provides: "All water used in this territory for irrigation purposes, except as otherwise provided in this act, shall be considered appurtenant to the land upon which it is used." This provision was, we believe, but a recognition of the law relative to waters used for irrigation, established by general custom. Where land is owned in severalty, to which a water right is appurtenant, which water right is of course only a right to take from the public stream a sufficient amount of water to properly irrigate the land, we fail to understand how such a right could be owned in common with other water users.

Appellees have cited us to section 62, Black's Pomeroy on Water Rights, where the author says: "Whenever ditches or other structures for diverting or appropriating water belong to two or more proprietors, such owners are, in the absence of special agreements to the contrary, tenants in common of the ditch, and of the water rights connected therewith, and their proprietary rights are governed by the rules of law regulating tenancy in common"—and also refer to the cases of *St. Anthony Falls Water-Power Co. v. City of Minneapolis*, 41 Minn. 270, 43 N. W. 56; *Bradley v. Harkness*, 28 Cal. 69; *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447, 4

Pac. 426. The learned author and the courts, we believe, erroneously consider the water rights attached to the ditch, which of course is owned by the parties constructing it as tenants in common, whereas said water rights are appurtenant to the lands owned in severalty by the parties. The ditch is simply the carrier, or agency employed by the parties, to conduct the water, the right to which is appurtenant to the land, to the land to be irrigated. Suppose, for example, that two farmers each owned a farm; their lands being contiguous. In order to reach their lands they should jointly construct a wagon road to the same. The road would be owned by the parties jointly or as tenants in common. Each would have the right to use the road. The fact that they haul their produce raised on the farm over the wagon road thus constructed would not make them tenants in common of the crops so hauled. However, if they should, for instance, mix their grain together, for the purpose of hauling it to market, they would of course be tenants in common of the grain so commingled.

In the case of *Norman v. Corbly*, 32 Mont. 195, 79 Pac. 1059, this principle is applied by the Supreme Court of Montana. The court say: "To constitute a tenancy in common there must be a right to the unity of possession (17 Am. & Eng. Enc. L. [2d Ed.] 651, and cases), and if this right is destroyed, the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for the parties can have no title to the water itself."

In the case of *City of Telluride v. Davis*, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101, the Colorado Supreme Court considered a similar question. There two parties constructed a ditch for the purpose of conveying water to mining claims, each owning a separate claim. The waters were carried through the ditch to the claims, where each party utilized one-half of the water. The trial court held that the appropriation made by the parties was a joint appropriation, and was owned and held by them as tenants in common and that neither could, without the consent of the other, divide the water at any other point than where they had theretofore divided it, nor divert or take his water through a different headgate. The court say: "We think the court below erred in holding that the appropriation made by Brown and Davis invested them with a joint ownership of the water appropriated. While it is true that they acted together in making the appropriation and in constructing the ditch, it was their understanding that each was to be entitled to one-half of the water so appropriated, and such share was to be applied on the separate estate and land of each; and, while there was a unity of possession in the water while it was being carried through the ditch, yet, when it reached the Ohio placer, the property of Mr. Brown, such unity of posses-

sion ceased, and one-half of the water was diverted to his individual use, while the remaining one-half was continued on till it reached the Kokomo placer, the separate and individual property of appellee. The water was not used, or to be used, upon any land jointly owned by them, but as stated above, was to be used upon each one's separate and individual land. In these circumstances, the right to a unity of possession necessary to constitute a tenancy in common did not extend to the right of user, which is essential to the existence of such a tenancy in a water right. *Norman v. Corbley*, 32 Mont. 195, 79 Pac. 1059."

[8] Did the act of 1895 change the status, in this regard, of the right acquired by the individual to divert and utilize water from a public stream? This question was apparently fully answered by the territorial Supreme Court, in the case of *Candelaria v. Vallejos*, 18 N. M. 147, 81 Pac. 589, where it enunciated the doctrine that the organization of such an association in no manner involved the surrender of individual property rights. The court say: "We are of opinion that under that system he remained as any other citizen vested with full rights of property, sacred against any alienation except by his consent or by due process of law. \* \* \* The corporation thus created \* \* \* has only the powers expressly or by necessary implication granted to it by the act creating it and no more. It belongs to the class of corporations known as public involuntary quasi corporations—citing *Elmore v. Drainage Commissioners*, 135 Ill. 269-273, 25 N. E. 1010, 25 Am. St. Rep. 363. \* \* \* This was no voluntary organization; the owners of these lands and the water rights appurtenant thereto were not given leave to incorporate, as a preliminary to which they deeded their several holdings to the corporation. On the contrary, the Legislature, for the purpose purely of more conveniently and economically distributing the water upon such lands, and thus perhaps of leaving by such economical use an overplus for new appropriations, decided to make corporations out of each of the ditches. The Legislature did not take away or diminish any property rights previously held by the several owners, nor could it do so. \* \* \* As it could not by its fiat confiscate the property of its citizens, it could not by creating a corporation and officers thereof confide to such corporation the power to confiscate property. \* \* \*"

The words, "that such officers shall have general charge of all affairs pertaining to the same," \* \* \* do not disturb property rights as they previously existed in the various coparceners; they do not disturb or destroy priorities as they existed before the statute of incorporations; they do not give the power to take away from one the water belonging to him and to give it to another."

The act in question was administrative only, and for convenience gave a legal status to such organizations, in order to facilitate the distribution of the water and the maintenance of the ditches and laterals. It did not attempt to interfere with the rights theretofore owned by the individual. It could not, had it so desired, have arbitrarily divested the individual of his right to divert and utilize water and invest the same in the corporation by it created. That it did not attempt to do so is plain.

[9] If our conclusion is sound, and the right to divert and utilize water, acquired under a community ditch, is a several right, vested in the individual appropriator, it necessarily follows that the individual is a proper and necessary party in an action for the adjudication of water rights, where such rights are exercised through a community ditch. If it be true that the individual is the owner of the right to divert water, it would necessarily follow that he would only be bound by decree, in a suit, to which he was a party.

Appellees contend that the appellant necessarily would not have any priority of right over his co-water users under the Mesilla Community Ditch. Admitting for the purpose of argument only that this contention is sound, it does not militate against his right to maintain this action. He has the right to have all the priorities adjudicated and settled by a decree of the court, even though such rights would be held co-ordinate and equal with his own. It was the evident design of the Legislature, by chapter 49, S. L. 1907, to have adjudicated and settled by judicial decree all water rights in the state, to have determined the amount of water to which each water user was entitled, so that the distribution of water could be facilitated, and the unappropriated water to be determined, in order that it might be utilized.

The only remaining ground of demurrer, not disposed of by what has been above said, is ground No. 1 in the demurrer interposed by F. J. D. Westell, viz.: "That the complaint does not show by what right plaintiff's alleged predecessors in interest diverted the waters of the Rio Grande river, nor that any such right to divert ever existed in favor of said alleged predecessors in interest, nor that plaintiff is now the bona fide holder or owner of any right, or has any right to the present use of any of the alleged diverted water, nor what amount of water was diverted from the Mesilla Community Ditch." A reading of the complaint, and construing the law relative to such water rights as above applied, will clearly demonstrate the lack of merit in this ground of the demurrer. Our conclusion is that the district court erred in sustaining each of said demurrers.

We are also of the opinion that the motion to make the complaint more definite and



certain, interposed by the Las Cruces Community Ditch, should not have been sustained, as to the grounds set forth in the statement of facts.

The first ground of the motion, which was sustained by the court, was that the plaintiff be required to allege whether or not the Mesilla Community Ditch is a corporation, and whether the plaintiff is a member of the same. In view of our conclusion as to the nature and character of such corporations it is evident that such an allegation is wholly unnecessary. However, the facts alleged in paragraph 4 of the complaint clearly show the organization and existence of an association such as was declared by the act of 1895 to be a corporation for certain specified purposes, and the complaint further shows that the plaintiff is a member of such association.

The second, fourth, twelfth, and fifteenth grounds of the motion sustained by the court have been disposed of by what we have said in discussing the demurrers, and further argument is unnecessary. These grounds of the motion were predicated upon the assumption that the Mesilla Community Ditch was the proper party to institute the action, and that a member of such a community corporation could not maintain the action in his own name, and were designed to require plaintiff to allege facts in his complaint more clearly establishing the fact that he acquired his rights as a member of such a community association or corporation. This, as we have seen, would not militate against his right to maintain the action, and such allegations would add nothing material to the complaint.

[10] The sixth, seventh, and eighth grounds of the motion were designed to require plaintiff to allege whether he had entered into an agreement, to convey his water rights to the Elephant Butte Water Users' Association, and to require him to state the nature and character of such association. The fact that he had entered into an agreement to, in the future, convey his rights to another party would not preclude him from maintaining the suit. He alleged in his complaint that he was the owner of the right. Until the title to such right passed from him he would have the right to maintain the suit. We fail to perceive how it was in any way material to the cause of action to allege the required facts. By sustaining the motion upon these grounds the court required plaintiff to plead facts which were foreign and not relevant to the cause of action set forth in the complaint, and facts which, if they existed, could properly be raised, if at all, only by answer.

For the reasons stated, the cause is reversed, with directions to the district court to overrule the demurrer, and the motion to make the complaint more definite and certain; and, it is so ordered.

HANNA and PARKER, JJ., concur.

**LA MESA COMMUNITY DITCH v. APPELZOELLER et al. (No. 1622.)**

(Supreme Court of New Mexico. April 28, 1914.)

(Syllabus by the Court.)

**1. WATERS AND WATER COURSES (§ 257\*)—IRRIGATION—COLLECTION OF ASSESSMENTS—REMEDY.**

No remedy is provided for the collection of assessments levied by acequia commissioners, under the provisions of paragraph 11 of the Compiled Laws of 1897, as amended by section 1, c. 44, S. L. 1903, except the deprivation of the delinquent party of the right to the use of water until payment is made, and the community officers are necessarily confined to the remedy given.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. § 257.\*]

**2. WATERS AND WATER COURSES (§ 266\*)—IRRIGATION—OFFENSES—DEFENSE.**

Where a party is in default in the payment of such an assessment, and has been notified not to take and use water until such assessment is paid, and such delinquent consumer, in violation of such order, takes and uses water, he is guilty of a misdemeanor. It is no defense, in a prosecution for such misdemeanor, to allege and prove that the assessment so levied and not paid by the water user is excessive.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 266.\*]

**3. INJUNCTION (§ 118\*)—COMPLAINT—ESSENTIALS—IRREPARABLE DAMAGES.**

In an action for injunction it is essential that the complaint disclose facts in order to enable the court to determine from the facts so alleged the necessity of awarding the extraordinary remedy of injunction. The naked allegation, that great and immediate irreparable damage will result to the plaintiff, unsupported by any facts, is not sufficient. The complaint must show how, in what way, and for what reason the threatened damages are irreparable.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

**4. WATERS AND WATER COURSES (§ 247\*)—IRRIGATION—UNLAWFUL DIVERSION—INJUNCTION.**

The unlawful diversion of water from a community acequia or the naked trespass, unaccompanied with great or irreparable damage or mischief will not warrant equitable relief, as the statute affords an ample remedy.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

**5. INJUNCTION (§ 102\*)—GROUNDS—CRIMINAL ACTS.**

Equity will not interfere to prevent the commission of a crime. It will, however, intervene to protect property and property rights from irreparable injury, even though the acts sought to be enjoined are criminal acts. But the court will not award equitable relief merely because the acts complained of constitute a violation of a criminal statute.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 176; Dec. Dig. § 102.\*]

**6. PLEADING (§ 418\*)—OVERRULING OF DEMURRER—WAIVER.**

When the complaint fails to state a cause of action, and clearly shows that, upon the case as stated, the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, with-

out losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict, where the defects in the complaint are not supplied by the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.\*]

**7. EQUITY (§ 329\*)—PLEADING—CURE OF ERROR.**

While the filing of a cross-bill, founded on matters of equitable cognizance, will cure any defects of jurisdiction under the original bill, and authorize the granting of relief to any party entitled thereto, still, if the cross-bill fails to state grounds for equitable relief, the defect is not cured.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 656-659; Dec. Dig. § 329.\*]

**8. INJUNCTION (§ 74\*)—SCOPE OF REVIEW—EXERCISE OF DISCRETION.**

Courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 142, 150; Dec. Dig. § 74.\*]

**9. SET-OFF AND COUNTERCLAIM (§ 34\*)—SUBJECT-MATTER OF COUNTERCLAIM.**

A counterclaim, under the Code, must be intended to answer the complaint, and must run counter to plaintiff's demand, in whole or in part.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 56, 57; Dec. Dig. § 84.\*]

Appeal from District Court, Dona Ana County; E. L. Medler, Judge.

Suit by the La Mesa Community Ditch, a corporation, to enjoin Nicholas Appelzoeller and others from using water contrary to orders of commissioners and mayordomo. From judgment for plaintiff, defendants appeal. Reversed, with directions.

Holt & Sutherland, of Las Cruces, for appellants. Young & Young and J. H. Paxton, all of Las Cruces, for appellee.

ROBERTS, C. J. This is a suit brought by the La Mesa Community Ditch against a large number of water right owners in the ditch to restrain them from using water contrary to the orders of the commissioners and mayordomo. Among other things, the complaint alleges that on December 2, 1912, the commissioners of the ditch made an assessment for each day's fatigue current for the following year, "to provide funds for the payment of the salary of the mayordomo and other legitimate expenses incident to the proper conduct and maintenance of the ditch for 1913," and that such assessment was necessary for the purposes mentioned; that due notice of the assessment was given to, and demand for the payment of same made upon, all water right owners; that defendants failed and refused to pay the assessment; that, to wit, May 9, 1913, plaintiff ordered defendants not to take or use wa-

ter from the ditch until the assessment was paid; that defendants continually thereafter took and used such water, and threatened to continue so doing contrary to such orders, "to plaintiff's great and irreparable damage"; and that plaintiff had no adequate remedy at law in the premises. The complaint was verified, and upon the ex parte showing thus made a preliminary injunction was issued, together with an order to show cause. To the complaint defendants interposed a demurrer, upon the ground that it did not state facts sufficient to constitute a cause of action, because, among other reasons specified, it appears from the allegations of the complaint that plaintiff was not without an adequate remedy at law, as the statute of New Mexico prescribed a specific remedy for the wrong complained of by plaintiff. The demurrer was overruled. Defendants thereafter filed an answer to the merits, and by way of cross-bill or counterclaim attempted to secure affirmative relief against the plaintiff: (1) To prevent plaintiff from closing down their various headgates and depriving them of the use of water, because of the alleged illegality of the assessment; and (2) to compel plaintiff to reconstruct the intake and a portion of the main ditch, theretofore alleged to have been washed out by floods. The ground set forth, as a predicate for the alleged illegality of the assessment, was as follows: "That as cross-complainants are informed and believe, and therefore aver, said cash assessment in the amount aforesaid was not necessary for the payment of the salary of the mayordomo of said community ditch and other legitimate expenses incident to the proper conduct and maintenance of said community ditch, but was, and is, largely in excess of the amount required for such purposes." A demurrer was interposed to each of said cross-bills, which was sustained as to the second and overruled as to the first. Thereupon reply was filed by the plaintiff, and the cause proceeded to trial. The court held that the burden of proof was upon the defendants upon their cross-bill, and after defendants introduced their evidence, judgment was entered for the plaintiff, enjoining defendants from using water until their assessments had been paid. From the judgment so rendered this appeal is prosecuted.

Appellants have assigned and discussed in their brief many alleged errors relating to rulings of the court upon the pleadings and the trial of the cause. We shall confine our attention, however, to the pleadings, for our conclusions thereon will dispose of the controversy.

[1] In order to arrive at an understanding of the questions involved, it is perhaps advisable to set out the sections of the statute which gave rise to the controversy, as the proper solution of the questions present-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed depend, more or less, upon the proper construction of these statutes.

Paragraph 11 of the Compiled Laws of 1897, as amended by section 1, c. 44, S. L. 1903, in part, reads as follows: "The commissioners shall assess fatigue work or task of all parties owning water rights in said community ditches or acequias, and shall have power to contract and be contracted with and also to make all necessary assessments to provide funds for the payment of the salary of the mayordomo and other legitimate expenses incident to the proper conduct and maintenance of the acequias under their charge, and also to make contracts for obtaining water for irrigation purposes in connection with their ditches, such contracts to be ratified by a vote of a majority of the owners of water rights in said ditches; and shall have a general charge and control of all affairs pertaining to the same, together with the power to receive money in lieu of said fatigue or task work at a price to be fixed by them; and shall, immediately upon taking office, provide by-laws, rules and regulations not in conflict with the laws of the territory for the government of said ditch or acequia, and a printed copy thereof shall be furnished to each owner of a water right in said ditch."

Section 13, C. L. 1897, as amended by section 2, c. 44, S. L. 1903, reads as follows: "Any person, not the owner or duly authorized representative of the owner, of a water right in said ditch, or any such owner or representative, who shall contrary to the orders of the mayordomo or commissioners, cut, break, stop up, or interfere with said acequia, or any contra or lateral acequia thereof, or take or use water from the same contrary to such orders, shall be guilty of a misdemeanor, and upon complaint made before the nearest justice of the peace, a warrant shall issue for his arrest, as in the case of any other offense against the territory, and upon conviction the defendant shall be fined in a sum of not less than ten dollars nor more than fifty dollars and in default of the payment of said fine shall be confined in the county jail for a period of not less than five nor more than thirty days. And it is hereby made the duty of the mayordomo of any such acequia, to prosecute in the name of the territory of New Mexico any violation of this section whenever he shall obtain knowledge thereof, and his failure to do so shall be deemed a misdemeanor, and upon conviction thereof shall be fined in a sum not less than twenty-five dollars nor more than fifty dollars or by imprisonment in the county jail not less than ten nor more than thirty days."

Other provisions, relating to community acequias will be found in chapter 1, C. L. 1897, and amendments thereof. It is not necessary to set out in full the other provisions of the law, and it probably will suffice to say that the Legislature has made provision for the regulation, government, and control, of

acequias, in order to facilitate the distribution of water, and the upkeep and repair of the ditches. A discussion of the history, nature, and character of those community acequias will be found in the case of *Snow v. Abalos et al.*, 140 Pac. 1044, decided at the present term of this court.

By the statutes provision is made for the election of commissioners by the water users under an acequia, and the duties of these officials are prescribed. They are given power "to make all necessary assessments to provide funds for the payment of the salary of the mayordomo and other legitimate expenses incident to the proper conduct and maintenance of the acequias under their charge." Community acequias are made corporations for certain purposes, with power to sue and be sued as such. A person in default, after due notice, in the payment of the amount assessed against him, has no right to take or use any water from the acequia, or contra acequia or lateral thereof. If he does so, in violation of the orders of the mayordomo, his act in so doing constitutes a misdemeanor, for which he can be punished.

[2] No remedy is provided for the collection, by the officers of the community acequia, of the assessments so levied, except the deprivation of the delinquent party of the right to the use of the water until payment is made, and the community officers are necessarily confined to the remedy given. This would appear to be adequate and complete remedy, for the member of the community must have water for the irrigation of his lands. If he takes this water, contrary to the orders of the mayordomo, he is subject to a fine of not less than \$10 nor more than \$50. And each time he opens his headgate contrary to such orders constitutes a separate offense. In such a prosecution, it is no defense to allege and prove that the assessments so levied and not paid by the water user are excessive, for it must be apparent that the water user would have no right to litigate the necessity of the assessment in a criminal case. The only question in such a case for determination is whether the defendant took and used the water in violation of the orders of the mayordomo. If such official arbitrarily and fraudulently denies water to a consumer to which he is justly entitled, he would have his recourse in a court of equity.

[3, 4] The bill of complaint in this case alleges that defendants are taking water in violation of the orders of the mayordomo, "to plaintiff's great and immediate irreparable damage." No facts are alleged, however, showing any damage, other than the fact that appellants have not paid the assessment so levied. This failure to pay the assessment, in and of itself, certainly would not warrant the conclusion that irreparable damages would result from appellants' acts in taking the water in defiance of the orders of the mayordomo. In an action for injunction it

is essential that the complaint disclose facts in order to enable the court to determine, from the facts so alleged, the necessity of awarding the extraordinary remedy of injunction. The naked allegation that great immediate irreparable damage will result to the plaintiff, unsupported by any facts, as it is, is not sufficient. *Shafor et al. v. Fry*, 164 Ind. 315, 73 N. E. 698. And the complaint must show how, in what way, and for what reason the threatened damages are irreparable. *Schuster v. Myers*, 148 Mo. 422, 50 S. W. 103; *Porter v. Armstrong*, 132 N. C. 66, 43 S. E. 542.

"The rule is that, when an injunction is invoked to restrain a threatened trespass, the facts showing the great or irreparable damage of mischief apprehended should be set out in the complaint or petition, as a bare averment to that effect will not alone suffice, unless supported by a proper averment of facts. This is essential in order to enable the court to judge of the necessity for an injunction. In view of the severity or harshness of the remedy by injunction, a strict adherence to this rule of pleading is required. *Centreville, etc., Turnpike Co. v. Barnett*, 2 Ind. 536; 10 Ency. Pl. & Pr. 925, 926, 950, 954; *High, Injunctions* (3d Ed.) § 722." *Wabash Railroad Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892.

"The complaint alleges that, if the treasurer is permitted to collect this tax, 'it will work a great and irreparable injury to the plaintiff,' but the facts are not stated showing to the court the nature of such injury, or how, or why, it will result; and such an allegation in a pleading is a mere conclusion of the pleader himself, which all the authorities hold to be not the allegation of a fact. *High*, § 491, and cases cited. So it will be seen from the foregoing that by no rational rule of construction can this complaint be held good." *Insurance Co. v. Bonner*, 24 Colo. 220, 49 Pac. 366.

That a water user, who is being deprived of water to which he is entitled, for the irrigation of his crops, may maintain an action in injunction to restrain the unlawful diversion of such water, upon a proper showing, is well settled. This is not such case, however. If we concede, without so deciding, however, that the community corporation could prosecute a suit, for the protection of the rights of the individual consumer, certainly, where it sought to enjoin the diversion of the water, it would be required to allege the necessary facts to show irreparable injury, or adequate grounds for the relief sought. The diversion of the water, or the naked trespass, unaccompanied with great or irreparable damage or mischief, would not warrant equitable relief, as the statute affords an ample remedy. The complaint does not show that any water user is being deprived of water to which he is entitled, by reason of the alleged wrongdoing of the defendants. For aught that appears there is

ample water for all of plaintiff's consumers, including those who have not paid their assessments.

The impregnable barrier, however, to the maintenance of the plaintiff's bill, is that it has an adequate remedy at law. The right which it has to close down a consumer's headgate, and preclude his use of water until he pays his delinquent assessment is a statutory right, for the invasion of which a statutory remedy is provided.

"Where a new right, or the means of acquiring it, is conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress." *Smith v. Lockwood*, 13 Barb. (N. Y.) 209. And this is especially true, in the absence of showing of equitable grounds for relief.

[8] It is the universal rule that equity will not interfere to prevent the commission of a crime. There is, of course, an exception to this rule, which is as general as the rule, viz., that equity will intervene to protect property and property rights from irreparable injury, even though the acts sought to be enjoined are criminal acts. But the courts will not award equitable relief, in the absence of a showing of irreparable injury, merely because the acts complained of constitute a violation of a criminal statute. *High on Injunctions* (4th Ed.) § 20; *Bishop's New Criminal Procedure*, §§ 1412, 1415. And see notes to *Ex parte R. J. Allison*, 3 L. R. A. (N. S.) 622, and *Detroit Realty Co. v. Oppenheim et al.*, 21 L. R. A. (N. S.) 585, for a full discussion of the exceptions to the rule. Plaintiff failed to allege facts which would bring its cause of action within the exceptions stated. This being true, no cause for equitable relief was stated, and the demurrer should have been sustained.

[9] Appellee argues, however, that appellants waived any error in the court's ruling on the demurrer, by pleading to the merits, and that they cannot now assign the ruling of the court as error. This is of course true, unless the ground of the demurrer is want of jurisdiction of the subject-matter, or failure of the complaint to state a cause of action.

"When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant there-to is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer nor is it cured by verdict." *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; *City of Pontiac v. Talbot Paving Co.*, 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326; *Schofield v. Territory ex rel.*, 9 N. M. 533, 56 Pac. 306. And subsection 39, § 2685, C. L. 1897, provides, in substance that, an objection that the complaint does not state facts sufficient to constitute a cause of action is not waived, even though

no demurrer is filed. And it cannot be said that the defects in the complaint were supplied by the evidence, as there was a complete lack of any evidence tending to show any irreparable injury to the community corporation, or any of its consumers.

[7] Appellants filed a cross-bill, in which they asked for equitable relief. Some courts have laid down the broad doctrine that the filing of a cross-bill, founded on matters of equitable cognizance, will cure any defects of jurisdiction under the original bill, and authorize the granting of relief to any party entitled thereto. 5 Am. & Eng. Ency. Pl. & Pr. 657; Cockrell v. Warner, 14 Ark. 345; Sale and Wife v. McLean et al., 29 Ark. 612; Conger v. Cotton, 37 Ark. 286; Radcliffe v. Scruggs, 48 Ark. 96; Crease v. Lawrence, 48 Ark. 312, 3 S. W. 196; and the same doctrine was impliedly adopted in Houston v. Maddux, 179 Ill. 377, 53 N. E. 599, and Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179. The contrary rule prevails in Alabama, however. Dill v. Shahan, 25 Ala. 694, 60 Am. Dec. 540.

As we are impressed with the reason and logic of the Arkansas rule, it will be necessary to examine the cross-bill to ascertain whether it states any grounds for equitable relief, thereby supplying the jurisdictional defects in the original bill. The first cross-bill, after reciting the preliminary facts, alleges: "That as cross-complainants are informed and believe, and therefore aver, said cash assessment in the amount aforesaid was not necessary for the payment of the salary of the mayordomo of said community ditch and other legitimate expenses incident to the proper conduct and maintenance of said community ditch, but was, and is, largely in excess of the amount required for such purposes." This allegation is followed by a statement of facts showing threatened irreparable injury to the cross-complainants.

[8] The acequia commissioners are authorized by the statute to make all necessary assessments to provide funds for the payment of the salary of the mayordomo and other legitimate expenses incident to the proper conduct and maintenance of the acequias under their charge. This being true, necessarily such commissioners are vested with discretion to determine the amount required for such purposes. It is a well-settled principle of equity jurisprudence that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed. High on Injunctions (4th Ed.) § 1240. Cross-complainants do not allege fraud. Their only ground for equitable relief is that the assessment was in excess of the amount required. The discretion to determine the amount is confined to the commissioners, and where they act in good faith,

their judgment is conclusive. The individual consumer cannot question the legality of such an assessment, because of mere error of judgment on the part of the commissioners. In order to warrant the interposition of a court of equity he must go further and show fraud. This being true, and the cross-bill containing no allegation of fraud, or bad faith, it follows that it stated no ground for equitable relief, and therefore does not bring this case within the rule announced by the Arkansas courts, and did not cure the jurisdictional defects in the original bill.

[9] Neither did the second cross-bill, which was dismissed by the court, warrant the granting of any relief to cross-complainants. By it they sought to compel the acequia commissioners to repair a portion of the ditch and intake, which had been washed out some years before. The repair of the ditch was not connected with the assessment in question, nor did it affect in any manner the relief demanded by the plaintiff.

C. L. 1897, § 2685, subsec. 1: "There shall be in this territory but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be denominated a civil action, and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant."

C. L. § 2685, subsec. 41: "The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"Second. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.

"The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

"The defendant may recover judgment on his counterclaim, if proved, for any excess thereof over the plaintiff's demand as proved."

It is evident that the counterclaim provided for in this statute must be intended to answer the complaint, and must run counter to plaintiff's demand, in whole or in part; since judgment is provided for any excess of the counterclaim over the plaintiff's demand as proved.

In the case at bar, the plaintiff's demand is for the enforcement of the regulation established by its commissioners in the exer-

cise of the discretion vested in them by law; its cause of action is the wrong committed by the defendants in the violation of this regulation; the subject of its action consists of the regulation in question. It is not the five-mile ditch nor the title thereto, nor yet the aggregate water rights claimed by appellants. The appellants assume this by perfecting their appeal without printing the record; for the regulation in question provided for an assessment in the aggregate sum of \$945, and the value of the ditch or the aggregate water rights mentioned evidently amounts to many thousands. The court properly sustained the demurrer to the second counterclaim.

From what we have said it follows that neither the original bill nor the counterclaim stated any cause of equitable relief, and the court was without jurisdiction to enter any judgment thereon. *Oliver v. Enriquez*, 17 N. M. 206, 124 Pac. 798.

For the reasons stated the cause is reversed, with instructions to sustain the demurrer to the original bill; and it is so ordered.

HANNA and PARKER, JJ., concur.

**STATE ex rel. SCOTILLO et al. v. WATER SUPPLY COMPANY OF ALBUQUERQUE.** (No. 1584.)

(Supreme Court of New Mexico. April 28, 1914.)

*(Syllabus by the Court.)*

**1. WATERS AND WATER COURSES (§ 202\*) — WATER COMPANIES — REGULATIONS — RIGHT TO ENFORCE.**

The owner of a municipal utility, whether a private party or the municipality, may prescribe and enforce such rules and regulations for its convenience and security as are reasonable and just, and refuse to furnish water, or other service being supplied, to any person who declines to comply with the same.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 276; Dec. Dig. § 202.\*]

**2. WATERS AND WATER COURSES (§ 202\*) — WATER COMPANIES — REGULATIONS — RIGHT TO ENFORCE.**

The right of a municipality, operating a municipal utility, to make and enforce reasonable rules and regulations, is exactly the same as that of a private corporation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 276; Dec. Dig. § 202.\*]

**3. WATERS AND WATER COURSES (§ 203\*) — WATER COMPANIES — REGULATIONS — ENFORCEMENT.**

A rule which provides for shutting off the supply of water from the person who contracted for and received the water, in default of payment for the same, is just and reasonable, and may be enforced by the company, where there is no dispute as to the amount owing, or the water was not furnished for some other place or residence, or for a separate and

distinct transaction from that for which he is claiming and demanding a water supply.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**4. WATERS AND WATER COURSES (§ 203\*) — WATER COMPANY — REASONABLENESS OF REGULATIONS—LIEN.**

In the absence of a statute, or an ordinance enacted under authority of a statute, making a charge for water supplied a lien upon the land or premises for unpaid dues, or which uses words equivalent to giving a lien, a rule or regulation which authorizes a water company to shut off the supply from the consumer in all cases of nonpayment of water rates would be unreasonable and void if so construed as to permit the water to be shut off and turned on because a former owner or occupant had not paid his bill for water, and thereby coerce the new owner or occupant into paying for water, or service, for which he did not contract and from which he received no benefit.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**5. WATERS AND WATER COURSES (§ 203\*) — WATER COMPANY — REASONABLENESS OF REGULATIONS—LIEN.**

Where the state law gives to the water company or municipality a lien upon the land and premises for unpaid dues, or uses words equivalent to giving a lien, a rule or regulation of the water company which provides for shutting off the supply and discontinuing the service until the delinquent charges are paid is reasonable, and may be enforced against a subsequent tenant, owner, or occupant of the building or premises upon which the lien exists.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

**6. WATERS AND WATER COURSES (§ 203\*) — WATER COMPANIES—LIENS.**

Section 1, c. 68, S. L. N. M. 1912, gives to the water company, engaged in supplying water to the inhabitants of cities and towns, a lien on the real estate and premises where the water is used for all legal charges for the water so supplied.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

Appeal from District Court, Bernalillo County; H. F. Raynolds, Judge.

Mandamus by the State, on the relation of Charles Scotillo and another, composing the firm of Scotillo & Nizzi, a partnership, against the Water Supply Company of Albuquerque, a corporation. Judgment for relators, and defendant appeals. Reversed, with directions.

The material facts in this case are: "That appellees were copartners, conducting a business at Nos. 225 and 227 North Third street in the city of Albuquerque, said premises being owned by one G. Badaracco. That from August, 1912, until the 17th day of February, 1913, appellees occupied the premises under a lease by the terms of which the landlord was to pay the water rent. In February, 1913, the landlord became delinquent to the appellant, and the water was shut off and the meter taken out. Thereupon appellees

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made a new lease with the landlord, under which the appellees agreed to pay the water rent accruing thereafter, but appellees did not undertake nor agree to pay the past-due water rent. After the new lease was made, appellees informed the appellant of the terms of the new lease, as it affected the payment of the water rent, and demanded that the water be turned on, and agreed to pay the regular rates charged by the company and to comply with "all the reasonable rules and regulations" of the appellant. Appellant, however, refused to turn on the water until the sum of \$9.55 was paid, said sum being the amount due from Badaracco, the landlord, for the period during which appellees had occupied the premises under the lease requiring the landlord to pay water rents. Appellees thereupon applied to the district court for a peremptory writ of mandamus to compel the appellant to turn on the water. Upon an agreed statement of facts, and after hearing argument in the case, the court granted the writ, and from this judgment this appeal is prosecuted.

A. B. McMillen, of Albuquerque, for appellant. John O. Lewis, of Albuquerque, for appellees.

ROBERTS, C. J. (after stating the facts as above). The appellant refuses to turn on the water until the appellees pay the bills incurred by their landlord for water supplied to the landlord for the premises occupied by appellees, because it has, during the whole existence of its franchise, established and enforced a rule that where water rates are not paid monthly, within a reasonable time after the same become due, the water will be turned off for nonpayment and remain off until the delinquent charges have been paid.

[1] There is no question raised as to the amount or justness of the delinquent charge; hence the only question in the case is as to whether the rule adopted, and here attempted to be enforced by the water company, is reasonable, for it is universally conceded by the courts that the owner of the municipal utility, whether a private party or the municipality, may prescribe and enforce such rules and regulations for its convenience and security as are reasonable and just, and refuse to furnish water, or other service being supplied, to any person who declines to comply with the same. *American Waterworks Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610. The rule is stated as follows by Farnham (section 161, vol. 1, *Waters and Water Rights*): "It [the company] may prescribe all such rules and regulations for its convenience and security in supplying water to a city or its inhabitants as are reasonable and just, and may refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But the rules must be reasonable,

just, lawful, and not discriminatory. And such rules may be enforced by shutting off the supply of a customer who refuses to comply with them. But the enforcement of unreasonable rules will be enjoined."

[2] And the authorities all agree, and appellees concede, that the right of a municipality, operating a municipal utility, to make and enforce reasonable rules and regulations, is exactly the same as that of a private corporation; no more and no less. *Girard Life Insurance Co. v. Philadelphia*, 88 Pa. 393; *Brewing Association v. City*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; *Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770.

[3] Appellees admit, and the courts universally hold, that a rule which provides for shutting off the water supply from the person who contracted for and received the water, in default of payment for the same, is just and reasonable, and may be enforced by the company (see note to the case of *State ex rel. Hallauer v. Gonsell* [Wis.] 61 L. R. A. 33, where the cases are collected on page 105; and note to case of *City of Mansfield v. Humphreys Mfg. Co.*, 82 Ohio St. 216, 92 N. E. 233, 31 L. R. A. [N. S.] 301, 19 Ann. Cas. 842), where there is no dispute as to the amount owing, or the water was not furnished for some other place or residence, or for a separate and distinct transaction from that for which he is claiming and demanding water supply.

[4] And it is likewise well settled that, in the absence of a statute, or an ordinance enacted under authority of a statute, making a charge for water supplied, a lien upon the land or premises for unpaid dues, or which used words equivalent to giving a lien, a rule or regulation which authorizes a water company, organized for the purpose of supplying the inhabitants of a city or town with water, to shut off the supply from consumers in all cases of nonpayment of water rates, would be unreasonable and void, if so construed as to permit the water to be shut off, or not turned on, because a former owner or occupant had not paid his bill for water, and thereby coerce the new owner or occupant into paying for water, or service, for which they did not contract and from which they received no benefit. *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432; *Burke v. Water Valley*, 87 Miss. 732, 40 South. 820, 112 Am. St. Rep. 468; *Farmer v. Mayor and City Council of Nashville*, 127 Tenn. 509, 156 S. W. 189, 45 L. R. A. (N. S.) 240, and note. In such cases no argument is required to demonstrate the unreasonableness of the rule or regulation, for it would be manifestly unjust to require A. to pay B.'s past-due account for water, where he was under no legal or moral obligation to do so, before the company or the municipality would permit him to receive the service, although he had offered on his

part, in so far as he was personally concerned, to comply with all the rules and regulations of the company in the future as to the water furnished him.

[8] On the other hand, it seems to be equally well settled by the adjudicated cases that, where the state law gives to the water company, or municipality, a lien upon the land and premises, for unpaid dues, or uses words equivalent to giving a lien, or where a city ordinance, enacted under authority conferred by the Legislature, makes such unpaid dues a lien upon the land, a rule or regulation of the water company, which provides for shutting off the supply and discontinuing the service until the delinquent charges are paid, is reasonable and may be enforced against a subsequent tenant, owner, or occupant of the building or premises upon which the lien exists. *Atlanta v. Burton*, 90 Ga. 486, 16 S. E. 214; *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. 393; *Appeal of Brumm (Pa.)* 12 Atl. 855; *McDowell v. Avon-by-the-Sea, etc.*, 71 N. J. Eq. 109, 63 Atl. 13; *Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; *Covington v. Ratterman*, 128 Ky. 336, 108 S. W. 297, 17 L. R. A. (N. S.) 923; *East Grand Forks v. Luck*, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198, 7 Ann. Cas. 1015; *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432.

In the case last cited the Massachusetts court say: "Of course, it cannot be disputed that, if the Legislature gives a lien upon the land to a water or gas company for unpaid dues, or uses words equivalent to giving a lien, it has the right to do so (require the subsequent owner, occupant, or tenant to pay delinquent charges before water is supplied to the premises upon which the lien exists), and there is nothing more to be said." In the case of *Linne v. Bredes*, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068, 11 Ann. Cas. 238, the Supreme Court of Washington say: "When a Legislature, by statute, authorizes or gives a lien on land for unpaid water rentals, as it has the power to do, of course such a right so conferred can be asserted and enforced by proper ordinances and rules (1 Farnham, Waters, § 166); but we have no such statute in the state of Washington."

The reason the courts decline to interfere with, or restrain, the enforcement of a rule which permits the water company, or the municipality, to refuse to supply water to the subsequent owner, occupant, or lessee of premises, upon which the statute gives it a lien for unpaid water rents, until all delinquent charges for water supplied the former owner or occupant of the building are paid, is because such a rule or regulation is reasonable and just. The reasonableness of the rule or regulation is always the criterion by which the court must be guided when its judgment is invoked. If it is reasonable, the

court will not interfere with its enforcement; if unreasonable, it will.

[9] Section 1, c. 68, S. L. 1912, of this state, reads as follows: "That any incorporated city, town or village owning its own water plant or any person or corporation having franchise from any such city, town or village, legally authorized and empowered to furnish water to such city, town or village or the inhabitants thereof, shall have a lien upon any lot or subdivision of such city, town or village for all legal charges for water furnished by such city, town, village, person or corporation and used upon such lot or subdivision or in or upon any buildings thereon situate: Provided, that whenever any building, lot or subdivision in or upon which water is being used shall become vacant, it shall be the duty of the owner or former tenant to give notice in writing to the city, town, village, person or corporation owning the water plant or holding the franchise therein, that the said property is vacant and when such notice is so given no lien for water furnished after three days from receipt of said notice, shall be had against said property, and provided, further, that no lien shall exist for water which is not fit for the purposes for which it is supplied."

By this act the water company is given a lien on the real estate and premises occupied by appellees, for the water supplied to their landlord. But it is argued by appellees that the water company has the right to enforce its lien by an appropriate action in the courts to foreclose the same. That it can do so will not be gainsaid, but this fact does not militate against the reasonableness of the rule and regulation in question. If it did so, it could be argued with as much plausibility that the water company could institute an action and recover for past-due water bills against all its consumers for water supplied them, and therefore all rules and regulations which permitted the company to refuse to supply water until delinquent obligations were paid would be unreasonable. Where the lien exists, the water company by the rule under discussion does not seek to foreclose its lien. It enforces the rule, in the same manner that it is enforced against the individual who refuses to pay for water which he has consumed, by refusing to continue the service until the delinquency is paid. The rule is held to be reasonable because, being a lien on the real estate, it could be foreclosed by an appropriate proceeding in the courts, and the real estate sold, and all rights of the owner, occupant, or tenant be thereby cut off. Such being true, the rule which requires the delinquent charges to be paid before water will be supplied to the premises is reasonable, and may be enforced against the subsequent owner or occupant. The charge being a lien upon the real estate, if it should be foreclosed in court, the subsequent owner or occupant could only protect his right to the possession



and enjoyment of the property by discharging the lien; and, this being so, it is not unreasonable to require the payment of the delinquent dues in order to procure a supply of water for the premises upon which the lien exists.

But it is argued that it is unjust to require the subsequent owner or occupant to pay for water used by some other person, or the landlord to pay for water used by the tenant. This argument, admittedly very persuasive, might have great weight with the Legislature; but it has, however, seen proper to make the charge a lien upon the real estate. This it had the power to do, and the wisdom of its action cannot be reviewed by the courts. It might be argued that it is unjust to require the subsequent owner of real estate to pay the past-due taxes on the same. But it must be remembered that he is not required to pay such taxes. If, however, he does not discharge the lien of the state for the same, the property upon which the lien exists will be sold, and he will be divested of the possession and enjoyment of the same. He elects to pay in order to retain and possess the property; likewise the right of the tenant would be cut off. In this case the lessors cannot be lawfully required to pay the past-due water rent, but the lien could be foreclosed and their tenancy cut off. Such being true, the courts, as stated, universally hold that a rule of a water company which permits the company to cut off the supply until the delinquent charges are paid is reasonable, and its enforcement will not be restrained.

For the reasons stated, it follows that the judgment of the trial court, awarding the peremptory writ of mandamus, was erroneous. The case will therefore be reversed, with directions to the district court to dismiss the alternative writ of mandamus; and it is so ordered.

HANNA and PARKER, JJ., concur.

**STATE ex rel. DE BURG v. WATER SUPPLY CO. OF ALBUQUERQUE.**  
(No. 1595.)

(Supreme Court of New Mexico. April 28, 1914.)

(Syllabus by the Court.)

**1. CORPORATIONS (§ 370\*)—PUBLIC UTILITY COMPANIES—RIGHT TO ENFORCE REGULATIONS.**

Public utility companies have a right to adopt and enforce reasonable rules and regulations for their security and convenience and enforce compliance therewith by refusing or discontinuing the service; but such rules must be reasonable, just, lawful, and not discriminatory.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1518; Dec. Dig. § 370.\*]

**2. WATERS AND WATER COURSES (§ 188\*)—WATER COMPANIES—FRANCHISE—CONSTRUCTION.**

Where a contract is entered into between a city and a water supply company for the bene-

fit of the people of the city, and under which the people are entitled to certain rights, benefits, and privileges, a construction of the meaning of ambiguous and doubtful provisions of the contract by one consumer or beneficiary is not binding upon other consumers or beneficiaries, not shown to have acquiesced in or assented to such construction.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.\*]

**3. WATERS AND WATER COURSES (§ 194\*)—FRANCHISES—CONSTRUCTION—REGULATIONS OF WATER COMPANY.**

Where a franchise granted to a water company provides that the company shall have the right "to make rules and regulations, to be approved by the city council," and the company contends that it has adopted and enforced a rule which required the consumer to pay the cost of making connection with its mains, before the question can arise as to whether the rule in question amounted to a construction of the contract by the city, it is incumbent upon the company to show that the city council gave its approval to the same.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 280; Dec. Dig. § 194.\*]

**4. WATERS AND WATER COURSES (§ 202\*)—WATER COMPANIES—FRANCHISES—RIGHT TO ENFORCE REGULATIONS.**

Where a franchise, under which a public utility company operates, imposes a burden upon the company, any rule or regulation adopted by the company, by which it attempts to shift the burden upon the consumer, is unreasonable and unjust and will not be enforced.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 276; Dec. Dig. § 202.\*]

**5. FRANCHISES (§ 3\*)—CONSTRUCTION.**

Where the meaning of a grant or contract regarding any public franchise is ambiguous or doubtful, it will be construed favorably to the rights of the public.

[Ed. Note.—For other cases, see Franchises, Dec. Dig. § 8.\*]

**6. WATERS AND WATER COURSES (§ 194\*)—WATER COMPANIES—FRANCHISES—CONSTRUCTION—COST OF SERVICE PIPE.**

Where a franchise, under which a water supply company operates, requires it to furnish water to private consumers at fixed rates, it must provide the necessary service pipe from the main line in an abutting street to the consumer's property line at its own expense, unless the franchise imposes this burden upon the consumer.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 280; Dec. Dig. § 194.\*]

**7. WATERS AND WATER COURSES (§ 194\*)—WATER COMPANIES—SERVICE PIPES—REASONABLENESS OF REGULATION.**

Where a municipality operates its own water supply system, it is not under contractual obligations to lay the service pipes from the curb to its main; hence a rule which requires the consumer to assume the burden is reasonable. But where, under a contract and franchise, this duty devolves upon the holder of the franchise, such a rule is unreasonable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 280; Dec. Dig. § 194.\*]

Appeal from District Court, Bernalillo County; H. F. Reynolds, Judge.

Mandamus by the State, on the relation of

Dolores Otero de Burg, against the Water Supply Company of Albuquerque, a corporation. From a judgment for defendant, relator appeals. Reversed, with directions.

John C. Lewis, of Albuquerque, for appellant. A. B. McMillen, of Albuquerque, for appellee.

ROBERTS, C. J. The material facts in this case are as follows: The relator is the owner of a lot abutting on North Thirteenth street in the city of Albuquerque, N. M. The respondent is a public service corporation, owning and operating a water system in the city of Albuquerque, under a franchise granted it by the city council of said city, pursuant to a vote of the qualified electors, and, under a contract entered into between said city and respondent, as authorized and directed by said franchise. A main of respondent's waterworks system is laid along North Thirteenth street in front of relator's lot.

The relator erected a dwelling on her said lot and equipped the same with all the fixtures necessary for water service and laid a pipe from said dwelling to the property line of said lot at its junction with North Thirteenth street; thereupon she made a demand upon respondent to connect its water main with the pipe laid by her to the property line of said lot. This respondent refused to do, unless relator would pay the expense of making such connection. Upon respondent's refusal, relator filed a petition for a writ of mandamus to compel it to make said connection. Upon issue joined, the cause was heard by the court, and the writ was denied, from which judgment relator appeals.

The sole question presented by this appeal is whether the property owner or the water company must defray the expense of laying the service pipe from the main to the property line and making the necessary connection with the main. The answer to the question necessarily depends upon the construction to be placed upon the franchise and contract under which the water company operates, for it is clear that the contracting parties might legally stipulate that this burden should be borne by the consumer, or, on the other hand, that the public service corporation should assume it. In its answer to the alternative writ, the respondent alleged that it had, during the whole of its present franchise, adopted and enforced as one of its rules and regulations, and has at all times required, as a condition precedent to being supplied with water, that the consumer should lay his service pipes to the mains of respondent and pay the reasonable expense of connecting the same therewith; but, if the contract and franchise under which respondent operates, imposes this duty and expense upon it, it must be apparent that the rule in question would be unreasonable and void and without any vitality whatever.

[1] Public utility companies, it is true, have a right to adopt and enforce reasonable rules and regulations for their security and convenience, and enforce compliance therewith by refusing or discontinuing the service. But the rules must be reasonable, just, lawful, and not discriminatory. If they be not so, their enforcement will be enjoined. If a privately owned water company, organized for profit, in which the citizens of a municipality do not participate, undertakes and agrees with the city that it will, at its own expense, carry the water to the lot line of its consumers, and there delivers the same, manifestly it cannot escape this burden by adopting a rule which would impose the expense upon the consumer. Such a rule would be unreasonable, unlawful, and unjust, and no consumer would be required to comply with it in order to secure the service.

[2] Respondent contends, however, that all its consumers, numbering some 2,500 or more, have complied with the rule and have construed the contract as imposing the burden upon the consumer. If such be the case, however, it would not affect the rights of the relator herein, because there is no showing that she has ever so construed the contract or acquiesced in the rule. Where a contract is entered into between a city and a water company, for the benefit of the people of the city and under which the people are entitled to certain rights, benefits, and privileges, a construction of the meaning of ambiguous and doubtful provisions of the contract by one consumer or beneficiary would not be binding upon other consumers, or beneficiaries not shown to have acquiesced in or assented to such construction. And the fact that certain consumers have complied with, or failed to object to, a rule of the water company, which was invalid and unenforceable, would not be binding upon other consumers or patrons.

[3] It is further contended by respondent that the city and the company have placed a construction upon the contract, adverse to relator's contention, and, such being the case, the court should give effect to such interpretation of the provision in question. It is well settled that the construction given a contract by the parties interested, especially where it has covered a long period of years, will be controlling unless the contract is so plain against such construction that there could be no reasonable doubt upon the question. *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768; *Cavazos v. Trevino*, 6 Wall. 773, 18 L. Ed. 813; *Bronson v. Rodes*, 7 Wall. 229, 19 L. Ed. 141; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Insurance Co. v. Dutcher*, 95 U. S. 273, 24 L. Ed. 410; *Fraser v. State Savings Bank et al.*, 137 Pac. 592. But respondent has failed to point out wherein the city has construed this provision of the contract, unless it be upon the assumption (a)

that the water company has, at all times during the existence of the franchise, enforced a rule which required the consumer to pay the cost of making the connection with respondent's water mains and laying the pipe from the curb to the main, as alleged in its answer, or (b) because the city itself has paid such expense, where it required water for city purposes.

It is sufficient answer to the first contention to state that neither the answer nor the proof show that the rule in question was approved by the city council. The franchise gives to the company the right "to make rules and regulations, to be approved by the city council." "A material fact, if not alleged, is presumed not to exist." 31 Cyc. 86. Before the question could arise as to whether the rule in question amounted to a construction of the contract by the city, it would be incumbent upon respondent to show that the city council gave its approval to the same. The fact that the company had adopted and enforced such a rule, without the concurrence and acquiescence of the city council, would not be tantamount to a construction of the contract by the city. Had the proof supplied the defect in the answer in this regard, the omission would doubtless have been cured by the judgment (31 Cyc. 763); but there was no proof whatever upon the question, as shown by the bill of exceptions, and, such being the case, the omission in the answer would not be cured by the judgment. *Holmes v. Preston*, 70 Miss. 162, 12 South. 202; *International Bank v. Franklin County*, 65 Mo. 106, 27 Am. Rep. 261. Until the rule or regulation was, in some manner, brought before the council for consideration, it could not well be argued that mere inaction by the city would amount to an affirmative approval of the practice of the water company, or constitute a construction of the contract.

Nor is there any merit in the second proposition stated, because section 9 of the franchise specifically provides that the city shall, at its own expense, erect all necessary stand pipes, or other appliances necessary for the drawing off of water for city purposes, and, if it be true, as stated, that the city has in some 30 or more instances laid the pipe between the curb and the main and paid the expense of making the connection, it did so doubtless under the above provision, applicable only to the city; and any construction it might have placed upon this provision in the franchise or contract would not be binding upon consumers, claiming rights under other and different provisions of the franchise, if it be admitted, for the sake of argument only, that the consumer would, in any event, be bound by a construction placed upon the contract by the city.

[4] The rights of the relator, therefore, not having been prejudiced or influenced by the acts or conduct of either the city or other consumers, it becomes necessary to ex-

amine the franchise under which the respondent operates and the contract existing between the city and the company in order to determine the reasonableness and justness of the rule and regulation under which respondent refuses to make the connection in question, unless first compensated therefor by the relator, for, as stated, if this burden rests upon the company, a rule or regulation by which it attempts to shift the same upon the relator would be unreasonable and would afford respondent no justification for its refusal to make the desired connection with its mains.

Section 1 of the franchise reads as follows: "There is hereby given and granted to the Water Supply Company of Albuquerque, or its assigns, the right and privilege to supply the city of Albuquerque, and the citizens thereof, with good water for domestic and manufacturing purposes, for the period of twenty-five years from and after the date of the approval of this franchise by the people, and no longer, subject to the terms and conditions herein set forth."

Section 2, after giving the company the right to erect, maintain, and operate its plant, and to lay pipes, continues: "And to extend aqueducts and pipes through any and all of the streets, avenues, and alleys and across any bridge or stream in said city or grant."

Section 3, in part, reads as follows: "The mains and distributing pipes \* \* \* shall not be less than five-eighths of an inch in diameter, and as much larger as the necessities of the business requires, and made of the best quality," etc.

Section 5, after providing that the company must furnish a good and sufficient supply of water, continues: "As the same may be needed and demanded for domestic and manufacturing purposes, so that it may be drawn off through the pipes connecting with the mains of said waterworks in all parts of said city where such pipes may be, at a minimum pressure," etc.

Section 7 begins: "The water rate to consumers during the continuance of this franchise shall not exceed the following monthly schedule rates." This is followed by a specific enumeration of the monthly flat rate which may be charged consumers for water, and the section contains provisions for meter rates. No mention is made in this section, or in any other provision of the ordinance or contract, as to the service pipes from the water main to the curb, except as above set forth. Pursuant to the franchise, a contract was entered into between the city and the water company, by which the city agreed to pay a stipulated sum for fire hydrants, the number of which were stated, and by said contract, as a part of the consideration moving to the city, the company agreed to comply with all the provisions of the franchise granted it by the city and its inhabitants.

From the excerpts quoted above, from the franchise, it will be seen that no specific provisions were made, imposing the duty of laying service pipes between the main and the curb, and within the franchise limits, upon either the company or the consumer. On behalf of the respondent, it is argued that by section 5, above quoted, this duty is impliedly cast upon the consumer. While this section requires the company to furnish water, "as the same may be needed for domestic and manufacturing purposes, so that it may be drawn off through the pipes connecting with the mains of said waterworks in all parts of the city where such pipes may be," etc., it will be noted that no provision is made as to who shall lay the pipes within the franchise limits of respondent. All that can be said, from the wording of the franchise, is that it is silent on the question. But it does grant to the company the right to lay its pipes and mains "through any and all of the streets, avenues, and alleys" in said city, in order to enable it to supply water to the city and its consumers. The right continues and exists during the whole term of the franchise, and no further permit or license is necessary. Such right exists only in the company (Pond on Public Utilities, § 537), and the consumer, without special permission from the municipal authorities, would have no right to tear up the street and lay pipes therein. Again, the franchise requires the company to restore the street to its former condition, after all excavations are made by it.

[5] After all, the most that can be said, as to the terms and requirements of the franchise in this regard, is that it is silent on the question. This fact was found by the trial court, in its eighth finding of fact, which reads as follows: "That there is no provision of respondent's franchise or contract with the city of Albuquerque requiring it at its own expense to lay service pipes for private consumers, or to connect the same up with its mains, without the consumer paying the reasonable expense thereof. There is no provision in respondent's franchise or contract with the city of Albuquerque requiring private consumers to lay service pipes from their lot lines to respondent's mains or to connect same with respondent's mains." Such being true, the question naturally arises as to the proper construction of the franchise, for, by the terms of the contract, the respondent undertook and agreed to perform all the conditions imposed upon it by the franchise.

It would seem that the rule announced by the territorial court in the case of Telephone Co. v. Fields, 15 N. M. 431, 110 Pac. 571, 30 L. R. A. (N. S.) 1088, is controlling. In that case the franchise granted the telephone company authorized it to charge telephone rental rates not to exceed \$36 per annum for one party residence. The company sought to enforce a rule that on all contracts for less than one year's rental a charge of \$2.50

would be made for installation and a charge of \$2 for removal of instruments. Its right to do so was denied. The court says: "On the other hand, appellee cites Omaha Water Works Co. v. Omaha, 147 Fed. 1 [77 C. G. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614], a case in the Circuit Court of Appeals for the Eighth Circuit, in which the court, after examining numerous cases, extracts from them the following rule, which we adopt, viz.: 'Where the meaning of a grant or contract regarding any public franchise is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain, it will be protected and enforced.' It thus appears that the true rule is that both the grant and the contract, in case of ambiguity or doubt, are to be construed favorably to the rights of the public, and we so hold."

For further illustrations of the rule, see the following cases: Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. Ed. 651; Proprietors of Stourbridge Canal v. Wheely et al., 2 Barn. & Adol. 793; Perrine v. Chesapeake, etc., Co., 9 How. 172, 13 L. Ed. 92; 1 Cook on Corporations (6th Ed.) 8.

[6] There is undoubtedly sound reasoning back of the authorities on this question. Public service corporations are allowed to charge the public a certain sum for service. This sum is the compensation for the expense of the corporation in installing and operating the plant for the convenience of the public, and it is supposed to bear all the expenses which are not specifically charged against the public. If the Legislature or the city council sees fit to provide that the property owner shall bear the expense of laying service pipes and making connections, then it is to be presumed that a lower rate will be fixed for service. If, as in the present case, no provision is made for laying service pipes and making connections, the rate allowed is presumed to be high enough to compensate the company for this expense.

Counsel for the appellee argues that, if the company was compelled to lay service pipes in the street, it could also be forced to lay them through consumer's lot and into his house. The fallacy and unsoundness of this reasoning is apparent at a glance. Everything within the franchise limit is under the control of the company, unless otherwise expressly provided by statute or ordinance, and the franchise limit is definitely fixed at the line between the lot and the street or alley. The franchise cannot convey any right to or impose any duty upon the corporation outside the franchise limit. It is limited in its scope to the domain of the municipality and cannot invade the territory of private citizens.

Our conclusion, therefore, is that under the franchise, as thus construed, it was the

duty of the water company to lay all necessary pipes, for supplying its customers with water, within the limits of its franchise, and this construction is fully supported by the adjudicated cases.

In the state of Idaho there is no statute imposing the duty of laying laterals and making connections in streets and alleys, and the franchise granted by the city of Pocatello to the Pocatello Water Company was silent as to who should bear the expense of this work, so that the conditions are exactly the same as in the present case, and the Supreme Court of Idaho uses this language: "Under the said franchise the respondent has been granted the right to lay its mains and pipes 'over, along, and under' the streets, alleys, and highways of said city for the purpose of supplying said city and its inhabitants with a sufficiency of pure water. It had the authority to lay all of the mains and pipes in said streets and alleys necessary to accomplish the purposes for which said franchise was granted. It is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits. The respondent has been granted a valuable right, that of laying its mains and laterals in the streets and alleys of the city, in consideration that it will furnish water to said city and its inhabitants. The company is under obligation to lay its pipes in the streets and alleys so as to make the water accessible to the citizen for his private use. It is given the right, within its franchise limits, to lay all pipes and make all connections with its mains and laterals. Beyond those limits it has no authority to enter upon the private premises of a citizen and lay its pipes. Neither has the citizen any right to enter within the franchise limits of the company, and in any manner interfere with its mains and pipes." *Pocatello Water Co. v. Standley*, 7 Idaho, 155, 61 Pac. 518.

In the case of *Bothwell v. Consumers' Co.*, 13 Idaho, 508, 92 Pac. 538, 24 L. R. A. (N. S.) 485, the court say: "The only further point to be considered in this case is whether the water company can require the consumer to pay for the tap and for making the connection with its main. It seems that this point ought to be disposed of without much difficulty. The franchise for laying pipes in the streets and alleys and maintaining and operating a water system is granted by the municipality to the water company. The property owner has no right or franchise to dig in the streets and alleys and lay pipes, and, if he should do so, he would acquire no property right therein. The main and all laterals, fixtures, and connections within the franchise limit belong to the company, and altogether constitute the water system. It is not the business of the citizen or consumer to construct any part of the company's system, nor

is it the company's business to place the pipes and fixtures on the consumer's premises. There is a clear and well-defined boundary line existing between the property of the water company and the property of the lot owner; that line is the one existing between the lot and the street or alley. The citizen owns his pipes and fixtures to that line, and beyond it is the company's property and water system. The rights, duties, and obligations of each go to this extent, and no further."

In Texas, at the time the case was decided, the same conditions existed as regards the city of El Paso, but in this case the franchise contained the provision that the company should furnish water to "consumers having pipe connections" at a specified rate. The Civil Court of Appeals held that primarily the duty of a company bound to furnish water to property owners on streets containing mains carried with it the duty to perform the work necessary to enable the company to furnish the owners with water, and the company could only be relieved from the obligation to construct at its own cost the necessary connections by some provision in the franchise or contract which unmistakably, or by fair implication, so operated. *International Water Co. v. City of El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

The Supreme Court of Idaho a second time handed down a decision upon the subject upon a statement of facts on all fours with the present case. The court say: "Under the franchise granted by the city of Coeur d'Alene to the consumers' company to occupy the streets and alleys of the city for the purpose of supplying the city and inhabitants thereof with fresh water, the right and authority to dig in the streets and alleys and lay pipes therein for supplying consumers with water is conferred upon the company alone, and no such right is conferred upon the individual or consumer, and the consumer acquires no right to lay pipes or acquire property in the street and alleys, but, on the contrary, the duty to do so and the rights acquired thereby belong to the water company. It is consequently the duty of the water company to supply and lay laterals from its main to the line of a consumer's property abutting on such street, and such laterals are the property of the water company. \* \* \* A public service corporation organized for the purpose of supplying the inhabitants of a municipality with water is not justified in assuming that the people it is to serve are dishonest, and that they will demand and pay for a month's water supply merely for the purpose of entailing upon the company the expense of putting in laterals and service connections, and that they will thereafter refuse to take water and thereby discommode themselves and depreciate their own property, and the courts will not base decisions upon such an

assumption." *Hatch v. Consumers' Co.*, 17 Idaho, 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263.

Appellee attempts to meet this decision with the statement that property owners had the right to dig into the streets and alleys upon complying with certain regulations. This is undoubtedly true, as it is true in all cities of the country, but the point in the reasoning in the *Hatch Case* is that the property owner has no right under the franchise to dig in the streets and alleys and lay pipes, but must get a special permit for which a fee is charged, while the water company is granted general permission under the franchise. The court in this case also answers the argument of appellee that dishonest consumers might pay water rent for one month and thereafter discontinue use of the water, inflicting a loss upon the company.

In the Supreme Court of Arkansas, in 1910, this question was raised upon a franchise, the terms of which were almost identical with those of the present appellee. The court say: "Is it the duty of appellant to construct and maintain the service pipes at its own expense, free of charge? By section 1 of this contract it assumed the duty of supplying the city and the inhabitants thereof with water and acquired the right 'to use the streets, alleys, sidewalks, and public grounds of the city of Pine Bluff, within its present and future corporate limits, for placing and taking up and repairing mains, hydrants, and other structures and devices requisite for the service of water.' The duty to furnish the city and inhabitants with water carried with it the duty to do and perform what was necessary to be done to place the company in a position where it could furnish the water. To do that the contract (section 1) expressly authorizes it 'to use the streets, alleys, sidewalks \* \* \* of the city of Pine Bluff \* \* \* for placing and taking up and repairing mains, hydrants, and other structures and devices requisite for the service of water'; that is to say, the delivery of water to the inhabitants or city. The duty is assumed, and the power is given, by the contract to perform it. The property owner, the inhabitant, or consumer has no right to lay the service pipes in the streets and connect them with the water company's mains, but this power is expressly given to the water company, in connection with the duty it assumes, and to no one else, which implies that it shall lay the service pipes at its own expense, for all of which the consumer is required to pay for the water furnished at certain rates specified in the contract. If it was not the intention of the contract that the water company should lay the service pipes, why did the city council give it the power to do so and withhold it from the inhabitant. It evidently intended that the water company should do so free of charge, because it fixes the compensation

to be paid by the consumer for services rendered him and says nothing about compensation for service pipes. How was it to render the services it undertakes without laying the service pipes, and where is the authority to collect from the consumer more than he is required by the contract to pay? There is none. *Pocatello Water Company v. Standley*, 7 Idaho, 155, 61 Pac. 518; *International Water Co. v. City of El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 820; *Bothwell v. Consumers' Co.*, 13 Idaho, 568, 92 Pac. 533, 24 L. R. A. (N. S.) 487;" *Pine Bluff Corporation v. Toney*, 96 Ark. 345, 131 S. W. 680.

In the case of *Bothwell v. Consumers' Co.*, 13 Idaho, 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485, the syllabus by the court is as follows: "All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of the company to construct the same at its own expense and connect with the pipes of the property owner at the line of his property and the limit of its franchise. Where a lot owner constructs a building on his property and places water pipes and fixtures therein, and extends the same to the street adjoining, and thereupon tenders to the water company the monthly rent charged by it, it becomes the duty of the company to make the necessary tap and connections and furnish the property owner with water as demanded."

In the case of *Hatch v. Consumers' Co.*, supra, the court further say: "We are aware that some courts have held that the consumer may be required to pay the expenses of 'service connections,' as it is sometimes called, or rather for laterals extending from the curb line to the main. So far as we have been able to examine, however, these decisions are based upon express statutes."

The Supreme Court of Washington, in a recent decision (*Cleveland v. Maiden Water Works Co.* [Wash.] 125 Pac. 769), followed the rule announced in the foregoing cases. The court say: "But this case is controlled by the franchise ordinance, which requires the company to furnish water to users and consumers at certain fixed rates; and we are of opinion that it is not so furnished, within the meaning of the ordinance, unless it is delivered to the consumer at his property line."

Respondent has cited some cases to the contrary, but we think the great weight of authority is in accord with the view we have expressed. *McQuillin*, in his work on *Municipal Corporations*, § 1696, in discussing the question, says: "While it has been held in some cases that the consumer may be required to pay the expense of laterals extending from the curb line to the main, these decisions are for the most part based upon express statutes, and, where there is no such statute, it is generally held that it is the duty of the company, at its own expense, to

supply and lay the laterals from its main to the line of a consumer's property abutting on the street." See, also, Pond on Public Utilities, §§ 536 and 537.

[7] A great many of these cases cited by respondent are cases where the waterworks were owned and operated by the municipality, and it had adopted a rule which required the consumer to bear the expense of laying the service pipe from the main to the property line. These cases are not in point. Where the city owns and operates the utility, no contractual rights exist in favor of the consumer. The city has the right to adopt and enforce reasonable rules and regulations, as likewise has a privately owned company. But a rule which is reasonable and enforceable under a municipally owned utility may not be where it is owned by private parties. In the former case, whatever profit arises from the venture inures to the benefit of the citizens generally, while in the latter it finds its way into the pockets of its stockholders. Again, the rights of the privately owned company are measured by its contract with the city; and where, under such contract, it assumes certain obligations, it cannot escape compliance therewith by any rule which it may adopt. Where a municipality operates its own water supply system, it is not under contractual obligations to lay the service pipes for its customers from the curve to its water main; hence a rule which requires the consumer to assume the burden is reasonable and just. On the other hand, here we have a corporation which, under the rule of construction which must be applied, assumed the burden of so doing; consequently the rule adopted by it is unreasonable and unjust.

Appellee contends, however, that such a construction will result in bankruptcy and ruin to it and all other privately owned companies doing business in New Mexico, because customers living in the suburbs and remote and thinly populated portions of the city will compel it to conduct water to their property line. If the argument were proper and entitled to consideration by the court, a sufficient answer would be that no such result will be attained, for, under its franchise, it cannot be compelled to extend its mains, by order of the city or otherwise, "unless the gross income from such extension, exclusive of hydrant rentals (by the city), shall equal 6 per cent. of the cost thereof." Such being the case, and the company, before it can be required to extend its mains, always being insured of 6 per cent. gross income upon the cost of the extension, will be in no danger of becoming impoverished.

For the reasons stated, the cause will be reversed, with directions to the district court to grant the relief prayed for by the relator; and, it is so ordered.

HANNA and PARKER, JJ., concur.

# McRAE v. WATER SUPPLY CO. OF ALBUQUERQUE. (No. 1610.)

(Supreme Court of New Mexico. April 28, 1914.)

(Syllabus by the Court.)

## WATERS AND WATER COURSES (§ 203\*)—MUNICIPAL FRANCHISE—CONSTRUCTION—WATER RATES.

Where, under a franchise granted to a water company, it is provided:

"Meter rates to consumers during the continuance of this franchise shall not exceed the following rates:

200 gallons or less daily, per 1,000 gallons .....	\$ .35
Over 200 and less than 600 gallons daily, per 1,000 gallons.....	.30"

and so on through the schedule of rates fixed by the franchise, the company is not authorized to charge a consumer using more than 200 gallons daily 35 cents per 1,000 gallons for the first 200 gallons used each day, but only to charge and collect 30 cents per 1,000 gallons on the total amount used, or such charge as it lawfully may make upon the class of consumers, in which the amount used places the consumer.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

Appeal from District Court, Bernalillo County; H. F. Reynolds, Judge.

Action by Louis A. McRae against the Water Supply Company of Albuquerque. From judgment for plaintiff, defendant appeals. Affirmed.

A. B. McMillen, of Albuquerque, for appellant. John C. Lewis, of Albuquerque, for appellee.

ROBERTS, C. J. The only question involved in this appeal worthy of consideration is the proper construction of that portion of the franchise, under which appellant is supplying water to the city of Albuquerque, and its inhabitants, relating to meter rates, which is as follows:

"Meter rates to consumers during the continuance of this franchise shall not exceed the following rates:

200 Gallons or less daily, per 1,000 gallons .....	\$ .35
Over 200 and less than 600 gallons daily, per 1,000 gallons.....	.30
Over 600 and less than 1,500 gallons daily, per 1,000 gallons.....	.27½
Over 1,500 and less than 3,000 gallons daily, per 1,000 gallons.....	.25
Over 3,000 and less than 10,000 gallons daily, per 1,000 gallons.....	.20

"All other rates to be special."

The contention of the appellee was, and is, that if the amount consumed is less than 200 gallons daily, a charge of 35 cents per 1,000 gallons is correct, but if more than 200 gallons and less than 600 gallons were used daily, even though it amounted to but 201 gallons per day, the price should be 30 cents per 1,000 gallons, and if over 600 and less than 1,500 gallons daily were used, even

though the excess over 600 gallons was but one gallon, the whole of the water used should be computed at the rate of 27½ cents per 1,000 gallons, and so on through the schedule rates fixed by the franchise.

On the other hand, appellant contends that the charge should be made as follows: 35 cents per 1,000 gallons for the first 200 gallons or less used daily; 30 cents per 1,000 gallons for the excess over 200 and less than 600 gallons daily; 27½ cents per 1,000 gallons for the excess over 600 and less than 1,500 gallons daily, and so on through the schedule of rates fixed by the franchise.

Appellant exacted water rent from the appellee, upon its theory of the proper construction of the franchise, which amounted to \$2.40 more than said charge would have been under appellee's construction, to recover which sum he instituted this action, and was successful in the lower court.

The views of the trial court as to the proper construction of the provision above quoted is clearly set forth in its finding of facts, from which we quote the following excerpt, viz.: "The court further finds that the method of calculation of water rates heretofore used by the defendant, that is to say, 35 cents per 1,000 gallons for the first 6,000, 30 cents per 1,000 gallons for the amount over 6,000 gallons and less than 18,000 gallons, and so on, is not warranted by the provisions of the franchise; but the court holds that the defendant should compute its water rates as follows: 35 cents per 1,000 gallons, provided no more than 6,000 gallons are used in one month; but that, if the amount consumed should exceed 6,000 gallons even by one gallon, but does not exceed 18,000, the computation should be at the rate of 30 cents per 1,000 gallons for the whole amount consumed; and that, if the amount consumed exceeds 18,000 gallons even by one gallon, but does not exceed 45,000 gallons, the computation should be at the rate of 27½ cents for the whole amount of water consumed; and, if the amount consumed should exceed 45,000 gallons even by one gallon, and not exceed 90,000 gallons, the computation must be at the rate of 25 cents per 1,000 gallons for the whole amount of water consumed; and, if the amount used exceeds 90,000 gallons even by one gallon, the computation must be at the rate of 20 cents per 1,000 gallons for the whole amount of water consumed."

Upon the hearing, the evidence adduced showed that the company, for 16 years, had exacted water rents in accord with the finding made by the court as to the proper construction of the franchise in that regard. In 1910 the management of the company was changed, and since that date water rentals have been collected under and pursuant to appellant's construction of this provision of the franchise.

Waiving the question as to whether the

court could properly consider the uniform course of the company for 16 years as a clew to the intention of the parties in arriving at the proper construction of the provision, we are of the opinion that the language of the franchise fully justified the finding made by the court. Such being the case, there was no necessity of a resort to the rule that, when the words of a grant are ambiguous, the court will call in the aid of the acts done under it as a clew to the intention of the parties. Similar provisions are to be found in many of the franchises granted to water, light, and gas companies by incorporated cities and towns, but no case has been called to our attention where a court has been called upon to construe the meaning of the language used. We think, however, that when the purpose of the provision is considered, its meaning becomes clear. It is a well-known fact that the initial cost of constructing such plants, and being prepared at all times to supply the commodity as required, entails upon the company the main cost and expense. For instance, it costs practically the same amount of money to install and equip a waterworks system where the consumers would each use 200 gallons per day, they having the right to use as much more as they desired and the company being required to furnish such excess as required, as it would to install and equip the same where each customer used regularly a larger amount. And such company must install, necessarily, engines, pumps, and appliances capable of furnishing whatever amount the consumer may require. Each day it is required to operate its engines, pumps, and appliances and keep the necessary supply available. Such being the case, the company is enabled to supply a much larger amount, at a minimum expense, over the fixed charge of operation. For this reason, it is the policy of all such companies, uniformly, we believe, to encourage greater consumption of the commodity produced, by reducing the charge as the consumption increases. In other words, by a sliding scale of prices, to encourage the consumers to use a larger amount and thereby obtain the benefit of the decreased price. Such we believe to have been the intention of the parties when the present franchise was granted and accepted. By the provision in question consumers were divided into five classes, and the rate to be charged each class was specified. It was provided that: "Meter rates to consumers during the continuance of this franchise shall not exceed the following rates:" For the first class, viz., consumers using 200 gallons or less daily, the charge should be at the rate of 35 cents per 1,000 gallons. For the second class, viz., consumers using more than 200 gallons and less than 600 gallons daily, the charge should be at the rate of 30 cents per 1,000 gallons, and so on through the schedule of rates fixed by the franchise.



Each consumer of water necessarily falls within one of the named classes and the rate he must pay for his water depends upon the class within which the amount of water used places him, and he can be charged for the service only the amount which may lawfully be exacted from water users within the given class.

We are of the opinion that the district court placed the proper construction upon that portion of the franchise relating to meter rates, and the judgment will be affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

### SEI v. WATER SUPPLY CO. OF ALBUQUERQUE. (No. 1611.)

(Supreme Court of New Mexico. April 28, 1914.)

*(Syllabus by the Court.)*

#### WATERS AND WATER COURSES (§ 203\*)—WATER COMPANY—REGULATIONS—VALIDITY.

A rule adopted by a water supply company engaged in supplying water under a franchise to a city and its inhabitants, which provides that all bills shall be paid monthly, within a reasonable time after they become due, and, in case such payment is not so made, the water will be turned off for nonpayment and a charge of \$1 made for turning off and turning on the same, is reasonable and not discriminatory, and may be enforced by the company.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

Appeal from District Court, Bernalillo County; H. F. Raynolds, Judge.

Action by P. Sei against the Water Supply Company of Albuquerque. From judgment for defendant, plaintiff appeals. Affirmed.

John C. Lewis, of Albuquerque, for appellant. A. B. McMillen, of Albuquerque, for appellee.

ROBERTS, C. J. There is but one question involved in this appeal, viz.: Where a company is engaged in supplying water to a municipality and its inhabitants, under a franchise limiting the maximum charge which said company may impose for water supplied, is a rule which provides that, in case a water consumer does not pay his monthly water rent within a reasonable time after the same becomes due, the water will be turned off for nonpayment, and a charge of \$1 made for the turning off and turning on the same, reasonable and enforceable? The trial court, after hearing evidence as to the expense entailed by the turning off and on of water in such cases to the company, sustained and upheld the validity and reasonableness of the regulation in dispute, and denied appellant's right to recover from the company the \$1 paid in compliance with the rule.

That a water company may adopt and

enforce, as a reasonable regulation for conducting such business, a rule providing that the water so supplied may be shut off for nonpayment therefor, and that, in pursuance of such regulation, the water supply may be discontinued on the failure of the consumer to pay the water rent, is so well settled, and so universally sustained, where there is no dispute as to the accuracy of the amount claimed, or the justness of the charge, that further discussion of this question would be futile and unproductive. *State ex rel. de Burg v. Water Supply Co.*, 140 Pac. 1059, decided at the present term of this court. And see note to case of *Mansfield v. Humphreys Mfg. Co.*, 19 Ann. Cas. 842, where the authorities are collected.

Such being the case, the only question necessary to consider is whether the imposition of the charge of \$1 for turning off and on the water renders the rule unreasonable, unjust, unlawful, or discriminatory. If it does not, it may be enforced; if it does so, it may not.

Appellant argues that, the franchise having prescribed the maximum rates which the appellee is authorized to charge for water furnished the consumers, there is necessarily included in the charge imposed all expenses entailed upon the company by turning on and off the supply, and delivering water to the consumer as required; that appellee could not lawfully exact from the consumer who desired to take water from it any charge for any duty on its part to be performed, in order to enable it to supply the commodity. Conceding this contention, however, it does not necessarily follow that the rule in question is unreasonable or discriminatory, for it must be remembered that this charge is imposed because of the delay in the payment of the consumer's debt to the company, and in such case, where the company is compelled to turn off the water to enforce the payment of the amount owing, the expense and trouble occasioned thereby cannot be said to be a duty which the company assumed under its franchise. All its customers are supposed to promptly pay for the water consumed by them, and, where they do so, of course, the public utility company must deliver the same to them at not to exceed the maximum rate which it is authorized by its franchise to exact. When the rates are fixed by the parties to the franchise, they are based upon the assumption that the consumers will pay, within the time required, for the service supplied, and it is upon this assumption that the charges are based. The city council, when it specified the rates which the company could charge, necessarily intended to permit the company to earn a sufficient amount to afford reasonable returns to the stockholders, and to provide for the maintenance, repair, extension, and betterment of the plant, so that the efficiency of the service should at all times be maintained. This the company

could only do by collecting promptly, and without expense, the charges for water. Its consumers number more than 2,500, and the amount collected monthly from each is comparatively small. If, as appellant argues, the appellee is without authority to impose a reasonable charge or penalty upon the delinquent customer, but must itself bear this expense of turning off and on the water, its revenues might seriously be impaired, and the efficiency of the service greatly hampered. The evidence discloses, and the court found, that the charge of \$1 imposed was the actual expense to the company of turning off and on the water. Let us suppose, for instance, that each of the 2,500 customers should refuse to pay their monthly bills, and the company, in order to collect, should turn off the water, and, upon payment being made, turn it on again. A monthly expense of \$2,500 would be entailed upon the company, which, it will be seen, would ultimately lead to its bankruptcy and the suspension of the service entirely. It is to the interest, not only of the company, but to every consumer who pays his bills, and the city likewise, that the appellee should be enabled, without expense to it, to collect for water used.

As was well said by the Supreme Court of Washington, in the case of *State ex rel. MacMahon v. Independent Telephone Co.*, 59 Wash. 158, 109 Pac. 368, 31 L. R. A. (N. S.) 329: "The company being bound to render the public efficient service, it has the right to enforce such rules as will provide for the prompt payment of its rentals, and thus provide for the securing of funds with which it may insure and protect the efficiency of its plant and keep it at such a standard as will enable it to discharge its public duties, when called upon to do so, either voluntarily at the request of the individual, or involuntarily at the command of the courts. Being a public service corporation, it is compelled to serve the individual when such service is demanded, but this does not take from it the right to demand that the continuance of such service be conditional upon the prompt payment of a reasonable rental, which shall be sufficient to enable the company to render an efficient service to its patrons, and at the same time provide a reasonable profit for itself. This is the reasoning upon which the courts have held companies of this character justified in withdrawing their service, when their charges are not promptly paid, or where a regulation fairly and generally beneficial to the company and its patrons remains uncompiled with. *Rushville Co-op. Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327; *Hewlett v. Western Union Tel. Co.* (C. C.) 28 Fed. 181; *McDaniel v. Faubush Tel. Co.*, 106 S. W. 825, 32 Ky. Law Rep. 572; *Jones, Telegraph & Telephone Companies*, §§ 341, 352. Manifestly, if all the subscribers of appellant continuously refused to pay their rentals in advance, and thus necessitated the employment of collectors, additional office

force, and the incurring of other expenses incident to the collection of such rentals, the moneys thus expended must be taken from the revenues of the company, and thus impair a fund to which the company must look for the expenditure necessary to keep its plant in the highly efficient condition required and demanded because of the public nature of the service. It is therefore not unreasonable that the company adopt a rule and enforce a regulation providing for the payment of its rentals in advance, and for an additional charge in case such requirement is not complied with. Such a charge is not an addition to the maximum rate provided for in the franchise. It is rather a charge for default and delinquency, which may be avoided by a compliance with the reasonable regulation for the payment of rentals in advance."

The argument advanced by the Washington court in the above case is, we think, convincing, and clearly sustains appellee's contention in this case.

While there are apparently but few adjudicated cases upon the question, the weight of authority is in accord with the views which we have expressed.

In the case of *Bowers v. United Gas Improv. Co.*, 37 Pa. Super. Ct. 113, the court upheld a regulation requiring citizens who desire to become consumers of gas to sign a contract to submit to a regulation that a penalty of 3 per cent. might be added on the bill, if it was not paid within five days after presentation.

In the case of *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. 393, the court sustained a regulation of the water department of a city claiming the right to shut off the supply unless payment was made of arrears for three years, together with a penalty of 15 per cent.

In *Mansfield v. Humphreys Mfg. Co.*, 82 Ohio St. 216, 92 N. E. 233, 31 L. R. A. (N. S.) 301, 19 Ann. Cas. 842, the court upheld a regulation that, where water has been turned off for neglect or refusal to pay rental when due, it shall not be turned on again until all back rent and damages shall be paid, and the further sum of \$1 for turning on and off the water.

Appellant relies upon the cases of *American Waterworks Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610, and *State v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404, which, it must be conceded, fully support his contention, but we cannot agree with the reasoning of those cases.

The rule is not discriminatory, for it applies alike to all who do not pay their bills for water promptly.

For the reasons stated, the judgment of the district court will be affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

**STATE ex rel. BOARD OF COMRS OF SAN MIGUEL COUNTY v. ROMERO,**  
County Treasurer.

**STATE ex rel. COUNTY ROAD BOARD OF SAN MIGUEL COUNTY v. SAME.**  
(Nos. 1641, 1642.)

(Supreme Court of New Mexico. April 27, 1914.)

(Syllabus by the Court.)

**1. HIGHWAYS (§ 99½, New, vol. 14 Key-No. Series)—COUNTY ROAD FUND—DISBURSEMENT.**

Section 7, c. 54, Laws 1912, which provides that the county road funds "shall hereafter be expended under the supervision and direction of the county road board, and the methods for making such expenditures and accounting therefor shall be the same as those now or hereafter required by law in the case of expenditures made by the boards of county commissioners." *Held*, to authorize the county road boards to draw their warrants upon the county treasurers directly against the county road fund, in payment of supplies necessary in the construction of public roads, under the same statutory regulations now in force controlling the boards of county commissioners in disbursing county funds.

**2. STATUTES (§ 161\*)—REPEAL BY IMPLICATION.**

Repeals by implication are not favored, but will be declared by the courts in cases where "the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

**3. HIGHWAYS (§ 19\*)—ACQUISITION OF LAND—REPEAL OF STATUTE.**

Chapter 54, Laws of 1912, granting to the county road boards general powers over public roads, *held* not to repeal by implication so much of chapter 124, Laws of 1906, as empowered boards of county commissioners to acquire by purchase or condemnation land for use as a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 28, 29; Dec. Dig. § 19.\*]

**4. STATUTES (§ 161\*)—REPEAL BY IMPLICATION.**

A subsequent statute, treating a subject in general terms, will not be held to repeal by implication an earlier statute, treating the same subject specifically, unless such construction is absolutely necessary in order to give the subsequent statute effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

**5. HIGHWAYS (§ 99½, New, vol. 14 Key-No. Series)—COUNTY ROAD FUND—WARRANTS—PAYMENT FOR LAND.**

*Held*, that section 7, c. 54, Laws of 1912, does not forbid the boards of county commissioners from drawing warrants against the county road fund to pay for land acquired for use as a public road, under the provisions of chapter 124, Laws of 1906.

Appeal from District Court, San Miguel County; before Justice Leahy.

Actions in mandamus by the State, on the relation of the Board of County Commissioners of the County of San Miguel, and by the State, on the relation of the County Road Board of the County of San Miguel against

Eugenio Romero, Treasurer and Ex Officio Collector of the County of San Miguel. From a judgment in the first case granting the writ, respondent appeals, and from a judgment in the second case denying the writ, relators appeal. Judgment granting the writ affirmed, and judgment denying the writ reversed.

Ira L. Grimshaw, Asst. Atty. Gen., and George H. Hunker, of Las Vegas, for appellants. C. W. G. Ward, Dist. Atty., and Chester A. Hunker, both of Las Vegas, for appellee.

**MECHEM, District Judge.** In case No. 1641, the board of county commissioners of San Miguel county sued out a writ of mandamus against the treasurer of that county to compel him to honor its warrant on the county road fund, drawn to pay the purchase price of land necessary for the laying out of the public road. In this case the court below granted the writ, and the treasurer has appealed.

In case No. 1642, the county road board of San Miguel county brought an action in mandamus against the treasurer of that county to compel him to honor its warrant drawn on the county road fund to pay for necessary supplies used in the construction of public roads in said county. The court below denied the petition of the road board, and it has appealed.

No question is made in either case that the indebtednesses for which the warrants are drawn are not legal charges against the road fund, but the question is solely one of whether or not the board issuing the warrant has power to draw on the county road fund. Previous to the legislation of 1912 the funds available in the various counties for road and bridge purposes were subject to control of and disposition by the boards of county commissioners, and the road supervisors, who were appointed by the commissioners. This system had been built up by statutes containing general delegations of power over roads, their establishment and maintenance, and particular statutes such as those prescribing the procedure in the purchase of condemnation of lands for use as public roads.

By an act, entitled "An act relating to public highways and bridges" (chapter 54, Laws 1912) a new department of county management, called a county road board, was created and its powers to some extent defined. The following are the sections of that act pertinent to this inquiry:

"Sec. 6. There is hereby created in each of the several counties of the state a county road board, the members of which shall serve without compensation, and which board shall consist of three qualified voters and taxpayers, who shall be appointed by the State Highway Commission for a period of

three years and subject to removal by said Commission for cause. Provided, however, that the members of such boards first appointed shall be appointed for periods of one, two and three years respectively, and not more than two of them shall be of the same political party at the time of their appointment.

"Within ten days after appointment, and on the first Monday in March in each year thereafter, the members of any such board shall meet and organize by electing one of their number as chairman and one as secretary treasurer. The secretary treasurer shall give bond in an amount to be fixed by the State Highway Commission, subject to approval by the district judge. The officers so elected shall hold their respective offices until their successors are elected and qualified.

"Sec. 7. All funds that may be derived from taxation, issuance of bonds, gifts, or bequests, or from any other source, for road and bridge purposes in the respective counties shall hereafter be expended under the supervision and direction of the county road board, and the methods for making such expenditure and accounting therefor shall be the same as those now or hereafter required by law in the case of expenditures made by the boards of county commissioners.

"Sec. 8. Such county road boards are hereby given authority to construct or improve or aid in constructing or improving any road or bridge within the county and to maintain and repair the same, and shall select and lay out a system of prospective county highways. Said system shall include the county seat and such other towns, settlements and railroad stations as may be deemed advisable, and include the main traveled highways in the county. Each such board shall, by conference with similar boards of adjoining counties, cause the respective county systems to join so as to make continuous and direct lines of travel between the counties, and each such board shall, in laying out said systems, co-operate with and be advised by the State Highway Commission. Each such board is hereby empowered and directed to employ the county surveyor of its county to prepare, upon the scale and in accordance with instructions to be prescribed by the State Highway Commission, a map which shall show the system of prospective county highways, which map shall be filed with the State Highway Commission and with the county clerk, and after such map has been filed such board may alter or increase such system, with the consent and approval of the State Highway Commission.

"Sec. 9. From and after the passage of this act such county boards shall be invested with the powers heretofore conferred by law upon the road supervisors in the various counties and shall be charged with the direction of the work heretofore imposed by law upon such road supervisors; and the

position of road supervisor is hereby abolished.

"Sec. 10. Such county boards are hereby empowered to employ, remove, and fix the salaries of such engineers, foremen, laborers and other employes as may be necessary to carry on their work, and may assign such duties and delegate such authority to such employes as they deem advisable.

"Sec. 11. Such boards shall make an annual report to the State Highway Commission and such other reports as may be called for by such Commission from time to time."

[2] The act does not contain a repealing clause. Though repeals by implication are not favored, yet courts declare them in cases where "the last statute is so broad in its terms and so clear and explicit in its words as to show it was intended to cover the whole subject, and therefore to displace the prior statute." *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *Territory v. Digneo*, 15 N. M. 157, 103 Pac. 975; *Territory v. Riggle et al.*, 16 N. M. 713, 120 Pac. 318.

These sections evidence clearly an intent upon the part of the Legislature to take from the boards of county commissioners and from road supervisors the general control of roads and to vest that control in the new board. That this act so considered is clearly within the limits of legislative authority is beyond question.

[1] It is argued that section 7, supra, does not authorize the county road board to issue its warrants or orders direct upon the county treasurer against the road fund. The section provides, not only that the road fund "shall hereafter be expended under the supervision and direction of the county road board," but further provides that "the methods for making such expenditures and accounting therefor shall be the same as those now or hereafter required by law in the case of expenditures made by the boards of county commissioners." The only law that can be here referred to are those statutes which prescribe the procedure by which boards of county commissioners pay out the county funds. These statutes (sections 668, 669, 670, 679, 680, 681, 693, and 697, C. L. Laws 1897) establish a system of disbursing county funds and accounting therefor, and may be easily followed by the county road boards. If the latter clause of section 7 above referred to is to be held otherwise than meaningless, it effectually grants to the county road boards the power to draw its warrants direct on the treasurer against the county road fund, under the same statutory restrictions and regulations heretofore or hereafter applicable to boards of county commissioners in the exercise of their power to disburse county funds.

[5] Coming to the next question presented by the record, that of the right of the board of county commissioners to draw its warrant against the county road fund to pay for land to be used as a public highway, it is to be

observed that by a particular statute (chapter 124, Laws 1905), which as far as the record discloses in case No. 1641 was followed, the board of county commissioners may, in certain cases, appoint viewers of land proposed to be taken for road purposes, and upon their report of damage done to the landowner, the board may make payment to him, which may be accepted by the landowner, or if not accepted, then the board may proceed to condemn.

[3] It is also to be considered that the act of 1912 is in general terms, and does not specifically give the powers conferred by chapter 124, Laws 1905, to the county road board, nor is chapter 124 repealed.

[4] The rule of construction applicable here is stated in Black on Interpretation, 116: "As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms, and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary to so construe it in order to give its words any meaning at all." *Rodgers v. U. S.*, 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816, and authorities cited.

The absurdity of permitting two independent boards to draw on the same fund is urged upon us, and untoward results are confidently predicted of such an arrangement. While persuasive in a case of ambiguity, such considerations have no place in declaring the plain letter of a statute, within the province of the Legislature to pass. It is to be confidently expected, if the dire results prophesied occur, that the Legislature will furnish a remedy.

The judgment of the lower court in case No. 1642 is reversed, and the case remanded, with instructions to grant the writ of mandamus, and the judgment in case No. 1641 is affirmed.

And it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

### ROTH v. YARA. (No. 1563.)

(Supreme Court of New Mexico. April 28, 1914.)

(Syllabus by the Court.)

#### 1. REPLEVIN (§ 103\*)—JUDGMENT FOR DEFENDANT.

In replevin actions, a defendant may not only recover the property and damages for the unjust caption or detention thereof, but shall have judgment, if plaintiff fails to prosecute his suit with effect, for the value of the property taken, and double damages for the use of the same from the time of delivery, with the op-

tion of taking back the property, or recovering the assessed value thereof.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 398-411; Dec. Dig. § 103.\*]

#### 2. REPLEVIN (§ 72\*)—DAMAGES—EVIDENCE.

Evidence examined. *Held*, that there is no substantial evidence to support the verdict for damages.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 292-295; Dec. Dig. § 72.\*]

Appeal from District Court, San Miguel County; Leahy, Judge.

Replevin by Peter Roth against Tranquillino Yara. From judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

On September 5, 1912, appellant herein, Peter Roth, filed in the justice of the peace court in and for precinct No. 29, in San Miguel county, state of New Mexico, his affidavit in replevin, setting up that he had good right to the possession of one sorrel stallion, five years old; that the same was wrongfully detained by one John Doe, and on the same day the justice of the peace issued a writ of replevin in said cause to the sheriff or any constable of said county, commanding him without delay to cause to be replevied unto the said Peter Roth the said property, which said John Doe had wrongfully detained from said Peter Roth; and that under and by virtue of said writ said horse was replevied and possession given to the said Peter Roth; that on the 12th day of September, 1912, in the said court of the justice of the peace, Tranquillino Yara, the appellee herein, appeared with his attorney and entered his appearance in said cause as the defendant, John Doe, and agreed that said cause be tried then and there upon its merits, which trial resulted in favor of the said Peter Roth; that said Tranquillino Yara thereupon appealed the cause to the district court of San Miguel county, where the matter came on for trial on November 19, 1912, before a jury, which returned a verdict finding the issues in favor of Tranquillino Yara, and further finding that the actual damage sustained by said Yara was \$95. Whereupon judgment in said cause in favor of appellee herein, awarding him possession of the horse in question, together with double damages, under the statute, in the sum of \$190, from which judgment appellant brings this cause for review to this court.

Hunker & Hunker, of Las Vegas, for appellant. O. A. Larrazolo, of Las Vegas, for appellee.

HANNA, J. (after stating the facts as above). [2] Numerous assignments of error were made by appellant, but the first to be argued before this court is upon the contention that the verdict for damages is not sustained by the evidence, and is contrary to the evidence. It appears from the record

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the appellant gained possession of the horse on or about the 5th day of September, 1912, and had possession of the same for a period of 2½ months. And by appellee, it is contended that the record discloses that the horse in question was a stallion and used for no other purpose than that of breeding mares. The only evidence introduced on the subject of damages is to be found in the testimony of appellee, Yara, to the effect that he had been damaged in the sum of \$100 and that he arrived at this conclusion because the horse failed him at the time he most needed him to serve some mares, and further to the effect that he valued colts of the horse at the time of birth at \$15, and charged for services of the stallion to others at the rate of \$15 for one mare, and \$25 for two. It is contended by appellant that there was no evidence to show that the horse in question was in condition to be used for breeding purposes during the 2½ months appellant had possession of it; and by appellant, in response to this contention, it is urged that the best evidence of that fact was the horse itself, which the jury and court reviewed at the time of the trial.

It does not appear from an examination of the record that there was any evidence that the appellee lost any opportunity which he may have had for the service of the horse, except such as might be implied from his statement that the horse failed him at the time when he most needed him to serve some mares.

[1] The question of damages being entirely dependent upon statutory provision upon the subject, it is necessary to consider our statutory law upon the subject of damages, applicable to this case. By subsection 228 of chapter 107, S. L. 1907, it is provided that: "Any person having a right to the immediate possession of any goods or chattels, wrongfully taken or wrongfully detained, may bring an action of replevin for the recovery thereof and for damages sustained by reason of the unjust caption or detention thereof." And by subsection 239 it is further provided: "In case the plaintiff fails to prosecute his suit with effect and without delay judgment shall be given for the defendant and shall be entered against the plaintiff and his securities for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof."

It is thus to be observed that in replevin actions a defendant may not only recover the property and damages for the unjust

caption or detention thereof, but shall have judgment, if plaintiff fails to prosecute his suit with effect, for the value of the property taken, and double damages for the use of the same from the time of delivery, with the option of taking back the property, or recovering the assessed value thereof.

The rule upon the matter of certainty as to damages is that damages which are uncertain, contingent, or speculative are not recoverable, and in this connection it is well said that damages may be speculative or uncertain in several respects. In the first place, it may be a matter of uncertainty whether the party claiming damages has in a legal sense been damaged at all. In the next place, though damages from some cause may be shown, it may be uncertain whether in the particular case they resulted from the defendant's acts; or, again, the damages may be wholly uncertain in measure or extent. 8 Am. & Eng. Ency. (2d Ed.) 608-610.

It would seem clear that, while appellee might properly recover damages for loss of the use of the animal in question, it would nevertheless be incumbent upon him to prove with definiteness and certainty the damages actually suffered by him. It does not appear from the record in this case that he could have used the animal in question at any time, had the animal been in his possession, and his testimony upon the subject reduces the element of damages in this case to one of speculation and uncertainty, in our opinion.

We therefore conclude that this assignment of error is well taken. The character of damages sought in this particular case is such that the matter should not have been left to the jury unless specific instances or occasions were pointed out when the appellee might have used the horse for the limited purposes which it is shown the horse was accustomed to be used for, and, no such instance having been pointed out, it became purely a conclusion on the part of the appellee that he had been damaged in a lump sum, to wit, the sum of \$100, without other evidence to support the conclusion, and no attempt on the part of the witness himself to support the conclusion or statement was made.

The conclusion we have reached makes it unnecessary for us to dispose of the other assignments of errors in this case, and, for the reasons stated, the judgment of the district court is reversed, and a new trial granted.

ROBERTS, C. J., and PARKER, J., concur.

**EDWARD THOMPSON CO. v. MURPHINE et al. (No. 11655.)**

(Supreme Court of Washington. May 28, 1914.)

**1. APPEAL AND ERROR (§ 1002\*)—FINDINGS—CONCLUSIVENESS.**

A finding on conflicting evidence and sustained by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**2. SALES (§ 479\*)—CONDITIONAL SALES—REMEDY OF SELLER—ELECTION.**

A seller, who retains the right of property until the price, payable in installments, is paid, and who on default in installments takes possession of the property, thereby elects his remedy, and he cannot recover the balance of the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by the Edward Thompson Company against Thomas F. Murphine and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Oliver Hulback, of Seattle, for appellant.

**PARKER, J.** The plaintiff seeks to recover from the defendants a balance due upon the purchase price of books under a sale contract which contemplated delivery of the books to them and payment to the plaintiff therefor, in installments. A trial before the court, a jury being waived, resulted in findings and judgment in favor of the defendants, from which the plaintiff has appealed.

[1, 2] By the terms of the sale contract, which was in writing, it was expressly agreed that the "right of property" in the books should remain in appellant "until the same are wholly paid for." The books were delivered by appellant to respondents and some of the installments paid thereon. Among the findings made by the trial court is the following:

"That prior to the commencement of the above-entitled action the said plaintiff took possession of all of the books in said agreement described, and now has in its possession and under its control each and all of the books in said contracts described, and is the owner thereof."

The evidence is in conflict upon the question of appellant taking possession of the books; that is, upon the question of appellant's agent authorizing one Watkins to take possession of the books. That such possession of Watkins was originally authorized by appellant's agent with a view to Watkins becoming the purchaser of the books from appellant may be regarded as not being fully established by the evidence; but we think that the evidence does, in any event, support the

conclusion that the books were eventually left by the agent of appellant with Watkins under such circumstances as to amount to appellant's assuming possession thereof. There is at least room for difference of opinion on this question such as induces us not to ignore this finding of the trial court as it is contended we should do. Under our decision in *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577, this amounted to an election of remedies on the part of appellant preventing it from recovering the balance of the purchase price. Clearly it cannot have both the books and the balance due upon the purchase price.

The judgment is affirmed.

**CROW, C. J., and MOUNT and MORRIS, JJ., concur.**

**COPPLE v. AIGELTINGER et al. (S. F. No. 6146.)**

(Supreme Court of California. May 7, 1914.)

**1. VENDOR AND PURCHASER (§ 75\*)—CONTRACT—RECEIPT FOR DEPOSIT—TIME FOR PERFORMANCE.**

A receipt for a deposit on the purchase price of a designated tract of land, which recited that the balance was to be paid upon delivery of the deed, and which was signed by the vendor, was an agreement, binding upon him, to convey the land upon receipt of the balance of the purchase price within a reasonable time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113-118, 126; Dec. Dig. § 75.\*]

**2. SPECIFIC PERFORMANCE (§ 32\*)—CONTRACTS ENFORCEABLE—MUTUALITY—STATUTORY PROVISIONS.**

While the vendor could not have specifically enforced the contract against the purchaser, because it was not signed by the latter, it was based upon a valuable consideration paid to the vendor, and was therefore binding upon him so long as it was unrevoked and the purchaser complied with its terms, the same as an option to purchase would be, and the vendor may be compelled to specifically perform his contract, under Civ. Code, § 3388, providing that a party who has signed a written contract may be compelled to specifically perform it, though the other party has not signed it, if the latter has performed, or offers to perform, on his part.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

**3. SPECIFIC PERFORMANCE (§ 32\*)—CONTRACTS ENFORCEABLE—MUTUALITY.**

The filing, by the purchaser, of a suit for specific performance of such contract binds him to abide by the decree in such a suit, and therefore empowers the court to award specific performance against him, and is equivalent to a written acceptance of the proposition.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

**4. SPECIFIC PERFORMANCE (§ 22\*)—DEFENSES—CONVEYANCE WITH NOTICE.**

The conveyance, by one who had signed a binding contract for the sale of land, of the same land to another, who had notice of the former contract, does not deprive the purchaser,

under the contract, of his right to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 51, 53; Dec. Dig. § 22.\*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by William Copple against E. H. Aigeltinger and others. A judgment in favor of the defendants was vacated by the trial court, and a new judgment rendered in favor of plaintiff, and defendants appeal. Affirmed.

Preston & Preston and Thomas & Thomas, all of Ukiah, for appellants. Robert Duncan, of Ukiah, for respondent.

ANGELLOTTI, J. This is an action for the specific performance of an agreement for the sale of real estate. The lower court first made its findings and entered its judgment in favor of defendants. Later, upon motion of plaintiff for amendments to the conclusions of law and for a judgment based thereon in his favor, the court made an order granting such motion, vacating the prior judgment, and directing a new judgment in plaintiff's favor, which was accordingly entered. From this order the defendants appeal.

The statute expressly provides for an appeal from such an order. Code Civ. Proc. § 663a.

The facts of the case are presented in the findings of the court, and are, in substance, as follows: On the 17th day of September, 1910, the defendant E. H. Aigeltinger was the owner of an undivided one-half interest in a tract of land near Hopland, and on that day made, executed, and delivered to one A. H. Pape, acting as agent for the plaintiff, an instrument in writing relative to the purchase of said real estate by plaintiff in the following words: "San Francisco, September 17, 1910. Rec'd. from A. H. Pape as deposit of \$10 for William Copple on sale of ½ piece of land known as Lowe place at Hopland. Balance of five hundred and ninety (\$590) dollars to be paid on delivery of deed. [Signed] E. H. Aigeltinger."

The purchase price of the land named in this instrument was reasonable, and the sum of \$10 was actually received by said Aigeltinger upon the date thereof. On September 23, 1910, said Aigeltinger requested William Copple, the principal of said Pape and plaintiff herein, to return said writing, and offered to repay to him the \$10 which he had received thereunder. The instrument was not returned nor the offer of repayment accepted; but on the 28th of September, 1910, Aigeltinger, for a valuable and sufficient consideration, conveyed the property to his co-defendants Spencer Beasley and Isaphene Beasley, his wife, who took such conveyance with full knowledge of the execution and terms of said instrument. On October 25, 1910, the plaintiff notified the defendant

Aigeltinger that he was ready, able, and willing to take said property under the terms of said instrument, and offered to pay the balance of the purchase price, which offer Aigeltinger refused, but on his part offered to return the \$10 which he had theretofore received. The plaintiff then brought this action for specific performance.

[1] By the instrument above set forth, Mr. Aigeltinger, in consideration of the payment to him of a part of the purchase price, bound himself in writing to convey the land involved to plaintiff, upon payment of the further sum of \$590, the same being the balance of the purchase price agreed on. No time being specified therein within which plaintiff must make such payment, he certainly had the right, in the absence of any tender of a deed by Aigeltinger and demand for payment, to defer such payment for a reasonable time. In view of the language used, it may well be held that his right to take the land upon payment of \$590 would continue until a demand by Aigeltinger of payment and a tender of deed, but, as there never was any such demand or tender of deed, it is unnecessary to determine this question, for it could hardly be contended, upon the facts found, that plaintiff did not make his tender within a reasonable time. Clearly there was no default on his part. While, owing to the fact that plaintiff had not signed this writing, the agreement could not originally have been specifically enforced against him (Harper v. Goldschmidt, 156 Cal. 251, 104 Pac. 451, 28 L. R. A. [N. S.] 689, 134 Am. St. Rep. 124), it was nevertheless binding upon Aigeltinger and those acquiring from him with notice of plaintiff's right, so long as it remained unrevoked, and there was no failure on the part of plaintiff to comply with its terms, for the simple reason that it was based upon a valuable consideration moving from plaintiff to him, the payment of a portion of the purchase price, and thus constituted a contract binding on him. So far as Aigeltinger was concerned, in the absence of default by plaintiff, it was a binding, irrevocable contract for the sale of the property; something which was, of course, entirely different from a mere offer, unsupported by any consideration, which might be revoked at any time before acceptance.

It is settled in this state, as to a mere option for the purchase of real estate, that, where there is a consideration therefor, the option cannot be withdrawn during the time agreed upon for its duration, and that, when accepted according to its terms, it vests in the vendee the right of acquiring the land, which right, when exercised, relates back to the time of giving the option, so as to cut off intervening rights acquired with knowledge of the existence of the option. See Smith v. Bangham, 156 Cal. 359, 364, 104 Pac. 689, 28 L. R. A. [N. S.] 522; Reese Co. v. House, 162 Cal. 740, 745, 124 Pac. 442.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



This rule is necessarily equally applicable in favor of the vendee under such a contract of sale as we have here, notwithstanding he has not signed the contract.

It is settled that such an agreement of sale as the one here involved may be specifically enforced by the vendee against the vendor, although the former has not signed the same, and although it could not originally have been specifically enforced against him by reason of the fact that he had not signed. Section 3388, Civ. Code; *Harper v. Goldschmidt*, 156 Cal. 251, 104 Pac. 451, 23 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124; *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970.

[3] Where there is no written acceptance by the vendee of the proposition of the vendor prior to suit, as said in *Harper v. Goldschmidt*, supra, "in equitable theory the requirement of mutuality of remedy is satisfied when the nonsigning plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in chancery, and so empowers that court to decree specific performance against him." Not being in default, plaintiff was therefore entitled to specific performance of the contract.

[4] The conveyance by the vendor to the Beasleys, who took with full notice of his rights, could not operate to preclude him from this relief. As said in *Smith v. Bangham*, supra, as to an option, "a subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase." See, also, *Reese Co. v. House*, supra. This is necessarily true as to such a contract as we have here.

In so far as *Leuschner v. Duff*, 7 Cal. App. 721, 95 Pac. 914, may be held to express views contrary to what we have said, we cannot follow it, in view of our decisions. The case of *Nason v. Lingle*, 143 Cal. 363, 77 Pac. 71, is clearly not in point. There was in that case no consideration for Lingle's proposition, and he effectually revoked such proposition prior to the action on the part of the plaintiffs, which, in the absence of such revocation, would have created a binding contract.

It is the absence of any consideration that distinguishes that case from this.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

MELVIN, J. I concur; but in approving the quotation from *Smith v. Bangham* I am not indorsing all of the doctrines of that case. The rule with reference to "subsequent purchasers with notice" was correctly expressed in the opinion, but I do not think Mrs. Bangham was properly classified as such a subsequent purchaser or as a person subject to the same rule. I adhere to the

convictions expressed in the dissenting opinion in that case of which Mr. Chief Justice Beatty was the author, and in the one written by me, in which Mr. Justice Lorigan concurred.

PEOPLE v. MERRILL et al. (Civ. 1317.)  
(District Court of Appeal, First District, California. March 30, 1914.)

1. STATUTES (§ 183\*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in construing a statute, must ascertain and give effect to the legislative intent, though it may not be consistent with the strict letter of the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 261; Dec. Dig. § 183.\*]

2. STATUTES (§ 184\*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in declaring the legislative intent of an ambiguous statute, is not restricted to the construction which will give only a literal effect to every word and phrase appearing by the letter of the statute, but may resort to a consideration of the purpose to be accomplished by the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 262; Dec. Dig. § 184.\*]

3. STATUTES (§ 181\*)—CONSTRUCTION—LEGISLATIVE INTENT.

Where a suggested construction of an ambiguous statute necessarily involves a decided departure from what may be fairly said to be the plain purpose of the statute, such construction will not be adopted to the exclusion of a possible, plausible construction, which will promote the legislative intent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

4. STATUTES (§ 183\*)—CONSTRUCTION—LEGISLATIVE INTENT.

The court, in construing a statute containing a patent ambiguity, must reject an interpretation which, if followed, will lead to a conclusion clearly inconsistent in its consequences with the reason and spirit of the statute, but must adopt the construction to which the statute as a whole will readily respond.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 261; Dec. Dig. § 183.\*]

5. INSURANCE (§ 20\*)—BROKERS—TAKES ON GROSS PREMIUMS—STATUTORY PROVISIONS.

An insurance broker, licensed to procure policies from unauthorized insurance companies under Pol. Code, § 596, authorizing the licensing of brokers to procure policies from unauthorized companies on executing a bond conditioned on the broker complying with the statute and filing with the insurance commissioner on March 1st annually a sworn statement of the gross premiums charged for insurance procured, and the gross return premiums on such insurance canceled under the license during the year ending December 31st last preceding, and to pay an amount equal to 4 per cent. of such gross premiums, less return premiums so reported, may compel the insurance commissioner to credit him with any premiums returned, regardless of the calendar year in which they were returned, in calculating the amount of the 4 per cent. tax.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 16, 18-22; Dec. Dig. § 20.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the People of the State of California by E. O. Cooper, Insurance Commis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sioner, against J. A. Merrill and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Wise, Sapiro & O'Connor, of San Francisco, for appellants. John W. Stetson, of Oakland, for respondent.

LENNON, P. J. In this action the plaintiff recovered a judgment in the sum of \$359.64 against the defendant J. A. Merrill as principal, and the defendant United States Fidelity & Guaranty Company as surety, upon a bond in the sum of \$20,000, running to the people of the state of California, which was given, pursuant to the provisions of section 596 of the Political Code, in consideration of a license issued to the defendant Merrill, permitting him to procure policies of insurance on risks located in the state of California for insurance companies not authorized to transact business within the state.

The obligation of the bond in suit is best stated in its own language as follows:

"Whereas, the above bounden principal is about to apply or has applied to the insurance commissioner of the state of California for a license pursuant to the provisions of section 596 of the Political Code of said state, permitting him, the said above bounden principal, to procure policies of insurance on risks located in the said state of California, for companies not authorized to transact business in the state of California; now, therefore, if the said above bounden principal and licensee shall faithfully comply with all the requirements of section 596 of the Political Code of the state of California, and shall file with the insurance commissioner of the state of California, on or before the first day of March of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross return premiums on such insurance canceled, under such license during the year ending the 31st day of December last preceding, and shall pay to the insurance commissioner of the state of California, for the use and benefit of said state, an amount equal to four per cent. of such gross premiums less such return premiums so reported, then this obligation to be void, otherwise to remain in full force and effect."

Briefly stated, the preliminary provisions of the statute requiring and governing the giving of the bond in suit relate to the manner in which insurance may be procured and placed in companies not authorized to do business in the state of California; and in that behalf authorize the insurance commissioner of the state of California to issue a license upon the payment of a fee of \$50, permitting a citizen to procure policies on risks in this state for such unauthorized companies. Two paragraphs of the statute in question, which cover and control the giving of the bond in suit, are as follows:

"Account of Business.—Every person so licensed shall keep a separate account of the business done under said license open at all times to the inspection of such insurance commissioner, and shall file a certified copy thereof forthwith with the insurance commissioner, showing the exact amount and character of such insurance placed for any person, firm, or corporation, the gross premiums charged thereon, the companies in which the same is placed,

the dates of the policies and the terms thereof, the location of the insured property, and also a report in the same detail of all such policies canceled and the gross return thereon.

"Bond of Licensee.—Before receiving such license the persons licensed shall execute and deliver to the insurance commissioner a bond to the people of the state of California in the penal sum of twenty thousand dollars, with such sureties as the commissioner shall approve, conditioned that the licensee shall faithfully comply with all the requirements of this section, and will file with the insurance commissioner on or before the 1st day of March of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross return premiums on such insurance canceled, under such license during the year ending on the 31st day of December last preceding, and will pay to the insurance commissioner of the state of California, for the use and benefit of said state, an amount equal to four per cent. of such gross premiums less such return premiums so reported, and in default of the payment of any sum imposed by this section, the said insurance commissioner may sue for the same in any court of record in this state."

The execution of the bond and the issuance of a state license to the defendant Merrill, permitting him to procure policies of insurance on risks located in this state for companies not authorized to do business in this state, were not denied. The case was tried and determined solely upon an agreed statement of facts which, among other things, showed in substance that the defendant Merrill, while operating under the state's license, had collected the sum of \$9,295.88 as premiums for policies of insurance placed by him in unauthorized companies during the year ending December 31, 1910; that he had actually returned gross premiums in the sum of \$3,006.48 on account of the cancellation of insurance policies placed subsequent to December 31, 1909, and during the year 1910; and that the tax due to the state for and on account of the insurance policies placed and reported during the period mentioned amounted to the sum of \$254.54. It was further agreed that the defendant Merrill had returned gross premiums amounting to \$482.30 to policy holders during the year 1910, on policies procured during the year 1909.

Upon the trial of the case it was stipulated that the sole issue presented by the pleadings and covered by the statement of facts was the right of the defendant Merrill to a credit of 4 per cent. (\$19.20) upon the amount of the gross premiums (\$482.30) returned to policy holders during the year 1910 on policies procured during the year 1909. Upon this appeal from the judgment the only contention made is that the defendant Merrill should have been given the credit which he claimed in the lower court.

[1] This contention calls for a construction of the provisions of section 596 of the Political Code as it existed in 1910. Appellants insist that the provisions of the statute in question relating to the credit to be allowed for return premiums should be construed as compelling the insurance commissioner to credit the broker with any premi-

ums returned regardless of the calendar year in which such premiums were paid. The respondent on the other hand insists that the statute warrants and requires the construction that the broker shall have no credit for return premiums on any insurance procured and placed by him, unless the premium is actually returned to the insured within the calendar year in which the business was written.

We are of the opinion that the contention of the appellants must be sustained. That contention is rightfully rested upon an obvious uncertainty in the language of the second paragraph of the statute, which relates to the ascertainment and collection of the tax in controversy. The uncertainty in the paragraph in the particulars stated is so pronounced that the rules of statutory construction must be invoked and applied to the entire statute in order to ascertain the legislative intent. The fundamentals of the rule of statutory construction may be stated to be as follows:

"The intent of the statute is the law. The intent is the vital part, the essence of the law; and the primary rule of construction is to ascertain and give effect to that intent. \* \* \* The intention of the Legislature in enacting the law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of the statute when it leads away from the true intent and purpose of the Legislature, and to consequences inconsistent with the general purposes of the act." 2 Sutherland on Statutory Construction (2d Ed.) § 363.

[2, 3] In searching for and declaring the legislative intent of an ambiguous statute we are not restricted to that construction which will give only a literal effect to every word and phrase appearing by the letter of the law, but we may rightfully resort to a consideration of the purpose to be accomplished by the enactment of the statute. *People v. Earl*, 19 Cal. App. 69, 124 Pac. 887; *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732. Therefore when a suggested construction of a statute in any given case necessarily involves a decided departure from what may be fairly said to be the plain purpose of the enactment, such construction will not be adopted to the exclusion of a possible, plausible interpretation which will promote and put in operation the legislative intent.

[4, 5] Presumably when the Legislature licensed brokers to place policies of insurance in unauthorized companies, and provided a tax therefor, it was the intention to permit such brokers to do business upon a profitable rather than a prohibitive basis. Plainly the purpose of the statute was to impose a fixed tax upon the gross premiums received, less those actually returned to the insured and reported; whereas the construction of the statute contended for by the respondent would result in an uncertain percentage tax, capriciously based upon a fortuitous event, and which might range so high as to prac-

tically tax the broker out of business. For instance, we will suppose a policy issued in December in any given year for a premium of \$100, and canceled the following January, with a resulting return premium of \$80. In such a case, under the construction contended for by the respondent, the broker would be compelled to pay a 4 per cent. tax upon the full premium, which would be tantamount to a 20 per cent. tax upon the \$20 premium, that had been actually earned; whereas, if the policy had been written in November and canceled in December, the tax would be but 4 per cent. upon such earned premium. It may be conceded that the Legislature might, if it saw fit, refuse to license such brokers altogether; but, having made provision for a license, it is inconceivable that it was the legislative intent to impose a practically prohibitive tax; and, in the absence of unequivocal language indicating such intent, the contrary will be presumed. However that may be, it is certain that in the presence of a patent ambiguity we must, in construing the statute, reject an interpretation which, if followed, would lead to a conclusion clearly inconsistent in its consequences with the reason and spirit of the statute. Rejecting such interpretation, we are then required to resort to that construction by which such consequences may be avoided and to which the statute as a whole readily responds. 2 Sutherland on Statutory Construction (2d Ed.) § 367.

It is conceded that the credit to be allowed the broker for gross return premiums on canceled policies is ultimately indicated by the phrase "such return premiums so reported," found in the second paragraph of the statute. If this paragraph contained in itself a complete expression of the legislative will with reference to the credit to be allowed the broker, it might be said—not without some slight uncertainty, however—that the phrase "such return premiums so reported" refers exclusively to the immediately preceding clause of the same paragraph, viz., "the gross return premiums on such insurance canceled under such license during the year ending on the 31st day of December last preceding." Under like circumstances it might be said that the words "such insurance" in the phrase last quoted refer back again to that clause of the second paragraph which requires the broker to file "with the insurance commissioner on or before the 1st day of March of each year a sworn statement of the gross premiums charged for insurance procured or placed," etc. In short, if it could be fairly said that the provisions of the second paragraph, standing alone, completely and exclusively cover the subject of the ascertainment and collection of the tax in controversy, we might be permitted to construe the statute to mean that the broker is entitled to credit only on the return premiums on such policies as were canceled during the

year in which the business was written. The second paragraph of the statute, however, does not exclusively and conclusively dispose of the credit to be allowed to the broker. To so hold, we would be compelled to ignore the provisions of the first paragraph, which in a material measure relates to the subject of "gross return premiums on canceled policies." In this behalf it will be noted that the first paragraph of the statute, under the heading of "Account of Business," requires the broker to file an account of insurance placed, the gross premiums charged thereon, and also "a report in the same detail of all policies canceled and the gross return thereon." Clearly this clause of the statute compels the broker to report every premium returned on canceled policies, regardless of the year in which such policies were written and the premiums thereon returned. If such a report was not required and intended to aid in the ascertainment of the credit to be allowed the broker, then its purpose is not apparent. When the statute is read and considered in its entirety the uncertainty with reference to the credit to be allowed the broker for return premiums is created by that clause of the second paragraph of the statute which requires the broker to file a bond, conditioned that he will make a sworn statement of the gross premiums charged for insurance and the gross return premiums on "such insurance" canceled during the preceding year. The grammatical arrangement of the language of the paragraph in question tends to the conclusion that the words "such insurance" relate solely to policies that were placed and canceled during the calendar year in which they were written. Such conclusion, however, is rendered doubtful, if not entirely negatived, by a consideration of the scope and effect of the controlling phrase in the same paragraph, which reads "Such return premiums so reported." This is so because the only preceding specific reference to a required report of "all policies canceled and the gross return thereon" is to be found in the first paragraph of the statute, and covers all premiums returned irrespective of the year in which the policy was written. Obviously the statute must be considered and construed in its entirety; and if the phrase last quoted be read in conjunction with the provisions of the first paragraph of the statute, no uncertainty exists, because with such a reading it may be fairly said that the words "so reported" as used in the second paragraph refer to the report specifically designated and required by the provisions of the first paragraph of the statute, which, without reference to the time of cancellation, must show "in detail all of the policies canceled and the gross return thereon."

This construction of the statute is not only in keeping with its plain purpose, but har-

monizes as well with the language of the statute as a whole; and, if correct, it follows that Merrill, the broker in the present case, should have been credited by the court below with all return premiums on policies procured pursuant to the license granted him, without regard to the year in which the policies, the cancellation of which gave rise to the return of premiums, were written.

The judgment appealed from is modified by striking therefrom the sum of \$19.20, and as so modified the judgment will stand affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

Ex parte KANTROWITZ. (Cr. 325.)  
(District Court of Appeal, Second District, California. March 28, 1914.)

1. RAPE (§ 18\*)—OFFENSES—PERSONS WHO MAY BE GUILTY.

Pen. Code, § 31, declares that those who aid in commission of crimes are principals, and section 971 abrogates the distinction between accessories and principals in the first and second degree. Section 261 defines "rape" as intercourse accomplished under certain circumstances with a female not the wife of the perpetrator. Held that, while any one guilty of rape must be a principal, a husband, while he cannot personally ravish her, may be guilty of rape on his wife as where he assisted another to ravish her.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 21; Dec. Dig. § 18.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5919-5925; vol. 8, p. 7778.]

2. WITNESSES (§ 53\*)—COMPETENCY—WIFE.

Under Pen. Code, § 1322, declaring that neither husband nor wife shall be competent to testify against the other except with consent of both or in case of criminal violence upon one by the other, a wife is competent to testify as to a crime of violence committed upon her after marriage by her husband.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 137-141; Dec. Dig. § 53.\*]

Petition by Abraham Kantrowitz for a writ of habeas corpus. Writ discharged, and petitioner remanded.

George L. Greer, of Los Angeles, for petitioner. J. D. Fredericks and W. J. Ford, both of Los Angeles, for respondent.

CONREY, P. J. Petitioner is in the custody of the sheriff of Los Angeles county under a commitment issued pursuant to an order holding him to answer upon a charge of rape. In his behalf it is contended that the imprisonment of the petitioner is illegal, in this, that the person upon whom said rape is alleged to have been committed appears from all of the testimony to be the wife of said Abraham Kantrowitz; also, that he has been committed to custody without reasonable or probable cause, in that the only testimony directly connecting him with the alleged offense is the testimony of his wife, it being claimed that she is not a competent witness.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] By section 261 of the Penal Code "rape" is defined to be an act of sexual intercourse accomplished with a female not the wife of the perpetrator and under certain circumstances specified in said section. Section 31 of the same Code defines principals in the commission of a crime in terms which include not only those who directly commit a felony or misdemeanor, but those who aid or abet in its commission. Section 971, Penal Code, abrogates the distinction formerly existing between an accessory before the fact and a principal, and between principals in the first and second degree in cases of felony.

In accordance with the foregoing statutory provisions, it is necessary in any indictment or information charging a defendant with the crime of rape that he shall be accused as a principal. The argument here presented on behalf of petitioner is that, since under the section defining the crime of rape it is manifest that a husband is incapable of personally committing that crime against his own wife, therefore he cannot be guilty of that crime under any circumstances. Under similar statutory conditions, the contrary rule is established by the authorities of several other states. In *People v. Chapman*, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857, it appeared that the defendant, being desirous of obtaining evidence by which to secure a divorce from his wife, employed another man to have intercourse with his wife, either with or without her consent, and the husband with witnesses concealed himself in an adjoining room. The wife resisted, and rape was committed. Under the statutes of Michigan, it was provided that all persons aiding, assisting, or abetting in the commission of a crime were liable to indictment, trial, and punishment as principals. The Supreme Court of Michigan sustained the lower court's instruction to the jury that if they found facts substantially as above stated the defendant was guilty of rape. To like effect, see *State of Louisiana v. Haines*, 51 La. Ann. 731, 25 South. 372, 44 L. R. A. 837, and *State of North Carolina v. Dowell*, 106 N. C. 722, 11 S. E. 525, 8 L. R. A. 297, 19 Am. St. Rep. 568. Several other cases to like effect are cited in the note, 8 L. R. A. 297. In the case of *In re Cooper*, 162 Cal. 81, 85, 121 Pac. 318, 320, where it was held that a single woman could not (under section 269a, Pen. Code) be guilty of adultery by personal participation in illicit intercourse with a married man, the court added the following observation, which is pertinent to this discussion:

"Of course, an unmarried person might be guilty as a principal of this offense, under section 31 of the Penal Code, by aiding and assisting in its commission in some other way than by living in a state of illicit intercourse with a married person; but we are considering here simply such aid and assistance as are involved in the mere fact of participation in the illicit intercourse."

[2] It is next contended that in this case the wife is not a competent witness against her husband, and that the petitioner is without probable cause held to answer, since it appears from the transcript of testimony at the preliminary examination that the only testimony directly connecting him with the alleged offense is the testimony of his wife.

"Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, or in cases of criminal violence upon one by the other. \* \* \* Pen. Code, § 1322.

In *People v. Curiale*, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 588, it was held that the words "criminal violence upon one by the other" mean criminal violence upon the wife by the husband, or criminal violence upon the husband by the wife, and that the exception refers to violence "by one spouse upon the other spouse. The exception does not extend to acts committed before the marriage." In that case the rape was alleged to have taken place on a certain day and the marriage on the following day. The decision is that, under those circumstances, the wife was not a competent witness against the husband. It is plainly to be inferred that, where a husband is charged with having committed a crime of violence upon a woman after his marriage to her, she is a competent witness.

The writ is discharged, and the petitioner remanded to custody.

We concur: JAMES, J.; SHAW, J.

COBB v. OKLAHOMA PUB. CO. (No. 3180.)  
(Supreme Court of Oklahoma. Feb. 17, 1914.)

*(Syllabus by the Court.)*

1. LIBEL AND SLANDER (§ 123\*)—PRIVILEGED PUBLICATION—QUESTION FOR COURT.

In an action for damages for a libelous publication, where there is no dispute as to the circumstances under which the publication was made—that is, where there is no dispute as to what the publication was, what it was about, and who made it—or where the language in the publication was plain and unambiguous, it is a question of law for the court to determine whether or not such publication was privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

2. LIBEL AND SLANDER (§ 123\*)—"PRIVILEGED PUBLICATION"—QUESTION FOR JURY.

Under subdivision 3 of section 2340, Comp. Laws 1909 (section 2381 Rev. Laws 1910), a privileged publication is one made by a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cerning the official act done, or of the officer, falsely imputes crime to the officer so criticised.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5599.]

### 3. LIBEL AND SLANDER (§ 123\*)—ACTION FOR LIBEL—SUBMISSION OF ISSUES—CONFLICTING EVIDENCE.

In an action for libel for publishing a report of any proceedings authorized by statute to be published, where there are controverted issues as to whether such report was a fair and true one, and whether such publication, taken as a whole, was made with malicious intent, and whether or not in such publication the plaintiff is falsely charged with crime, it is not error for the court to submit such issues to the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

### 4. LIBEL AND SLANDER (§ 109\*)—ACTION FOR LIBEL—EVIDENCE—BRIEF IN JUDICIAL PROCEEDINGS.

Where a publication contains only excerpts from a brief in a judicial proceedings, and the issue is raised as to whether such publication was a fair and true report of such proceedings, it is not error to admit the entire brief in evidence.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 306; Dec. Dig. § 109.\*]

### 5. LIBEL AND SLANDER (§ 42\*)—PRIVILEGED PUBLICATION—JUDICIAL PROCEEDINGS.

The published report of a proceedings authorized by law to be made need not be verbatim, nor need it set out such proceedings in extenso in order to be privileged, but may be abridged or condensed, provided it is not unfair to the party complaining.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 42.\*]

### 6. LIBEL AND SLANDER (§ 105\*)—ACTION FOR LIBEL—EVIDENCE—JUDICIAL PROCEEDINGS.

Where there is an issue as to whether the complaining party has been falsely accused of crime by the report of a judicial proceedings, it is not error to admit in evidence the indictment or other court records which tend to show the truth of the charge.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 282, 283, 292-294; Dec. Dig. § 105.\*]

### 7. EVIDENCE (§ 151\*)—RELEVANCY—MALICE.

Upon the issue as to whether a publication was maliciously made, it is not error to permit the party making same to testify that it was made without malice toward the complaining party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. § 151.\*]

### 8. APPEAL AND ERROR (§ 971\*)—WITNESSES (§ 267\*)—EXAMINATION OF WITNESS—DISCRETION OF COURT—REVIEW.

The limit to which a witness may be cross-examined for the purpose of testing his credibility is largely within the discretion of the trial court, and such discretion will not be disturbed on appeal, unless it clearly appears to have been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.\* Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by T. S. Cobb against the Oklahoma Publishing Company for libel. Judgment for defendant, and plaintiff brings error. Affirmed.

Kistler, McAdams & Haskell, of Oklahoma City, and Crump & Fowler, of Wewoka, for plaintiff in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendant in error.

HARRISON, C. This was an action by T. S. Cobb against the Oklahoma Publishing Company for libel in the publication of an article under the following headlines:

"Protection against Guardians Sought.—Indian Minors Being Systematically Robbed in Many Instances.—Aid of Legislature will be Invoked.—Some Charges Already Preferred."

The article in question contained a rather lengthy comment upon conditions claimed to be existing on the east side of the state relative to Indian minors being defrauded of their allotments, giving a number of instances in which fraud and graft was claimed to have been perpetrated, mentioning as one instance the proceedings instituted by the Attorney General against T. S. Cobb to remove him from office for fraud, and publishing certain excerpts from the Attorney General's brief, and concluding with some independent comments upon the Attorney General's charges against the plaintiff. The plaintiff brought suit for damages alleged to have been sustained by reason of such libelous publication, and the cause was tried in May, 1911, resulting in a verdict and judgment in favor of defendant publishing company, from which plaintiff appeals upon 13 assignments of error.

The questions raised in these assignments are properly determined under three heads, viz.: First, errors in the admission and rejection of testimony; second, errors in the instruction given by the court and in refusing to give certain instructions offered by the plaintiff in error; third, errors in overruling motion for new trial, which included other errors of law occurring at the trial and duly excepted to.

The decisive question involved is whether the alleged libelous publication was privileged, which, of course, is conditioned upon: First, whether the purported excerpts from the Attorney General's brief was a fair and true report; second, whether the publication as a whole was made with malicious intent; third, whether plaintiff, independent of the excerpts from the Attorney General's brief, had been falsely charged with a crime by defendant. This being true, and the plaintiff's right of recovery depending upon the determination of these questions, we will first look to the instructions of the court in order to ascertain whether the jury was properly instructed as to the law involved, as from the court's charge we are enabled to ascertain what he conceived the law to be on the material issues, and are thereby better enabled

to determine whether error was committed in the admission and rejection of testimony and in overruling the motion for new trial, which included other errors of law occurring at the trial.

[1-3] That portion of the publication which referred directly to plaintiff, Cobb, was a purported excerpt from the brief of the Attorney General filed in the Supreme Court in an action to remove Cobb from the office of county judge of Seminole county for an alleged conspiracy to defraud Indian minors of their allotted lands. The court construed this to be a privileged publication—that is, under the conditions prescribed by statute—and so instructed the jury. The question then is whether the court erred in so doing. The rule in such cases is that, where there is no dispute as to the circumstances under which a publication is made—that is, where there is no dispute as to what the publication was, what it was about, and who made it—or where the language in the publication is plain and unambiguous, it is a question of law for the court to determine whether or not such publication was privileged. This rule is announced in 25 Cyc. 542, 547, 18 Am. & Eng. (2d Ed.) 1050, and is supported by decisions from most of the states and from the Supreme Court of the United States. Besides, the rule, in substance, was announced by this court in *Tuohy v. Halsell*, 35 Okl. 61, 128 Pac. 126, 43 L. R. A. (N. S.) 323; *Spencer v. Minnick*, 139 Pac. 130. In determining this question of law the court was guided by our statute on libel and slander, which reads as follows:

"A privileged publication is one made: 1st. In any legislative or judicial proceeding or any other proceeding authorized by law; 2nd. In the proper discharge of an official duty; 3rd. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticised. \* \* \* Section 2340, Comp. Laws 1909; section 2381, Rev. Laws 1910.

Also section 2348, Comp. Laws 1909 (section 2386, Rev. Laws 1910), which reads as follows:

"No editor or proprietor of any newspaper, shall be liable to prosecution for a fair and true report of any judicial, legislative or other public official proceedings except upon proof of malice in making such report, and in making such report of public official proceedings, malice shall not be implied from publication; but libelous remarks connected with matters privileged under the last section, shall not be privileged by reason of their being connected therewith."

The latter section above quoted, it is true, relates to criminal actions for libel or slander, but, being a part of the legislative act on the subject, its provisions are useful in revealing the legislative intent as to what should constitute privileged publications, and

viewing the intention of the Legislature through the provisions of both sections, it is obvious that any publication coming clearly within the third subdivision of section 2340, Comp. Laws 1909 (section 2381, Rev. Laws 1910), is privileged; provided of course, it be a fair and true report of the proceedings attempted to be reported, and not be maliciously made, and does not falsely impute crime to some one independently of such report. The portion of the publication in question which refers directly to plaintiff, and which constitutes the purported excerpts from the Attorney General's brief, is as follows:

"In his ouster proceedings against T. S. Cobb, county judge of Seminole county, Attorney General West details at some length the methods alleged to have been pursued by this probate court in robbing many Seminole Indian minors of their lands, and which illustrate well the conditions that exist elsewhere when the probate court and 'professional guardian' are in an alliance for bad."

#### West's charges:

"The investigation of this defendant's official acts," says Attorney General West (beginning on page 4 of his brief filed in the Supreme Court in the case of *State of Oklahoma ex rel., etc., v. T. S. Cobb*, County Judge of Seminole County, etc.), "proved a conspiracy existing between Judge Cobb and certain other individuals of Seminole county, to wit, H. T. King, J. S. Barham, and E. E. Jayne, who, in connivance and collusion with each other, evolved and carried out an extensive and systematic plan to deprive, in a general and wholesale way, many of the minor Seminoles and freedmen of their inherited lands; by having one of their coterie, to wit, H. T. King, a white man, make application for the appointment of himself as guardian of a particular minor, perhaps personally unknown to him, which application, without notice to the minor or his friends, was granted, and letters of guardianship to the said King, granted by Judge Cobb; the same trio of appraisers (if appraisers were used) were usually appointed and uniformly appraised the lands at grossly inadequate sums and far below their actual or fair market value. Orders of sale were granted and the lands advertised and sold at public sale, being usually bought in by Barham at from one-fifth to one-seventh of their true value; these sales were confirmed by Judge Cobb, and the guardian's deed executed."

The publication of the foregoing extract comes clearly within the third subdivision of our statute, and was a privileged publication, provided it be a fair and true report not maliciously made, and did not by independent comment falsely impute crime to plaintiff. But, as the article in question included not only the extract above, but included also a general and rather lengthy comment on alleged conditions existing on the east side of the state as to minor Indians being defrauded of their allotments, as well as some direct comment upon the particular proceedings against Judge T. S. Cobb, the issue arose as to whether the conditions imposed by statute had been violated, and out of such issue arose the questions whether the report was fair, whether the publication taken as a whole was malicious, and whether the plaintiff was falsely accused of crime. These were issues of fact to be determined from the evidence by the jury.



"Where the report is a verbatim account of what took place at the trial, and differs so little that no reasonable man could say that what was omitted could affect the minds of the jury, it is the duty of the court to pronounce the report privileged. But, if the question of the fairness of the report is capable of different conclusions, the question of privilege is for the jury." 18 Am. & Eng. (2d Ed.) 1045, and authorities cited under note 7.

Also Parker v. Republican Co., 181 Mass. 392, 63 N. E. 931; Willmann v. Press Pub. Co., 49 App. Div. 35, 63 N. Y. Supp. 515; American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005; Wilcox v. Moore, 69 Minn. 49, 71 N. W. 917; Fay v. Harrington, 176 Mass. 270, 57 N. E. 369; Meriwether v. George Knapp & Co., 211 Mo. 199, 16 L. R. A. (N. S.) 953, 109 S. W. 750, and notes; Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; Flynn v. Boglarsky, 164 Mich. 513, 129 N. W. 674, 32 L. R. A. (N. S.) 740, and notes.

Likewise the question of malice is generally a question of fact for the jury. 25 Cyc. 548, 549, and authorities cited in notes; 18 Am. & Eng. (2d Ed.) 1050, and notes.

And the rule is especially applicable under the issues raised by the pleadings and circumstances involved in the case at bar. Hence the question here is whether such issues were fairly submitted to the jury in the court's charge.

In instructions 6 to 13, inclusive, the court submitted these issues to the jury; that is, the issues as to whether the published extract from the Attorney General's brief was a fair and true report of same, as to whether the newspaper article taken as a whole was maliciously made, and the issue as to whether the plaintiff, Cobb, was falsely charged with crime in such article were all submitted to the jury in said instructions.

It is urged by plaintiff in error that the court erred in each of said instructions. But from an examination of the record in order to ascertain the real issues involved, and the testimony in support of same, together with the charge of the court, we believe that all the material issues involved in the case were fairly and fully submitted to the jury in the court's charge. At least we are strongly impressed with the belief that the instructions were altogether fair to the plaintiff. We are unable to see wherein the plaintiff could reasonably ask for a charge more fair to him.

It is also contended by plaintiff in error that the court erred in refusing to give certain instructions offered by plaintiff. But from an examination of the instructions offered by plaintiff in error we find that the law applicable to the issues therein presented was fairly and fully submitted to the jury in the court's charge, and therefore find no error in the refusal to give the instructions submitted by plaintiff.

In this connection it might be as well to notice the assignment that the court erred in recalling the jury on its own motion, and

that during a colloquy between the court and one of the jurors as to the meaning of certain instructions the court made the following remarks:

"It don't make any difference if Attorney General West told a nefarious lie about it. It was a judicial proceeding, and the statute says that a paper may publish those proceedings provided it gives a fair report of those proceedings and comments fairly upon what they publish."

It appears from the record that the jury, after having retired for deliberation, returned, by permission, and asked the court for further explanation on certain phases of the case; that, after they had returned to their jury room, the court, being desirous of further examining the instructions or the language of some paragraph of same, recalled the jury on its own motion, at which time the above remarks were made. We are unable to see wherein such remarks could have materially prejudiced the rights of plaintiff; for, while they may not be couched altogether in classic legal verbiage, they nevertheless correctly state the law. The truth or falsity of the Attorney General's argument in his brief had nothing whatever to do with the question whether or not a fair and true report of same were made, nor the question whether such report was made with malicious intent. Plaintiff in error having failed to point out wherein his rights were prejudiced, we, being unable to see wherein they could have been prejudiced, see no reversible error under this assignment.

[4] Having determined the position taken by the trial court as to the law of the case, we will now examine the assignments of error as to the admission and rejection of evidence. It is contended by plaintiff in error that the court erred in admitting in evidence the entire brief of the Attorney General. On this contention we cannot agree with plaintiff in error. If the published excerpt from the Attorney General's brief was a fair and true report of same, then the publication was privileged under our statutes, and the question whether it was a fair report arose from the fact that not all the Attorney General's brief was published. This, however, was a material issue of fact to be determined by the jury, and we know of no more satisfactory way by which such fact could be determined than by admitting the brief in evidence so that by comparing the brief with the published excerpt the jury might be enabled to determine whether or not the publication was a fair and true report, and, inasmuch as they returned a verdict in favor of defendant, they must have determined that such report was a fair and true one. And as to this phase of the case we cannot say that the verdict was contrary to law nor contrary to the evidence.

[5] The law is that a report of this character need not be verbatim, nor need it contain all the proceedings. It may be abridged or condensed, but it must not be partial or



garbled. Yet, while it need not state all that occurred in extenso, a publisher cannot claim immunity if the facts which tell against the libeled party are selected and those which tell in his favor are omitted. See Starkey on Slander, 227; Odgers on Libel and Slander, 316; 18 Am. & Eng. (2d Ed.) —; 25 Cyc. title "Libel and Slander." Neither can we say that the verdict in this regard was contrary to the evidence, because the brief of the Attorney General discloses many statements and arguments and much matter that might be far more detrimental to plaintiff's character and name than the portion of the brief which is published, and by a comparison of the brief with the published extract it is obvious that no unfairness in this regard was done to plaintiff in the publication.

[7] Another contention is that the court erred in permitting the witness R. E. Stafford, editor of the defendant paper, to testify that the publication was made in good faith and without malice. The issue of malice was made by plaintiff himself. Plaintiff was therefore permitted to show malicious intent by any competent testimony. See 25 Cyc. 584. And it necessarily followed that defendant should be permitted to disprove malice by any competent testimony which tended to do so. 25 Cyc. 584, and authorities cited in notes; also State v. Clyne, 53 Kan. 8, 35 Pac. 789. The question of malice was before the jury for determination, submitted under the court's instructions upon plaintiff's theory of the case. They were therefore entitled to have the entire publication, together with any competent testimony either tending to prove or disprove malice, and, having determined such issue from the entire article considered as a whole, and from all the evidence submitted we see no reason for disturbing the verdict in this regard.

[8] Another contention is made that the court erred in admitting in evidence an indictment returned by the grand jury of Seminole county against plaintiff, and also erred in the admission of other records of the probate court proceedings in the estates of minor Indians. This contention is based upon the rule that, where a party is being tried for a definite offense, evidence of other specific acts or crimes are inadmissible for the purpose of proving the crime for which he stands charged. But this rule, sound and wholesome as it is, is wholly inapplicable to the case at bar. The reason is plain. The plaintiff was not on trial for a particular offense. He was not on trial at all, but was prosecuting the defendant for falsely charging him with a general system of defrauding Indian minors. This being true, and defendant being allowed by statute to show the truth of the charge, then certainly any specific acts or records coming within and tending to prove a general system of fraud were competent to prove the truth of the publication, and the rule invoked by plaintiff is therefore

inapplicable. Besides, this issue was submitted to the jury upon plaintiff's own theory of the case, and upon such theory the court submitted to the jury the issue as to whether or not the publication in question falsely imputed a crime to plaintiff. It was contended by plaintiff that certain comments following the excerpts from the Attorney General's brief were intended to charge plaintiff with fraud and official crime in handling the estates of minor Indians, such comments being:

"Relative to this particular case: Despite the fact that the Attorney General had the support of Governor Haskell and the Department of the Interior, he found much difficulty in indicting Judge Cobb. Public sentiment in Seminole county apparently stood back of the accused judge. Public demonstrations were held in his support; a secret organization, known as the Seminole County Protective Association, stood behind him; the grand jury was cajoled and threatened. Nevertheless indictments were secured; but were dismissed by the district court before the Attorney General was ready for trial."

The question then for the jury was: First, whether such comments should be construed as charging plaintiff with the commission of a crime; second, if so, whether such charge was true or false. And on the issue of the truth or falsity of such charge, it was certainly competent for defendant to show that it was true, and the indictment and probate records pertaining to minor Indians' estates, being the best evidence as to whether such charge of crime was true or false, were properly admitted in evidence.

[9] It is contended that the court erred in permitting the plaintiff on cross-examination by defendant to be asked about certain transactions and dealings which plaintiff had had with certain Indians. But the record discloses that defendant was permitted by the court to cross-examine plaintiff in this regard only for the purpose of testing the credibility of the witness, and stated that it should not be considered for any other purpose by the jury. The plaintiff himself had put his character in issue by alleging that defendant had falsely charged him with crime, and, having taken the stand in his own behalf in this regard, it was not error to permit him to be cross-examined as to any transactions or court records pertaining to the subject or dealings with the Indians which plaintiff claimed was referred to by defendant in the article in question. Besides, the rules of evidence allow great scope in cross-examinations for the purpose of testing the credibility of the witness.

"The limits within which either party may cross-examine upon matters not strictly relevant, but which affect the credibility of the evidence, is largely discretionary. \* \* \* Questions put to the witness for the purpose of ascertaining his relations, business, social, or otherwise, with the accused and his state of mind, whether hostile or friendly toward him, are unobjectionable. \* \* \* The rule under which evidence of collateral facts is excluded during the direct examination is not applied with strictness to the cross-examination. The theory upon which the

latter is conducted is that its primary object is the ascertainment of truth, not by eliciting positive evidence directly bearing on the facts, but by furnishing a means of testing the truthfulness and credibility of the witness." Section 221, Underhill on Criminal Evidence, and authorities in support of the text.

Also in 7 Enc. of Ev. 171; 40 Cyc. 2616; State v. Greenburg, 59 Kan. 404, 53 Pac. 61; Fowler v. State, 8 Okl. Cr. 130, 126 Pac. 831; Crawford v. Ferguson, 5 Okl. Cr. 377, 115 Pac. 278; Terry v. State, 7 Okl. Cr. 430, 122 Pac. 559.

Under the third and last group of errors may be considered the assignment that the verdict is not sustained by the evidence; that it is contrary to law; and that the court erred in overruling the motion for a new trial. But we cannot say, as a matter of law, that the evidence disclosed by the record falls to sustain the verdict. Nor can we say upon the whole that the verdict is contrary to law. The law applicable to the facts and issues involved, we think, was fairly and fully given to the jury in the court's charge, and, as a general proposition of legal liability under the entire record, we believe the verdict is in accord with the law, and, finding no other errors of law occurring at the trial which, in our judgment, would justify a reversal of the judgment, we think the motion for a new trial was properly overruled.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

#### OKLAHOMA CITY CONST. CO. et al. v. PEPPARD. (No. 3339.)

(Supreme Court of Oklahoma. April 14, 1914.)

(Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§§ 304, 318\*)—INJURY TO SERVANT—LIABILITY OF MASTER—EXISTENCE OF RELATION.

Where a contractor undertakes in general terms to do work, and the employer reserves the power to direct what shall be done, and how it shall be done, the latter is the principal or master, and is liable for the negligence of the former while constructing the work by which the plaintiff is injured. The principal or master is liable for the acts and negligence of his agent or servant in the course of his employment, although he did not know of or authorize the particular acts complained of.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1226-1229, 1257, 1258; Dec. Dig. §§ 304, 318.\*]

#### 2. MASTER AND SERVANT (§ 6\*)—EXISTENCE OF RELATION—PRESUMPTION.

Every person who is found performing the work of another is presumed to be in the employment of the person whose work is being done, and if the facts be such as to exempt the owner of the property improved, or the persons for whom the work is being performed, from liability for the acts of those performing such work, it devolves upon him who claims such exemption to make proof of the terms of the contract showing that the relation of master and servant did not exist.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6; Dec. Dig. § 6.\*]

#### 3. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—SUBMISSION OF ISSUES.

Record examined, and held, that no reversible error was committed by the trial court by giving or refusing to give instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by Mrs. Onno Peppard against the Oklahoma City Construction Company, a corporation, and another, for wrongful death of plaintiff's husband. Judgment for plaintiff, and defendants bring error. Affirmed.

J. S. Ross and Snyder, Owen & Lybrand, all of Oklahoma City, for plaintiffs in error. Harris & Nowlin, of Oklahoma City, for defendant in error.

KANE, C. J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, to recover damages for the wrongful death of her husband, who was killed by falling from a scaffold while engaged in working as a bricklayer upon the Skirvin Hotel during its construction. The defendants answered separately. The answer of the Oklahoma City Construction Company admits its incorporation, and that at the time the injury was inflicted upon the deceased it was engaged in the erection of the Skirvin Hotel, and that the deceased was in its employ, and further in effect alleges (1) that if there was anything unsafe or insecure in the construction of said scaffold, or the appliances connected therewith, which caused or contributed to the happening of the accident complained of, it was due entirely to the negligence of the plaintiff's fellow servants; (2) that the deceased at the time he entered its employment assumed all the risks and dangers ordinarily incident to such occupation, and that one of the risks incident to the employment in which he was engaged at the time of the happening of the accident alleged was the risk of injury from the falling of the scaffold; (3) that the deceased carelessly and negligently failed to use or exercise ordinary or reasonable care for his own safety and protection; (4) that if there was any negligence on the part of the servants which contributed to or caused the accident complained of, other than that of the deceased himself, that said servants who were guilty of said negligence were fellow servants of the deceased. The answer of the defendant Skirvin admits that he is now, and was at the time mentioned in the plaintiff's petition, the owner of what is known as the Skirvin Hotel building, and the lots on which it is situated in Oklahoma City. In other respects, his answer in effect is the same as the Oklahoma City Construction Company's answer, except that it contains an allegation to the effect that the Oklahoma City Construction Company was an independent contractor. Upon trial to a

jury there was a verdict for the plaintiff in the sum of \$12,000, upon which judgment was duly rendered, to reverse which this proceeding in error was commenced.

The grounds for reversal, as stated by counsel for plaintiff in error in their brief, are (1) that the evidence establishes the fact beyond serious controversy that the Oklahoma City Construction Company was an independent contractor, and was solely responsible for the conditions which obtained on this building during its construction; (2) instruction No. 3 offered by plaintiff in error should have been given without modification; and (3) it was error to give instruction No. 5 given by the court. We think the evidence is sufficient to establish the relation of principal and agent, or master and servant, between the defendants. The record discloses that the defendant Skirvin, the owner, and the construction company entered into a written contract which, no doubt, specifically defines their legal relations to each other, and that counsel for some reason preferred to have the relationship shown by parol evidence. While Mr. Shenk, the president of the construction company, was being examined by counsel for plaintiff as to the relation existing between his company and Mr. Skirvin, the owner of the hotel, one of the counsel for the defendants asked leave to ask the witness a question, whereupon the following occurred:

"Q. Were your relations set down in a written contract? A. Yes, sir.

"Mr. Snyder: We object to the testimony.

"Mr. Harris: If this objection is on the ground that the questions do not call for the best evidence because there was a written contract in evidence, but we do not think counsel will want to insist upon his objection. If so, however, we will wish to offer the written contract in evidence.

"Mr. Snyder (after consultation with Mr. Ross): We withdraw the objection."

Thereafter, without further objection, parol evidence was introduced to the effect that Mr. Skirvin was the owner of, and caused to be erected upon lots owned by him, a certain hotel building, known as the Skirvin Hotel; that the Oklahoma City Construction Company was erecting said building for Mr. Skirvin, and that the deceased, the husband of plaintiff, was employed as a bricklayer in the construction of said building; that Mr. Skirvin himself made the contract for the brickwork in the building. The direct examination of the president of the construction company closed as follows:

"Q. From the time that building was commenced until it was finished, I will ask you to state whether or not the authority of Mr. Skirvin was not exercised and recognized there on everything that he exercised or sought to exercise authority over. A. Yes, sir. Q. His word was the law on that building, wasn't it? A. Yes, sir."

[1] This evidence, and much more to the same effect which was entirely uncontradicted, was amply sufficient to take the case to the jury on the question of whether the construction company was an independent contractor, or the servant or agent of the owner.

The rule seems to be well settled that, where a contractor undertakes in general terms to do the work, and the employer reserves the power to direct what shall be done, and how it shall be done, the latter is the principal or master, and is liable for the negligence of the former while constructing the work by which the plaintiff is injured. And the principal or master is liable for the acts and negligence of his agent or servant in the course of his employment, although he did not authorize or know of the particular acts complained of. *Derr Construction Co. v. Geiruth*, 29 Okl. 538, 120 Pac. 253; *Railroad Co. v. Hanning*, 15 Wall. 649, 21 L. Ed. 220; *Singer Mfg. Co. v. Rahn*, 182 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *De Palma et al. v. Weinman et al.*, 15 N. M. 68, 103 Pac. 782, 24 L. R. A. (N. S.) 423. Moreover, the mere fact, that the construction company was engaged in the construction of the building for Mr. Skirvin, the owner, which was admitted both by the pleadings and the evidence, would have been sufficient to create a presumption that the relationship of master and servant existed. *Taylor, B. & H. Ry. Co. v. Warner*, 88 Tex. 642, 32 S. W. 868; *Burton v. Railway Co.*, 61 Tex. 526; *Norris v. Kohler*, 41 N. Y. 42.

[2] In the first case cited the rule is stated as follows:

"Every person who is found performing the work of another is presumed to be in the employment of the person whose work is being done, and if the facts be such as to exempt the owner of the property improved, or the persons for whom the work is being performed, from liability for the acts of those performing such work, it devolves upon him who claims such exemption to make proof of the terms of the contract showing that the relation of master and servant did not exist."

Whilst one of the defenses of the defendant Skirvin was that the construction company was an independent contractor, no serious effort seems to have been made during the trial to establish the same. His counsel waived the introduction in evidence of the contract which would have been conclusive on that point and failed to introduce it himself, presumably for the reason that it would be unfavorable to his contention. *Moore v. Adams et al.*, 26 Okl. 48, 108 Pac. 392.

[3] In our judgment it would have been entirely proper for the court to have instructed the jury that the construction company was not an independent contractor, as a matter of law; but as the question was submitted to the jury, and the jury reached the right conclusion in the premises, the defendants could not have been injured thereby. The same may be said of the first complaint we find in relation to the action of the court in the matter of instructions. Counsel say:

"By a careful examination of the instructions which were given none will be found which properly recites the conditions or circumstances under which the jury could determine, as a matter of fact, what connection Skirvin had with the construction of this building."

Assuming this to be so, yet, as the uncontradicted evidence conclusively establishes the relation of principal and agent, the find-

ing of the jury to that effect could not injuriously affect any substantial right of the defendant Skirvin. In such circumstances the instruction given by the court on that question was sufficient.

The next assignment of error is that instruction No. 3 offered should have been given without any modification. The record shows that this instruction was requested by the defendants and "given as modified"; but we are unable to gather therefrom in what particular it was modified. The instruction as given, however, seems to be substantially correct. On the whole, we are convinced that the record is free from any reversible error. The case was unusually well tried for both sides, and the trial was not only conducted according to the forms of law, but the verdict returned is amply supported by the evidence, and is in accordance with right and justice.

The judgment of the court below is therefore affirmed. All the Justices concur.

#### TURNER et al. v. F. W. TEN WINKEL CO. (Civ. 1466.)

(District Court of Appeal, First District, California. March 31, 1914.)

#### APPEAL AND ERROR (§ 783\*) — DISMISSAL — RIGHT TO DISMISS.

An appeal being given as a matter of right from an order granting or denying a new trial, the appellate court has jurisdiction to and must determine an appeal from such order, notwithstanding an irregularity in the presentation of the motion for new trial; and hence an appeal from a denial of a new trial cannot be dismissed because the appellant failed to give notice of intention to move for new trial, although that may be good ground for affirmance on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3125; Dec. Dig. § 783.\*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by George C. Turner and another against the F. W. Ten Winkel Company, a copartnership composed of F. W. Ten Winkel and L. F. Gump. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. On motion to dismiss. Motion denied.

Finch & Melsted, of San Francisco, for appellant. Franklin T. Poore, of San Francisco, for respondents.

LENNON, P. J. In this action for money had and received the plaintiffs sought and recovered judgment in the sum of \$335.25 against the defendants, and each of them, namely: F. W. Ten Winkel Company (a copartnership) and F. W. Ten Winkel and L. F. Gump. An appeal was taken from the judgment, and from an order denying a new trial. Plaintiffs and respondents in due time moved to dismiss both appeals upon various grounds. Subsequently the appeal from the judgment was dismissed pursuant to the stipulation

and consent of all of the parties to the action. The motion to dismiss the appeal of the copartnership defendant from the order denying a new trial was made, argued, and submitted for decision in advance of the consideration of the appeal upon its merits. That motion was based upon the ground that said defendant did not at any time make, file, or serve any notice of intention to move for a new trial of the action, or join with its codefendants in making said motion.

The motion to dismiss, based as it is entirely upon the ground stated, cannot be entertained. An appeal is given as a matter of right from an order granting or denying a motion for a new trial, and, when properly taken and perfected, this court has jurisdiction to and must hear and determine the same upon its merits, notwithstanding an alleged irregularity or defect in the procedure prescribed as a preliminary to the presentation of a motion for a new trial. *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Centerville, etc., v. Bachold*, 109 Cal. 111, 41 Pac. 813; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171. Accordingly it is the rule that a failure to give notice of intention to move for a new trial is not a recognized ground for dismissing an appeal from an order denying a new trial. In *re Ryer*, 110 Cal. 556, 42 Pac. 1082; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Baker v. Clark*, 128 Cal. 181, 60 Pac. 677; 2 *Hayne on New Trial*, p. 1511. Such a failure may constitute a sufficient reason for the refusal of the lower court to grant a new trial, and may therefore, when we come to a consideration of the appeal upon its merits, be considered a good ground for affirming the order appealed from. In *re Ryer*, supra: *Niles v. Gonzalez*, 155 Cal. 359, 100 Pac. 1080.

The motion to dismiss the appeal from the order denying a new trial is denied.

We concur: RICHARDS, J.; KERRIGAN, J.

#### ELY v. LISCOMB et al. (Civ. 1380.)

(District Court of Appeal, Second District, California. April 1, 1914.)

#### 1. ATTORNEY AND CLIENT (§ 100\*)—REPLEVIN (§ 120\*)—DISCHARGE OF SURETIES—OFFER TO DELIVER PROPERTY.

Where the defendant in claim and delivery gave a redelivery bond and subsequently surrendered possession of the property, which included a barn on leased land, to the sureties, who offered to deliver possession of the barn and other property to plaintiff, but plaintiff refused to accept it, unless they made good the alleged loss of some of the property and paid up an arrearage of rent as to which they had assumed no obligation, they were not liable to plaintiff for the value of the barn, which, by the failure to remove it before the expiration of the term, became the property of the lessor.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 204, 205; Dec. Dig. § 100.\* Replevin, Cent. Dig. § 479; Dec. Dig. § 120.\*]

#### 2. REPLEVIN (§ 123\*)—DISCHARGE OF SURETIES—OFFER TO DELIVER PROPERTY.

The attorney for plaintiff, in an action in claim and delivery, had authority to receive the

property involved in satisfaction of the judgment for plaintiff. Code Civ. Proc. § 283, subd. 2, authorizing an attorney to receive the money claimed during the pendency of an action or after judgment and discharge the claim or satisfy the judgment not limiting the attorney's authority to receive the proceeds of judgment to those cases in which a money judgment is rendered; and hence a formal offer to the attorneys, though not communicated to plaintiff, to surrender the property discharged the sureties on a redelivery bond where the offer was refused.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 481-486; Dec. Dig. § 123.\*]

### 3. PRINCIPAL AND SURETY (§ 121\*)—DUTIES OF CREDITOR TOWARDS SURETY.

It is the duty of a creditor to act in the utmost good faith towards a surety, and so far as he can, consistently with his own rights, protect the interest of the surety, as well as his own.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 298-301; Dec. Dig. § 121.\*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. H. Ely against A. H. Liscomb and another. Judgment for plaintiff, and defendants appeal. Reversed.

Kaye & Siemon, of Bakersfield, for appellants. Rowen Irwin, of Bakersfield, and Lamberson, Burke & Lamberson, of Visalia, for respondent.

SHAW, J. Action to recover upon an undertaking given by defendants pursuant to the provisions of section 514, Code of Civil Procedure. Judgment went for plaintiff, from which defendants appeal.

In June, 1904, plaintiff brought suit in claim and delivery against Ben C. Williams and Forrest Flint for the possession of certain chattels, consisting of horses, vehicles, and other equipment of a livery stable, including a barn 75 by 120 feet in dimensions, which was erected upon a lot the use of which was leased therefor, and upon all of which plaintiff held a chattel mortgage executed by Williams and Flint, to foreclose which plaintiff had brought suit.

For the purpose of securing the return of the chattels, Williams and Flint, defendants in that action, caused an undertaking executed by defendants herein, as prescribed by said section 514, Code of Civil Procedure, to be given the sheriff; whereupon he returned the property to defendants in said action.

On October 31, 1904, the case was tried, followed on November 17th by a decision for plaintiff, in whose favor judgment was entered on December 17th. The lease of the lot upon which the barn was erected, by its terms, expired January 1, 1905, and the provisions of the lease were such that, if the barn was not removed before the termination of the lease, all right of the lessees thereto terminated, and the same became the property of the lessor as owner of the lot. Prior to the time of the trial Williams and Flint had abandoned the business and delivered

possession of all the property involved in the action to the defendants herein, who had given the undertaking for the return thereof. All of the property for which delivery was adjudged, other than the barn, was by these defendants delivered to plaintiff after January 1, 1905, at which time, by reason of the title to the barn having under the terms of the lease passed to the owner of the lot, it was impossible to deliver the same to plaintiff.

This action was brought to recover the value of the barn, together with damages and costs expended in the suit instituted against Williams and Flint for the recovery of the property.

In their answer defendants alleged that subsequent to September 22, 1904, said Williams and Flint at divers times offered to deliver to said plaintiff all of the personal property described in the complaint, including said barn, and on November 28, 1904, made an offer in writing to deliver all of the said personal property and the said stable or barn to the plaintiff, which said offer was refused, and plaintiff refused to take possession of the same; that at the time when said offers to deliver the property were made to plaintiff Williams and Flint were in possession of the same, and at all times prior to January 1st said barn was held by Williams and Flint under a lease of the lot upon which the stable was erected, which lease expired January 1, 1905, at which time the lessees ceased to have any right of possession to the barn, and the owner of the lot entered into and held possession thereof.

Upon the issues so tendered, the court found that plaintiff was at all times ready and willing to receive the barn; that defendants on several occasions offered to deliver it to him, but at the times when such offers were made they did not have possession thereof and could not deliver it; that on November 28, 1904, Williams and Flint, by their attorneys, served upon the attorneys of record for plaintiff in the claim and delivery action a written offer to deliver the same, together with the other property involved, to plaintiff, but plaintiff's attorneys never communicated the same to him. These findings, other than that to the effect that defendants offered to deliver the barn to plaintiff, are attacked by appellants upon the ground that they are not supported by the evidence.

[1] The evidence, without contradiction, shows that in August or September, 1904, Williams and Flint abandoned the business and delivered possession of all of the property involved to defendants herein; that from that time to January 1, 1905, the barn and all of said property was in the possession and under the control of defendants. The testimony of defendant Stoll is to the effect that in August or September, 1904, they having possession and control of the prop-

erty, all of which was then in the barn, he and his codefendant met plaintiff at the former's store, at which time they told plaintiff he could have the property; that they were anxious to get rid of it. "The only answer he gave us," says the witness, "was: 'I don't want the stable; I don't want that stable at all.' He says: 'The bond is good enough; you and Dr. Liscomb are good enough for that amount.' That was the main argument; we was good enough for the amount of money that we was up against for the bond." The only evidence tending to controvert this is the testimony of plaintiff, who stated that prior to January 1, 1905, he had a conversation with defendants wherein *he offered to compromise and satisfy the said judgment, if defendants would make good what property was gone and pay up the back rent on the barn;* that Liscomb said:

"No; you will take just what is left, or nothing." Q. Didn't they, at the time this compromise was talked over, offer to deliver to you this property, and tell you that you could have it, that it was at your disposal? A. They said I could have what was left; yes, sir. Q. Wanted you to take it? A. Well, they wanted me to take what was left; yes. Q. What do you mean by the statement, 'what was left'? A. Well, there was some of the rigs and some of the stock. And me pay up the back rent, I believe. Q. The difficulty was they wouldn't pay up any rent? A. They would not pay up any rent, or make good the other property, the harness and stuff that was gone."

The subject of this action is the value of the barn, and not the rent, nor is "the harness and stuff that was gone" involved herein. Defendants were at the time in possession of the barn, and, according to plaintiff's own testimony, offered to deliver it with other property to him and wanted him to take it. He refused to accept it, unless they made good the alleged loss of some of the property, just what, or its value, is not made to appear, and pay up arrearage of rent, as to which they had assumed no obligation.

[2, 3] It further appears that on November 28, 1904, *after judgment had been ordered for plaintiff*, Anderson & Kaye, attorneys for Ben C. Williams and Forrest Flint in the claim and delivery action, delivered to J. W. P. Laird and E. B. Coll, attorneys of record for plaintiff in said action, a formal written offer, signed "Ben C. Williams and Forrest Flint, by Anderson & Kaye, Their Attorneys," and addressed to plaintiff and his attorneys, whereby they offered to deliver to plaintiff all the property involved in the action and specifically describing the barn, the value of which is the subject thereof. The court found that the written offer was made as alleged on November 28, 1904, but that plaintiff's attorneys, to whom the written offer was delivered, never communicated the same to him. The contention of respondent, and the view apparently taken by the trial court, was that plaintiff's attorneys as such had no authority to receive the chattels involved, and hence the offer, since they did

not communicate it to plaintiff, was ineffectual as a tender. Upon delivery of the property, defendants had a right to insist upon the judgment being satisfied. Plaintiff's attorneys of record were the only persons who were authorized to enter such satisfaction. They had been employed to institute a suit for recovery of possession of the barn as personal property, and, in our opinion, it follows that they were authorized to receive the property the recovery of which was sought. Respondent cites subdivision 2 of section 283, Code of Civil Procedure, which provides that an attorney has the authority "to receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment," and insists that the authority of an attorney to receive the proceeds of a judgment is confined to those cases only where a money judgment is rendered. In our opinion, it could not have been the intent of the Legislature to so limit the authority of an attorney. Plaintiff's attorneys of record were authorized to have issued an execution and direct the levy thereof upon the property, and thus indirectly secure possession of the property. Having this power, it must follow that they were likewise authorized to receive the property the possession of which had been adjudged to their client. It was therefore immaterial whether or not the offer so made to plaintiff's attorneys was communicated to him. Had it been a judgment for money, the offer to the attorneys would have exonerated the sureties upon the undertaking. Since it was a judgment for the possession of chattels, the offer made to plaintiff's attorneys to deliver the chattels to plaintiff likewise exonerated them from liability upon the undertaking. We think the evidence clearly shows that from September, 1904, at which time Williams and Flint delivered the property to these defendants, they were willing and anxious to relieve themselves from their obligation on the undertaking by delivering the same to plaintiff; and it is likewise clear, as to the barn at least—title to which, unless removed before January 1, 1905, would be lost—that plaintiff was unwilling and refused to receive the same, preferring, as he said, to look to the undertaking for its value. It is the duty of a creditor to act in the utmost good faith towards a surety, and so far as he can, consistently with the security of his own right, protect the interest of the former, as well as his own.

In our opinion, the evidence shows that on two occasions prior to January 1, 1905, at which time title to the barn passed to the owner of the leased lot, delivery of possession thereof was offered to plaintiff, in compliance with the conditions of the undertaking, at which times the persons making the

offer were in possession and control of the barn, and were ready, able, and willing to deliver the same to plaintiff, but that he refused to accept it. Hence the findings upon which the judgment is based are not supported by the evidence. This conclusion renders it unnecessary to discuss other alleged errors upon which appellants claim a reversal.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

# BOHANNON v. STATE BOARD OF MEDICAL EXAMINERS et al. (Civ. 1313.)

(District Court of Appeal, First District, California. March 31, 1914. Rehearing Denied by Supreme Court May 29, 1914.)

## 1. STATUTES (§ 72\*)—GENERAL OR SPECIAL—CLASSIFICATION—PRACTICE OF MEDICINE.

St. 1911, p. 1437, providing for the board of medical examiners issuing a certificate to any one to practice a special branch of medicine and surgery, who shall have at the time of the act going into effect, practiced it 35 years, 15 of it within the state, and shall pass a practical examination, consisting of a demonstration in such special branch, and thereafter qualify by effecting a cure, is based on a proper classification: Ability acquired by experience, and shown by an examination, notwithstanding the persons to whom it applies had violated the law, by practicing without a certificate.

[Ed. Note.—For other cases, see *Stautes*, Cent. Dig. § 72; Dec. Dig. § 72.\*]

## 2. PHYSICIANS AND SURGEONS (§ 5\*)—CERTIFICATE OF PRACTICE—SPECIAL BRANCH.

Whether, within St. 1911, p. 1437, providing for the granting of a certificate to practice "a special branch" of medicine and surgery, "cancers, tumors, malignant growths, and cutaneous diseases" are so correlated that they may be classed as such a branch is a question of fact under competent evidence.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 5; Dec. Dig. § 5.\*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by John L. Bohannon against the Board of Medical Examiners of the State of California and others. From a judgment on the sustaining of a demurrer to the amended complaint, plaintiff appeals. Reversed, with directions.

Samuels & Magnes, of Oakland, for appellant. W. W. Kaufman, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a judgment entered upon the sustaining of defendants' general demurrer to the amended complaint.

[1] The principal point presented in the court below was as to the constitutionality of the amendment to the statute in relation to the practice of medicine, upon which the plaintiff bases his claim that it is the duty of the defendants, as the Board of Medical Examiners, to issue to him a certificate authoriz-

ing him to practice a special branch of medicine and surgery.

The amendment referred to is chapter 740, Statutes 1911, approved May 1, 1911, which amends that certain act for the regulation of the practice of medicine, surgery, etc., approved March 14, 1907 (St. 1907, p. 252), as amended by an act approved March 19, 1909 (St. 1909, p. 418), and more particularly amending section 6 of said act of 1907, and refers to the qualifications necessary for obtaining a certificate entitling the holder to practice medicine and surgery in the state of California. Said amendment provides in substance that the medical examiners may issue a certificate to any person who has practiced a special branch of medicine and surgery, at the time the act goes in effect, for a period of not less than 35 years, 15 years of which time shall have been within the state of California. It further provides that an applicant, to practice a special branch of medicine, must file an affidavit, etc., showing that he has successfully and effectively practiced "the special branch of medicine and surgery" for the term of years mentioned. It further enacts that such applicant shall not be required to file a diploma, but he may be required to take an examination, which shall be practical in character, consisting of a demonstration in the special branch of medicine and surgery set forth in the affidavit of such applicant, for the purpose of ascertaining his fitness to practice such special branch. And finally it provides that if, after such practical demonstration, an applicant shall qualify by effecting a cure, the State Board of Medical Examiners shall issue a certificate to such applicant to practice the special branch of medicine and surgery set forth in his affidavit.

Respondents' contention in the court below was, and is here, that the classification is unreasonable, in that it is not based upon any test of ability, but proceeds from the commission of a number of misdemeanors, because one, before practicing any branch of medicine or surgery within this state for 15 years without a certificate, must necessarily have been violating the medical acts which throughout that period have required such certificate. On the other hand, appellant's position was and is that the amendment announces a test of qualification, whereby an individual may gain a right to practice a special branch of medicine and surgery, just as the preceding paragraphs in the statute announce the test of qualification whereby an individual may gain the right to practice medicine and surgery generally within this state.

The trial court was of the opinion that the amendment, in so far as it provides for special certificates, is unconstitutional, for the reason that the classification is unreasonable. The question, therefore, here presented is the interpretation to be given to this amend-

ment when tested by the provisions of the state Constitution. Does the statute classify according to ability, as claimed by appellant, to be inferred from years of experience, practical demonstration, and the passing of the examination required by the act, or does it classify according to the number of years of commission of misdemeanors, as asserted by respondents? The law must be upheld unless clearly violative of the Constitution.

As to what is a proper classification by the Legislature, the courts have frequently been called upon to determine. In *Ex parte King*, 157 Cal. 161, 164, 106 Pac. 578, 579, it is said:

"While arbitrary discriminations by the Legislature between persons standing in the same relation to the subject of the legislation will not be sustained by the courts, it is firmly settled that 'a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction.'"

And further:

"If it operates uniformly upon all members of such class it necessarily has the 'uniform operation' required by section 11 of article 1 of the Constitution. The question whether the individuals affected by a law do constitute such a class is primarily one for the legislative department of the state, and it is hardly necessary to cite authorities for the proposition that, when such a legislative classification is attacked in the courts, every presumption is in favor of the validity of the legislative act. Where, upon the facts legitimately before a court, it is reasonable to assume that there were reasons, good and sufficient in themselves, actuating the Legislature in creating the class, though such reasons may not clearly appear from a mere reading of the law, such presumption will be made, and the legislation upheld. To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination" (citing *Grumbach v. Leland*, 154 Cal. 679, 684, 685, 109 Pac. 1059).

Again in *Hellman v. Shoulters*, 114 Cal. at page 147, 44 Pac. at page 918, the court, in discussing the question of classification, says:

"It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied if it applies to all of the class alike. \* \* \* The word 'uniform' in the Constitution does not mean universal. The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same."

"The classification, however, is not," as stated in *Ex parte Sohncke*, 148 Cal., at page 267, 82 Pac., at page 959 (2 L. R. A. [N. S.] 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475), "a proper one for distinct legislation, if it is not founded upon some natural, intrinsic, or constitutional distinction, a distinction which bears some relation to, or furnishes cause for, the particular legislation embraced in the act."

It is not necessary to review in detail all the decisions of the Supreme Court upon this subject; the above expressions sufficiently indicating the well-established rules that guide us in determining whether a classification is

violative of the constitutional restraint and prohibition.

The Legislature is clothed with the power to regulate the practice of medicine and surgery; and in the exercise of that power it is proper for it to protect the people from the imposition of quacks and charlatans, and to insure proper qualifications of those seeking to administer aid to the sick and infirm. And with that end in view it may prescribe what are and what are not proper qualifications for those to possess who would engage in this calling; and in the determination of this question it may exact a certain degree of skill and learning upon which the community may rely. When it has done this its action is binding upon courts, provided its power has been constitutionally exercised.

The provisions of the act complained of clearly show a legislative intent to admit certain persons to practice a special branch of medicine and surgery who have previously violated the law, not, however, because they have violated the law, but because of an acquired experience in given branches of medicine or surgery. It is not seriously contended, nor can it be, that such is not the express intent of the Legislature. We are therefore only concerned with the constitutionality of the amendment. As before stated, the trial court decided that the classification was unconstitutional.

It is conceded that the act of the Legislature may not have been the most expedient or salutary, but the courts are not concerned with the good or bad policy exercised by that branch of the government. It is not the province of the courts to inquire into the motives or policies which may have actuated the Legislature in passing a law, except in so far as may be necessary to aid them in its correct construction, nor to signify their approval or disapproval of its acts, provided the legislative body has kept within constitutional limits. In the present case the method of classification adopted is assailed for the reason that it extends certain privileges to a class that has been practicing medicine and surgery illegally for a certain period. In the adoption of qualifications necessary to pursue certain callings requiring skill and ability, Legislatures frequently exempt from their operation those who have lawfully practiced in the state for a prescribed time, and such provisions have received the sanction of the courts as not being violative of the Constitution on the grounds of unreasonableness or discrimination. *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13. The only argument, therefore, against the classification here adopted is that it extends a certain exemption to a particular class who for a certain period have been practicing illegally. Does this illegal practice *ipso facto* deprive the Legislature of the right to adopt regulations under which the persons in this class as such may gain the right to practice



medicine and surgery? We are of the opinion that the question must be answered in the negative.

It is argued by respondents that such a classification is not based upon a test of ability, and that many persons who are quacks and have practiced for 35 years and longer are still such. In some instances this is undoubtedly true. On the other hand, there may be a great number of capable persons practicing medicine and surgery in violation of law who have been unable to obtain a certificate. However this may be, the examination that the amendment requires is intended as a safeguard against such a contingency; and, although not an infallible test, it may be said that it shares its weakness with all examinations designed to test the qualifications of those entering them.

It was not a crime at the common law to practice medicine without a license. The state law makes such act a misdemeanor. The offense at most is *malum prohibitum*, and does not involve inherent baseness. The classification cannot be said to be founded upon the commission of successive misdemeanors, but rather upon the years of experience acquired, although unlawfully.

But the duration of the practice is not all that is required by the amendment. The applicant is not qualified for practice by the number of years of his violation of the law, but he must pass an examination, and in addition thereto give a practical examination of his successful practice in a special branch; and even then, if he successfully pass these tests, the privilege of general practice is not conferred upon him, but only a right to practice the special branch in which he is experienced and proficient. The principal effect of this amendment is to assist the competent offender by opening to him a limited field in which he may lawfully practice, and under it his years of experience are counted for less than the term of study required in a medical college, for he receives but a limited privilege.

The fact that the amendment favors this class of practitioners by exempting only those who have practiced for the period of time mentioned when the act became effective does not, under authorities in this state, make the classification objectionable. A classification based on the extent of time of an unlawful practice is no more objectionable for this reason than one based on a period of lawful practice. If the unlawful element were excluded, the right of the Legislature could not be questioned to constitute a number of years of practice as equivalent to a diploma. The validity of such a classification has been often questioned, but uniformly sustained. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Ex parte Whitley*, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; *In re Spencer*, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702; *Ex parte King*, 157 Cal. 161, 106 Pac. 578. Such a classifi-

cation, it is true, is discriminatory, but it is not so in a constitutional sense. The Legislature may exempt from complying with certain regulations those who have been practicing for any period of time prior to the adoption of the act; the experience thus gained being accepted as proof of competency, and the object of the regulations being to ascertain the competency of those subjected to them. Such matters depend upon the judgment of the Legislature, which, when reasonably exercised, the courts cannot control. *Ex parte Whitley*, supra.

The right of the Legislature to extend the privilege to a class who had previously violated the law is not without judicial authority to support it. The medical act of the state of Ohio provides that one engaged in the practice of medicine in that state, but not a legal practitioner, nor a graduate in medicine or surgery, may present himself before the board and submit to an examination as to his qualifications, and upon satisfactory examination the board shall issue to him a certificate. This act was construed in *France v. State*, 57 Ohio St. 1, 47 N. E. 141, though the decision did not involve the point here presented. In the state of Washington, however, similar acts were before the Supreme Court of that state for interpretation. In *State ex rel. Smith v. Board of Dental Examiners*, 81 Wash. 492, 72 Pac. 110, the question presented related to the practice of dentistry, but the principle is the same. The constitutionality of the act was not involved, and in construing the section the court held that, while it was not the legislative intent to admit one who had been practicing without legal authority, still, if such were clearly the fact, it would have to be so held, however unwise such a regulation might be deemed to be. The medical act of the state of Washington contains a provision similar in effect to the one under review. Section 4 of the Act of 1909, c. 192, provides for the obtaining of a certificate to practice medicine and surgery, and contains the following exemption:

"Or if having been in continuous practice in one locality in this state for the past two years."

In the case of *In re Christensen*, 59 Wash. 314, 109 Pac. 1040, the court, in construing this provision, uses the following language:

"That part of section 4 following the word 'provided' refers to the two classes who may receive licenses: 'The first' one, persons that 'have been legally engaged in such practice prior to the passage of the act.' The second one, those persons who had been in 'continuous practice' in one locality for two years. It may be difficult to see the reason for the Legislature exempting one class from the effect of their unlawful acts and not the other; but the use of the word 'legally' in referring to \* \* \* the other clearly indicates that the Legislature intended to give the license privilege to the second class, even though they have violated the previously existing license law. The offense was in any event purely statutory, and merely a misdemeanor, and did not involve moral turpitude, and there is nothing so extraordinary in grant-

ing the license privilege by the Legislature to those engaged in such practice for two years, even though such persons did thereby violate the then existing license law, as to suggest that we should attribute to the word 'practice,' as here used without qualification, any other than its ordinary meaning."

It will be noticed that the Legislatures of the states mentioned confer upon such persons the right to practice generally. Our statutes does not go nearly so far, but, as above stated, merely provides for the right to an examination for the purpose of ascertaining the applicant's qualifications to pursue a special branch of medicine or surgery.

We conclude, therefore, that the classification is not objectionable for the reasons urged.

[2] The second point raised by the respondents that the applicant has not brought himself within the terms of this statute when he applied to the Board of Medical Examiners for a certificate to practice what he called a special branch of medicine and surgery presents the question as to what is meant by the words "a special branch," as used in said act. The applicant specified as the "special branch of medicine and surgery" which he desired to practice, "the treatment of cancers, tumors, malignant growths, and cutaneous diseases." We cannot judicially say that these disorders are not so correlated that they cannot be classed as a "special branch of medicine and surgery." This question is a matter for determination by the trial court under competent evidence.

For the reasons given, the judgment is reversed, and the trial court directed to overrule the demurrer to the amended complaint.

We concur: LENNON, P. J.; RICHARDS, J.

#### FORGEUS v. SANTA CRUZ COUNTY et al. (Civ. 1179.)

(District Court of Appeal, Third District, California. March 25, 1914. Rehearing Denied by Supreme Court May 23, 1914.)

#### 1. BOUNDARIES (§ 13\*)—NAVIGABLE WATERS— —"USUAL HIGH-WATER MARK."

The usual or ordinary high-water mark, constituting the boundary of one's land on a tide bay, is not the limit of the monthly spring tides, but the limit reached by the neap tides.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 95-101; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7241.]

#### 2. BOUNDARIES (§ 37\*)—NAVIGABLE WATERS— ORDINARY HIGH-WATER MARK—EVIDENCE.

Evidence in an action involving the southern boundary of plaintiff's land, depending on the northern limit of ordinary high water in a tide bay, held not to authorize the finding that it was as far north as the southerly boundary of a highway granted by plaintiff's predecessor in title.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

#### 3. EASEMENTS (§ 1\*)—DEED OF RIGHT OF WAY.

A deed to a county, the habendum clause of which is, "To have and to hold said strip of land unto the said party of the second part for the uses and purposes of a public highway or street," does not convey the fee, but merely a right of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 1, 2, 5-7; Dec. Dig. § 1.\*]

#### 4. NAVIGABLE WATERS (§ 44\*)—GRANT OF EASEMENT ALONG SHORE—RIPARIAN RIGHT OF GRANTOR.

A conveyance of an easement of a right of way for a highway along the shore of the ocean leaves in the grantor his riparian estate, as regards right to accretion.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. § 44.\*]

#### 5. NAVIGABLE WATERS (§ 44\*)—RIGHT TO AC- CRETION.

The owner of land on the shore of the ocean granting to the county an easement of right of way for a highway along the shore is entitled to accretion due to the raising by the county of the roadbed along the right of way.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266-278, 281, 282; Dec. Dig. § 44.\*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by J. A. Forgeus against the County of Santa Cruz and others. Judgment for defendants, and plaintiff appeals. Reversed.

H. A. Van C. Torchiana, of San Francisco, and W. P. Netherton, of Santa Cruz, for appellant. Benj. K. Knight, of Santa Cruz, for respondents.

BURNETT, J. The plaintiff is the owner of a tract of land near Twin Lakes in Santa Cruz county, the bay of Monterey being the southerly boundary line of said land. One of plaintiff's predecessors in interest, J. C. Kimble, by deed dated September 4, 1890, granted to the county of Santa Cruz, for public use as a highway, street, or road, a strip of land 60 feet in width, now known as the East Cliff Drive. It is the contention of appellant that the road divided the Kimble land into two parts, leaving north of the road high land and south of the road beach land. The tract south of the road is the one in dispute. It consists of sand hills, or dunes, and a regular beach, and there is no dispute that for years teamsters have gone onto this tract and hauled away large quantities of sand, it being particularly adapted for plastering. In January, 1907, the Santa Cruz Bay View Company, the predecessor in interest of plaintiff, constructed a fence around the property it claimed to own south of the road. Openings were left in the fence for the use of the public in going on to the beach, and no objection seems to have been made to any one carrying away driftwood, but the fence excluded the teams and, under the direction of one of the supervisors, and in accordance with the advice of the district attorney of the county, the north fence was torn down and the teamsters drove again up-

on the beach for the purpose of getting sand. A complaint was thereupon filed in the superior court for an injunction against the county of Santa Cruz and the board of supervisors as a whole and the members thereof individually, to enjoin them from interfering with, molesting, or destroying said fence or any part thereof and them or their agents from entering upon said premises. The court found that all the land south of said right of way is tide land which is covered by the neap tides, that plaintiff has no right, title, or interest therein, and that the fence constructed was and is a public nuisance, defendants being entitled to remove the same and to prevent the construction or rebuilding thereof at any point south of said right of way deeded by said Kimble to the county of Santa Cruz.

Manifestly—and it is so conceded—the vital point in the case relates to the location of the south line of plaintiff's land, and this depends upon the northern limit of ordinary high water in Monterey Bay. It is the contention of plaintiff that the ordinary high-water mark is 250 feet, or thereabouts, south of the southern boundary of said East Cliff Drive while, as must be apparent, the claim of defendants, which was approved by the court, is that said boundary of the drive corresponds with said ordinary high-water mark.

If plaintiff's position is correct or if said ordinary high-water mark lies at any considerable distance south of said drive, it would follow that the court's findings cannot be sustained.

[1] There is no dispute as to the significance of the expression "ordinary high tide," or that this line marks the said boundary of plaintiff's land according to the common law and the rule which prevails in this state. This terminology does not refer to the "limit which the monthly spring tides reach, tides which occur only at the full and the change of the moon. \* \* \* The limit of the monthly spring tides is, in one sense, the usual high-water mark, for as often as those tides occur, to that limit the flow extends. But it is not the limit to which we refer when we speak of 'usual' or 'ordinary' high-water mark. By that designation we mean the limit reached by the neap tides; that is, those tides which happen between the full and change of the moon twice in every 24 hours." *Teschemacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151. See, also, *Gould on Waters*, p. 61; *Long Beach Land & Water Co. v. Richardson*, 70 Cal. 206, 11 Pac. 695; *Valentine v. Sloss*, 103 Cal. 215, 37 Pac. 326, 410, and section 670 of the Civil Code.

[2] Turning to the evidence, we can find no substantial support for the conclusion that the ordinary high-water mark is as far north as the southerly boundary line of said drive. As the controversy is largely one of fact, it seems advisable to quote quite extensively from the testimony of the witnesses.

It appears that, in 1896, by the United

States Geodetic Coast Survey, the line of ordinary high tide was located all along the coast, and at different locations were placed, so as to insure permanency as far as practicable, bench marks, a bench mark being a "mark affixed to a permanent object in tidal observations, or along a line of survey, to furnish a datum level." The bench mark for the coast of Santa Cruz was placed on the stone steps of the courthouse at Santa Cruz. According to custom, said geodetic survey branch of the government, in 1910, published its tide tables for 1911 by means of which, in connection with said bench marks, it is not disputed that the ordinary high-water line of that date can be determined and located.

A. M. Baldwin, the county surveyor of the county of Santa Cruz, in April, 1911, established the line of ordinary high water along Twin Lakes, using said bench mark as the base for his survey, in connection with the data furnished by said tide tables. He explained, carefully and technically, his method of procedure. The result of his testimony, in connection with the map compiled by him according to his survey, would be the conviction that the northern boundary line of the ordinary high tide is something over 240 feet south of said drive, and that it corresponds substantially with the meander lines of the survey under which the United States patent was granted to plaintiff's predecessors in interest.

The foregoing surveys and calculations may be, of course, faulty; but if they cannot be held to be conclusive of the controversy, their significance as a factor is readily apparent. It may be stated that the county surveyor did not pretend to testify from his personal observation and knowledge of the tides.

E. R. Bennett, the minister of the Baptist church, which owns some property adjoining the beach in controversy, testified:

"I have known the property situated south of the road marked 'East Cliff Drive' down to the Bay of Monterey, more or less intimately for 12 years. For five years I have passed the property very often, and I have observed it at those times. I have been on the property. I remember in the year 1907 when the Santa Cruz Bay View Company built a fence on that property. I looked over the place, described as 'sand bluff' on the map, about three days ago, and it seems to be about in the average condition of the past several years. Taking the average, summer and winter through, it is very nearly the average tide at the present time."

He further testified that the beach had "not changed in any particular degree in the last twelve years, that is, no permanent change is particularly noticeable. There have been temporary changes, quite a number of slight ones, in the last 12 years," and that the ordinary high tide for 12 years has reached the line as claimed by plaintiff.

C. A. Wood, another witness, testified:

"I have known the property south of the county road, north of the Bay of Monterey, and belonging to Mr. Forgeus, for 12 or 14 years.

I have seen the property every morning for the last 10 years. About 180 feet south of the county road is a jump off place, and sand bluff, as it is called on the map. It may be 180 feet from the road. There has always been a bluff there, more or less. I have had occasion to observe the flow of the tides there as I pass along, and I am naturally interested to see how high it comes. The ordinary high tide comes to about the bluff. That is the way that bluff is formed. I have seen it about every day."

The plaintiff testified:

"I have noticed the effect of the tide along on this beach during the years I have been interested there, since 1905. Ever since I have known the property there has been from 140 to 180 feet of good dry beach all the way."

John J. Stewart has resided at Twin Lakes for about seven years within 200 yards of the beach, and he testified:

"I have noticed the ebb and flow of the tides quite frequently for the last seven years. I know the sand bluff. The ordinary tides come close to it, but the extreme tides may go over the top and spread over the lap of the beach. The ordinary tides come nearly to the said bluff. I estimate that the low tide is 40 feet below there and the average tide, I suppose, would be something like halfway between the distance and the bluff."

J. E. Armstrong testified:

"I have resided in Santa Cruz about 30 years, and I know Mr. Forgeus' property, being acquainted around Twin Lakes and with the beach there. I know the fence, marked on this map, which is running about parallel with the Cliff Drive, and I had occasion recently to look at the beach south of that fence. I know the sudden jump off in the sand there, which is marked on this map as 'sand bluff.' That is where the breakers dip up and slide back again. During my residence here I have had occasion frequently to notice the tides there south of this sand bluff on the Forgeus property in a general way. The ordinary high tide would be about halfway from the lower condition of the water to the top of the sand bluff."

Thus far, manifestly, the only reasonable inference that could be indulged is in favor of appellant's contention. This inference is strengthened by circumstantial evidence which we deem it unnecessary to detail, and the conclusion is left undisturbed and unaffected by the testimony offered on behalf of respondents.

It is true that a large number of witnesses was called by defendants, but a careful examination of the record shows that the facts concerning which they testified are not at all inconsistent with appellant's position, nor would it be a fair deduction from their testimony that the ordinary high tide reaches or approximates the county road. The attention of these witnesses was directed to unusual tides, storms, and floods, and this circumstance renders their testimony easily reconcilable with that of plaintiff's witnesses. We may take the testimony of Adolph Bodeman as a fair example for all:

"I know the land here in question, and am familiar with that part of the country. I have gone over this land here in question, at the point where the East Cliff Drive crosses over the tracks of the Union Traction Company just before reaching the Twin Lakes station and I am familiar with that country. \* \* \* I have seen the tides, the waters from the bay up near

the tracks of the Union Traction Company and near the lagoon, quite often there. In reference to the crossing where the street crosses the tracks of the Union Traction Company, I have noticed water running there, once decidedly in March, 1905, it was after dark. \* \* \* The water was on both sides of the road, a little further east of the crossing. The water was running over the county road and over the track both. It was the water from the bay. During the eight years I have been a street car conductor all told I have been five years on the run between Santa Cruz and Capitola."

And on cross-examination he testified that he had seen the water as high as the tracks only once and that was when there had been a high wind during the day.

[3, 4] Another theory contended for by respondents is based upon the testimony of some of the witnesses that by reason of accretion the beach has been extended south of the road, and is to the effect that:

"If this accretion is subject to private ownership it belongs to the county because the county owns the 60-foot roadway against which the accretion banks, and furthermore, that Kimble, or his successor, the appellant, cannot take advantage of their own wrong in closing up the channel by erecting an obstruction on public land and claim this sand as an accretion."

The facts, however, are not as expressed and implied in the foregoing statement. It is not a fair construction of the deed of September 4, 1890, from J. C. Kimble to the county of Santa Cruz that it conveyed the fee. The intention was clearly to grant merely a right of way, the habendum clause being:

"To have and to hold said strip of land, unto the said party of the second part, for the uses and purposes of a public highway or street."

The riparian estate of Kimble was therefore not severed from the ocean.

"A riparian right is not destroyed by the acquisition of an easement for a highway, railroad or canal along the shore." *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.*, 44 N. J. Eq. 898, 15 Atl. 227, 1 L. R. A. 133.

[5] Again, if any accretion or reliction was formed it was not caused by any act of Kimble or his successors in interest, but it was due to the act of the county in raising the roadbed along said right of way. It could hardly be contended that the county by such artificial means could secure the fee to the alluvion as an addition to its right of way. The alluvion would be an accession to the fee and not to the easement. In *Tatum v. City of St. Louis*, 125 Mo. 654, 28 S. W. 1003, it is said:

"The riparian owner is entitled to the land formed by gradual and imperceptible accretions from the water, regardless of the cause which produced it. This right he cannot be deprived of by the acts of others over whom he has no control, and for which he is in no way responsible. It was pertinently said by Mr. Justice Swayne, in *St. Clair County v. Livingston*, 23 Wall. 68 [23 L. Ed. 59]: 'It is insisted by the learned counsel for the plaintiff in error that the accretion was formed wholly by obstructions placed in the river above, and hence that the rules upon the subject of alluvion do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The proximate cause was the deposit made by the water. Whether the flow of water

was natural or affected by artificial means is immaterial."

There are many decisions to the same effect, and they recognize the principle as expressly stated in some of them, that the right of alluvion to be formed in the future is an inherent and essential attribute of the original proprietorship and is a vested right, with all the usual incidents of such property interest.

Clearly, there is a distinction between this case and that where a structure is erected, by the state or municipality, on land below the line of ordinary high water. In the latter case the deposit of alluvion caused by such structure would not inure to the benefit of the riparian owner. This is pointed out in *Dana v. Jackson Street Wharf Co.*, 81 Cal. 118, 89 Am. Dec. 164, wherein it is held that, "in case of purpresture or encroachment by the erection of a wharf in the Bay of San Francisco beyond the city front, the right to recover possession is in the people, and not in the owner of the land adjoining on the city front," and furthermore:

"The owner of a lot upon the water front of San Francisco, as established by statute, below low-water mark, is not a 'riparian proprietor' in the sense in which that term is used in the law of tide waters, for the water front of San Francisco is of statutory construction."

Therein the court, though, recognizes the general rule as follows:

"As to the lands gained from the sea by alluvion, i. e., by the washing up of sand or earth, so as in time to make terra firma, the law is held to be that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. 2 Bl. Com. 61."

It is also apparent that quite a different situation is presented in the case of *San Pedro, etc., R. R. Co. v. Hamilton*, 161 Cal. 610, 119 Pac. 1073, 37 L. R. A. (N. S.) 686. This is shown by the following quotation from the opinion:

"That question may be thus broadly stated. When the Constitution (article 15, § 3) declares 'all tide lines within two miles of any incorporated city or town in the state, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations,' does the language forbid the leasing for a term of any part of such lands? For the consideration of the question stated, 'tide lands' as thus used in the Constitution will be construed more broadly than in the ordinary signification of lands covered and uncovered by the daily efflux and reflux of the tide. It will be construed to embrace lands properly described as submerged lands (*Ward v. Willis*, 51 N. C. 183, 72 Am. Dec. 570), such as, in major part, the lands here in controversy unquestionably were. The phrase will be so construed to carry out the manifest intent of the framers of the Constitution, to protect the harbors of cities and towns from falling into private monopolistic ownership."

It is thus to be seen that the case had nothing to do with the subject of accretion or the interpretation of a patent from the general

government prescribing as one of the boundaries of the land a navigable bay.

The case of *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 565, has no bearing upon the question before us. The point of controversy there was whether the United States or the state of Alabama was clothed with sovereignty over lands on navigable waters below ordinary high water, and it was held by the United States Supreme Court that this power belonged to the state, and that the "right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant land in Alabama which was below usual high-water mark at the time Alabama was admitted into the Union." The United States having issued its patent to land below the usual high-water mark, the patent was therefore void and conveyed no title, and manifestly no accretion could inure to the benefit of the patentee.

The decision in *Cook v. McClure*, 58 N. Y. 487, 17 Am. Rep. 270, turned upon the opinion of the court as thus expressed:

"I think the language of the deed indicates a clear intention to establish a fixed and permanent line, and not one changeable by the changes in the high-water mark of the water in the pond."

It was therefore held that whether alluvion had been formed had nothing to do with the location of the boundary of the grantee's land.

*Nixon v. Walter*, 41 N. J. Eq. 108, 3 Atl. 385, was similar to the New York case, supra, and it was held that the deed conveyed the land by explicit boundaries, one of which was "high-water mark," and that the line thus given was a fixed and permanent one—"the line of high water at the date of the deed, and does not follow the changes of the high-water mark." No one, of course, will deny that the parties to a deed may fix the line of the ordinary high tide as it exists at the time of the execution of the deed as a boundary for the land conveyed.

*Eichelberger v. Mills Land, etc., Co.*, 9 Cal. App. 628, 100 Pac. 117, to the extent that it is in point at all, supports the position of appellant, inasmuch as it is held that a tract of land described as bordering upon the Pacific Ocean is delimited by "the line to which the flow of the water reaches at ordinary or neap tide, unaffected by wind or wave, not the line of extreme high tide nor extreme reach of the wash of the waves."

In *Hendricks v. Feather River Canal Co.*, 138 Cal. 423, 71 Pac. 496, the familiar principle is reaffirmed that in determining the correctness of boundaries of public lands the government plat and survey which show that the land is to be bounded by a river must be construed as referring to the margin of the river, and must prevail over the meander lines run by the surveyor where they do not coincide and that the meander lines cannot

limit the grant in the patent. No question of that kind arises here. As claimed by appellant: The south boundary line of plaintiff's land was established by the survey of the county surveyor. It coincides substantially with the points on the beach established in 1858 by the surveyor of the United States government and with the map and official plat of the survey of the lands returned to the General Land Office by the Surveyor General and mentioned in the patent of 1867, and it coincides with the data contained in the United States geodetic survey issued in 1908, and with the data contained in the official book known as "The result of Spirit Leveling in California, 1897-1907" and also with the rational inference arising from the testimony of all the witnesses.

As to the suggestion that the physical condition of the beach was changed by the closing of one of the two channels extending to the ocean from what is known as Woods Lagoon, we think no comment is required. If we concede that the circumstance may have caused the said line to shift, it does not militate in the least against appellant's claim.

We think that it appears by the transcript that the judgment herein has deprived plaintiff of a substantial right, and the judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

McREYNOLDS et al. v. HARRIGFELD et al.  
(Supreme Court of Idaho. May 5, 1914.)

1. FRAUDS, STATUTE OF (§ 60\*)—IRRIGATION DITCH—RIGHT OF WAY—PAROL LICENSE.

A parol license for a right of way for a ditch, if sought to be declared perpetual, would be an easement or interest in real property, which can only be created by operation of law, or a conveyance or other instrument in writing, subscribed by the party sought to be charged.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 94, 95; Dec. Dig. § 60.\*]

2. FRAUDS, STATUTE OF (§ 60\*)—CREATION OF EASEMENT.

*Held* that, where the evidence fails to disclose that licensees have expended considerable money or made valuable improvements in reliance upon a parol license for a right of way for a ditch, and fails, further, to show that benefits or advantages have accrued to licensors thereunder, this court will not "by operation of law" declare such parol license an easement, and not within the inhibition of section 6007, Rev. Codes.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 94, 95; Dec. Dig. § 60.\*]

3. WORDS AND PHRASES—"IN STATU QUO."

If parties are placed in their original position, and with their original rights, they are "in statu quo."

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, pp. 3485, 3486.]

4. WATERS AND WATER COURSES (§ 157\*)—PAROL LICENSE—RIGHT TO REVOKE.

Mere naked possession by the licensees of a right of way created by parol license is not

sufficient to authorize such license to be declared irrevocable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.\*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by A. L. McReynolds and others against George Harrigfeld and others to quiet title to ditch and right of way for same across lands, and to enjoin defendants from interfering with plaintiffs' use of same. Judgment for defendants, and plaintiffs appeal. Affirmed.

Millsaps & Moon, of St. Anthony, and C. H. Lingenfelter, of Boise, for appellants. N. D. Jackson, of St. Anthony, for respondents.

WALTERS, District Judge. The appellants herein, who were plaintiffs below, brought this action in the trial court to obtain decree quieting in them title to a certain ditch and right of way for the same across the lands of the respondents, who were defendants below, and to obtain an injunction perpetually restraining defendants from interfering with plaintiff's use of the same.

After trial the lower court found that plaintiffs based their claim of title to said ditch and right of way for the same upon the fact that the predecessors in interest of plaintiffs had procured from the defendants a verbal license to construct said ditch across defendants' lands, and found, further, as a matter of law that said verbal license was revocable at the will of the defendants, that prior to the commencement of said action defendants, by certain acts, had revoked said license, and that plaintiffs had no right, title, or interest in and to said ditch or a right of way for same over or across the lands of defendants.

The facts involved in this case do not seem to be in serious dispute, and disclose that in the year 1901 John McIntosh and Oscar Green went to the residence of the defendant George Harrigfeld and represented to him that they wished to build a ditch across a certain tract of raw, uncultivated land then owned by defendants, and situated some several miles from defendants' residence.

The defendant Harrigfeld testified that in the early part of the summer of 1901 McIntosh and Green drove up to his home on a Sunday afternoon, and that McIntosh stated that he had a little hay on his place that he would like to save, and asked permission to make a ditch across the land in question, and promising that, when Harrigfeld desired to cultivate the land, should the ditch be found to be situated not as Harrigfeld desired, he would change the same to such location as Harrigfeld should indicate, and that it was upon such an understanding that permission was given to Mc-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Intosh to construct the ditch across such land.

McIntosh and Green, who testified on behalf of plaintiffs, corroborated Harrigfeld in part, testifying, however, that they had no recollection that Harrigfeld required as a condition that the ditch should later be changed, should he so desire when he put the land in cultivation, but that they did not desire to testify that Harrigfeld had not so required.

McIntosh, Green, and a third person named McGavin, neither of whom are parties to this action, constructed the ditch and used the same for four or five years, when they severally disposed of their lands. Green and McGavin abandoned such ditch and claim no interest therein; the plaintiffs herein basing their claim of title to said ditch and right of way for same on mesne conveyances from McIntosh.

The trial court further found the facts to be that the licensees (McIntosh, Green, and McGavin) constructed said ditch in the summer of 1901, and that they and the successors in interest to the lands of McIntosh used the same until the year 1910, at which time the tenants of the defendants plowed and cultivated the land covered by said ditch; that the tenants of defendants in the year 1911 again plowed and cultivated the land covered by said ditch, but that in the month of July of said year the plaintiffs opened the ditch and again used the same; that in the year 1912 the plaintiffs again undertook to use said ditch, when they were prevented from so doing by defendants, whereupon plaintiffs instituted this action; that the land formerly owned by the licensee McIntosh, for the irrigation of which the license for the construction of said ditch was obtained, is the same land now owned by the plaintiffs; that said ditch when constructed was constructed with reference to the natural surface of the ground, and without reference to the lines or boundaries of the same; and that the seepage from the same renders some portion of defendants' land wet and useless for farming, and that it is necessary for defendants to construct flumes over said ditch in order to irrigate some portions of their own land.

It further appears that in the year 1911 the plaintiff McReynolds and the defendant George Harrigfeld had some conversation about the location of the ditch in question, when Harrigfeld informed McReynolds that, if he must take water across defendants' land, defendants would grant plaintiffs a full right of way for the same across defendants' land, to be, however, constructed along the fence line, and of sufficient capacity to convey the 40 inches of water owned by plaintiffs, where defendant asserted it could be easily constructed, would cause no damage, and be out of the way of everybody. To this offer, the plaintiff McReynolds refused to

accede, insisting that, if the ditch was rebuilt elsewhere it should be done by defendants.

Based upon this record the trial court found, as conclusions of law, that the oral license obtained by the licensees (McIntosh and Green) from said defendants for the construction of said ditch, and upon which plaintiffs based title, was revocable at the will of the defendants; that the defendants, prior to the institution of this action, had revoked said license; that the plaintiffs have no right or other interest in or to said ditch or a right of way for the same, and decree was entered accordingly, from which plaintiffs prosecuted this appeal.

[1] 1. It thus appears that the precise question here for inquiry is: When will a parol license for a right of way for a ditch over land be made perpetual, having in mind that such right of way is an easement or interest in real property, which section 6007 of the Revised Codes declares can only be created by operation of law, or a conveyance or other instrument in writing subscribed by the party granting such easement or right of way?

Inasmuch as it is not claimed that any consideration passed to, or benefit has been received by, the defendants for the license granted to construct the ditch across defendants' land, this case, therefore, does not fall within the rule announced by this court upholding oral agreements for such purposes in the following cases: *Stowell v. Tucker*, 7 Idaho, 812, 62 Pac. 1083; *Feeney v. Chester*, 7 Idaho, 824, 63 Pac. 192; *Male v. Lefang*, 7 Idaho, 848, 63 Pac. 108.

[2] 2. It should further be borne in mind that the record in this case is absolutely silent as to what amount of money the licensees or their successors in interest may have expended, if any, in reliance upon their license, or oral permission to construct said ditch; what additional acreage or improvements, if any, licensees, or their successors, may have developed or made. It is not shown that the defendants permitted said ditch to be constructed because of any benefit or advantage which may accrue to them, nor that any benefits or advantages have accrued to defendants by reason of the construction of said ditch. The testimony merely shows that defendants had granted licensees permission to build the ditch, and that they had so built it.

The question involved in this appeal has received some considerable attention by the courts, and it has been held, as the most liberal view, that when the licensee has acted under the authority conferred, and has incurred expense in pursuance of it, by making valuable improvements on his own property, or on the right of way, that equity will regard it as an executed contract, and will not permit it to be revoked, regarding it substantially as an easement, the revocation of which would be a fraud on the licensee.

The Supreme Court of Nevada, in the case of *Lee v. McLeod*, 12 Nev. 280, has held:

"A parol license to erect a dam upon another's land, or to convey water from a stream running through the land of another, for the purpose of erecting and conducting a flouring mill, is, in our opinion, irrevocable after the party to whom the license is given has executed it by erecting the mill, or otherwise expended his money upon the faith of the license."

In the case of *Bowman v. Bowman*, 85 Or. 279, 57 Pac. 546, it is said:

"For the rule is well settled in this state that a parol license cannot be revoked after the licensee has expended money or performed labor in making valuable and permanent improvements on real property upon the faith of such license."

The question here mooted seems to have been exhaustively considered by the Supreme Court of Oregon in the recent case of *Shaw v. Proffitt*, 57 Or. 192, 110 Pac. 1092, Ann. Cas. 1913A, 63, wherein the following language is quoted with approval:

"The cases are practically agreed that on strict common-law principles a bare license is revocable at the will of the licensor, even though executed; but it is held by a very respectable line of authorities, as in the reported case, that on principles of equity the revocation of a license after the licensor has stood by and permitted the licensee to incur considerable expense on the faith of the license would amount to a constructive fraud, working an estoppel in the licensee's favor."

To the same effect is *Great Falls Water Works Co. v. Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963. See, also, 25 Cyc. 646, and cases cited.

This court has heretofore recognized such principle of law in the case of *Howes v. Barmon*, 11 Idaho, 64, 81 Pac. 48, 69 L. R. A. 568, 114 Am. St. Rep. 255, where it is held that a court of equity will not lend enforcement to a parol license for an easement in realty where the party invoking its aid has not parted with any consideration or property, and no irreparable damage is suffered, and no fraud is inflicted upon him, and where he is *in statu quo* at the time of the commencement of his action.

So in the case at bar it does not appear that the plaintiffs, nor their predecessors in interest, parted with any consideration or property for the permission given; neither does it appear that plaintiffs will suffer irreparable damage by a denial of the court to enforce the specific performance prayed; nor does it appear that, should the court refuse to grant plaintiffs the relief asked, they will not be left in their original position, nor defeated of their original rights. On the contrary, they will be absolutely *in statu quo*, and hence it clearly appears this is not a case authorizing or justifying the interference of a court of equity to make perpetual or permanent a parol license for an easement in realty.

[§] 3. In the case of *Daly v. Bernstein*, 6 N. M. 380, 28 Pac. 764, the Supreme Court of New Mexico says:

"*In statu quo* means being placed in the same position in which a party was at the time of the inception of the contract which is sought to be rescinded."

As was said in *Howes v. Barmon*, *supra*:

"But courts of equity grant relief in such cases upon the principal theory that the parties cannot be placed in the position they originally occupied, and therefore equity will compel them to live up to their agreements."

[4] 4. All that may be said in the case here considered is that the plaintiffs, or licensees, have been let into possession of the property or right of way for ditch, and such fact alone is not sufficient for a court of equity to declare that "by operation of law" the provisions of section 6007, Rev. Codes, need not be observed. *Howes v. Barmon*, *supra*, and cases there cited.

We conclude that, upon the evidence as contained in the record, and the law applicable thereto, the trial court was authorized to enter the judgment appealed from; and said judgment is affirmed, with costs awarded to respondents.

AILSHIE, C. J., and SULLIVAN, J., concur.

#### SOULE v. FIRST NAT. BANK OF ASHTON.

(Supreme Court of Idaho. May 9, 1914.)

#### 1. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.

Instructions examined, and found erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

#### 2. BANKRUPTCY (§§ 159, 166\*)—PREFERENCES—RECOVERY—CAUSE OF ACTION—ELEMENTS.

In an action by a trustee of a bankrupt estate to set aside a transfer on the ground that a preference has, by such transfer, been created within the inhibition of the act of Congress, and the several acts amendatory thereof, to establish a uniform act of bankruptcy in the United States (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, Act June 15, 1906, c. 3833, 34 Stat. 267, and Act June 25, 1910, c. 412, 36 Stat. 838 [U. S. Comp. St. Supp. 1911, pp. 1491, 1507]), said trustee must prove by sufficient evidence that the bankrupt, (1) while insolvent, (2) within four months of the bankruptcy, (3) made the transfer in question, and (4) that the creditor receiving the transfer will be thereby entitled to obtain a greater percentage of his debts than other creditors of the same class, and (5) that the creditor had reasonable cause to believe that the enforcement of such transfer would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 250-253, 255-258, 262, 268-281; Dec. Dig. §§ 159, 166.\*]

#### 3. BANKRUPTCY (§ 166\*)—PREFERENCES—RECOVERY—INTENT OF BANKRUPT.

In an action of this character, an inquiry as to the intent of the bankrupt to effect a preference is not necessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.\*]



**4. BANKRUPTCY (§ 303\*)—PREFERENCES—RECOVERY—NOTICE TO CREDITOR—BURDEN OF PROOF.**

The burden of proof that the creditor had reasonable cause to believe that the enforcement of a transfer would effect a preference is upon the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.\*]

**5. TRIAL (§ 238\*)—INSTRUCTIONS—REPEALED STATUTE.**

An instruction based upon a legislative enactment which had theretofore been repealed, and which was not then in force, is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 552-556; Dec. Dig. § 238.\*]

**6. TRIAL (§ 192\*)—INSTRUCTIONS—PLEADING—ADMISSIONS.**

Instruction based upon lack of denial, and admission thereby made, examined, and found sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by H. W. Soule, as trustee in bankruptcy for the Ashton Hardware & Implement Company, against the First National Bank of Ashton. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

N. D. Jackson, of St. Anthony, for appellant. Soule & Soule, of St. Anthony, for respondent.

WALTERS, District Judge. This action was brought in the trial court by H. W. Soule, as trustee for the Ashton Hardware & Implement Company, a bankrupt, as plaintiff, against the First National Bank of Ashton, as defendant.

The complaint charges that certain notes and moneys of the property of the Hardware & Implement Company were placed in the hands of defendant bank for safe-keeping, pending settlement and payment of the claims of the creditors of the Hardware & Implement Company, and that, within four months prior to the institution of the bankruptcy proceedings, the defendant bank conspired with the Hardware & Implement Company, and converted the notes and money to its own use, and refused, upon demand, to deliver the same to the trustee; that said act of conversion thus created the defendant bank a preferred creditor, in violation of the act of Congress of the United States to establish a uniform act of bankruptcy. Plaintiff asks for judgment against defendant for the value of the notes and money, and that the transfer of the same be set aside as a preference prohibited under said Bankruptcy Act.

1. After answer the cause was tried to a jury, and judgment rendered in favor of the plaintiff as prayed for.

[1] The defendant appeals, and assigns as error the giving of certain instructions by the court.

Instructions Nos. 3 and 6 were in part, and as objected to, as follows:

"(3) You are therefore instructed that, if you find that the notes in question in this case were not transferred and assigned by the bankrupt company to defendant in good faith and four months prior to the date of filing the petition in bankruptcy, and that defendant refuses to account for them to plaintiff, then the plaintiff is entitled to recover their value in this action, and, if you find that the money in question was not placed in defendant bank in the regular course of business, as hereinafter defined, but was placed therein for the benefit of all creditors, then the title to the same is also in the plaintiff, and he is entitled to recover the same in this action."

"(6) You are further instructed that where a preference, as defined in the last instruction, is given by a bankrupt to one creditor over other creditors, that it is the duty of the trustee of the bankrupt to take such proceedings as may be necessary to set such preference aside, and any property that is taken by one creditor from the bankrupt which creates, or will operate as, a preference, as defined in the last instruction, takes the same subject to the title of the trustee to recover the property or its value to be taken back into the estate of the bankrupt and distributed as provided under the bankrupt act. And, if you find from the evidence that, within four months before the filing of the petition in the bankruptcy proceedings, the bankrupt made a transfer of the notes in question to the defendant, and the effect and force of such transfer would be to enable the bank to obtain a greater percentage of the debt due the bank than any other such creditor of the same class, then you are instructed that such transfer is void, and that the plaintiff is entitled to recover the said property, or its value, from said defendants in this proceeding."

It is objected by the appellant that said two instructions are at fault, in that they do not take into consideration the provisions of subdivision "b" of section 18 of chapter 487 of the Laws of the Fifty-Seventh Congress, approved February 5, 1903 (32 U. S. Stats. at L. 797), amending section 60 of the old act, and defining the conditions under which a preference shall be voidable by the trustee; said subdivision "b" being in part as follows:

"b. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Appellant urges that instructions 3 and 6, supra, should, because of the provision last quoted, be qualified by requiring, before the trustee can recover, proof that the defendant bank "had reasonable cause to believe that it was intended thereby to give a preference," and that such omission constitutes a fatal defect.

It is asserted by counsel for appellant, and conceded by counsel for respondent, that subdivision "b" of section 18, supra, was the law at the time this action was instituted, but our investigation has led to the discovery that such was not the law, inasmuch as said subdivision "b," upon which counsel rely, was further amended by chapter 412 of the Laws of the Sixty-First Congress, approved

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

June 25, 1910 (86 U. S. Stats. at L. 838), which amendment was in force a year prior to the institution of the bankruptcy proceedings involved herein, and almost three years prior to the trial of this action, and was a part of the law to be followed by the trial court in this action.

Said subdivision "b," as amended by section 11 of Chapter 412 of the Laws of the Sixty-First Congress, approved June 25, 1910, in so far as the same is pertinent to this inquiry, is in language as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, *and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference*, it shall be voidable by the trustee and he may recover the property or its value from such person. \* \* \*

It will be noted that, while the trial court in instructions 3 and 6 advised the jury under what circumstances the transfer in question would be void and the plaintiff entitled to recover, the statement is entirely omitted that before such transfer would be void, and the plaintiff entitled to recover, that it must also be proven by plaintiff that the defendant bank "had reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference."

[2] 2. In other words, the plaintiff in this case, before a right of recovery can be had, must prove by sufficient evidence, not only that the bankrupt, (1) while insolvent, (2) within four months of the bankruptcy, (3) made the transfer in question, and (4) that the creditor receiving the transfer will be thereby entitled to obtain a greater percentage of his debt than other creditors of the same class (*Kimmerle v. Farr*, 189 Fed. 295, 111 C. C. A. 27), but must also, in addition, prove (5) that the creditor "had reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference."

The jury was not advised that the plaintiff's right of recovery was predicated also upon this last requirement, and they were thus permitted to find a verdict against defendant upon an insufficient and an incorrect statement of required proof.

[3] 3. It will be noted that, prior to the amendment of 1910, in an action of this character the intent of the bankrupt to effect a preference must be shown, but that by said amendment such proof is not now required. This statement finds expression in 1 *Loveland on Bankruptcy*, 978, in the following language:

"Prior to the amendment of 1910 the intent of the bankrupt to prefer was essential to a preference. The act as originally passed, and, as amended in 1903, included as an element of voidable preference that the creditor 'had reasonable cause to believe that it was intended thereby to give a preference.' This language was held to imply that the debtor must intend the transfer to be a preference at the time it was made. The intent of the bankrupt might be presumed from the necessary result of the transaction. This language of section 60 of the act was changed by the amendment of 1910 to 'had reasonable cause to believe the enforcement of such judgment or transfer would effect a preference.' This makes the intent of the debtor immaterial. The test is clearly the effect of the transaction without regard to the intent of the debtor."

[4] 4. In reference to the burden of proof as to the reasonable cause of belief that the enforcement of a contested transfer would effect a preference, it is stated in 3 *Remington on Bankruptcy*, 419, that "the burden of proof of the existence of the reasonable cause of belief is on the trustee," citing *Getts v. Janesville Grocery Co.* (D. C.) 163 Fed. 417; *Calhoun County Bank v. Cain*, 152 Fed. 983, 82 C. C. A. 114.

[5] 5. It is urged by counsel for plaintiff, respondent here, that the error complained of in instructions 3 and 6 is cured by instruction 16, given by the court to the jury, which is as follows:

"The mere giving of a preference to a creditor of the bankrupt within four months of the filing of a petition in bankruptcy, or after the filing of a petition in bankruptcy, does not make the preference void, and it is not even voidable, unless the creditor or his agent acting therein had reason to believe that it was intended thereby to give a preference."

Counsel for respondent urge that this instruction is drawn in conformity with the amendment of 1903, *supra*, and, read with instructions 3 and 6, makes a sufficient statement of the law.

A sufficient answer to such contention is that instruction No. 16 did not contain a correct statement of the law for the control of this case, by reason of the amendment of said subdivision "b" made in 1910 and hereinbefore discussed.

[6] 6. The plaintiff alleges the value of the notes, by the collection of which, by defendant, it is charged a voidable preference was created, is the sum of \$1,800. For the failure on the part of the defendant to deny the value of said notes as laid in the complaint, the court charged that the value of the same was by defendant admitted.

Appellant assigns the giving of this instruction as error, maintaining that the answer sufficiently denied the value of said notes.

We have examined the pleadings and the instruction in question, and find no error in the giving of the same.

Inasmuch as counsel for the parties hereto were each in error as to the law applicable to a case of this nature at the time of trial, it quite naturally followed that the trial court erred in the instructions given, and, it appearing that such error is prejudicial to the

rights of the appellant, this judgment must be reversed, and the cause remanded for a new trial. Costs will be awarded to appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

#### WRIGHT v. MERRILL

(Supreme Court of Idaho. April 18, 1914. Rehearing Denied June 1, 1914.)

##### 1. EXECUTORS AND ADMINISTRATORS (§ 17\*)—APPOINTMENT OF ADMINISTRATOR—PRIORITY.

The order of priority in right of administration on the estate of a person dying intestate is fixed by the provisions of section 5351, Rev. Codes.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

##### 2. EXECUTORS AND ADMINISTRATORS (§ 17\*)—RIGHT OF ADMINISTRATION—NONRESIDENTS.

Section 5365, Rev. Codes, which provides that administration may be granted to one or more competent persons, although not otherwise entitled to the same, upon the written request of a person entitled, filed with the court, does not apply to nonresidents, since under the provisions of section 5355 a nonresident is not competent or entitled to appointment as an administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

##### 3. EXECUTORS AND ADMINISTRATORS (§ 20\*)—RIGHT OF ADMINISTRATION—PRIORITY.

Under the provisions of section 5363, Rev. Codes, letters of administration must be granted upon proper application, although it appears that other persons have better rights to the administration, when such persons fail to appear and claim the issuance of such letters to themselves within a reasonable time after the death of the intestate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 83-105; Dec. Dig. § 20.\*]

##### 4. EXECUTORS AND ADMINISTRATORS (§ 20\*)—RIGHT OF ADMINISTRATION—PRIORITY—FAILURE TO APPLY.

The provisions of this section require persons entitled or having better rights to administration to make application within a reasonable time for such appointment, and, if they fail to make such application, letters should be granted to any qualified applicant who makes application therefor prior to the time that application is made by the one who may have had a better right.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 83-105; Dec. Dig. § 20.\*]

Appeal from District Court, Bear Lake County; Alfred Budge, Judge.

Action by Frank Wright against J. G. Merrill. From judgment appointing an administrator of the estate of Rody Thornton, deceased, plaintiff appeals. Reversed.

Thos. L. Glenn, of Montpelier, for appellant. Gough & Kunz, of Montpelier, for respondent.

SULLIVAN, J. This is an appeal from a judgment of the district court affirming the

decision of a probate court in the appointment of J. G. Merrill as administrator of the estate of Rody Thornton, deceased.

It appears from the facts of the case that said deceased was at one time a resident of the state of Wyoming, and died intestate in the county of Bear Lake, Idaho, while temporarily residing in Idaho. He left property in Bear Lake county of the estimated value of \$3,525. He was unmarried at the time of his death, and none of his heirs resided in this state. Said Thornton departed this life on the 4th day of May, 1912. At the time of his death he left in the state of Wyoming an estate consisting of personal and real property; the real estate being of the estimated value of \$30,000, and the personal property of the value of \$40,000. See *In re Thornton's Estate* (Wyo.) 133 Pac. 134. From that decision, it appears that the said J. G. Merrill claimed to be heir to the entire estate under and by virtue of a nuncupative will alleged to have been made by said Thornton during his lifetime, which will was held invalid and void by said decision of the Supreme Court of Wyoming.

During the pendency of said case in the Wyoming courts, nothing was done in the state of Idaho toward administering on that portion of said deceased's estate situated in this state; but after said decision was rendered by the Supreme Court of Wyoming holding said nuncupative will invalid, and on the 29th day of July, 1913, the appellant herein filed his petition in the probate court of Bear Lake county, praying for letters of administration on said estate. Said petition was filed at the instance and written request of George Thornton, one of the brothers of said deceased, who acted therein for and on behalf of himself and the other heirs of said deceased, all of whom were nonresidents of the state. The next of kin surviving said deceased are as follows: George Thornton, Hugh Thornton, and Peter Thornton, brothers of deceased, Anna J. Thornton McDonald, a sister, and the children and heirs of Perry Thornton, a brother of decedent, and the children of Mary Thornton Nolen, a sister of the decedent.

To said petition, the respondent, Merrill, filed a protest, and prayed that letters of administration on said estate be granted to him, and that the application of said Frank Wright for letters be rejected. On the 13th day of August, 1913, said George Thornton filed his verified petition and affidavit in said cause, demanding and requesting that letters of administration be granted to the appellant, Wright.

A hearing was had by the probate court in said matter, and the probate court thereafter made an order denying the application or petition of Wright to be appointed administrator, and granted the application or petition of Merrill, and thereupon issued letters of ad-

ministration to the said Merrill, from which order Wright appealed to the district court, and thereafter said matter was heard upon the records and files of the case and the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties herein, through their respective attorneys, as follows, to wit:

"(1) That the applicant, Frank Wright, is a resident of Bear Lake county, Idaho, and is a person competent to administer on the estate of the deceased, situate in said Bear Lake county, Idaho.

"(2) That the said deceased left no wife surviving him, that his only heirs at law are his brothers, and sisters and nephews and nieces named in the petitions for letters herein, and that all of his said brothers and sisters and nephews and nieces are nonresidents of the state of Idaho.

"(3) That George Thornton, a brother of the deceased, acting for himself and the other said heirs, has requested in writing filed in the probate court of Bear Lake county, Idaho, the appointment of the said Frank Wright as administrator of the estate of said deceased, situate in said Bear Lake county, Idaho.

"(4) That J. G. Merrill, the protestant and an applicant herein, is a resident of Bear Lake county, Idaho, and is a competent person to act as administrator for the estate of said deceased, situate in Bear Lake county, Idaho, and that the said J. G. Merrill is a creditor of said estate.

"(5) That this matter may be heard in this court at this time on the records and files herein and the facts stipulated above."

The district court thereafter entered a judgment affirming the decision of the probate court in the appointment of Merrill as administrator of said estate.

Two errors are relied upon: First, that the court erred in affirming the judgment of the probate court in its appointment of Merrill as administrator of said estate, for the reason that one of the brothers, on his own behalf and on behalf of the other heirs, requested the appointment of said Wright as administrator; second, that the court erred in appointing said Merrill, for the reason that Merrill had failed to apply within a reasonable time for letters of administration, and not until Wright had petitioned for such appointment. Merrill claims to be a creditor of said estate, and bases his application on that ground.

[1] Priority in rights of administration are provided by section 5351, Rev. Codes, and brothers are fourth in order, and creditors tenth in order, under said section. Wright claims the right of appointment under the application of a brother of the deceased, which brother was a nonresident of the state.

It is admitted that both Wright and Merrill are competent to act as such administrator; but it is contended by the appellant that, since the brother and other heirs of said deceased requested the appointment, he had the preference, because the brothers of a deceased are fourth in the order entitled to administration under the provisions of section 5351, Rev. Codes, and a creditor is the tenth in order.

[2] It is also contended that the brothers

had a right to a preference over the creditor under the provisions of section 5365, Rev. Codes, even though they were nonresidents. Section 5365 is as follows:

"Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a nonresident of the state, affidavits taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of the state, may be received as primary evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court."

It is contended by counsel for respondent, under the provisions of section 5365, that a nonresident brother is not competent to serve as an administrator, and for that reason the provisions of section 5365 are not applicable, and that the written request of a brother who is not competent to act as an administrator because of his nonresidence does not come within the provisions of said section; that such written request must be made by one who is competent to act as an administrator and a bona fide resident of the state. Counsel cites, in support of that contention, *In re Estate of Thomas Beech*, 68 Cal. 458, which case was decided by the Supreme Court of California in June, 1883. In that case two applications were made for letters of administration, one by the public administrator, and the other by a person who based his claim upon the written request of a son of the deceased residing in Great Britain, and the trial court decided in favor of the public administrator, on the ground that no effect could be given the request of the son by reason of his nonresidence. The court there held, after reviewing certain other provisions of the statute, that the decision of the trial court was correct. In the decision of the Supreme Court, reference is made to section 1369 of the Code of Civil Procedure of California, which declares, among other things, that no person is competent or entitled to serve as an administrator who is not a bona fide resident of the state. That section corresponds to section 5355 of the Revised Codes of this state. The court there also refers to section 1379 of the Code of Civil Procedure of California, which is substantially the same as section 5365 of the Revised Codes of this state, and the question determined by that court was whether the two clauses of said sections were repugnant or irreconcilably inconsistent; and the court said:

"The former positively declares that no person is competent or entitled to serve as administrator who is not a bona fide resident of the state. The latter does not expressly declare that any person who is not a bona fide resident of the state shall be competent or entitled to so serve. It says, 'when the person so entitled is a nonresident,' his identity may be proven in a certain way. But 'the person so entitled' never can be a nonresident so long as the clause which we have quoted from section 1369 stands unrepealed. So the Legislature appears to have provided for a contingency which cannot arise under the law as it now stands, and, until that

contingency does arise, the latter clause of section 1879 must remain practically inoperative."

The sections above referred to of the Idaho Code were adopted from the California Code, and were a part of the California Code before the Revised Statutes of 1887 of this state were adopted, and that decision was rendered prior to 1887. We are therefore inclined to follow the California Supreme Court on the question under consideration and hold that the application of a non-resident brother and other heirs of the deceased does not give the person recommended by them a preference right over any others entitled to the appointment as administrator under the provisions of said section 5351.

[3, 4] It is next contended that, since Merrill, as a creditor of said estate, neglected and failed to apply for letters of administration for more than a year after the death of said deceased, and until after the application of Wright had been made, under the provisions of section 5363, the court erred in appointing Wright as administrator. Said section is as follows:

"Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves."

It appears that the principal part of the estate of said deceased was situated in the state of Wyoming, and that for about a year after the death of the deceased Merrill was attempting to secure to himself said entire estate through a nuncupative will which the Supreme Court of Wyoming, in the case of *In re Thornton's Estate*, supra, held was not a valid will, and there is no doubt considerable feeling existing between the heirs of said deceased and the said Merrill. It also appears that the heirs claim there is considerably more property in Idaho belonging to said estate than Merrill admits belongs to the said estate, and under all of the facts of the case it certainly appears that Wright, who is conceded to be fully competent to act as administrator, ought to be more satisfactory to all concerned than one who has attempted, rightfully or otherwise, to procure said entire estate to himself.

Under the provisions of said last-mentioned section, we think on account of the long delay of Merrill in making his application for letters of administration, and his not having made such application for some 14 months after the death of the deceased, and until after Wright had made application for such letters, that the court erred in appointing Merrill as such administrator.

The judgment of the trial court is therefore reversed, and the cause is remanded, with instructions to the trial court to reverse its former judgment affirming the judgment of the probate court, and reverse the judgment or order of the probate court appointing Merrill as administrator, and to re-

mand the cause to the probate court for further proceedings in accordance with the views expressed in this opinion. Costs are awarded to appellant.

AILSHIE, C. J., concurs.

## FOX v. SPOKANE INTERNATIONAL RY. CO.

(Supreme Court of Idaho. May 9, 1914.)

### 1. SPECIFIC PERFORMANCE (§ 16\*)—CONTRACT TO CONSTRUCT PRIVATE CROSSING OVER RAILROAD—DEFENSE.

Where a railroad company purchased a right of way across the lands of F., and paid certain cash consideration, and entered into an agreement to construct a crossing over its right of way and track for the convenience, use, and benefit of F., and for such consideration, and upon the execution of such a contract, F. conveyed to the railroad company such right of way, and the company constructed its road thereon, it will not be sufficient excuse to constitute a defense to an action for specific performance of the contract that the roads by and over F.'s land have been changed, and that the railroad track at the place where the crossing was to be constructed runs through a deep cut, instead of on the surface, and that it will be necessary to build an overhead crossing, instead of a grade crossing, and that the expense of constructing and maintaining the same will be heavier than was anticipated by the company at the time the contract was made.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 29, 35, 36; Dec. Dig. § 16.\*]

### 2. SPECIFIC PERFORMANCE (§ 51\*)—CONTRACT TO CONSTRUCT RAILROAD CROSSING—ESTOPPEL.

Where the knowledge or means of knowledge of the future condition or changes that may take place are peculiarly within the possession of the railroad company which is about to construct a railroad, and has agreed to maintain a crossing over its right of way and track, and it enters into a contract to maintain a crossing, it will not thereafter be heard to complain on the ground that the contract was unfair and became more onerous than was anticipated at the time the contract was entered into by reason of the track having to be laid through a cut, instead of on the surface of the ground, and that other conditions have changed since the contract was entered into.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 153, 154; Dec. Dig. § 51.\*]

### 3. SPECIFIC PERFORMANCE (§ 16\*)—CONTRACT TO CONSTRUCT PRIVATE CROSSING OVER RAILROAD—DEFENSE.

Facts of this case examined and considered, and *held*, that it is a proper case for the specific performance of the contract, and that no just defense is presented which would excuse or relieve the company from specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 29, 35, 36; Dec. Dig. § 16.\*]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action for specific performance by August Fox against the Spokane International Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Allen & Allen, of Spokane, Wash., and Herman H. Taylor, of Sandpoint, for appellant. G. H. Martin, of Sandpoint, for respondent.

**AILSHIE, C. J.** This action was brought to compel the appellant railway company to construct an open crossing over its track where it runs through the respondent's land, and to recover damages for the failure and neglect so to do. It is alleged and admitted that on or about the 8th of November, 1905, respondent and appellant entered into an agreement, by the terms of which respondent agreed to convey to the railway company a strip of land 100 feet wide, being 50 feet on each side of the center line of its railroad track, across the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 32, and thereafter the railway company constructed its road across this land. The company agreed to pay the respondent \$125 in cash, and to construct and maintain an open crossing over its right of way and track near by the respondent's residence. The right of way granted runs through respondent's land, dividing it into two tracts, one on each side of the railroad track. Pursuant to this agreement the respondent executed and delivered to appellant a deed for the right of way across the land, and appellant paid therefor \$125, and at the same time executed and delivered to respondent a written agreement for the construction of the crossing, which agreement is as follows:

"Laclede, Idaho, Nov. 8, 1905.

"Pursuant to a deed executed this date for a right of way granted by August Fox to the Spokane International Railway Company across N. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , Sec. 32, Twp. 56 N., R. 3 W., Boise meridian, the said railway agrees to construct and maintain an open crossing across said right of way on the road used by said Fox leading east from his residence. [Signed] Spokane International Railway Company, by Arthur J. Shaw, Right of Way Agent."

After the road was constructed, the matter ran along from time to time without any crossing being made, and in the meanwhile it appears that some change was made in the public road or thoroughfare across and by respondent's land. In the summer of 1912 the railroad company fenced its right of way, without making provision for the construction of the crossing as provided for in its agreement. Thereafter, on the 5th day of August, 1912, respondent, through his attorney, made written demand upon appellant for the construction of the crossing, and thereafter, on the 6th day of August, 1912, the president of the appellant company, D. C. Corbin, wrote to the attorney for respondent in reply to the demand for the construction of the crossing as follows:

"Spokane International Railway Co.,

"Spokane, Washington, August 6, 1912.

"Mr. G. H. Martin, Attorney, Sandpoint, Idaho—Dear Sir: I have your letter of the 5th inst. You may inform your client that we will

comply with our agreement with him very shortly. Yours truly, [Signed] D. C. Corbin, President."

The controversy arose over the fact that the railroad company had made a deep cut through respondent's land in the place where it was agreed this crossing should be maintained, and it became impracticable to construct and maintain a grade crossing, but, on the contrary, would be necessary to construct and maintain an overhead crossing in the event any crossing is maintained there at all.

[1-3] The chief contention made by appellant is that to construct and maintain an overhead crossing over appellant's road will be a continuing and perpetual expense and charge on the railroad company, and that the failure to construct such crossing can be adequately compensated in damages, and that under such circumstances specific performance should not be ordered. In justification and support of this contention, appellant quotes at length from Pomeroy on Contracts at section 185, where the author discusses the subject of specific performance as follows:

"Not only must the agreement be fair and reasonable in its terms and its surrounding circumstances, it is also a well-settled doctrine that its specific execution must not be oppressive—that is, the performance must not be a great hardship to the parties. This rule includes the one treated of in the last section, since every unfair contract is essentially unconscionable and hard; but it is more extensive, since the oppressive nature of the performance may result from the situation or relations of the parties exterior to and unconnected with the terms of the contract itself or the circumstances of its conclusion. The oppression and hardship, therefore, which fall within the scope of the doctrine may result from the unequal, unconscionable provisions of the contract itself, or from external facts, events, or circumstances which control or affect the situation and relations of the defendant with respect to the performance."

In our opinion, the present case is not one presenting such facts as will bring it within the rule which Mr. Pomeroy suggests. Here the contract was fairly made, and the facts were equally known to both parties. The promise to construct and maintain the crossing was part of the consideration for the right of way, and, while its maintenance will be a continuing and permanent charge on the railroad company, that was necessarily included in the terms of the contract, and must have been foreseen and contemplated at the time of the execution of the contract. While it may not have been anticipated that a grade crossing could not be maintained, that knowledge was peculiar to the railroad company, and not to the landowner, and respondent cannot be charged with such knowledge, or with in any way overreaching appellant in securing a contract for a more expensive crossing than it could foresee or anticipate. The company had charge of establishing its grades, and in so laying its road as to make a cut at the place where this crossing was

to be built and maintained. On the other hand, if the court should refuse to decree a specific performance of this contract, it would result in perpetually lessening the value of respondent's land and impairing its use to the owner, and, if he should want to sell it to some one else, he would not be able to realize as much from such sale without this crossing as he would be able to get with it.

This case seems to fall within the rule adopted in *Lane v. P. & I. N. Ry. Co.*, 8 Idaho, 230, 87 Pac. 656, and the discussion contained in the opinion of that case is well applicable here.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN, J., concurs.

### SWANSTROM v. FROST.

(Supreme Court of Idaho. May 12, 1914.)

#### 1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Facts of this case examined, and held sufficient to support a verdict that the defendant was guilty of negligence, and to warrant a verdict and judgment for damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

#### 2. APPEAL AND ERROR (§ 1002\*)—VERDICT—EVIDENCE—MASTER AND SERVANT.

Where a log decker was injured by being knocked off the deck by a "gunning" log, and sues his employer for damages, and charges that the master was negligent, in that he furnished a deaf teamster to drive the team that was doing the cross-hauling, and that he did not furnish a reasonably safe place for the team, and that, on the contrary, the place where the team had to walk was so muddy, swampy, and unsafe that it irritated and excited the team so that they could not be stopped upon signal, and that his injuries resulted from either a failure of the driver to hear the signal or the inability of the driver to stop the team upon receiving the signal, and there is some evidence in the record which would sustain either one or both of the contentions, the verdict and judgment in favor of the party injured will not be disturbed, even though the preponderance of the evidence is against his contention.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by Otto Swanstrom against W. E. Frost, doing business as the Frost-Cope Lumber Company. From judgment for plaintiff, defendant appeals. Affirmed.

G. H. Martin, of Sandpoint, for appellant. O. J. Bandelin, of Sandpoint, and George M. Ferris, of Spokane, Wash., for respondent.

AILSHIE, C. J. This action was instituted by the plaintiff in the lower court for the recovery of damages for personal injuries re-

sulting from the alleged negligence of the defendant. The plaintiff received his injuries while "decking" logs. It appears that the plaintiff, who is respondent in this court, was a log decker, and was set to work by appellant decking sawlogs while the logs were being hauled upon the deck by means of a team attached to a long chain, and the logs were thus being elevated to the deck by a method called "cross-hauling." The team was driven by another employe of the appellant. While the logs were being hauled up the skidway to the deck, it was the duty of respondent to signal the teamster whenever he desired the team to stop, and it was the duty of the teamster to stop on the signal from the man on the deck.

The grounds of negligence charged are (1) that the teamster employed by appellant was deaf, and could not, and did not, hear the signal to stop, and (2) that the ground over which the team had to travel in hauling the logs onto the deck was so muddy, swampy, and in such a dangerous condition as not to afford the team sure or safe footing, which resulted in irritating the team, and rendering them unmanageable, and making it impossible to stop them promptly on giving the signal.

In hauling a log onto the deck, after the deck had been built to a height of about 16 feet, one end of the log moved up the skidway faster than the other, pointing crosswise of the deck, which is called by lumbermen "gunning." The respondent claims that he gave two or three signals to the driver to stop, but that the driver either failed to hear the signal or neglected or was unable to hear the team, and so they kept going, and respondent, in his effort to get out of the way of the log, was thrown off the deck, receiving severe injuries, for which this action has been prosecuted. The case was tried to a jury, and a verdict rendered in favor of the respondent, and this appeal was thereupon prosecuted.

[1,2] It is contended that the evidence fails to disclose any negligence on the part of the appellant, and that, on the contrary, the respondent both assumed the risk and was guilty of contributory negligence.

If we were adjudging this case in the capacity of jurors for the purpose of weighing the evidence and determining the preponderance of the evidence, we are inclined to the opinion that upon the record as it comes to us on appeal we should conclude that the respondent both assumed the risk and so contributed in negligent acts as to bar a recovery. We are mindful, however, of the fact that in this case there must have been some circumstances and conditions which confronted the jury and trial court which we cannot see or learn from a record. There is also some evidence in the record which may be considered material and substantial

that would support such a verdict. In our opinion, there is sufficient in this case to bring it within the rule this court has announced in *Adams v. Bunker Hill, etc., Co.*, 12 Idaho, 637, 89 Pac. 624, 11 L. R. A. (N. S.) 844; *Carscallen v. Cœur d'Alene, etc., Co.*, 15 Idaho, 444, 98 Pac. 622, 16 Ann. Cas. 544; *Wheeler v. O. R. & N. Co.*, 16 Idaho, 375, 102 Pac. 347; *Maloney v. Winston Bros.*, 18 Idaho, 740, 111 Pac. 1080, 47 L. R. A. (N. S.) 634; *Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9; *Staab v. Rocky Mt. Tel. Co.*, 23 Idaho, 314, 129 Pac. 1078; and *Calkins v. Blackwell Lumber Co.*, 23 Idaho, 128, 129 Pac. 435.

The question argued by appellant that respondent was at fault, in that he received the injury while attempting to "square" the log by throwing his weight on it when it was "gunning," is not a controlling question here. This question went to the jury, and they evidently thought the respondent did not act negligently or recklessly. The jury may have concluded that the team used on the "cross-haul" was not a safe team, or that the driver was deaf, and that the employer was negligent in furnishing such a team or such a driver, or in both respects. These reasons were advanced by respondent as grounds of negligence on the part of the employer.

We find no error in the giving or refusing to give instructions.

The judgment is affirmed. Costs awarded in favor of respondent.

SULLIVAN, J., concurs.

#### RICHARDSON v. BOHNEY.

(Supreme Court of Idaho. May 7, 1914.)

##### 1. APPEAL AND ERROR (§ 1026\*)—REVIEW—HARMLESS ERROR.

No judgment will be reversed upon appeal by reason of errors or defects in the proceedings below which do not affect the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. § 1026.\*]

##### 2. BOUNDARIES (§ 37\*)—HOMESTEAD ENTRIES—EVIDENCE.

Evidence examined, and held, that there is substantial evidence to support the verdict and findings of the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by George A. Richardson against Joseph D. Bohney. Judgment for plaintiff, and defendant appeals. Affirmed.

Millsaps & Moon, of St. Anthony, for appellant. Soule & Soule, of St. Anthony, for respondent.

WALTERS, District Judge. This action was commenced by the plaintiff for the purpose of ascertaining and determining the

true boundary line between the homestead entries of the plaintiff and the defendant, Joseph D. Bohney. The plaintiff and defendant differed as to the location of said line as established by the original government survey. By answer the defendant put in issue the allegations of the complaint as to the location of said line, and such question was by trial presented to a jury, who returned a general verdict in favor of the plaintiff, and made answers to interrogatories in each instance favorable to the contention of the plaintiff. The defendant brings this action here for review upon ten assignments of error, the first nine of which urge that the court erred in overruling the defendant's objection to some several questions on the ground that the same were incompetent, immaterial, and irrelevant, were not proper rebuttal, or were not proper cross-examination.

1. The record discloses that this action consumed five days for trial, and that 22 witnesses were called and testified, the greater number of them being returned to the stand more than once; the transcript of the testimony being over 600 pages in volume. From the length of time occupied in trying the case and the number of witnesses called, it may readily be seen that it would be quite extraordinary if erroneous rulings of the trial court upon some several questions on the ground that the same were incompetent, immaterial, and irrelevant, or not proper rebuttal or proper cross-examination, would constitute reversible error, such as to authorize or justify the judgment being disturbed, where no controlling principle of law was involved. Counsel for appellant, however, concede that the law of the case as announced and invoked by the trial court was correct.

[1] We can note no error in the particulars assigned sufficient to authorize or require a reversal of this judgment, for, if there is any error in the rulings questioned, it is but purely technical, and in no sense and no manner prejudicial, and, at most, can only be such harmless or technical error as abounds in every trial of some considerable length which is vigorously, and oftentimes blunderingly, contested. This court is admonished by section 4231 of the Revised Codes that no judgment shall be reversed or affected by reason of errors or defects which do not affect the substantial rights of the parties.

[2] 2. It is further lastly urged by counsel for appellant in assignment of error No. 10 that the verdict and findings of the jury were not in accordance with the evidence. It may, in short, be said that there is very substantial evidence to support the verdict and findings of the jury and the judgment duly entered herein, and that, in accordance with the provisions of section 4824 of the Revised Codes, requiring "that whenever there is substantial evidence to support a verdict



the same shall not be set aside," the judgment entered herein should not be set aside and is hereby affirmed.

Costs are awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

**MILLER v. KLASNER. (No. 1573.)**

(Supreme Court of New Mexico. April 28, 1914.)

*(Syllabus by the Court.)*

**1. INJUNCTION (§ 114\*)—PARTIES—WATERS AND WATER COURSES.**

It is a familiar and fundamental rule that a court can make no decree affecting the rights of a person over whom it has not obtained jurisdiction, or between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. *Held*, in a suit to enjoin A. from interfering with a certain ditch and the distribution of water therefrom, where A. was acting under authority of B., not a party to the suit, and who owned an interest in the ditch, and conducted water through the same for the irrigation of her lands, that B. was a necessary party to the suit, as complainant's right to the relief depended upon an adjudication of his right to the use of the ditch and water as against B.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.\*]

**2. PARTIES (§ 84\*)—OBJECTION—WAIVER.**

The general rule is that a defendant must take advantage of the defect of parties defendant by demurrer or answer, failing in which the objection is waived, but this rule does not apply to an indispensable party, and where the court may not proceed to a decree or judgment without his presence.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-142, 171; Dec. Dig. § 84.\*]

**3. JUDGMENT (§ 138\*)—DEFAULT—VACATION.**

A default judgment will be set aside as irregular, when it appears that the real party in interest was not made a party defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.\*]

Appeal from District Court, Lincoln County; E. L. Medler, Judge.

Action by Hurim M. Miller against Lillie C. Klasner. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Renehan & Wright, of Santa Fé, for appellant. Geo. B. Barber, of Carrizozo, for appellee.

ROBERTS, C. J. Appellee instituted this action in the district court of Lincoln county, to enjoin appellant from interfering with his right to the use of a stated amount of the water flowing through an irrigation ditch, known as "the school land ditch," through which water was diverted from the Rio Hondo for the irrigation of appellee's lands, and certain lands alleged to be under the control of appellant. The prayer was for a determination of the rights of the parties in and to said waters, and an allotment of the use thereof upon certain days of each week,

and injunction against appellant restraining her from interfering with the water during the time appellee was awarded its use, and for general relief. Appellant answered, denying generally the allegations of the bill. She also filed a cross-complaint, by which she asked for affirmative relief against appellee. A referee was appointed by the court to take the testimony and report the same to the court. Such referee served notice of the time and place of hearing by mailing to the attorney of each party a written notice thereof. Appellant's attorney, George W. Prichard, Esq., who resided in Santa Fé, received the said notice, and immediately notified the referee that he would not be able to be present at the time fixed, by reason of previous engagements. He also stated that he would notify his client, so that she could make other arrangements. The referee thereupon mailed a notice of the time and place of hearing to the appellant, by registered mail, but this notice was misssent by the post office authorities to Roswell, N. M., and appellant did not receive the same until some time after the hearing. Appellant denied receiving any information from her said attorney of his receipt of said notice and inability to be present. At the time and place appointed, or an adjourned date, the referee proceeded to take the testimony, and reported the same to the court. The court, upon motion, and without notice to appellant, proceeded to consider the testimony so taken and the referee's report, and rendered judgment thereon. By its judgment the court awarded and decreed to the appellee a two-thirds in said ditch and all the water flowing therein, and to Ellen Casey, mother of appellant, not a party to the suit, a one-third interest in said ditch and all the water flowing therein. Thereupon the court proceeded to and did apportion the use of said water between the appellee and Ellen Casey, specifying the days of each week when each party should have the right to the use of the water. Appellant was perpetually enjoined from interfering with said ditch, or the use of the water which was awarded to appellee. From the record before us it is apparent that appellant was either the agent of her mother, Ellen Casey, or was a tenant in common with her mother and others in and to the lands over which she exercised supervision and control. Within a few days after the judgment was entered, appellant moved the court to set the same aside for divers reasons, stated in her motion. This motion was overruled, and the cause was removed to this court by appeal.

[1] Appellant contends that the court should have vacated the decree, because she had no opportunity to defend her rights. Waiving this question, however, the judgment in question should have been set aside, because it appears from the decree itself that Ellen Casey was a necessary and indispen-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

sable party to the action. It is a familiar and fundamental rule that a court can make no decree affecting the rights of a person over whom it has not obtained jurisdiction, or between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. *Shields et al. v. Barrow*, 17 How. 130, 15 L. Ed. 158. In this case appellee's right to the relief which he sought necessarily depends upon a determination of his right to the use of the ditch and water as against Ellen Casey, or the principals, represented by appellant. Until this right was determined the court could not rightfully enjoin appellant from using the water, as the representative of these absent parties. The injunction was necessarily predicated upon the prior determination of these rights. The interest of Ellen Casey was necessarily so interwoven with the interests of the parties to this suit that no decree could possibly be made, affecting the rights of those before the court, without operating upon her interest. Such being the case, she was an indispensable party, without whom the court could not lawfully proceed. *C. S. M. Co. v. V. & G. H. W. Co.*, 1 Sawyer, 685, Fed. Cas. No. 2,990. When this fact was developed by the evidence, even though it had not been raised by the pleadings, the court should have taken notice of the same and have directed that the cause stand over, in order that such party could be brought in. As was said by the Massachusetts Supreme Court, in the case of *Schwoerer v. Boylston Market Association*, 99 Mass. 285: "If there be an omission of an indispensable party, so that a complete decree cannot be made without him, the court will itself, *ex mero motu*, take notice of the fact, and direct the cause to stand over, in order that such new party may be added."

[2] While it is true, the general rule is that a defendant must take advantage of the defect of parties by demurrer or answer, failing in which the objection is waived, still this rule does not apply to an indispensable party, and where the court may not proceed to a decree or judgment without his presence. *Peck v. Peck*, 33 Colo. 421, 80 Pac. 1063; *Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166.

[3] The only remaining question then is whether the objection that there is the want of a necessary and indispensable party can be taken after a judgment by default, by motion to set aside the judgment. This question was answered in the affirmative by the Supreme Court of Texas, in the case of *Ebell v. Bursinger*, 70 Tex. 120, 8 S. W. 77. The court say: "The court should not render a judgment, there being the want of a necessary party to a suit. The defendant in such a case has a right to presume that the court will not enter an erroneous judgment against him, and hence should not be held in default

until the necessary party is brought before the court. If judgment by default be taken, it should be set aside upon motion; and in case the motion be overruled it will be reversed upon appeal or a writ of error." See, also, *Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S. W. 559, and *Black on Judgments* (2d Ed.) § 326, where the author says that a judgment taken by default will be set aside as irregular, when it appears that a real party in interest was not made a party defendant.

This being true, the trial court should have sustained appellant's motion to vacate and set aside the judgment. For its failure so to do the judgment must be reversed and the cause remanded, with instructions to sustain the motion to vacate the judgment, and to proceed no further until the necessary parties are made parties defendant by amendment, and that upon appellant's failure to do this the suit be dismissed, unless by amendment issue can be joined, that the rights of others will not be affected by the judgment; and it is so ordered.

HANNA and PARKER, JJ., concur.

STATE v. PROBERT. (No. 1565.)

(Supreme Court of New Mexico. April 28, 1914.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 110\*) — SUFFICIENCY—LANGUAGE OF STATUTE.

An indictment for embezzlement under section 1123, Comp. Laws 1897, in the exact language of the statute is sufficiently specific to require no amplification. It is only where the terms of a statute are so general as to require specification of detail in order to identify a given transaction with which it is sought to charge a defendant that the allegations of an indictment must be expanded beyond the statutory terms. To allege that a person has fraudulently embezzled and converted to his own use the money of another is to allege that he so did with intent to defraud. To do an act fraudulently is to do it with intent to cheat and defraud.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

2. CRIMINAL LAW (§ 603\*)—MOTION FOR CONTINUANCE—SUFFICIENCY.

A motion for a continuance which fails to allege that the affiant believes in the truth of the fact to be testified to by the absent witness, as required by section 2936, Comp. Laws 1897, is properly overruled.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.\*]

3. EMBEZZLEMENT (§ 30\*)—INDICTMENT—ALLEGATION OF OWNERSHIP.

The title to money which is contracted to be deposited by the vendee to the credit of one tenant in common is properly laid in such tenant in common, notwithstanding his cotenant may be entitled to his share of the fund upon an accounting between them.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 44, 45; Dec. Dig. § 30.\*]

**4. EMBEZZLEMENT (§ 35\*)—INDICTMENT—VARIANCE.**

Where a vendee covenants with a vendor to deposit in a bank to his credit a sum of money pending an investigation of title to the real estate, and attempts to perform his contract by drawing his check in favor of the bank for the amount, which check and the proceeds thereof are embezzled by the president of the bank, and are never so deposited, and where the check is not treated by the parties as a present deposit of the amount, the title to the check and the proceeds thereof remain the property of the drawer of the check, and an allegation of title to the funds in the vendor is not sustained.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 55-59; Dec. Dig. § 35.\*]

Appeal from District Court, Taos County; T. D. Leib, Judge.

A. Clarence Probert was convicted of embezzlement, and appeals. Reversed and remanded.

A. C. Voorhees, of Raton, and F. T. Cheetham, of Taos, for appellant. Frank W. Clancy, Atty. Gen., for the State.

**PARKER, J.** The appellant was indicted for the crime of embezzlement, under section 1122, C. L. 1897, which is as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent, or servant of a private person, or of any co-partnership, except apprentices, and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use, any money or property of another, which shall have come to his possession or shall be under his care, by virtue of such employment, he shall be deemed by so doing, to have committed the crime of larceny."

The indictment charged that the appellant did "then and there unlawfully, feloniously, and fraudulently embezzle and convert to the use of him, the said A. Clarence Probert, certain property then and there of and belonging to Roy A. Clifford, to wit, the sum of five hundred dollars, which said property had theretofore come into the possession of and was then and there under the care of him, the said A. Clarence Probert, by virtue of his, said A. Clarence Probert's, employment as such officer, agent, and servant of such corporation, said State Savings Bank; which said property aforesaid, to wit, the sum of five hundred dollars, being then and there of the goods and chattels of the said Roy A. Clifford, he, the said A. Clarence Probert did then and there knowingly, willfully, unlawfully, and feloniously take, steal, and carry away, contrary to the form of the statute," etc.

[1] Appellant moved to quash the indictment upon several grounds, only one of which is present here, viz.: That the indictment fails to allege that the embezzlement was committed with intent to defraud the owner of the money. Counsel cites *Territory v. Heacock*, 5 N. M. 54, 20 Pac. 171, as supporting their contention. The indictment in that

case was drawn under section 1123, C. L. 1897, and the case is not therefore authority as to the proper interpretation of section 1122. Section 1123 covers the crime of embezzlement by carriers of goods or property, and for that reason the defendant in the *Heacock* Case was held not to be properly charged in the indictment, he being a justice of the peace, and having collected a fine which he failed to account for. The court, in the *Heacock* Case, further pointed out that the indictment in that case was defective, by reason of the fact that it contained no allegation as to how the defendant became intrusted with the money with the embezzlement of which he was charged. This part of the decision is entirely inapplicable to this case.

The indictment in this case charges the defendant with the alleged crime in the exact language of the statute, and the terms of the statute are sufficiently specific to require no amplification by the pleader. It is only where the terms of a statute are so general as to require specification of detail in order to identify a given transaction with which it is sought to charge a defendant that the allegations of an indictment must be expanded beyond the statutory terms. 1 *Bishop's New Cr. Proc.* §§ 623-630; 22 *Cyc.* 341.

The Attorney General argues that embezzlement is a statutory offense, and that an allegation of intent to defraud is not required by the statute, to which we agree. But, if it were required, it is contained, in substance, in the indictment. To allege that a person fraudulently embezzled and converted to his own use the money of another is to allege that he so did with intent to defraud. To do an act fraudulently is to do it with intent to cheat and defraud. *State v. Noland*, 111 Mo. 473, 19 S. W. 715.

[2] 2. The court overruled a motion for continuance based upon the absence from the jurisdiction of a witness. The affidavit in support of the motion fails to allege that the defendant believed in the truth of the facts to be testified to by the absent witness. This alone defeats the motion, under the terms of section 2986, C. L. 1897. *Kent v. Favor*, 3 N. M. (Gild.) 350, 5 Pac. 470.

[3] 3. The most important question in the case is raised by a motion for a directed verdict of acquittal. The motion was founded upon the proposition that there is a variance between the allegations and the proof as to the ownership of the property which was the subject of the embezzlement.

It appears that one Clifford and one Chase, of the first part, and one Woody, of the second part, entered into a contract for the sale of what is called the "Hilton Ranch"; that Woody agreed to deposit to Clifford's credit in the State Savings Bank of Taos the sum of \$500, pending the examination of title of the property; that, if the title was approved, the balance of purchase price was to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

likewise deposited to Clifford's credit in the Taos Bank; if the title was disapproved, the \$500 was to be returned to Woody. Woody drew his check on his bank at Tucumcari for \$500 in favor of the Taos bank, and delivered the same to the defendant, who was president of the latter bank. The evidence shows that this check was forwarded for collection, and in due time was collected and credited to the account of the Taos bank. The embezzlement by the defendant, if it was committed, consisted in placing this check to the credit of his own personal account in the Taos bank, which was overdrawn, on the day following its receipt by the bank, through him as its president. The indictment alleges ownership of the \$500 in Clifford.

It is alleged that there is a fatal variance between the allegations and the proof, because: First, if title to the money passed from Woody at all, it passed to Clifford and Chase jointly; and, second, the title to the money remained in Woody until the conditions of the contract in regard to the approval of the abstract of title had been complied with.

The first proposition above stated needs little discussion. It is true that it appears that Chase was the joint owner with Clifford of the subject-matter of the contract, but it is likewise true that the contract provided for the deposit of the entire purchase price of the property to the credit of Clifford in the Taos bank. If Chase was entitled to receive any portion of this purchase price by reason of his joint ownership it was a mere matter of contract between Clifford and Chase. The title to the money when paid would pass to Clifford, and, if Chase was entitled to any portion of the same, Clifford simply owed him the money. After the money was paid to Clifford, if it was, the relation between Clifford and Chase would become that of trustee and beneficiary, giving to Chase the right to an accounting and recovery of his proportion of the fund. This relation between these two parties would not operate to transfer the legal title to Chase of his proportion of the fund.

[4] 4. The second proposition above stated, that the title to the money remained in Woody, is more serious. The contract provided: "The second party hereto agrees to deposit with the State Savings Bank of Taos, New Mexico, the sum of five hundred dollars, to be placed to the credit of Roy A. Clifford, pending the examination of title to the said real estate; the said second party further agrees that the said deed and abstract shall be sent by the State Savings Bank of Taos, N. M., to the International Bank of Commerce at Tucumcari, N. M., for examination and approval, and if approved the said second party shall send to the State Savings Bank of Taos a draft of the said International Bank of Commerce of Tucumcari for the sum of twenty-eight hundred dollars, the balance of the purchase price of the said parcel

of real estate, to be placed to the credit of the said Roy A. Clifford. In case of nonapproval of abstract, the said sum of five hundred dollars shall be returned by the said State Savings Bank of Taos to B. M. Woody at Tucumcari, New Mexico."

After executing the contract, Clifford and Woody went to the Taos bank and left a copy of the contract with the defendant, as its president. Woody attempted to carry out his contract with Clifford, and drew his check on the Tucumcari bank in favor of the Taos bank for \$500, and delivered the same to the defendant. The check was forwarded for collection and paid, but the amount was never credited by the bank to Clifford, nor did it obligate itself to pay him the same. Clifford testified in regard to the transaction as follows: "Q. State to whose credit that check was to have been deposited? A. It was to have been placed to my credit upon the acceptance of the deal."

Woody testified: "Q. What was said there relative to this agreement? A. Well, it was after business hours. We just left the agreement with Probert and he filled out a check for \$500 on the International Bank of Tucumcari, and I signed it, and he placed the check in an envelope, and was to leave it there until the deeds were sent to Tucumcari bank. Q. Did you so instruct him? A. Yes, sir."

On cross-examination, he testified: "Q. Mr. Woody, what was the understanding between you and Mr. Probert at the time you left the check there as to what he should do with the \$500 check? A. He was to have the check cashed and hold the money until the trade was through."

There is no evidence that the Taos bank or the defendant specifically undertook or agreed with Clifford to do anything as his agent. The undertaking to him, if there was one, was implied. The undertaking on the part of the bank or the defendant was with Woody to take his check and hold it (Woody says on direct examination) until the abstract of title was examined, and, if approved, it was to be turned over to Clifford. On cross-examination, he testified that the check was to be collected and the proceeds held pending the closing of the deal. If the transaction is to be viewed in the light of the contract, and what was actually done, and Woody's testimony on cross-examination, the check was received for collection as the agent of Woody, and the proceeds, when collected, were to be retained as a sort of earnest money, and in the nature of an escrow. But this latter was never done by the defendant or the bank. The transaction never proceeded that far, and neither the defendant nor the bank ever discharged the obligation of Woody by accepting the money in escrow under the terms of the contract, or depositing the same to Clifford's credit. The proceeds of the check were intercepted before they reached the destination intended by the parties. This took place

the next day after the check was given, so far as any act of the defendant is concerned, by his placing the check to his own credit, and thereby paying his overdraft in the bank. In neither of the views of the transaction above outlined could the title to the proceeds of the check pass to Clifford. In the first place, under section 189 of our Negotiable Instruments Law, the giving of the check did not operate as an assignment of the funds of the drawer, Woody. Section 189, c. 83, Laws of 1907. Until the check of Woody was actually presented to the Tucumcari bank, and paid out of his funds, no possession or control of his funds could by any possibility be obtained by either the Taos bank or the defendant, and consequently up to that time there could be no embezzlement of the same. If the defendant committed any act of embezzlement prior to the payment of the Woody check, he embezzled something other than the funds of Woody, and that something must have been the check itself, and not the funds. If, on the other hand, the transaction be treated as a deposit by Woody in the Taos bank upon the handing in of the check, the proceeds to be applied as directed by the contract, then the deposit was for collection and was specific, and the title to the proceeds remained in Woody until the purposes for which they were deposited had been carried out. 1 Morse on Banks and Banking, § 185; Covey v. Cannon, 104 Ark. 550, 149 S. W. 514.

The mere fact that Woody had contracted with Clifford to deposit the money to his credit, and had employed the agency of the Taos bank or the defendant to accomplish that end, did not operate to pass the title to his money to Clifford. It was a mere contract to deposit, not a deposit, in escrow. Something more was required, viz.: The money must be collected, and there must be some undertaking on the part of the bank to Clifford to hold the money for him according to the terms of the contract. If the money itself had been handed in to the bank by Woody and Clifford, together with the contract, and the bank or the defendant had accepted it in accordance with the terms of the contract, then the charge of the embezzlement of the same as the property of Clifford might be perhaps maintained, he having a special ownership therein. In such case Woody might be held to be the agent of Clifford, and the latter might be held to be the real depositor, or the deposit to be joint. Mayer et al. v. Bank, 51 Ga. 325.

In this connection it is to be noted that neither the bank nor the defendant received any written instructions as to the disposition of the so-called escrow. If the evidence of Clifford is to control, then the defendant embezzled the check, and not the funds. He is not so charged.

Counsel on both sides consider the transaction as a deposit of the check for collec-

tion, and an embezzlement of the funds, and there is evidence to support this view. But, as we have seen, if the defendant embezzled the money, it was Woody's money, and not Clifford's. He is not so charged.

It follows from the foregoing that there was a variance between the allegations and the proof as to the ownership of the funds, amounting to a failure of proof.

Other errors are assigned, but need not be considered.

For the reasons stated, the judgment of the court below will be reversed, and the cause remanded, with instructions to award a new trial, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

# STATE v. COOLEY. (No. 1628.)

(Supreme Court of New Mexico. May 12, 1914.)

## (Syllabus by the Court.)

### 1. HOMICIDE (§§ 23, 28\*)—REDUCTION OF OFFENSE—DRUNKENNESS—"MURDER IN SECOND DEGREE.

Between the two offenses, murder in the second degree and voluntary manslaughter, the drunkenness of the offender forms no legitimate matter of inquiry; if the killing is unlawful and voluntary, and without deliberate premeditation, the offense is murder in the second degree, malice being implied, unless the provocation were of such character as would reduce the crime to voluntary manslaughter, for which offense a drunken man is equally responsible as a sober one.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40, 44, 45, 46, 133; Dec. Dig. §§ 23, 28.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4641, 4642; vol. 8, p. 7727.]

### 2. HOMICIDE (§ 252\*)—REDUCTION OF OFFENSE—DRUNKENNESS—PROOF.

Where a defendant, charged with first degree murder, relies upon the defense of intoxication for the purpose of reducing the grade of the offense to murder in the second degree, he is not required to establish the fact of his intoxication, or that at the time he inflicted the fatal injuries he was so deeply intoxicated as to be incapable of forming in his mind a deliberate premeditated design to do the killing, beyond a reasonable doubt. All that he is required to do is to introduce such evidence as will raise in the minds of the jurors a reasonable doubt as to such facts in order to reduce the grade of the offense to murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 518-522; Dec. Dig. § 252.\*]

### 3. CRIMINAL LAW (§§ 706, 730\*)—EXAMINATION OF WITNESSES—CURATIVE INSTRUCTIONS.

It is improper for the court, in the trial of a criminal case, to permit the district attorney to ask witnesses if he (the district attorney) did not instruct said witnesses not to talk to any one about the cause, and if they did not, in violation of such instructions, talk to the attorney for the defendant about the facts in the case; and, where the court erroneously permits such questions to be asked and answered, it should, upon request, instruct the jury that the district attorney had no right to forbid witnesses talking to the attorney for the defend-

ant about the facts in the case, or to enforce such an order.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1661, 1693; Dec. Dig. §§ 706, 730.\*]

#### 4. CRIMINAL LAW (§ 451\*)—EVIDENCE—OPINION.

Where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion in order to put the jury in a position to make the final decision of the facts. *Held*, that the court erroneously withdrew from the jury a statement by a witness that the defendant and deceased appeared to be perfectly friendly toward each other five minutes before the killing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1040-1042; Dec. Dig. § 451.\*]

Appeal from District Court, Rio Arriba County; E. C. Abbott, Judge.

Claud M. Cooley was convicted of murder in the first degree, and appeals. Reversed and remanded.

The appellant was indicted at the November, 1912, term of the district court for Rio Arriba county for the murder of one Edwin A. Gilliland. The case was tried to a jury at the June, 1913, term, and resulted in a verdict of murder in the first degree. Motion for a new trial was duly filed, overruled, and the appellant sentenced to be hanged on the 25th day of July, 1913, from which judgment and sentence this appeal is prosecuted.

The homicide occurred on the 22d day of December, 1911, at the town of Chama, in the county of Rio Arriba, and state of New Mexico; the deceased and the defendant were first cousins, and had practically lived together as members of the same family from earliest childhood. There was only about a month's difference in their ages. On the night before the homicide there had been a "Gun Club Dance" in one of the public halls at Chama, at which guns, cartridge belts, hunting knives, etc., had been used for decorative purposes. The deceased, Gilliland, acting as a member of the decorating committee, had charge of securing the various guns and other weapons used to decorate the hall. The appellant did not go to the dance. The next day, the 22d day of December, Gilliland attended to the returning of the various guns used to decorate the hall, and brought a number of them to the room occupied jointly by himself and the appellant.

On the day of the homicide the appellant, after getting his lunch, went down to the depot with a small nephew to meet an older sister of the appellant's, who was expected to arrive on the afternoon train from Denver. While at the station waiting for the train, he had several drinks of whisky from a bottle carried by a man whom he met at the depot. The appellant's sister did not come as expected, and after the departure of the af-

ternoon trains the appellant, with several others, including the deceased, Gilliland, made the rounds of the saloons, and spent the balance of the afternoon playing cards and drinking.

According to the testimony, Gilliland drank very little, if anything, during the afternoon, taking cigars instead of liquor. The appellant was drinking whisky during the entire afternoon. About supper time the defendant and the deceased left the Navajo saloon to go to supper, but changed their minds and went to the Social Club saloon, where they played a couple of games of pool (the appellant taking another drink), then left and went back to the Navajo saloon, where they met a friend by the name of Pogue. Gilliland took one drink, and the appellant and the man Pogue took several drinks. At this time the appellant began to feel the effect of the liquor he had taken; but Gilliland was perfectly sober. At about this time the bartender in the Navajo saloon stated to the appellant that he had a box of apples down at the depot which he wanted to get out of the express office before it was locked up. Gilliland and the appellant went down to the depot and succeeded in getting the box of apples, returning with it; the box being carried by Gilliland to the saloon from which they started. There the appellant had at least three drinks; Gilliland not taking any.

At this point in the proceedings there was some discussion between the appellant, the bartender, and a man by the name of Branson as to the appellant's condition of sobriety. The bartender then started out of the saloon for his home; the deceased following him with the box of apples on his shoulder, and the appellant trailing behind.

Between the hours of 3 o'clock in the afternoon and about 7:30 of the 22d day of December, 1911, the day of the killing, defendant had taken, in all, fourteen drinks of whisky of different quantities and one small beer.

The appellant remembered every minute detail of the events occurring during all of that time until he left the saloon en route home in company with the deceased and another person. From that time on he claims to remember absolutely nothing until he awoke in jail the next morning.

Somewhat later, and about 7 o'clock, one George A. Kelly, a witness for the state, met the appellant, with another man, in front of the Social Club saloon and spoke to them. Cooley answered in Spanish, and the witness then saw that his face was bleeding, and asked him what had happened. He said he had been hit; Cooley talking in Spanish, and the witness not understanding all that was said, or by whom Cooley claimed that he had been hit. The witness Kelly, with the assistance of one Joe Martinez, then proceeded to take Cooley to his room. Both the witness

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

Kelly and the witness Martinez testified that Cooley was very drunk, staggering, and had to be helped down the street. When they arrived at the room, they found the deceased, Gilliland, in bed asleep. He awakened after they had entered, and they all three tried to induce Cooley to get into bed. Cooley was staggering around the room, and upset some of the furniture, and picked up one of the guns in the room. At about this time the witness Kelly asked Gilliland if there were any loads in the room for the gun, to which Gilliland replied in the negative, speaking to Cooley, and telling him, in a joking way, "Come on to bed, you damn fool," and telling Kelly and Martinez that it was all right, that he would take care of Claud. The witnesses Kelly and Martinez then left the room.

The room occupied by the appellant and the deceased was in a house owned by the appellant's mother and occupied by a Mrs. Fitzer, who, together with one Gladys Bryan, was in the front room, sewing. They testified that they heard some disturbance, which sounded like furniture being overturned, also some talking, but that the talking was not particularly loud or boisterous; that this noise continued for some few moments, when a shot was heard. Mrs. Fitzer went outside, and met the appellant coming around the house on the board walk, with a gun in his hand. She spoke to him and tried to get him to return to the room, and not go uptown. He refused, muttering and mumbling and staggering along the walk with the gun in his hand, muttering, "My God, Maggie, I have shot Ed." Mrs. Fitzer was unable to prevent the appellant from going uptown. At this time the witness Pound, who lived near by, and who had come out of his house to see what had happened, spoke to the appellant; the appellant replying (as testified to by the witness Pound), "Get out of my way, or I will kill you, too." The appellant then passed on up the street, where he was seen by the witness Daggett. The witness Daggett saw him coming up the street staggering, with a gun in his hand, and muttering to himself. When he reached where Daggett was, he said to the witness Daggett, "Oh, my God, Art!" The witness Daggett testified that the appellant was "kind of crying and swearing" as he staggered up the street, that he kept cursing, did not seem to know anything until he arrived in front of the saloon known as Boyer's saloon; John Boyer being the stepfather of the appellant. When Cooley got in front of the saloon, Mr. Boyer came out of it. As Boyer stepped out of the saloon, Cooley turned around so that the gun was pointing toward Boyer. Cooley worked the lever of the gun, and by that time the witness Daggett caught hold of the gun and pushed it down. At this time the gun went off. The witness Daggett then let go of the gun and took hold of Cooley, and with the assistance of two or three other

men, who came up at about that time, took the gun away from Cooley and gave it into the possession of Boyer, who took it into the saloon, worked the lever, and took out an empty shell and one loaded shell. According to the evidence the gun was afterwards delivered to the district attorney.

The witness Rice testified that he arrested the appellant at the house of John Boyer; that at the time of the arrest Cooley was lying on the kitchen floor of the Boyer residence so drunk that he could not get up, in other words, "dead to the world"; that the witness, with the assistance of three other men, managed to get him up and carried him to the jail. This occurred about half past eight.

There was no evidence in the record to show that there had been any trouble or ill feeling between the deceased and the appellant during the entire day, or at any other time. In fact, their relations had been extremely friendly.

The evidence of the state was entirely circumstantial; there being no eyewitnesses to the actual shooting.

At the time Kelly and Martinez took Cooley to his room and left him there, Gilliland was lying upon the back side of the bed asleep. After Kelly and Martinez entered with Cooley, he awakened, threw back the covers, and invited Cooley to come to bed. During the conversation with Cooley he reached out and picked up a pipe which was lying upon a small stand near the bed. After the homicide, when other parties entered the room, Gilliland was found lying in practically the same position he had occupied when the witnesses Kelly and Martinez left the room before the homicide. The pipe was on the bed near one hand, as though it had fallen from his hand at the instant of the shot, and the other hand was underneath his cheek, supporting the cheek and face. The bedclothes were not in any way disturbed, and were in practically the same condition as when last noticed by the witnesses Kelly and Martinez. The shot had entered the right eye, while open, passing directly through the head, and entering the wall immediately back of where the deceased's head lay upon the pillow. The entire right eyeball was gone, with practically no lacerations of the eyelids. At the time the witnesses Kelly and Martinez brought Cooley to the room, there was no light in the room other than a lantern carried by the witness Kelly. There was a hand lamp in the room, however, and, when Dr. Garthwaite reached the room after the homicide, this lamp was lighted and burning, without any chimney. The doctor testified that the body of the deceased lay in a position of rest upon the bed when he saw it; that the bullet from the rifle passed directly through the deceased's head, and into the wall, on practically a level line. A cartridge belt containing cartridges and a hunting knife was found hanging up-

on the wall almost directly over where the deceased was lying. The room was somewhat in disorder when the doctor entered.

Renehan & Wright, of Santa Fé, for appellant. F. W. Clancy, Atty. Gen., for the State.

ROBERTS, C. J. (after stating the facts as above). From the foregoing statement of the facts of this case, it appears that appellant's indulgence in strong drink has resulted in the death of his bosom friend and cousin and his present unfortunate predicament.

While the law licenses and legitimizes the sale of intoxicating liquor for the protection of society, from time immemorial it has said that, if one voluntarily puts himself into a condition wherein he has no control over his actions, he is responsible for what he does in this condition. So, if a man becomes intoxicated, and while in that condition he commits a crime, he is nevertheless answerable therefor; while this is true, yet intoxication may be shown where the offense consists of several grades for the purpose of reducing it from a higher to a lower grade. Section 1120, Woollen's Thornton on the Law of Intoxicating Liquors. At common law there were no degrees of murder, and the crime was committed where a person of sound memory and discretion unlawfully killed any reasonable creature in being and in the peace of the commonwealth, with malice aforethought, either express or implied. *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 193; 21 Cyc. 703, and cases cited under note 20.

Upon the trial of this case, the court, by its twenty-eighth instruction, instructed the jury as follows: "The jury is instructed that drunkenness voluntarily produced does not excuse crime. Yet, when a homicide admitting of different degrees of punishment under the law has been committed by a person in such a condition of drunkenness as to render him incapable of a willful, deliberate, and premeditated purpose, the jury cannot find the defendant guilty of murder in the first degree. If the jury believe from the evidence and beyond a reasonable doubt that the defendant, Claud M. Cooley, killed the deceased, Edwin A. Gilliland, as charged in the indictment, and at the time of such killing the defendant was under the influence of liquor voluntarily taken by him, then said intoxication so produced is in law no excuse for the act done by the defendant, if it was done, unless they believe from the evidence such intoxication was such as did in fact deprive him at the time of the killing of the mental capacity to form a malicious, deliberate, and premeditated purpose to kill, in which event they may still find the defendant guilty of murder in the second degree, voluntary manslaughter, or involuntary manslaughter under the instructions herein given."

Appellant contends that this instruction

was erroneous, in that it did not properly apply the law to the defense of intoxication with reference to murder in the second degree; his contention being that intoxication is available as a defense for the purpose of reducing murder in the second degree to voluntary manslaughter. In this, as we shall see, he is mistaken.

Section 1, c. 36, S. L. 1907, reads as follows: "All murder which shall be perpetrated by means of poison or lying in wait, torture, or by any kind of willful, deliberate and premeditated killing, or which is committed in the perpetration of or attempt to perpetrate any felony, or perpetrated from a deliberate and premeditated design unlawfully and maliciously to affect the death of any human being, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree."

Voluntary manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or in the heat of passion.

[1] Intoxication of the defendant at the time of the killing, while a proper subject of inquiry in determining whether the deliberate premeditation necessary to constitute murder in the first degree was present, cannot be said to furnish the provocation required to reduce murder in the second degree to voluntary manslaughter. If, by reason of intoxication, the mind of the defendant was incapable of that cool and deliberate premeditation necessary to constitute murder in the first degree, but the killing was unlawful, and the act was not done under circumstances which would make the killing only voluntary or involuntary manslaughter, necessarily it would be murder in the second degree, as malice would be implied. Between the two offenses, murder in the second degree and voluntary manslaughter, the drunkenness of the offender forms no legitimate matter of inquiry; if the killing is unlawful and voluntary, and without deliberate premeditation, the offense is murder in the second degree, and malice will be implied from the killing, unless the provocation were of such a character as would reduce the crime to manslaughter, for which offense a drunken man is equally responsible as a sober one. *Willson v. State*, 60 N. J. Law, 171, 37 Atl. 954, 38 Atl. 428; *State of W. Va. v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *State v. Tatro*, 50 Vt. 483.

In the state of Tennessee the statute on murder is identical with that of New Mexico. In the case of *Pirtle v. State*, 9 Humph. (Tenn.) 663, the Supreme Court of that state says: "As between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing



being voluntary, the offense is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offense a drunken man is equally responsible as a sober one."

This case is cited with approval by the Supreme Court of California, which state has a similar statute on murder, in the cases of *People v. Belencia*, 21 Cal. 548, and *People v. Langton*, 87 Cal. 427, 7 Pac. 848.

[2] While the instruction quoted was not objectionable upon the ground urged, it is, however, erroneous, because it might be reasonably construed as requiring the defendant to establish beyond a reasonable doubt the fact that he was intoxicated in order to justify an acquittal of murder in the first degree. From a review of the case note accompanying the case of *Kelch v. State*, 39 L. R. A. 737, it will be found that five different rules have been established by the courts relative to the measure of proof of insanity in criminal cases, which will justify an acquittal, and necessarily the same rule would apply to the defense of intoxication. These are: (a) Beyond a reasonable doubt; (b) to the satisfaction of the jury; (c) by a preponderance of the evidence; (e) clearly proved; and (f) where a reasonable, well-founded doubt is raised by the evidence as to the sanity of the defendant, he is entitled to the benefit of such doubt. The latter is the predominating rule in American jurisprudence, and was followed by the territorial Supreme Court in the case of *Territory v. McNabb*, 16 N. M. 625, 120 Pac. 907. We believe the same rule should apply to the defense of intoxication, and that all that should be required of the defendant is to introduce such evidence of the fact that, at the time he inflicted the fatal injuries, he was so deeply intoxicated as to be incapable of forming in his mind a deliberate premeditated design to do the killing as will raise in the minds of the jurors a reasonable doubt as to such fact in order to reduce the grade of the offense to murder in the second degree. An excellent instruction on the subject will be found in the case of *Maynard v. State*, 81 Neb. 301, 116 N. W. 53.

[3] Upon the trial of the case the court permitted Mr. Crist, an attorney appointed by the court as special deputy prosecutor, to ask certain witnesses for the state, who had given testimony favorable to the accused, if they had not talked with Mr. Renehan, one of the attorneys for the defendant, relative to the facts in the case, and, upon receiving an affirmative answer, further permitted him, over objection, to ask such witnesses if he (Crist) had not theretofore instructed them not to talk to any one about the case without his permission, and if they had not violated such instructions by talking to Mr. Renehan; in answer to which questions, such witnesses admitted that they had violated his instructions in that regard. In order to cure any

prejudice which might have resulted to the defendant by reason of the inference which might reasonably have been drawn by the jury from such evidence, that defendant's attorney had acted improperly in interviewing the state's witnesses, and that such witnesses had violated an injunction which the state's attorney was authorized to impose upon them, the defendant asked the court to instruct the jury as follows: "There has been some evidence offered in this case tending to show that the acting district attorney, or special prosecutor, Mr. Crist, instructed certain witnesses not to converse about the case with any other person than him. There was no authority in the district attorney to make such request, or to enforce obedience to it, especially where it included defendant's counsel. Attorneys engaged in the defense of important criminal trials have the right to ascertain by proper and legitimate means the nature, strength, and credibility of the testimony to be offered in the case, so long as they do not, by word or act, attempt in any manner to influence a witness to conceal, modify, or change his testimony from that which is absolutely true. The attorney for the defendant was authorized by his professional duty to interview the witnesses in this case who had been summoned by the state, particularly since the witnesses for the one side were witnesses for the other side."

The court refused to give the instruction, to which refusal the defendant excepted. Appellant contends that the action of the special prosecutor, in view of the court's refusal to instruct as to the right of counsel for the defendant to interview all the witnesses in the case, both for the state and the defendant, necessarily must have prejudiced the rights of the defendant.

The attorney for the defendant had the right to ascertain by proper and legitimate means the facts in the case. With such end in view, he had the right to interview the witnesses, or the people whom he supposed were witnesses to the occurrence or cognizant of facts material to the case. Of course he would have no right to attempt to cause such witnesses to color their testimony, or to conceal, modify, or change the same from that which was absolutely true. As was said by the territorial Supreme Court in the case *In re Catron*, 8 N. M. 253, 43 Pac. 724: "We know of no rule of morals or professional ethics which is opposed to this view. If this is not allowed, then you break down the barrier which the law and the courts have erected as a shield to protect the lives and liberty of the citizens from what might prove an unjust and designing prosecution. We do not wish to be understood as in the slightest degree countenancing any conduct on the part of any attorney in attempting in any manner to influence a witness to conceal, change, or in any manner give improper testimony under any circumstances. Such an act, when established, should meet with con-

demnation by the bar, and should be visited with disbarment by the court. We discover, however, no unprofessional conduct in the respondent in his simply visiting the witness to honestly ascertain what would be his testimony, so long as he did not in any way attempt to influence him to conceal, falsely change, or modify his testimony."

Were this not the rule, then the state would be able to absolutely preclude the defendant from preparing intelligently to present his defense to the court and jury by subpoenaing as its witnesses all the witnesses to the transaction, and thereby preclude defendant's attorney from interviewing them. Witnesses are supposed to be impartial in all cases, and to be actuated with a desire to tell only the truth. So long as no attempt is made to cause them to discolor or change their testimony from the actual facts in the case, an attorney is acting properly and legitimately when he endeavors to ascertain their knowledge of the case. As was said by the Supreme Court of Rhode Island in the case of *State v. Papa*, 32 R. I. 453, 80 Atl. 12: "The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case, and to interview and examine as many as possible of the eyewitnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties and should not be partisans; they do not belong to either side of the controversy; they may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous. Such a proceeding in a criminal case would violate the provisions of the Constitution of this state (article 1, § 10), which provides that: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defense, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.' The defendant, therefore, has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf. He has also the right, either personally or by attorney, to ascertain what their testimony will be. But in the interviews with and examination of witnesses out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject informa-

tion, and by all means to resist the temptation to influence or bias the testimony of the witnesses. If in any case the claim should be made that a party has misconducted himself in this respect, the matter should be left to the determination of the jury as affecting the question of his guilt or innocence of the crime charged. If it was charged that an attorney had been guilty of such impropriety, it would constitute cause for the disciplinary action of the court, and should not be submitted to the jury, unless it appeared that it was done with the knowledge and consent of his client, in which case the matter should be left to the determination of the jury. The court, however, should refrain from the use of expressions which are likely to give the jury the impression that the court has prejudged the matter. The expressions of the court in this case, above quoted, beginning, 'It is unfortunate that the defendant's attorney should feel under any obligation to send for one of the witnesses for the state,' and ending, 'That is an unfortunate circumstance to say the least,' are subject to this criticism. This exception must therefore be sustained."

The court properly permitted the state to ask the witnesses if they had talked to any one about the case, but should not have allowed the special prosecutor to ask if he had not instructed such witnesses not to talk to any one else about the case, and if they had not violated his instructions in talking to Mr. Renehan. By permitting such questions to be answered, the jury would naturally be led to believe that the witnesses had been guilty of impropriety, to say the least, in talking to the attorney for the defendant, in violation of the orders of the state's attorney, and likewise must have been also impressed with the idea that the attorney for the defendant was reprehensible in talking to such witnesses under the circumstances. Having permitted the evidence to go to the jury, over objection, the court should have given the requested instruction.

[4] It is next contended that the court erred in refusing to permit lay witnesses to give opinion evidence as to the insanity of the defendant, and that it likewise erred in not permitting certain witnesses to express an opinion as to whether the relations between the deceased and the defendant appeared to be friendly, or otherwise, a few minutes before the homicide.

The right of a lay witness to give in evidence his opinion as to the sanity or insanity of a party is fully discussed in the case of *Territory v. McNabb*, 16 N. M. 625, 120 Pac. 907. We are of the opinion that the rule therein announced is the correct rule on the subject, and further discussion would be fruitless.

Kelly, a witness for the state, had testified that he met the defendant on the village street, and that he, in company with another witness named Martinez, took him to his room, which was used by both the

defendant and the deceased; that the defendant was very much intoxicated; that, when they entered the room with the defendant, the deceased was in bed. After detailing fully all that was done and said in the room by all the parties, he was asked to "proceed and describe the manner in which Cooley and Gilliland addressed each other in anything that they said, and describe their acts toward each other, if there were any acts, with such detail as you can give them, for the jurors' information." In response to the question, the witness proceeded to describe the appearance, acts, and conduct of the parties toward each other, and concluded, "They both seemed to be, on my leaving the room, perfectly friendly." This portion of the answer, over the objection of the defendant, upon the motion of the state, was withdrawn from the jury.

It was of the utmost importance to the defendant that the jury should be fully acquainted with the relations existing between himself and the deceased at the time referred to by the witness, for the killing took place within five minutes after the witness left the room. If the relations between the parties at that time were friendly, it would have been a strong circumstance in his favor militating against that deliberate premeditated malice essential to first degree murder. It would be, indeed, a very difficult matter for a witness adequately, by mere descriptive language, to convey to the jury the fact of the friendly relations existing between parties by a mere recital of their acts and words. Two men meet, in the presence of a witness. There may not be a word spoken or an act done, which can be described in words, which would indicate unfriendliness; still the witness may observe from the appearance and expression of the face and eyes and the general demeanor of the parties, which he cannot portray with words, that an unfriendly feeling exists between the two men. If he cannot give to the jury his opinion as to the relation of the parties toward each other, the jury would not be able to form an intelligent opinion thereon.

In the case of *Commonwealth v. Eyler*, 217 Pa. 512, 66 Atl. 746, 11 L. R. A. (N. S.) 639, 10 Ann. Cas. 786, the court say: "The rule as to the admissibility of opinions of non-expert witnesses was settled in the leading case of *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151 [12 L. R. A. 293]: 'Where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion in order to put the jury in position to make the final decision of the fact'—and quoting from *Com. v. Sturtivant*, 117 Mass. 122 [19 Am. Rep. 401]: 'The exception includes the evidence of common observers testifying to the results of their observations made at the time, in regard to common appearances or facts, and

a condition of things which cannot be reproduced and made palpable to a jury.' " Quoting further from *Graham v. Pennsylvania Co.*, it is said: "In several classes of questions the line between the witness' judgment or opinion and his affirmation of a fact is so indistinct that it cannot be marked out in practice. Such are questions of identity of persons or things, of the lapse of time, of comparative shape or color or sound, of expression, and, through it, of meaning, etc. In all of these, however positively the witness may affirm facts, what he says is after all only his opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished."

The case of *State v. Marsh and Buzzell* was a trial of a wife and her paramour for the murder of a husband. "The witness F. F. White was asked what he observed in respect to the conduct of the respondents toward each other on an occasion, the day after the death of the deceased, and answered, 'I observed they were very intimate.' To this answer, the respondents excepted, for that it was not responsive to the question, and, as given, was simply an expression of the witness' opinion. The court then had the witness state the acts which he observed which gave him the impression that they were very intimate. There was no error in this action of the court. The rule governing the admission of this class of evidence is well stated by Peck, J., in *Bates v. Sharon*, 45 Vt. 481, as follows: 'Where facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the trier to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who had the benefit of personal observation, he is allowed, to a certain extent, to add his conclusion, judgment, or opinion.' This is given as an exception to the general rule that the opinion of nonexpert witnesses is inadmissible." *State v. Marsh*, etc., 70 Vt. 288, 40 Atl. 836.

In *Smith v. Miles*, 15 Vt. 245, 249, the case being a trial for slander, the court, speaking of the importance of the sense in which the alleged slanderous words were spoken, said: "Hence those who see or hear those incidents are permitted to state the impression made upon their minds at the time, on the same ground, I apprehend, that any witness is allowed to state appearances in any case where such appearances are, in their nature, incapable of exact and minute description; e. g., the health or sanity of a person, at a particular time, in regard to which even unprofessional witnesses are permitted to speak of opinions formed at the time from indications and appearances not susceptible of description."

"A witness was allowed to state that at a certain time—the fact being material—the plaintiff was intoxicated. This was objected

to as being the expression of the opinion of a witness. Such testimony was directly decided to have been admissible in *People v. Eastwood*, 14 N. Y. 562. In a certain sense a vast deal of testimony is but statements of opinion. But it is not opinion in an objectionable sense. It is everyday practice for witnesses to swear to such facts as the quantity, weight, size, and dimension of a thing, to heat and cold, age, sickness, and health, and many other matters of the kind. In such cases witnesses do not express an opinion founded on hearsay or the judgment of other men. It is not an opinion based upon facts recited and sworn to by other witnesses. It is their own judgment, based upon facts within their own observation. It is, so far as such a thing can be, knowledge of their own. It is an opinion which combines many facts without specifying them. It has been described as 'an abbreviation of facts,' a 'shorthand rendering of facts.' It is an inference equivalent to a specification of the facts. \* \* \* The witness in effect describes the facts when he gives his opinion. It is his way of stating them. Such testimony is admitted from necessity. A witness can seldom give in detail all the points and particles which go to make up his belief; but he can characterize them." *Stacy v. Portland Pub. Co.*, 68 Me. 279.

In the case of *Blake v. People*, 73 N. Y. 586, a witness for the state was asked "whether the hold of the prisoner and the deceased was a friendly \* \* \* grasp. He answered he did not know; he believed it was a friendly grasp." Held to be within the rule in *People v. Eastwood*, 14 N. Y. 562, where a witness was asked if, in his judgment, a person was intoxicated.

"The witness may summarize human conduct by stating the effect which it produced on his mind, its manner, and he may state its object, and the emotions, influences, or other causes from which he infers it took place, and what relations they indicate between two persons." 17 Cyc. 95, 96, and cases cited.

On the trial of an indictment for murder, a witness may be asked his opinion as to whether the defendant and the deceased were on good terms or not. *State v. Stackhouse*, 24 Kan. 445.

"Where anger or bad temper of a party is material to the issue, a witness may be allowed to testify that the party appeared to be angry, as anger or bad temper can be proved in no other way." *Jenkins v. State*, 82 Ala. 25, 2 South. 150.

On a trial for murder, a woman who was sitting in deceased's lap was properly permitted to testify whether defendant appeared to be mad, or to be in fun, when he approached deceased, and declared his intention of killing him. *State v. Edwards*, 112 N. C. 901, 17 S. E. 521. The court should not have withdrawn from the jury the answer in question.

Complaint is also made as to rulings of the court in excluding other similar evidence offered by the defendant. What we have said above, however, will be a sufficient guide to obviate a recurrence of error in a second trial of this case in this regard. Appellant argues, with great plausibility, that the facts are insufficient to sustain a conviction of murder in the first degree. While we entertain grave doubts as to whether the facts in this case, as shown by the record before us, warranted the jury in returning a first degree verdict, still, as the cause must be reversed for other reasons, it is not necessary for us to discuss the facts.

Other grounds of error are argued by appellant's counsel; but, as the cause must be reversed, and a new trial awarded, we will not consider the remaining assignments, as the questions presented are either well settled by adjudications of our own court or will probably not arise upon a subsequent trial.

For the reasons stated, the cause is reversed and remanded, with instructions to the district court to award a new trial; and it is so ordered.

HANNA and PARKER, JJ., concur.

#### FIELD v. HUDSON. (No. 1651.)

(Supreme Court of New Mexico. May 4, 1914.)

(Syllabus by the Court.)

PARTITION (§ 84\*) — OWELTY — PECULIAR VALUE.

Where two town lots were owned in common, and were susceptible of being divided by giving each of the parties a lot of equal value, owelty of partition will not be granted because one of the lots had a peculiar value to one of the cotenants to whom it was allotted.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 230-235; Dec. Dig. § 84.\*]

Appeal from District Court, Bernalillo County; H. F. Raynolds, Judge.

Action for partition by Mary Lester Field against Clarence A. Hudson. From the judgment, both parties appeal. Reversed.

Action for partition between appellant, plaintiff below, and appellee, defendant below, owners as tenants in common of lots 13 and 14, block 2, Pera addition to Albuquerque, N. M. The plaintiff sought a partition in kind; the defendant asked for a sale of the lots. Commissioners were appointed to make the partition and reported that the property consisted of two unimproved lots of no appreciable difference in value; that sold together they would bring \$100 more than if sold separately; that plaintiff was the owner of lots adjoining lot 13, on which she had valuable improvements; they recommended that lot 14 be set over to the defendant, and that lot 13 be set over to the plaintiff, and that plaintiff pay the defendant the sum of

\$50 as damages. Both parties excepted to the report of the commissioners and the judgment of the court which divided the property, and decreed the payment of damages as recommended by the commissioners, and both parties appealed.

H. B. Cornell, of Albuquerque, for appellant. E. W. Dobson, of Albuquerque, for appellee.

MECHEM, District Judge (after stating the facts as above). It is within the power of a court of equity to decree "owelty of partition" where the property is incapable of exact or fair division. *Pomeroy, Equity Jur. § 1389; Bispham's Principles of Equity, § 492; Sawin v. Osborn, 87 Kan. 828, 128 Pac. 1074, Ann. Cas. 1914A, 647.*

In this case there being no appreciable difference in the value of the two lots, the doctrine of owelty of partition has no application. The peculiar value of lot 13 to the plaintiff did not render that lot intrinsically more valuable than lot 14.

For this court to reverse the judgment of the lower court in part and affirm it in part, so as to give it the effect and force of a judgment of partition in kind, would be equivalent to this court rendering a judgment making partition directly, without the intervention of the statutory commissioners.

The judgment of the lower court is reversed.

ROBERTS, C. J., and PARKER, J., concur.

STATE v. VALENCIA. (No. 1636.)  
(Supreme Court of New Mexico. May 13, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 782\*)—HOMICIDE (§ 221\*)—DYING DECLARATIONS—PROBATIVE FORCE—INSTRUCTIONS.

Dying declarations, being in their nature secondary evidence and subject to many infirmities, are not ordinarily entitled to the same weight or credence as living witnesses under oath and subject to cross-examination, the question of weight being one for the jury, and, it is error to instruct the jury that such evidence is of no more weight than if the deceased was present and testifying, because such instruction is calculated to lead the jury to consider that dying declarations are entitled to the same weight as the testimony of living witnesses under oath, and subject to cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. § 782; \*Homicide, Cent. Dig. §§ 463, 464; Dec. Dig. § 221.\*]

Appeal from District Court, Eddy County; Collin Neblett, Judge.

Antonio Valencia was tried for the murder of Simon Rodriguez, found guilty in the first degree, and appeals. Reversed and remanded.

Guy A. Reed and Robert C. Dow, both of Carlsbad, for appellant. Harry S. Clancy, Asst. Atty. Gen., for the State.

HANNA, J. Several assignments of error are predicated upon the instructions of the court with respect to the dying declaration of deceased, and it becomes necessary to consider the instructions as a whole in passing upon the merits of appellant's contention. These instructions, numbered from 18 to 21, inclusive, are as follows:

"(18) You are instructed that in prosecutions for murder the dying statement or declaration of the person with whose murder the accused stands charged, when material and made under the sense of impending death, is admissible in evidence. Such declaration is made when the party making it is at the point of death, and when every hope of the world is gone and when every motive for falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; the situation in law is considered as creating an obligation equal to that which is imposed by an oath administered in a court of justice.

"(19) You are instructed that the declaration of Simon Rodriguez, offered in evidence in this case through certain witnesses, was admitted under such a rule of law, but the truth or falsity of such declaration of Simon Rodriguez, and the degree of accuracy or inaccuracy in the recital thereof by the witnesses, are matters for you to weigh under the same tests as apply to other witnesses, considering all of the circumstances in evidence surrounding each case and each witness.

"(20) The court instructs the jury that the statement read to you as a dying declaration of Simon Rodriguez should be received by you as such declaration, but because it is a dying declaration you are not necessarily bound to believe it, but you will give it that weight which you think it ought to have when considered in connection with all the other facts and circumstances in evidence.

"(21) A statement by one who has been shot, respecting who it was that inflicted the wound and the circumstances under which the same was inflicted as a dying declaration, if made at a time when he did not expect to survive the injury, is of no more weight than if the deceased was present and testifying."

It is to be observed that the court in its final instruction, supra, told the jury that the dying declaration is of no more weight than if the deceased was present and testifying. It cannot be questioned that the great weight of authority and the best opinion upon the subject favor the rule that because the accused is deprived of an opportunity of investigating the truth of the statements contained in the dying declaration, by means of cross-examination, that the maker of the statement was, at the time it was made, under no apprehension of punishment for perjury, and the jury had no opportunity to

observe the conduct and demeanor of the witness, such testimony is not to be considered on the same plane or of equal weight or value with that of a sworn witness giving evidence in the presence of the court and jury under the scrutiny mentioned. Therefore the only question for our consideration is whether the instruction referred to, taken in consideration with the other instructions upon the same subject, did attach undue importance to the dying declaration.

The instruction is somewhat out of the ordinary, and, so far as we can find, is based upon the supposed authority of an Arkansas case, viz., *Allen v. State*, 70 Ark. 337, 340, 68 S. W. 28. In this case, however, it is to be observed that the instruction was requested by appellant, and it does not appear that any point was made, or could have been made, upon the apparent infirmity of the instruction.

The admission of evidence of this character is an exception to the rule of inadmissibility of hearsay testimony, and many reasons, other than those given, might be referred to as constituting proper and sufficient grounds for not giving to dying declarations the same force and effect as if the declarant had been a witness in court. These reasons are fully pointed out by Mr. Elliott in his work on Evidence, vol. 1, § 358. See, also, *State v. Van Sant*, 80 Mo. 67; *State v. Mathes*, 90 Mo. 571, 2 S. W. 800; *Lambeth v. State*, 23 Miss. 322; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

The case last cited is more nearly in point than any other we have found, or to which our attention has been called. Most, if not nearly all, of the cases examined have to do with instructions to the effect that the dying declaration was to be given the same weight as that of a sworn witness giving evidence in the presence of the court. See cases collection in note to *Harper v. State*, 56 L. R. A. 372, at 446. While in the case under consideration the language used by the court was that the dying declaration "is of no more weight than if the deceased was present and testifying," and in the *Eddon* Case, supra, the language adopted by the court was "dying declarations are to have no greater weight than if the deceased was alive and testified to the same facts upon the witness stand." While it might be urged that there is a distinction between the words "the same weight" and "no more weight," or "no greater weight," we think it must needs be a distinction without any serious merit. To the average juror the words "no more weight" would convey to the mind the impression that he was justified in attaching the same weight, or as much weight to the class of testimony in question as he would to a living witness present in court.

The serious infirmity about this class of evidence, i. e., dying declarations, is the lack

of opportunity to investigate the truth of the same by searching cross-examination. And it can well be urged that the passion of the moment, or the clouded mind resulting from the injury, not to say anything about the possible incorrect quoting of deceased by those depended upon to supply this evidence, would all tend to indicate the lurking evils of this class of testimony to which the jury is prone to attach great consideration, for which reasons instructions tending to point out the weight to be attached to such evidence are dangerous and calculated to be highly prejudicial to defendant.

As stated, dying declarations constitute one of the exceptions to the rule which rejects hearsay evidence, and are admissible because of the necessity of the case and the presumed sanctity given them by the sense of impending death, which must exist, and which is said to create an obligation equal to that which is imposed by an oath administered in a court of justice. We are of the opinion, however, that dying declarations, being in their nature secondary evidence and subject to many infirmities, are not ordinarily entitled to the same weight, or credence, as is the testimony of living witnesses under oath and subject to cross-examination, the question of weight being one for the jury, and it is error to instruct the jury that such evidence is of no more weight than if the deceased was present and testifying because such instruction is calculated to lead the jury to consider that dying declarations are entitled to the same weight as the testimony of living witnesses under oath, and subject to cross-examination.

In the present case much depended upon the dying declaration, which received but little and perhaps questionable corroboration, so that we feel constrained to reverse the case upon the ground mentioned, and to remand the same for a new trial; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

JONES v. RANKIN et al. (No. 1599.)  
(Supreme Court of New Mexico. April 28, 1914.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 217\*)—STOCKHOLDERS—ADDITIONAL LIABILITY—CONSTRUCTION OF STATUTE.

The additional liability of a stockholder depends upon the terms of the statute creating it, and, being in derogation of the common law, the statute cannot be extended beyond the words used.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 835-844; Dec. Dig. § 217.\*]

2. BANKS AND BANKING (§ 293\*)—STOCKHOLDERS—ADDITIONAL LIABILITY—CONSTRUCTION OF STATUTE.

Section 14, c. 68, S. L. 1887, construed. Held, that it imposes no individual liability up-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on stockholders in a savings bank, for the debts of such bank, where the original subscribers for such stock paid the full par value thereof to the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1133-1135; Dec. Dig. § 293.\*]

### 3. CORPORATIONS (§ 217\*)—STOCKHOLDERS—ADDITIONAL LIABILITY—STATUTES.

The general corporation act (Laws 1905, c. 79) did not repeal or change the liability of stockholders under chapter 36, S. L. 1884, and chapter 68, S. L. 1887.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 835-844; Dec. Dig. § 217.\*]

Appeal from District Court, Quay County; T. D. Lieb, Judge.

Action by H. B. Jones, Receiver, against O. H. Rankin and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Renehan & Wright, of Santa Fé, for appellant. Reed Holloman, of Tucumcari, for appellees.

ROBERTS, C. J. The only question presented by this appeal is the proper construction of section 14, c. 68, S. L. 1887 (section 273, C. L. 1897), which reads as follows:

"The stockholders of any such corporation or association shall only be individually liable to the extent of the par value of the shares of stock subscribed for by them, except as otherwise herein provided."

This section is a part of the Savings Bank Act, and applies only to the liability of stockholders in such corporations. The exception referred to in the section fixes the liability of officers, agents, etc., of such institution, who receive deposits, or assent to their reception, or who contract debts or assent to their creation, after knowledge that such institution is insolvent or in failing circumstances. The exception is of no consequence, so far as this case is concerned.

The appellant is the receiver of the International Bank of Commerce, of Tucumcari, N. M., an insolvent institution, incorporated under chapter 68, S. L. 1887, as a savings bank. He instituted this suit against the appellees, who were stockholders in said bank at the time it became insolvent, to recover from them an assumed statutory liability to the extent of the par value of the shares of stock held by each of said stockholders. The complaint set forth all the facts leading up to the appointment of the appellant as receiver of the bank, the indebtedness, insufficiency of assets, and that appellees all became stockholders by purchase of stock from the original subscribers to the capital stock of their assignees, for which stock the full par value had been received by the corporation. To the complaint the appellees demurred, on the ground that they were not liable under the statute above quoted. The demurrer was sustained by the court, and appellant elected to stand upon his com-

plaint. Judgment was thereupon entered for appellees, dismissing the complaint. From such judgment this appeal is prosecuted.

[1] 1. The first question discussed by counsel on either side is the rule of construction to be applied to the statute; appellant contending that the statute is remedial and should be liberally construed, while appellees claim that a statute imposing a liability upon stockholders for the debts of the corporation, being in derogation of the common law, should be strictly construed. Under the common law, a stockholder was not liable for the debts of the corporation, where the corporation had received the full par value of the stock. This being true, it necessarily follows that the additional liability of the stockholder depends upon the terms of the statute creating it, and, being in derogation of the common law, the statute cannot be extended beyond the words used. *Brunswick Terminal Co. v. National Bank of Baltimore*, 192 U. S. 886, 24 Sup. Ct. 314, 48 L. Ed. 491. The rule of strict construction is applied to such statutes by the great majority of the courts in this country, as will be seen by a reference to the cases cited in note 7, § 214, vol. 1, *Cook on Corporations* (7th Ed.). The author says:

"Inasmuch as all statutes creating an additional liability on the part of the stockholders are in derogation of the common law, they are to be strictly construed."

Appellant relies upon the case of *Carver v. Braintree Mfg. Co.*, 2 Story, 432, Fed. Cas. No. 2,485, which supports his view as to the proper rule of construction; but as this case is so at variance with the almost universal holding of the courts, including the Supreme Court of the United States, and our own territorial Supreme Court (*Perea v. Bank*, 6 N. M. 1, 27 Pac. 322), we must decline to follow it.

[2] 2. The statute, then, must not be extended beyond the words used, and it says that the stockholders of any such corporation shall only be individually liable to the extent of the par value of the stock subscribed for by them. No one of the appellees herein were subscribers to the capital stock of the insolvent corporation, according to the accepted definition of the term "subscriber." *Cook on Corporations* (7th Ed.) § 10, says:

"A subscriber is one who has agreed to take stock from the corporation on the original issue of such stock."

In the case of *Thames Tunnel v. Sheldon*, 6 B. & C. 341, the word "subscriber" is defined and held to mean only such persons as have entered into an express contract to take up a certain number of shares, on the original issue.

If it be conceded that the statute imposes an additional liability upon stockholders, over and above and independent of the original par value of the stock, it must be apparent that such liability extends only to such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—71

stockholders as were subscribers to the capital stock of the corporation.

"When men subscribe for the stock of a company, it is for so much stock as the company still owns and has not parted with. Stock, which has been issued to or passed into the ownership of outside parties, cannot be subscribed for; it is not then the subject matter of subscription." *Bates et al. v. Great Western Tel. Co.*, 134 Ill. 586, 25 N. E. 521.

In *Seaboard National Bank v. Slater* (C. C.) 105 Fed. 179, the court draws a sharp distinction between stock subscribed for and stock held without subscription. The case of *Libby v. Tobey*, 82 Me. 897, 19 Atl. 904, illustrates the distinction. The court says:

"A fair inference to be drawn from the language of the statute is that of a transaction or contract with the corporation in accepting, subscribing for, or agreeing to take stock, and not one between individuals in the purchase of stock in open market. Had the Legislature intended to make the remedy as broad as that contended for by the plaintiff, and thus render the defendant liable as a 'stockholder' upon all stock held or owned by him, regardless of the manner in which he may have obtained it, it would have been an easy matter to have so expressed its meaning."

In like manner we are justified in saying that had the territorial Legislature intended to impose a liability upon all stockholders, irrespective of whether they had purchased their stock in the open market, or had secured it by subscription to the capital stock, it would have been an easy matter to so have expressed its meaning. By section 9, c. 86, S. L. 1884, the Legislature clearly and unmistakably imposed upon all stockholders in banks of discount and deposit an individual liability for the debts of the corporation. Many of the provisions of the act providing for the organization of savings banks are identical with the provisions found in said chapter 36, S. L. 1884, and, had the Legislature intended to create the same stockholder's liability, it would doubtless have employed the same language.

In the case of *Reid v. De Jarnette*, 128 Ga. 787, 51 S. E. 770, 3 Ann. Cas. 1117, the Supreme Court of Georgia was called upon to construe the language of a special act of the Legislature, incorporating the Putnam County Banking Company. The act provided:

"Each stockholder in said corporation shall be individually liable for the debts of the corporation to the amount of his or her unpaid subscription to the capital stock of the corporation, and for an additional amount equal to his subscription."

The court say:

"The question presented for determination is: Was it the purpose of the General Assembly to impose this individual liability upon each and every person who might become a shareholder of the corporation, by subscribing to its capital stock or by purchase of shares issued to another, or otherwise succeeding to the holdings of a stockholder who had ceased to be a member of the corporation; or was the legislative intent to fix the statutory liability upon such

stockholders only as became such by subscribing to the capital stock? The term 'stockholder' is not synonymous with that of 'subscriber'; each has a distinct definite technical meaning; the latter is employed to denote one who becomes bound by a subscription to the capital stock of a corporation. It is to be presumed that the members of the General Assembly knew what was an 'unpaid subscription to the capital stock' of a corporation, when they declared that each stockholder could be called on by creditors to pay, not only his 'unpaid subscription to the capital stock of the corporation,' but also an 'additional amount equal to his subscription.' If effect be given to the letter of the act, then the liability imposed was upon those who became stockholders through their voluntary act in subscribing to the capital stock of the banking company and assuming responsibility for the payment of its debts, not only to the extent of their respective stock subscriptions, but for double the amount thereof. \* \* \* The corporation itself was made primarily liable for the payment of its debts; those who subscribed to its capital stock were called on by the General Assembly to be its backers, its guarantors. The argument is advanced by counsel for the plaintiff in error that, unless all stockholders (however they may have acquired their holdings) be held liable for the debts of the corporation, its creditors may not be able to collect their demands against it, since many, if not all, of the subscribers to its capital stock may now be dead, and such estates as they left fully administered. Conceding that such may be the case, we do not feel justified in so stretching the words used in the act of incorporation as to bring within its operation all stockholders of the bank, whether they became shareholders by subscribing to its capital stock, or by way of succession from those who originally became bound to pay double the amount of their stock subscriptions, if necessity so to do should ever arise. We cannot assume that the General Assembly contemplated that those who accepted the charter and organized under it could relieve themselves of the liability they voluntarily assumed by subsequently transferring their stock to others who might, or might not, be solvent and able to respond to the demands of debtors of the corporation. Nor does the act of incorporation provide any scheme whereby this liability might be shifted upon stockholders who purchased stock upon the faith that the act was to be understood as meaning neither more nor less than was said, nor is there any suggestion in the act of a compounding of liability, so that a creditor could treat each successive shareholder as an additional guarantor and, at his election, call upon either past or present stockholders for payment of his demand, or enforce satisfaction from all as one collective body answering to the description of 'stockholders.' We try to construe, not to legislate. No good reason has been advanced why the words used in the statute under construction should not be given their usual signification and the conclusion reached that, while an individual liability was imposed upon each of the original shareholders, no provision was made for any further protection of creditors in the event the affairs of the bank might eventually be conducted by persons who succeeded to the rights of the subscribers to its capital stock and in this manner became stockholders."

The reasoning of this case is directly applicable to the statute under consideration, in so far as the liability of the appellees is involved. Our conclusion, therefore, is that no individual liability is imposed upon a stockholder in a savings bank, for the debts of the corporation where such stockholder was not a subscriber to the capital stock of



such corporation but purchased his stock in the open market. The question as to the liability of the original subscriber is not involved in this case, and is therefore not before us for decision.

[3] 3. Appellee further contends that the general corporation law of 1905 (chapter 79, S. L. 1905) repealed all stockholder's liability under chapter 86, S. L. 1884, and chapter 68, S. L. 1887. Under said general act, the common-law liability only is imposed by section 22, while section 23 provides a method by which the stockholder may be relieved of that liability. Section 131 extends the provisions of the general act to certain corporations organized under special acts, including the act in question in this case, and further provides for the organization of such corporations under the general act. But the same section also provides:

"But, provided, however, that this act shall not be held to divest the corporations incorporated under any of said acts of any rights, privileges or franchises which such corporations now have. And all the provisions of said act as to organization, powers, capital stock, stockholders, liability and suspension shall apply to any company organized under this act and doing business in the territory of New Mexico."

Thus clearly evidencing an intention to make the provisions of the general act apply to such corporations only in so far as the provisions of the general act did not conflict with the exceptions stated. The proviso left intact the provisions of the special acts as to organization, powers, capital stock, stockholders, liability, and suspension. This is made even more manifest by the provisions of the next succeeding section of the general act, which provides:

"The acts referred to in the last preceding section shall not be held to be repealed by this act, but the provisions of this act and the provisions of said acts shall be construed together as one act, and the general provisions of this act relating to the management, control, reports, amendments, stock liability, levy upon property or corporations, levy and sale of stock, and all other general provisions contained in this act which can be enforced consistently with the provisions of the said special acts hereinbefore referred to shall be held to apply to all such corporations."

For the reasons stated, the judgment of the lower court is affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

STATE v. DE ARMIJO. (No. 1519.)  
(Supreme Court of New Mexico. April 20, 1914.)

(Syllabus by the Court.)

1. OFFICERS (§ 18\*)—RIGHT TO HOLD OFFICE—NATURE AND SOURCE.

The right to hold a public office is not a natural right. It exists, where it exists at all, only because and by virtue of some law expressly or impliedly conferring it.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 22; Dec. Dig. § 18.\*]

2. OFFICERS (§ 18\*)—RIGHT TO HOLD OFFICE—NATURE AND SOURCE.

The right may be conferred by act of the Legislature, or exist by virtue of the common law, in those jurisdictions where the common law is in force, and no statute expressly or impliedly denies the right.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 22; Dec. Dig. § 18.\*]

3. OFFICERS (§ 18\*)—RIGHT TO HOLD OFFICE—CONSTRUCTION OF STATUTE.

Section 1 of chapter 134, Sess. Laws 1909, which provides that "No person prevented by the Organic Act of the territory of New Mexico \* \* \* shall be entitled to vote or hold public office in this territory," refers to the original act of Congress creating the territory of New Mexico, and the only limitations thereby imposed upon the right to vote or hold public office are that such rights shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, etc.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 22; Dec. Dig. § 18.\*]

4. OFFICERS (§ 20\*)—RIGHT TO HOLD OFFICE—COMMON LAW.

The statutory law of the territory of New Mexico neither expressly conferred nor denied the right of women to vote or hold public office; hence we must look to the common law, if it was in force in the territory, to ascertain and determine the right of women to vote and hold public office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 24, 25; Dec. Dig. § 20.\*]

5. COMMON LAW (§ 12\*)—OPERATION.

The common law is the rule of practice and decision in New Mexico, by virtue of section 2871, Comp. Laws 1897, except where modified by statute.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 10; Dec. Dig. § 12.\*]

6. STATES (§ 69\*)—STATE LIBRARIAN—NATURE OF OFFICE.

The office of State Librarian is a ministerial office.

[Ed. Note.—For other cases, see States, Cent. Dig. § 71; Dec. Dig. § 69.\*]

7. OFFICERS (§ 20\*)—RIGHT TO HOLD OFFICE—COMMON LAW.

Under the common law, a woman was eligible to hold a purely ministerial office, whatever might be the nature of the office, if she was capable of performing the duties thereof, and there was no incompatibility between the nature and character of the duties of the office and their due performance by a woman, where, in so doing, she was not called upon to exercise judgment and discretion.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 24, 25; Dec. Dig. § 20.\*]

8. COMMON LAW (§ 12\*)—OPERATION.

Such political rights as were recognized by the common law, and not in conflict with our established laws, institutions, and customs, and suitable to our conditions, were carried into the body of our law.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 10; Dec. Dig. § 12.\*]

9. STATES (§ 9\*)—STATE LIBRARIAN—CONTINUANCE IN OFFICE.

The appellee being rightfully in office at the time of the adoption of the Constitution, she was continued in office by virtue of section 9, art. 22, of the Constitution.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4; Dec. Dig. § 9.\*]

Hanna, J., dissenting.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Santa Fé County; H. C. Abbott, Judge.

Quo warranto by the State, to oust Lola Chaves de Armijo from the office of state librarian. From a judgment of dismissal, plaintiff appeals. Affirmed.

Frank W. Clancy, Atty. Gen., and Felix Lester and Summers Burkhart, both of Albuquerque, for appellant. Renehan & Wright, of Santa Fé, for appellee.

ROBERTS, C. J. This is a quo warranto proceeding to oust the respondent from the office of state librarian. The sole basis for the proceeding is the fact of the alleged ineligibility of the respondent to hold the office on account of sex; she being a woman. The district court held that the respondent was eligible and dismissed the petition, and the state appealed.

A discussion of the matter involved would seem naturally to present the following inquiries, viz.:

1. What is the nature of the right to hold public office, and what is the source of that right?

2. What provision, either statutory or common-law, or both, had been made in this jurisdiction in that regard prior to the adoption of the state Constitution?

3. What effect, if any, did the Constitution have upon the right?

[1, 2] 1. It may be stated that the right to hold a public office is not a natural right. It exists, where it exists at all, only because and by virtue of some law expressly or impliedly conferring it. Mechem on Public Officers, § 64; 29 Cyc. 1375. It may be conferred by act of the Legislature, as is usually the case, or exist by virtue of the common law, in those jurisdictions where the common law is in force, and no statute expressly or impliedly denies the right. In the latter case recourse must of course be had to the common law to determine the limitations upon and extent of the right.

[3] 2. It therefore becomes necessary to examine the condition of the law in this jurisdiction in regard to the right of women to hold office. The territory of New Mexico was organized by the act of Congress of September 9, 1850 (Act Sept. 9, 1850, c. 49, § Stat. 449). Section 6 of that act provides:

"That every free white male inhabitant, above the age of twenty-one years, who shall have been a resident of said territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly: Provided, that the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, concluded February second, eighteen hundred and forty eight."

The provisions of this section appear in R. S. U. S. of 1878, as sections 1859 and 1860,

in somewhat different language, but in the view we take of the case such revised sections are of no importance in determining the issues involved herein.

By an act of the territorial Legislature, approved July 20, 1851, which will be found on page 196 of the Session Laws of 1851, a complete election law was enacted. Section 19 of the act defined the qualifications of voters and of holding elective office as follows:

"Sec. 19. Every white male citizen of the United States, over twenty-one years of age, who shall have resided in the territory one year, and in the county in which he offers to vote, for three months shall be entitled to vote and be elected to office in any election provided for in this act, unless in the cases hereinafter specified."

By this section it will be observed that the right to vote is limited to white *male* citizens of the United States, who possess the required qualifications as to residence. Likewise, by the section no one could be "elected to office, in any election provided for in this act," unless he possessed the required qualifications. Under this section a woman was debarred from voting, and could not be elected to any office, at any election held under the act in question. Section 21 of the same act reads as follows:

"Sec. 21. No person prevented by the organic law of the territory, no officer or soldier in the United States Army, and no person included in the term 'camp followers' of the United States Army shall be entitled to vote or hold office in this territory."

It will be observed that the latter section is broader in its scope than section 19. It denies the right to hold office, either elective or appointive, to any person "prevented by the organic law of the territory." Section 19, in so far as it prescribed the qualification of voters, was evidently superseded by the registration law, which required all voters to be registered, and prescribed the qualifications required for registration, which will be found as section 1703, C. L. 1897, and permitting all registered voters to vote. Section 1706, C. L. 1897. Section 21, supra, however, was carried into the Compilation of 1897 in its original form as section 1647. It will therefore be seen that section 19 of the original act is of no importance in this case, except as an aid to the proper construction of section 21. Section 21, supra, was amended by chapter 21, S. L. 1907, and again by chapter 134, S. L. 1909. The amendment of 1907 need not be set out, as it is, in so far as material, in the same identical language as section 1 of chapter 134, S. L. 1909, which, in so far as pertinent, reads as follows:

"Sec. 1. No person prevented by the organic act of the territory of New Mexico, \* \* \* shall be entitled to vote or hold public office in this territory. \* \* \*"

It will be observed that the original section used the term "Organic Law," whereas the amendment refers to the "Organic Act," thus clearly meaning the original act of Con-

gress creating the territory, and not the section of the Revised Statutes of 1878, hereinbefore referred to. It is evident, therefore, that we must look to the terms of the Organic Act to determine who were prevented from holding office by its terms. It prescribes the right of suffrage and of holding office at the first election, and then provides that the qualifications of voters and of holding office at all subsequent elections shall be prescribed by the legislative assembly, and concludes with the following proviso:

"Provided, That the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, concluded," etc.

From a reading of the section, it would appear to the legal mind that the proviso was a limitation upon legislative power, and that it was not intended to operate directly upon the right of suffrage. But in what light did the legislative assemblies regard the proviso when they referred to the limitations upon the right of suffrage and of holding office contained in section 21 of the original act and the amendments thereto? It is clear that they treated it as an independent section, and as a limitation upon the right itself, rather than a legislative limitation. The only limitations upon the right, or the only reference to the subject, in the Organic Act, are found in the section above quoted. It must be apparent that the Legislature did not refer to the limitations upon the right of suffrage and of holding office at the first election, for to so hold would present insurmountable absurdities. For instance, at the first election the right was confined to "free white male inhabitants." Now is it to be presumed that the Legislature in 1907 and 1909 would attempt to violate the fifteenth amendment of the Constitution of the United States, and the act of Congress making such amendment applicable to territories? Again the section limits the right of suffrage and of holding office, at the first election, to free white male inhabitants "who shall have been a resident of said territory at the time of the passage of this act," consequently, should we hold that the limitations referred to were those prescribed for the first election, it would necessarily result that the Legislature, as late as 1909, was attempting to deny the right of suffrage to all those who were not residents of New Mexico in 1850. Such, of course, was never the intention, and therefore the Legislature necessarily must have had in view the limitations contained in the proviso, and intended that the right of suffrage and of holding office should be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the republic of Mexico, etc.

"The Supreme Court of the United States, in *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627, has held that the word 'citizen,' as used in the Constitution and laws of the United States,

has uniformly conveyed the idea of membership of a nation, and nothing more, and hence include either sex alike." *Cronly v. City of Tucson*, 6 Ariz. 285, 56 Pac. 876.

[4, 5] Hence, from a review of the statute law of the territory, it will be seen that there was no express denial of the right of suffrage, or of holding office, to women; neither was the right granted in terms. In this connection it is to be remembered that the civil law of Spain and Mexico was in force in this territory at the time of the original enactment by the territorial Legislature, under which women had no such right as is contended for, and this remained the situation until January 7, 1876, when the act was passed by the Legislature, adopting the common law in this jurisdiction. This appears as section 2871, Comp. Laws 1897, and reads as follows:

"In all the courts in this territory the common law as recognized in the United States of America, shall be the rule of practice and decision."

There being no statute, either denying or conferring the right of suffrage and of holding office upon a woman, it is clear that we must look to the common law, if the above section adopted it in New Mexico, to ascertain and determine the right of women to vote and hold office. Under the common law, the right of women to vote was, of course, never recognized, and such right is not involved in this case, but merely the right to hold an appointive office, which is purely ministerial. Before discussing the right of a woman to hold such an office, under the common law, it will be necessary to dispose of appellant's contention, viz: That the civil law and not the common law is in force here, except where modified by statute. In support of the contention, *Ward v. Broadwell*, 1 N. M. 85, *Chavez v. McKnight*, 1 N. M. 147, *Ilfeld v. Baca*, 14 N. M. 65, 89 Pac. 244, are cited and relied upon. The first two cases cited were decided long prior to the passage of the act of January 7, 1876, and at the time such decisions were rendered the civil law was in force in New Mexico, except where changed by statute, or abrogated by the Organic Act. No such point was involved in the last case cited. On the other hand, as early as 1886, in the case of *Browning v. Estate of Browning*, 3 N. M. (Gild.) 659, 9 Pac. 677, the Supreme Court of New Mexico construed the above statute and held:

"The Legislature intended by the language used in that section to adopt the common law, or *lex non scripta*, and such British statutes of a general nature not local to that kingdom, nor in conflict with the Constitution or laws of the United States, not of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country."

This construction of the effect of the above statute has been consistently adhered to by the courts of the territory for more than a quarter of a century. *Territory v. Ashenfelter*, 4 N. M. (Gild.) 93, 12 Pac. 879; *Dye*

v. Crary, 12 N. M. 460, 78 Pac. 533; Sandoval v. Albright, 14 N. M. 345, 93 Pac. 717.

[8] Accepting the construction of section 2871, supra, in the Browning Case as correct, it is therefore necessary to inquire into the right of a woman, under the common law of England, at the time of our separation from that country, to hold such an office as Librarian of the State Library. Before reviewing the common law, however, it would perhaps be well to consider the statutes of the territory, creating the office and defining the duties of the librarian, in order to determine the nature of the office, for, as we shall later see, under the common law women were only permitted to hold certain offices, and their right to so hold such offices depended, to a large degree, upon the nature and duties of the office.

The statutes relating to the territorial library, the custody and management thereof, will be found under section 2187, to and including section 2215, C. L. 1897. Under said sections the management of the library is placed in the hands of a board of trustees, and said board is given the power to adopt rules for the conduct and management thereof. All books must be purchased by the board. The act defines the duties of the territorial librarian, which may be briefly summarized as follows: (a) Such librarian has the care and custody of the library; (b) is to keep same in a room in the capitol building provided for that purpose, and to provide for the safe-keeping therein of all things belonging or appertaining thereto; (c) has charge of all books, maps, etc., belonging to the library or directed to be deposited therein; (e) must keep the library open during certain hours; (f) not to permit books to be removed from the library, except by certain officials, and to take a receipt for all books removed; (g) to prepare an alphabetical catalogue of the library; (h) to label each book in the library in a specified manner; (i) to report to the Governor, when required, a list of books missing and the fines collected, and to report to the Legislature; (j) to institute suit, in the name and use of the territory, for the recovery of certain penalties, for the unauthorized removal from the library of any books, etc. From a review of the statutes upon the subject it will be found that the librarian is not required to exercise his or her judgment in any respect. The duties are prescribed by statutes or defined by rules adopted by the board of trustees. The office is purely ministerial.

"Ministerial offices, it is said, are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior." *State v. Loechner*, 65 Neb. 814, 91 N. W. 874, 59 L. R. A. 915.

Under the statute in question the librarian was required to conform to the rules adopted by the board of trustees. He was given no initiative as to any matter, or power to determine any question. He was to perform

the duties prescribed by the act and the rules of the board in the manner directed.

"A ministerial act \* \* \* is defined to be 'one which a person performs in a given \* \* \* manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done.'" *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468.

An officer, performing only ministerial acts, is, of course, only a ministerial officer.

[7] The office being purely ministerial, it remains to determine the right of a woman to hold such an office under the common law.

From a review of the American cases, where the common-law rights of women to hold public office have been considered, there appears to be a decided conflict of authority upon the subject. We have, however, been referred to no case, where the duties were so purely ministerial, in which the right to exercise the duties of the office have been denied to women.

In *Opinion of Justices*, 107 Mass. 604, the right of a woman to hold the office of justice of the peace was denied. But this office, under the Constitution of that state, was a judicial office, the duties of which must be exercised by the incumbent in person. The case cannot therefore be considered in point in this case, where the office is ministerial.

Again, in *Lelia J. Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239, the same court denied the right of a woman to be admitted as an attorney and counselor of the court. The court says:

"An attorney at law is not indeed, in the strictest sense, a public officer. But he comes very near it. As was said by Lord Holt, 'The office of an attorney concerns the public, for it is for the administration of justice.'"

In the opinion the court evidently treats an attorney at law as an officer, and denies the right of a woman to be admitted thereto because under the common law a woman was not permitted to hold any office that concerned the administration of justice, where she was required to exercise the duties of the office in person.

The same court later, in *Opinion of Justices*, 186 Mass. 578, held that, under St. 1879, c. 291, § 2, which provided that the Governor, with the advice and consent of the council, should appoint nine persons, who should constitute a state board of health, lunacy, and charity, it was competent to appoint a woman member of the board. While the court does not, in terms, base the right upon the common law, it does say:

"The duties of the board are mostly administrative, and are such as may well be performed by women. There is no incompatibility between the nature and character of the duties and their due performance by women"

—thus recognizing the common-law limitations upon the right, and implying that under the statute a contrary doctrine would have been announced were the office under consideration one which at common law a woman would have no right to hold.

In an earlier case, the same court, in *Opinion of Justices*, 115 Mass. 602, held that under the Constitution a woman might be a member of a school committee. The Constitution was silent upon the question of the right, and the court, in discussing the right of a woman to hold such an office under the common law, say:

"The common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character the duties attached to which were such that a woman was competent to perform them."

The Supreme Court of Michigan, in the case of *Attorney General v. Abbott*, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92, held that a woman could not be elected to the office of prosecuting attorney, under an article of the Constitution of that state which provided that such officers shall be "chosen by the electors," in the absence of an express provision conferring the right to hold such an office on women. The court say:

"There being no express provision of the Constitution or laws of the state conferring upon the respondent the right to hold this office, the question must be determined by the principles of the common law, and the manner in which those principles have been construed in this state for the past years. \* \* \* There can be no question of the common-law rule that a woman cannot hold a general public office in the absence of express constitutional or statutory authority conferring upon her such right."

The opinion of the court was based chiefly upon the exposition of the common-law right of women to hold office by Chief Justice Gray, in *Robinson's Case*, supra. It will be noted from the above quotation that the court say that at common law a woman could not hold "general public office." The court does not undertake to define the meaning of "general public office," but it will be seen, from the concurring opinion of Mr. Justice Hooker, that the court had in view the disqualification of women under the common law to hold general public office connected with the administration of justice, where she was compelled to perform in person the duties of the office, calling for the exercise of personal discretion and judgment. The Justice says:

"It remains to inquire whether the office of prosecuting attorney is such a ministerial office as to render a woman ineligible"

—thereby implying that women would be eligible to hold certain ministerial offices, even though they might fall within the meaning of the term "general public office." Certainly the criterion is not whether the office be a state, district, or county office, for the Supreme Court of Massachusetts, in the *Opinion of Justices*, 136 Mass. 578, recognized the right of woman to be appointed to and hold the office of member of the state board of health, lunacy, and charity, which clearly would make her a state officer. It would seem that under the common law a woman was not capable of holding a public office, connected with the administration of justice, or the legislative department of the government, for her powers could not be delegated,

and in either position she would be called to exercise judgment and discretion, and it was generally supposed, in that period of the history of the world, when the common law had its birth, that women were incapable mentally of exercising judgment and discretion and were classed with children, lunatics, idiots, and aliens in so far as their political rights were concerned, but we have been cited to no English case which denies the right of a woman, under the common law, to hold a purely ministerial office, whatever might be the nature of the office, if she was capable of performing the duties thereof, and in so doing was not called upon to exercise judgment and discretion. The Michigan court evidently recognized this distinction in the case of *Attorney General v. Abbott*, supra, for Justice Hooker says in discussing the inquiry suggested as to the nature of the office of prosecuting attorney:

"That, I think, is settled by one of our own decisions, the case of *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886. It was there held that a prosecuting attorney could not delegate his powers; that he was vested with a personal discretion as a minister of justice. He might perhaps employ assistants when authorized by law, but could not delegate his official discretion. It seems clear that this judicial discretion takes the office out of the class recognized by the common law, and the cases, both English and American, as within the right of women to hold."

Even in the above case, where the official was "vested with a personal discretion as a minister of justice," a strong dissenting opinion was filed by Justice Moore, wherein he contended that a woman was eligible to that office.

The Supreme Court of Oregon, in *Re Leonard's Application* to be admitted as an attorney, 12 Or. 93, 6 Pac. 426, denied the right of a woman to be admitted as a member of the bar. The opinion was based entirely upon the *Robinson Case*, supra. The Massachusetts Supreme Court denied the right of a woman to be appointed a notary public. See *Women as Notaries Public*, 6 L. R. A. 842; *Opinion of Justices*, 165 Mass. 599, 48 N. E. 927, 32 L. R. A. 350.

The New Hampshire Supreme Court in *Re Opinion of Justices*, 78 N. H. 621, 62 Atl. 969, 5 L. R. A. (N. S.) 415, 6 Ann. Cas. 283, denied the right of a woman to hold the office of notary public on the ground that the office was "public and governmental," and could not, at common law, be held by a woman.

On the other hand, many courts have recognized the right of women to hold various offices, where no statute or constitutional provision existed, either expressly or impliedly denying the right. Thus, in the case of *Wright v. Noell*, 16 Kan. 601, in an opinion by Justice Brewer, the Supreme Court of Kansas held that a woman in that state was eligible to hold the office of Superintendent of Schools. Likewise the Supreme Court of Washington announced the same doctrine in the case of *Russell v. Guptill*, 13 Wash. 831,

43 Pac. 340. The Supreme Court of Indiana, in the case of *In re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701, held that a woman could be admitted to practice law, as did the Supreme Court of Connecticut, in the case of *Matter of Hall*, 50 Conn. 131, 47 Am. Rep. 625. The Indiana court say:

"We have searched in vain for an expression from the common law excluding women from the profession of the law."

The Supreme Court of Michigan, in the case of *Wilson v. Circuit Judge*, 87 Mich. 493, 49 N. W. 869, 24 Am. St. Rep. 173, held that a woman could be appointed deputy county clerk, as the office of county clerk was wholly ministerial. A woman was held eligible to election as a county clerk, under a constitutional provision which provided that no person shall be chosen to an office "who is not a citizen of the United States, and who shall not have resided in this state one year." *State ex rel. Crow v. Hostetter*, 187 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515.

The Supreme Court of Nebraska, in the case of *State ex rel. Jordan v. Quible*, 86 Neb. 417, 125 N. W. 619, 27 L. R. A. (N. S.) 531, 21 Ann. Cas. 401, held that a woman was eligible to the office of county treasurer. The court say:

"No constitutional or statutory provision inconsistent with the right of a woman to hold that office has been found. A familiar legislative enactment, however, adopts 'so much of the common law of England as is applicable and not inconsistent' with the federal and state Constitutions and the statutes of this state. This court in its early history announced that the common law thus adopted permitted women to hold office administrative in character, the duties of which they were competent to discharge."

See, also, *Opinion of Justices*, 62 Fla. 1, 57 South. 351, Ann. Cas. 1913C, 1161. Exhaustive notes on the right of women to hold office generally will be found appended to the cases of *State ex rel. Crow v. Hostetter*, 38 L. R. A. 208, and *State ex rel. Jordan v. Quible*, 27 L. R. A. (N. S.) 531. From a review of the cases it will be found that the courts in this country are by no means agreed upon the rights of women under the common law to hold office. The right, as to many offices, has been denied by some courts and upheld by others. We do not believe, however, that an American case can be found expressly denying the right of a woman to hold a purely administrative, ministerial office, such as the one here in question. On the other hand, many cases affirm their right to hold offices, even where judgment and discretion must be exercised by the incumbent. A review of the English cases will show that women have held many important offices in that country, some by appointment, others by inheritance. Her right to hold a purely ministerial office, so far as we have been able to ascertain, was never denied by the English courts, and her eligibility to judicial office sometimes was made to depend upon

whether the duties of the office could be performed by a deputy. Eleanor was appointed Lord Keeper of England. 1 Campbell, L. L. Ch. 134. An unmarried woman was held to be eligible to appointment as arbitrator. 8 Edw. 4; 1 Br. 37. A woman was chosen sexton by election, and her right to the office upheld. *Olive v. Ingram*, 2 Str. 1114.

In *King v. Stubbs*, 2 T. R. 395, it was held that a woman could be elected to and hold the office of overseer of the poor. Counsel, in arguing against the right, said:

"Wherever it is said that a woman may hold any particular office, it is either because the office is ministerial, or because, though partly judicial, it is hereditary, and then she may appoint a deputy."

The court say:

"The only question then is whether there be anything in the nature of the office that should make a woman incompetent, and we think there is not. There are many instances where, in offices of a higher nature, they are held not to be disqualified; as in the case of the office of high chamberlain, high constable, and marshal; and that of a common constable which is both an office of trust, and likewise, in a degree judicial. So in the case of the office of sexton."

Other English cases will be found cited in the note in 38 L. R. A. 208, and note to *Schuchardt v. People*, 89 Am. Rep. 34. We shall not attempt to review them all. The common-law rule upon the subject, deducible from the cases, may be stated as follows: That while women did not generally hold public office, and the question of their competency was not well settled, they did hold various offices, some of which were of great importance; some were appointive and some hereditary; that their right to hold a purely ministerial office was never denied, and has been upheld; that they were ineligible to hold any office which called for the exercise of judgment and discretion, unless the duties of the office could be exercised by deputy, it being generally supposed that women, from the nature of the sex and their inexperience, were incapable of exercising that judgment and discretion which was necessary to properly discharge the duties of the office. Another consideration was that there must be no incompatibility between the nature and character of the duties of the office and their due performance by women; if the duties of the office could be performed by a deputy she was held capable of holding the office. It is worthy of note, as stated by the annotator of the case note, in 38 L. R. A. 208—

"that in every instance in which a woman's right to any office was questioned prior to the present generation she was held to be competent, although the courts often took occasion to say that women were not competent to hold all offices."

The office of state librarian is clearly such an office as a woman might hold under the common law of England at the time of our separation from that country. The office is purely ministerial, and called for the exercise of neither judgment nor discretion, and

the duties of the office are not incompatible with the ability of a woman to perform.

Another argument, were it needed, might be advanced in favor of such a construction of the law by the courts, viz., the long-continued executive construction of the law upon the subject. Since the year 1905 the Governor, in whom, by the act creating the territorial library, the appointing power was vested, has uniformly appointed women to fill this office. Such appointments have been confirmed by the legislative council of the territory without question as to the right of a woman to fill the office. Governor Otero, in 1905, appointed Mrs. Anita Chapman as librarian, and she was promptly confirmed by the council. The present incumbent was twice appointed to the office by Governor George Curry, and the present Governor of the state nominated a woman for the office, whose appointment, however, failed of confirmation by the Senate, but not because of the fact that the appointee was a woman. Other instances might be cited where the executive authority of the territory recognized the right of women to fill various offices. Women were appointed notaries public, and served without question, even prior to the act of 1909, which distinctly authorized their appointment. The people, in various parts of the state, have elected women to the office of county superintendent of schools, and their right to hold such offices has never been questioned. The Supreme Court of the territory, in 1908, admitted a woman to practice law in the territory, and 25 years ago a woman was admitted to the bar at Las Vegas. The people of the territory, the chief executive of the territory, and the courts having long recognized the right of women to hold various offices, and the office in question having been acceptably filled for many years by women, it is clear that this court should not oust a woman from the office because of her sex solely, unless it is clearly and unmistakably demonstrated that she holds the office without right or lawful authority. The most that can be said against her right to so hold is that the statute does not, in terms, make her eligible. This is true, but, on the other hand, it does not deny such right. Under the common law, no case has been cited denying the right of a woman to hold the particular office in question, nor, on the other hand, have we found a case affirming the right. But on principle, deducible from the old English cases, we are of the opinion that under the common law she could have held the office, and, no statute of the territory denying her the privilege, she was rightly in office at the time of the adoption of the state Constitution.

[8] But it is insisted, that the right to hold the office is a political right, which was not carried into the law of the territory by the statute adopting the common law of England. It is sufficient answer to this contention to say that we adopted all of the common law,

or *lex non scripta* of England and such British statutes as were of a general nature and not local to that kingdom, in force at the time of our independence, in so far as the same did not conflict with the Constitution or laws of the United States and the Organic Act of the territory and the legislative enactment thereof, which were applicable to our conditions and circumstances and our form of government. Many of the political rights recognized by the common law were in conflict with our customs and institutions and not suited to our conditions, and of course were not brought into our law, but such as were recognized by the common law, and not in conflict with our established laws, institutions, and customs, and suitable to our conditions were of course carried into the body of our law. That the common law is applicable to the question involved in this case, in the absence of a statute upon the subject, has never been denied by an American court, even in those cases which denied woman the right to hold office.

It is also suggested that at the time of the adoption of the common law the Legislature did not have in view or contemplation the fact that a woman would claim the right thereunder to hold office. This is doubtless true. But it is also probable that the question was not considered by the Legislature. This can be no argument against the right of a woman to hold office under that law. Since the adoption of the common law in New Mexico, it is as much the rule of decision in this state as in those states in which it was the law from the beginning of their political existence. *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S. W. 740, 69 L. R. A. 966, 8 Ann. Cas. 1117. Again, innumerable rights, privileges, and immunities were conferred, recognized, protected, preserved, and enforced by the common law, and it is hardly imaginable that the legislative assembly, when it adopted the common law in the territory, had in mind each particular right or privilege which would be claimed under that law. The Legislature adopted it all, to the extent hereinbefore stated, and the courts will not deny a right asserted under that law, on the ground that the Legislature did not have the particular right or remedy in view at the time of the adoption of the law.

[9] The question as to the right of a woman to be appointed to such an office under the Constitution of the state is not involved in this case. It is conceded that if the present incumbent was rightfully in office, at the time of the adoption of the Constitution, she was continued in office by virtue of section 9, art. 22, of the Constitution, which provided:

"All courts existing, and all persons holding offices or appointments under authority of said territory, at the time of the admission of the state, shall continue to hold and exercise their respective jurisdictions, functions, offices and appointments until superseded by the courts, officers, or authorities provided for by this Constitution."

This clause was for the purpose of continuing in office those legally entitled thereto at the time of the adoption of the Constitution, until succeeded by their successors, appointed or elected according to law. It did not, of course, divest the courts of the power given them by law to remove officers for the causes prescribed by law, or to oust intruders from such offices. If the appellee was rightfully in office at the time of the adoption of the Constitution, she was continued therein by the above clause, until her successor was appointed and qualified, according to law, subject only to removal for legal cause prior to such time.

Appellee, rightfully holding the office at the time of the adoption of the Constitution, was entitled to retain the office at the time of the institution of this suit, and the judgment of the lower court sustaining the demurrer to the information will be sustained; and it is so ordered.

PARKER, J. (concurring). I have had great difficulty in agreeing with some of the propositions upon which the opinions of my Associates are based. Upon first examination of the case, I was convinced that women were prohibited from holding office by reason of the condition of the statute law on the subject. My conclusion was reached as follows: The Organic Act prescribed the qualification of voters and office holders at the first territorial election, and limited the same to males, thereby excluding females; it granted power to the Legislature to prescribe the qualification of voters and office holders for the future, but restricted the power so that only citizens of the United States might receive the right; the Legislature at its session in 1851 prescribed the qualification of electors and elective office holders, and limited the same to males; it further restricted office holding generally to such persons as were not prevented by the terms of the Organic Law. This was the state of the specific statute law on the subject at the time appellee was appointed as territorial librarian.

As a conclusion from the foregoing facts, I was of the opinion that Congress in the Organic Act, and the territorial Legislature in its acts on the subject, having extended these rights to males only, when dealing with the subject should be held, under the doctrine of "Expressio unius est exclusio alterius," to have, in legal contemplation, denied these rights to women as effectually as if the denial had been express; that this denial of the right to women, being specific, and in a statute dealing specifically with this subject, it was not controlled by the act of 1876, which was a statute of a most general character, and which adopted the common law as the rule of practice and decision in this jurisdiction, and did not purport to deal specifically with the right to hold office. This position was disclaimed by counsel for the state on reargument, and, after repeated conferences

and discussions with the other members of the court, and upon more mature consideration, I am convinced that this conclusion is not warranted.

In this connection it is to be noted that there is no express grant of a right to hold appointive office in either the Organic Act or the territorial legislation to either males or females. Section 19 of the act of 1851 is complete on the subject of the right to vote and hold elective office, and it follows perfectly the restriction contained in the Organic Act. Section 21 of the Act of 1851 must therefore be held to relate to offices other than elective offices; otherwise its provisions are meaningless and unnecessary, being fully covered by the provisions of section 19, in so far as the restriction to citizens of the United States is concerned. It must therefore relate to appointive offices. This section is negative in form and would appear to be a limitation upon, rather than a grant of, the right to hold office. But while negative and restrictive in form, it is permissive at least, if not positive and creative in substance. The section prohibits aliens from holding appointive office, but impliedly authorizes citizens of either sex to hold such office. If the Legislature of 1851, in the exercise of the powers conferred by the Organic Act, had simply provided that "no person not a citizen of the United States shall vote or hold office," the implication would be irresistible that it intended thereby to grant that right to citizens. Just so in the present case. It provided that no person not a citizen (that is, no person prohibited by the organic law) might hold appointive office, thereby impliedly granting that right to citizens. Women are, of course, included in the words "citizens of the United States."

When the Governor was authorized to appoint a state librarian under section 2195, C. L. 1897, what class of person was he authorized to select? The act creating the office furnished no answer. The one other provision on the subject is section 21 of the act of 1851, which excludes aliens, and impliedly includes citizens, among whom, of course, are women. If express statutory authority is necessary to confer the right to hold appointive office, where is the authority for men to hold such office, except as contained, impliedly, in section 21, *supra*, it does not exist otherwise.

In *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, in discussing who may hold office, this significant statement is made:

"The Constitution giving the right of election and the right of appointment, these rights consisting essentially in the freedom of choice, and the Constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any express terms of the Constitution, but it results, as a just deduction, from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities, to choose and to appoint any person, who is not made ineligible



by the Constitution. Eligibility to office, therefore, belongs not exclusively or specially to electors, enjoying the right of suffrage. It belongs equally to all persons whomsoever, not excluded by the Constitution."

As applied to the appointment of a woman as a deputy to perform ministerial duties, the Supreme Court of Michigan, in *Wilson v. Circuit Judge*, 87 Mich. 493, 49 N. W. 869, 24 Am. St. Rep. 173, said:

"The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has authority to appoint whomsoever he pleases. The person appointed acts for him; or, in other words, he acts through his deputy. His choice is not confined to any race, sex, color, or age."

It may occur to the mind that if this position be correct then infants may hold appointive office. It would appear at first glance that such could not be the case, but an examination of the law discloses that infants at common law, and here, unless expressly excluded by statute or Constitution, may hold any ministerial office not connected with the administration of justice. 22 Cyc. 515; *U. S. v. Bixby* (D. C.) 9 Fed. 78; *Harkreader v. State*, 35 Tex. Cr. R. 243, 33 S. W. 117, 60 Am. St. Rep. 40, collecting cases.

It may be suggested that the statutes heretofore mentioned, taken in connection with the civil law, which was then in force, would exclude women from holding appointive office, at least until the civil law was superseded by the act of 1876, which brought in the common law. I do not agree to the suggestion. Of course, ordinarily the laws of a country acquired by conquest remain in full force until superseded by the laws established under the new government, and they are superseded only to the extent to which the laws of the new sovereignty are antagonistic thereto. But in this case, while the civil law denied such rights to women, the Congress established a new form of government, and the Legislature established a new system of political and governmental rights. Under such circumstances the laws of the former jurisdiction relating to such rights must necessarily be held to have been directly or impliedly repealed.

It would seem, therefore, that there is implied statutory authority for women to hold appointive office.

I am aware that the rule of interpretation above mentioned is to be applied with caution, and only when the act is creative of a right rather than merely declaratory or limitative of a right. But it seems to me that in this case the legislative intent to grant the right to all citizens to hold appointive office is manifest, and the application of the rule of interpretation above mentioned is justified and required.

Counsel for the state rely upon two propositions: First. There is no statutory grant to women of the right to hold appointive of-

fice. This contention has been disposed of. Second. The common law, which was adopted by the act of 1876, clearly excludes a woman from such an office as state librarian. With the latter contention of counsel I cannot agree. If this question had arisen in England just prior to the separation of the Colonies, I feel convinced that the right of a woman to hold this office would have been upheld. The question at common law, in case of appointive offices, was whether the office was ministerial, and consequently did not involve the exercise of judgment or discretion, of which women were not supposed to be possessed. If so, a woman could be appointed to and hold the same, if it was not unsuited to her ability to perform its duties. This office is a ministerial office. Not a single duty exists which is not subject to control by either the board of trustees of the library, or the letter of the statute creating the office. Nothing is left to discretion. The restriction to local officers by the Massachusetts court in 115 Mass. 602, is ingrafted on the law, and is not warranted by the English cases.

For the reasons stated, I concur in the result reached by Judge ROBERTS.

HANNA, J. (dissenting). I find I cannot concur in the majority opinion of the court in its conclusion that under the common law a woman was eligible to hold a purely ministerial office, if she was capable of performing the duties thereof and was not called upon to exercise judgment and discretion.

My reasons therefore are: First that the right to hold office under our political system is not a natural right, but exists only because and by virtue of some law expressly or impliedly creating or conferring it. *Mechem on Public Officers*, § 64. And it has been held that women, although citizens of the United States in the broad sense, have, under our political system, no political power, and cannot, except under an enabling statute, be considered eligible to hold office. *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *Mechem on Public Officers*, § 73. This is doubtless the law of the case, unless our Legislature by the adoption of the common law (section 2871, C. L.), as the rule of practice and decisions in our courts, had enlarged the right so far as women are concerned. Can it, therefore, be said that the right to hold an office such as the one in question had been conferred upon women by the common law, assuming for the present that if the right existed, as a common-law right, and our Constitution or legislation does not prohibit, a woman may hold the office under consideration?

Our inquiry is made a difficult one by reason of the fact that no office similar to the one under consideration, i. e., librarian, was ever referred to in the English reports; so we will give a general consideration to the early English cases, where the right of a woman to hold office was considered.

The cases, decided prior to April 21, 1788, are collected in the case of *Rex v. Stubbs*, reported in 2 T. R. (D. & E.) 395. It was there contended by counsel that:

"A woman is capable of serving almost all the offices in the kingdom; such as those of queen, marshal, great chamberlain, and constable of England, the champion of England, commissioner of sewers, governor of the workhouse, sexton, keeper of the prison of the gatehouse of the dean and chapter of Westminster, returning offices for members of Parliament, and constable, the latter of which is in some respects judicial."

Opposing counsel contending as follows:

"With respect to all the instances cited in which women have served other offices, no argument whatever can be drawn from them to show that a woman is competent to serve this office; there being not the least similarity between the nature of the respective offices. As to the Queen of England, it is sufficient to say that of all other stations there is not one perhaps which requires less personal exertion than this. And it was even doubted whether the regal office in this kingdom was hereditary in a female. In consequence of which the statute 1 M. St. 8, c. 2, was passed, purposely to declare that a female was capable of inheriting. The reason why a female may hold the office of constable of England is because she may appoint a deputy; now that reason is an admission that if she could not appoint a deputy she could not hold the office. The same reason is given why Lady Russell might hold the office of the custody of the castle of Dunningham, because the office was granted to be exercised *per se vel deputatum suum*. Oro. Jac. 18. So the offices of great chamberlain, marshal, and champion of England are hereditary; they are granted to a man and his heirs. With respect to the instance of a commissioner of sewers, it is merely the opinion of Callia, for which he gives the absurd reason that Semiramis governed Syria. As to the case of the sexton, which is said to be only a private office of trust, to take care of the church, etc., and therefore a woman may serve it; it is also said there that if there were anything to be done by the sexton, not proper for a woman, it would be otherwise. With respect to the case of the constable, it is only the opinion of Serjeant Hawkins that a custom to serve by rotation is good, because he thought that a woman might procure a deputy; now this admits that she cannot serve in person; and if she cannot serve by deputy, the custom could not be supported. In answer to these cases, it is not necessary to consider how far they are authorities to show that in certain cases a woman may appoint a deputy, but for this part of the argument it is sufficient if they prove the incompetency of females to serve those offices in person. Wherever it is said that a woman may hold any particular office, it is either because the office is ministerial, or because, though partly judicial, it is hereditary, and then she may appoint a deputy. So a woman, who is a forester in fee cannot execute the office herself, but she may appoint a deputy; the office being ministerial. The incompetency of women extends to a variety of cases; they cannot serve on juries; vote for members of Parliament; in particular, the case in 16 Vin. Abr. 415, is decisive to show that a woman is incompetent to serve it. There a woman was rejected as unfit; and Powell, J., said: 'A woman cannot be an overseer of the poor, and there can be no custom of the parish to appoint her, because it is an office created by act of Parliament.' Secondly, an officer, who acts merely ministerially may appoint a deputy, but a judicial officer cannot; neither can a deputy be appointed where the office is (strictly speaking) neither ministerial nor judicial, but an

office of trust and discretion and the office of overseer of the poor is of that description. It is said in Bro. Abr. tit. Deputy, pl. 9, tit. Graunt, pl. 108, tit. Patent, pl. 68, and Sir W. Jones, 113, that an office of trust cannot be assigned; neither can it be executed by deputy unless power be expressly given for that purpose. Co. Litt. S. 879. A steward cannot appoint a deputy without power. 9 Co. 48. Nor the clerk of the papers. Freem. 429. The office of high constable of England is expressly granted to be exercised by himself, or his sufficient deputy. And the offices of earl, marshal, great chamberlain, and the champion of England, are hereditary; that they are to the grantees and their heirs, so that, according to the terms of those grants, power is given to appoint a deputy. All of the offices mentioned on the other side (except one) are either ministerial or hereditary, in both which cases a deputy may be appointed. The instance indeed of a constable's appointing a deputy, if it be the law, forms an exception to the general rule."

In the *Stubbs* Case the office involved was overseer of the poor; it being contended that in the St. 43 Eliz. c. 2, prescribing that the office should be served by "substantial householders," there was no reference to sex, and the defendant, *Stubbs*, a woman, was eligible to appointment. The court disposed of the question in the following language.

"As to the second objection, we think that the circumstance of one of the persons appointed being a woman does not vitiate the appointment. The only qualification required by St. 43 Eliz. is that they shall be substantial householders; it has no reference to sex. The only question, then, is whether there be anything in the nature of the office that should make a woman incompetent, and we think there is not. There are many instances where, in offices of the higher nature, they are held not to be disqualified, as in the case of the office of high chamberlain, high constable, and marshal, and that of a common constable, which is both an office of trust, and likewise, in a degree, judicial; so in the case of the office of sexton. As to the case in Vin. tit. Poor, 415, that is no conclusive authority. It is to be collected from the case that there were other persons in the parish proper to serve; and, if so, the court held that the Justices had not acted improperly in refusing to approve of a woman; where there are a sufficient number of men qualified to serve the office, they are certainly more proper; but that is not the case here, and therefore, if there be no absolute incapacity, it is proper in this instance from the necessity of the case. And there is no danger of making it a general practice; for as the Justices are invested with a discretionary power of approbation, it is not likely that they will approve of such an appointment when there are other proper objects."

So that we find that the English courts had not affirmatively determined the rights of women in the matter of the holding office, in 1788.

In the *Stubbs* Case, while the woman was conceded to be a substantial householder, and as a result came within the terms of the statute, the court said it was proper that she serve "from the necessity of the case," and that "there is no danger of making it a general practice."

Turning to the American cases in which the common law was considered as affecting the rights of a woman to hold an office, we find a conflict of opinion. Our inquiry is neces-

sarily limited to those states where the power to hold office has not been conferred expressly upon women by Constitution or statute. It has been held that a woman cannot hold a judicial office, i. e., that of justice of the peace. Opinion of the Justices, 107 Mass. 604. The reason assigned in this case was that the office was a judicial one, and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. In a later opinion from the same court, the court said:

"The common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform." Opinion of the Justices, 115 Mass. 602.

This opinion of the court was announced without citing authority, and would be of some importance in determining what the common law upon the subject has been interpreted to be by American courts, had not the same court in a later opinion (Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239), which carefully considered all the English authorities, arrived at a somewhat different conclusion. It is unnecessary to quote at length from this opinion, which is a careful review of the English cases and authorities, and I will only quote the conclusion reached, in the following language:

"And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold, without express authority of statute, except that of overseer of the poor, a local office of an administrative character, in no way connected with judicial proceedings. The King v. Stubbs, 2 T. R. 395."

As to the one exception referred to by the Massachusetts court in this opinion, we have observed that the English court based its decision upon the necessity of the case, and that the statute, impliedly, at least, by fixing the qualification of "substantial householders," had conferred the right to fill the office upon women, by legislative grant.

The Court of Appeals of Kentucky, in the case of Atchison v. Lucas, 83 Ky. 465, said, "At common law, a woman could not hold any public office," and denied to a woman the right of filling the office of jailor. The court further said in this connection:

"We do not mean to adjudge that offices of legislative creation may not be filled by women, or the right of suffrage granted them in certain cases; but, on the contrary, such rights may be conferred."

By the statements quoted the court clearly took the position that the right to hold office was to be controlled by legislation creating or conferring the right, and, in the absence of enabling legislation, must be considered as withheld, and further that no right arose by virtue of the common law. This may seem to conflict with the English cases referred to, where women filled certain offices through deputies, but the very fact that her right was so limited to offices where she

might appoint a deputy would indicate that otherwise she did not possess the right.

So we find the rule proclaimed in Comyns' Digest, vol. 5, p. 202, under title, Grant of an Office (B2) as follows:

"To a Woman: (What Offices a Woman may Execute;) So, the grant of an office of government, which may be exercised by a substitute or deputy, to a woman, will be good; as a woman may be made regent of the kingdom. Cal. 201."

Likewise in Ohio it was held that, in the absence of constitutional or statutory provision on the subject, a woman could not hold the office of director of a workhouse. State v. Rust, 4 Ohio Cir. Ct. R. 829.

It is also contended that the Massachusetts court in Opinion of the Justices, 136 Mass. 578, recognized a woman's right to serve as a member of the board of health, lunacy, and charity because the duties of the board are mostly administrative, and are such as may well be performed by a woman, thus recognizing what it is contended are the common-law limitations upon the right of woman to fill an office. I cannot agree with this contention. The court simply passed upon a statute providing that the board should consist of nine "persons" appointed by the Governor, and held that "the word 'persons' clearly included women." This court expressly referred to its previous decision in Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239, and said that there was no conflict between the two cases. The distinction between the two is obvious, the one being based upon the common law of the subject (Robinson's Case) and the other upon the construction of a statute plainly intending to continue women as qualified incumbents for positions, which by previous legislative enactments women had been designated as qualified to fill.

The New Hampshire Supreme Court, in a case involving the question of the right of a woman to fill the office of notary public, said:

"Because by our common law women are disabled from holding public office, and because the place of notary public is a public governmental office, and because we are unable to find any evidence of legislative purpose or intention to change the common law of this state in this respect, if such power exist, a point not considered, we are compelled to answer in the negative the question submitted." Re Opinion of Justices, 78 N. H. 621, 62 Atl. 969, 5 L. R. A. (N. S.) 418, 6 Ann. Cas. 283.

The rule laid down in this case is the prevailing doctrine in this country upon the subject, as applied to the office of notary public.

It may be argued that the office of notary public is a judicial one, but the reasons assigned for the disqualification of women is not put upon that ground.

It has been held in Massachusetts that none of the acts which a notary is called upon to perform are judicial, but that the office is a public one, the duties of which must be performed personally, and cannot be performed by deputy. Women as Notaries Public, 6 L. R. A. 842.

In the Michigan case of Attorney General v. Abbott, 121 Mich. 540, 80 N. W. 372, 47 L. R. A. 92, it was stated as the opinion of the court, by Long, J., that:

"There can be no question of the common-law rule that a woman cannot hold a general public office, in the absence of express constitutional or statutory authority conferring upon her such right."

It is argued that because Hooker, J., in a special concurring opinion, in the Michigan case, conceded that there were instances "where it had been held that they [women] could hold local offices of little importance, where the duties were wholly ministerial," it was to be implied that women could be eligible to hold certain ministerial offices, even though they might fall within the term "general public office." This is a legitimate argument to be drawn from the opinion, but I believe that a careful consideration of this opinion better justifies a different conclusion. In commenting upon those instances of "local offices," ministerial in nature and of little importance, which women had held, Justice Hooker said:

"But while these cases support the claim that women might hold some offices, they reinforce the authorities which deny the general right contended for here."

The right contended for was "that inasmuch as the Constitution is silent upon the subject of the qualifications requisite to this office, we must recognize the right of every one to hold it."

It is worthy of note that the opinion in this case, while apparently pointing out that local ministerial offices of little importance had been held by women, did not give any authority as a basis for the conclusion that such statement might be the rule of common law. We are more inclined to believe that the common-law rule is correctly stated by the editor of the note to the case of *State v. Hostetter* (Mo.) reported in 38 L. R. A. 208, at 215, in the following language:

"It may be said to be the general doctrine now held, both in England and America, that women are ineligible to any important office except when made so by enactment. It is usually said that this is the common law of the subject."

It is also argued that many courts have recognized the right of women to hold various offices, where no statute or constitutional provision existed denying the right. The *Hostetter* Case, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515, is cited as an instance. It is to be found, however, in this case that the Supreme Court of Missouri had under consideration a statute defining the qualifications for the particular office, among other things, to be that of citizenship of the United States, and a former statute, with respect to the same office, had previously provided that the citizenship should be restricted to "free white male citizens." The court said:

"The dropping of the word 'male' in describing the qualifications for such offices has

value as a guide to the legislative purpose in enacting the present law on this subject."

The effect of the opinion was to hold that the Legislature intended to remove the disqualification, and qualify women for this office, which, in passing, it is worthy of note, was held to be a ministerial office admitting of the use of a deputy, and the duties of which were said to be not of such a nature as to be incompatible of discharge by a woman.

A legislative intent to make women eligible was looked for and found by this court. I do not disagree with this view, but consider that it is for the Legislature to grant the right or withhold it, within constitutional limitations, and that the alleged common-law rights have not been so definitely defined as to be worthy of consideration as sufficient rules now to be applied.

*Wright v. Noël*, 16 Kan. 601, is another case cited in support of the rule last referred to. Justice Brewer in this case based his opinion upon the rule announced by the Supreme Court of Massachusetts (*Opinion of Justices*, 115 Mass. 602), which court a few years later, in a lengthy opinion reviewing all of the English authorities (*Robinson's Case*, 131 Mass. 379, 41 Am. Rep. 239), materially qualified its opinion.

The Washington case of *Russell v. Guptill*, 13 Wash. 361, 43 Pac. 340, followed the Kansas case (*Wright v. Noël*, 16 Kan. 601), and Massachusetts case (*Opinion of Justices*, 115 Mass. 602). In *re Leach*, 134 Ind. 685, 34 N. E. 641, 21 L. R. A. 701, and in the Matter of *Mary Hall*, 50 Conn. 131, 47 Am. Rep. 625, are cases involving the construction of statutes, and in each case it was held that the term "persons" used in the statutes necessarily included women.

The case of *Wilson v. Circuit Judge*, 87 Mich. 493, 49 N. W. 869, 24 Am. St. Rep. 173, was also cited, but is not in point, and only declared and affirmed the common-law rule (2 Bl. Com. 86) that a ministerial officer may appoint a deputy, and that, under a statute which was silent as to qualification of deputies, his choice was not limited to any race, sex, color, or age.

The case of *State v. Quible*, 86 Neb. 417, 125 N. W. 619, 27 L. R. A. (N. S.) 531, 21 Ann. Cas. 401, is also cited, but this, as well as all the other American cases which seem to be in point, relies upon the Massachusetts case (*Opinion of Justices*, 115 Mass. 602). An earlier case in Nebraska (*Crosby v. Cones*, 15 Neb. 444, 19 N. W. 682) followed the Massachusetts case, and the later case followed the earlier one without question or consideration of authority.

After a careful consideration of the English and American cases, I conclude as follows: That, if there was any common-law rule defining the rights of women in the matter of holding public office, it was so indefinite and uncertain as to be of no value in sustaining a contention that our Legislature

adopted it and put it into force by adopting the common law. It is apparent that the women of England had, prior to 1776, asserted rights to public offices in a few instances; but, as stated by the Massachusetts Supreme Court, no case is to be found, prior to 1776, where any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged by the English courts to be competent to hold without express authority of statute. This being true, it would seem to be for the Legislature to enlarge the rights of women, which our recent Legislature has done (chapter 60, S. L. 1913) by providing that women may hold any appointive office in this state. Can we properly hold that she had the right prior to this legislation of 1913? In doing so, I believe we invade the province of the Legislature.

It may be said that the office of state librarian is one that permits of the appointment of a deputy, and is therefore not within the application of the limitations herein pointed out. It is true that the librarian has a right to appoint a deputy in instances specified by the statute, but the limitation of such right would preclude any general power to so appoint. I cannot concur in the opinion that importance is to be attached to the executive construction referred to in the majority opinion, because I believe that no statute attempting to define the rights of women to this, or other similar, office is involved, and that the right was not declared by the common law; therefore the right fails to exist because never granted, and there can therefore be no law to construe. The so-called executive construction has doubtless grown up under the assumption that, there being no prohibition, there was no disqualification, entirely overlooking the principle, enunciated by Mr. Mechem, that the right to hold a public office under our political system is not a natural right, and exists, where it exists at all, only by virtue of some law expressly or impliedly creating and conferring it. Mechem on Public Officers, § 64.

For the reasons indicated, I dissent.

#### OVERTON v. STATE. (No. A-2029.)

(Criminal Court of Appeals of Oklahoma. June 6, 1914.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—EVIDENCE.

When the facts disclosed by the record, under any reasonable construction thereof, support a verdict of guilty, this court will not reverse a conviction, in the absence of errors of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8074-8083; Dec. Dig. § 1159.\*]

#### 2. INTOXICATING LIQUORS (§§ 226, 286\*) — PROSECUTION — EVIDENCE — ADMISSIBILITY — SUFFICIENCY.

(a) On a trial of a person charged with having unlawful possession of intoxicating liquor with intent to sell the same, the quantity and kind of liquor, the size and number of packages, the occasion upon and circumstances under which it is found, the conduct and demeanor of the accused at the time and prior to the discovery, and any and all other circumstances reasonably calculated to throw light on the purpose and intent with which the liquor was possessed, are admissible in evidence, and are all entitled to consideration by the jury in arriving at a verdict.

(b) For a discussion of facts sufficient to sustain a conviction, see opinion.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 282-286, 800-822; Dec. Dig. §§ 226, 286.\*]

Appeal from County Court, Tillman County; W. C. Lukenbill, Judge.

A. Overton was convicted of having unlawful possession of intoxicating liquor with intent to sell the same, and appeals. Affirmed.

Mounts & Davis, of Frederick, and Gray & McVay, of Oklahoma City, for plaintiff in error. E. G. Spilman, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. Plaintiff in error, A. Overton, was tried and convicted at the January, 1913, term of the county court of Tillman county on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$125 and imprisonment in the county jail for a period of 60 days.

[1, 2] The evidence on behalf of the state tends to establish the following facts: That on the date alleged by the information the plaintiff in error went to a public gathering at Panther Springs, in Tillman county; that he carried 13 bottles of intoxicating liquors; that he was discovered by a deputy sheriff in the act of taking one of the bottles from a buggy, whereupon he dropped the bottle and ran; that he was overtaken by the sheriff and arrested. When the officer came up he said: "You just beat me to it." When the officer went back to the buggy he found the other 12 pints of whisky. In addition to the whisky, 9 quarts of beer were found in possession of the accused. After the arrest the accused inquired of the officer how many cases would be filed against him, and he was informed that there would be three. He admitted being the owner of the whisky, and indicated a willingness to plead guilty to one charge if the others were left off.

Defendant testified in his own behalf that he owned the 14 pints of whisky; that he carried 14 pints to the picnic; that he drank some of it at the picnic; that he was fixing to take a drink when the officer discovered him; that he dropped the whisky and ran into a cornfield; that he did not intend to sell the whisky.

The whisky was apparently carried to the picnic grounds about 7 o'clock in the morning. The evidence nowhere indicates that any sale had been made or attempted. Upon this state of facts conviction resulted in the trial court, and counsel here argue that the verdict is not supported by the evidence, and is contrary to law. This proposition was raised in the trial court and preserved by exceptions for review here. Counsel for accused endeavor to invoke the doctrine announced by this court to the effect that mere possession of a limited amount of liquor, standing alone, without any other circumstances, is not sufficient to justify a conviction under the statute which penalizes possession of liquor with an unlawful intent to sell the same.

We have examined this record carefully, and are of opinion that there are many circumstances in addition to possession which indicate the intention required by the statute. In the first place, this whisky was purchased at Wichita Falls the day before the picnic. On the morning of the picnic at an early hour it was conveyed to the picnic ground, and kept under cover until discovered by the officers, and, when discovered, the accused immediately took flight. It calls to our minds a much quoted passage, to wit: "The wicked flee when no man pursueth, but the righteous are as bold as a lion."

No law-abiding citizen has any inclination to attend a public gathering in possession of 14 pints of whisky. It is a matter of common knowledge that bootleggers are usually on hand plying their trade around public gatherings, which annoys good people, and many times endangers life. If the accused had any lawful use for 14 pints of whisky, he certainly did not have any such lawful use for it on the 1st day of August at a Tillman county picnic. The jury is the final arbiter of the facts, and, while ordinarily the possession of a small quantity of liquor, standing alone, is insufficient to justify conviction, yet we are not prepared to say that 14 pints of whisky is a small quantity within the purview of the law. No sick man can use that amount in one day, and no well man has a right to attend such a gathering with the purpose of endeavoring to use it. All the facts and circumstances surrounding the acquiring of this whisky, the place to which it was taken, the size of the packages, the number of packages, the total quantity of the liquor possessed, the acts of accused in connection with the whole transaction are to be considered by the jury, and the fact that a person was found in possession of the quantity this accused admits having, the size and number of the packages he had at a public picnic, in our judgment, amply warranted the jury in convicting him of having unlawful possession with intent to sell, as contemplated by law.

This court would not hesitate to reverse a

conviction if all the facts and circumstances indicated that the accused was a good citizen and innocent of any wrongdoing, or any violation of the law, or any intent to violate the law, but it is our judgment that this conviction is entirely proper. The doctrine laid down by this court to the effect that possession, standing alone, was insufficient to support conviction is not to be extended for the purpose of aiding the violation of the law in any particular. That doctrine is only justified under the law as it exists in this state for the purpose of protecting good citizens thereof in possession of small quantities of liquor for medicinal and other legitimate use, and is not now, and will not be, extended to aid or protect the violator of the law.

We are of opinion that the judgment of the trial court should be affirmed, and it is so ordered.

**A. F. SHAPLEIGH HARDWARE CO. v.  
PRITCHARD et al.**  
(No. 3715.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**1. UNITED STATES MARSHALS (§ 36\*)—DUTIES—PERFORMANCE—RETURN OF EXECUTION—OMISSION—LIABILITY ON BOND.**

Under section 3061, Mansfield's Digest, Laws of Arkansas, extended over and in force in the Indian Territory prior to statehood, a United States marshal, who received an execution for service and failed to return the same "within 60 days from its date," and the sureties on his official bond were liable at the suit of an execution creditor for the amount of the execution, unless the failure to make return was caused by the act, instructions, or was waived by such creditor.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. §§ 36, 37; Dec. Dig. § 36.\*]

**2. UNITED STATES MARSHALS (§ 32\*)—EXECUTION—FAILURE TO RETURN—LIABILITY—MEASURE OF DAMAGES.**

In such action the liability is not limited to the injury sustained by the execution creditor by a failure to make the return, but is fixed by statute in the amount of the execution and 6 per cent. interest thereon.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. §§ 29-33; Dec. Dig. § 32.\*]

**Commissioners' Opinion, Division No. 2. Appeal from District Court, Pittsburg County; Preslie B. Cole, Judge.**

Action by the A. F. Shapleigh Hardware Company against Geo. K. Pritchard and the Central Trust & Guaranty Company. Judgment for defendants and plaintiff appeals. Reversed and rendered.

A. C. Markley, of McAlester, for plaintiff in error. Latham & Harris, of McAlester, for defendants in error.

**GALBRAITH, C.** This was an action by the execution creditor against the marshal,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the sureties on his official bond, for failure to make return of an execution delivered to the marshal for service. A jury was waived, and the cause was submitted to the court upon the following agreed statement of facts:

"That plaintiff was and is a corporation as alleged; that Geo. K. Pritchard was the duly appointed, qualified, and acting United States marshal as alleged; that said Geo. K. Pritchard, as principal, and said Central Trust & Guaranty Company, of West Virginia, a corporation, as surety, made, executed, and filed said United States marshal's bond as alleged; that on February 8, 1907, the judgment of the United States Court, a court of record, sitting at McAlester, in the Central district of the Indian Territory, was duly rendered and entered in favor of said A. F. Shapleigh Hardware Company, and against one W. B. Gay, for the recovery of \$126.15, with 6 per cent. interest per annum and costs taxed at \$4.45; that therefore on March 1, 1907, there was duly issued out of said United States Court and placed in the hands of said United States marshal, Geo. K. Pritchard, for execution and return within sixty days therefrom, a writ of execution directing him to collect out of the estate of said W. B. Gay the said judgment in favor of A. F. Shapleigh Hardware Company and against W. B. Gay for \$126.15, with interest at 6 per cent. per annum and \$4.45 costs; that thereafter, on April 12, 1907, said United States marshal, acting under said writ of execution, and by direction of A. C. Markley, as attorney for said A. F. Shapleigh Hardware Company, did levy upon a certain 20-acre tract of land in the Fifteenth recording district of the Central district of the Indian Territory as the property of said W. B. Gay, and then with the knowledge, consent, and approval of said attorney, A. C. Markley, did advertise said property levied upon for sale on the 4th of May, 1907; that thereafter, on May 4, 1907, at the time and place said property was advertised for sale, said A. C. Markley appeared and along with others made bids on said property, and the crier of said sale declared the property sold to A. C. Markley at his bid of \$130 therefor, and immediately thereafter, upon being informed by said United States marshal that no alias execution of venditioni exponas had been issued for the sale of said property, and that the said original execution had not been returned into court, and that the advertisement for the sale of said property had only been printed in one issue of the McAlester News, a weekly newspaper printed and published at McAlester, Indian Territory, repudiated his bid made for said property; that said writ of execution was never returned to the court from which it was issued within the 60 days from its issue or thereafter, and is still in the possession of said Geo. K. Pritchard and his attorneys; that but one writ of execution was issued in said cause, and no alias writ of execution or venditioni exponas was ever asked for by said United States marshal, or by said A. F. Shapleigh Hardware Company, or by its attorney, A. C. Markley; that aforesaid judgment of A. F. Shapleigh Hardware Company against said W. B. Gay has never been paid, settled, or satisfied, and remains of record wholly due and unpaid, and not affected other than by the proceedings hereinabove stated. Plaintiff's suit is based upon the law stated in sections 3061, 3063, 2967, 2971, and 3049 of Mansfield's Digest, Ark., or sections 2176, 2177, 2082, 2086, and 2164 of Indian Territory Statutes, introduced in evidence. A. C. Markley, Attorney for Plaintiff. Latham & Gresham, Attorneys for Defendants."

The court found for the defendants, and rendered judgment against the plaintiff for

costs. To review that judgment, an appeal has been duly perfected to this court.

The plaintiff in error's cause of action is based upon certain sections of the statutes of Arkansas extended over and in force in the Indian Territory at the time this controversy arose. These statutes render the sheriff or marshal and the sureties on his official bond liable for failure to make return of an execution on or before the return day named therein.

The only question presented by this record is one of law, whether or not, under the facts agreed upon, the law renders the defendants in error liable.

[1] In the case of Grubbs v. Needles et al., 70 Fed. 199, 17 C. C. A. 60, the Circuit Court of Appeals for the Eighth Circuit said, in regard to one of the sections of the statute of Arkansas relied upon by the plaintiff in error:

"We have decided at the present term that section 3061, Mansf. Digest, is in force in the Indian Territory, and that proceedings thereunder may be had against the marshal and his sureties. *Mfg. Co. v. Needles*, 69 Fed. 68 [16 C. C. A. 132]."

Judge Caldwell, who rendered the opinion of the court in the Grubbs Case, supra, said, in regard to the conduct of the creditor's attorney as affecting the failure of the marshal to make the return:

"Touching the defense based on the alleged directions of the plaintiff to the marshal, we do not deem it necessary to do more than to call attention to the rule announced by the Supreme Court of Arkansas in a proceeding under this statute where that defense was relied on: 'The sheriff is not excused from returning an execution by any conduct of the plaintiff which falls short of showing that the nonreturn resulted from the act or instructions of the plaintiff, or was ratified or waived by him.'"

It is not material that the execution in the instant case was levied upon real estate, and that the judgment upon which the execution issued was a lien upon this real estate, or may have been a lien upon it, and that therefore the creditor lost nothing by the failure of the marshal to make a return of the execution. Nor is it material that the execution creditor was the purchaser at the sale of the property conducted by the marshal under the execution. The statute makes it the duty of the marshal to return every execution on or before its return day, and prescribes as a penalty for failure to discharge this duty that he shall be liable for the amount of the execution and interest, and under the construction of the statute as made by the Supreme Court of Arkansas there seems to be no escape from this penalty where it has been incurred.

In *Jett v. Shinn*, 47 Ark. 378, 1 S. W. 694, it is said:

"If the sheriff was misled by the advice of the plaintiff's attorney, so that he postponed the date of sale beyond the lifetime of the writ, this may furnish a satisfactory reason for not selling, and for not having the money to render to the plaintiff; but it is no excuse for not returning the process upon its return day. *Norris v. State*, 22 Ark. 524."



Again, it is said in *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82:

"The execution was returnable, by its terms and by the law, 'within 60 days' from its date. The sixtieth day after its date was Sunday, and the execution was returned the next day thereafter. It is argued that, as no return could be made on Sunday, the officer might legally postpone the act until Monday. But the statute will not admit of that construction. It does not require the return to be made upon the sixtieth day only. If it did, and that day were Sunday, then the argument would be forcible. But executions are returnable 'in sixty days from their date' (Mansf. Dig. § 2971), and a legal return may be made by the sheriff at any time after the writ comes to his hands—even a return of nulla bona, if he knows that the defendant is insolvent, and is willing to take the hazard of his remaining so. *Reeves v. Sherwood*, 45 Ark. 520. The penal statute, moreover, prescribes that he shall be liable for a failure to make his return 'on or before the return day.' 'On or before the return day' does not mean after the return day. *Alston v. Falconer*, 42 Ark. 117. And as the last day fell upon Sunday, it was the officer's duty to make the return on the preceding Saturday. *Crocker on Sheriffs*, § 40; *Sedgwick, Stat. & Const. Law*, p. 358; *Sutherland, Stat. Const.* § 115; *Haley v. Young*, 134 Mass. 364; *Ex parte Simpkin*, 105 Eng. C. L. 392. See *Endlich, Int. of Stat.* § 393. The return was not made on or before the sixtieth day, and the penalty was incurred under section 3061."

Again, in *Wilson v. Young*, 58 Ark. 593, 25 S. W. 870, Mansfield, Justice, speaking for the court, said:

"The section of the digest mentioned above provides that, if the officer receiving an execution shall not return it 'on or before the return day therein specified,' he 'shall be liable and bound to pay the whole amount of money in such execution specified'; and the next succeeding section (3062) provides that any person aggrieved by the nonpayment of such amount 'may have his action against the officer and his sureties upon his official bond.'"

And at page 599 of 58 Ark., at page 872 of 25 S. W., in this opinion, the court said:

"Such is the effect given to a similar statute by the Supreme Court of Illinois in *Robertson v. County Commissioners*, 5 Gilman, 559, 567, which was an action upon the official bond of a constable for his failure to return an execution. With reference to the contention made in that case that, in the absence of any real injury, the damages recoverable were only nominal, Judge Trumbull, in delivering the opinion of the court, said: 'The statute requires an execution to be returned within a certain time, and, lest this requirement should be disregarded, provides that, if a constable will continue to violate his duty by failing to return an execution for ten days after its return day, both he and his securities shall be liable to the party aggrieved for the full amount of the execution, and interest upon the judgment on which it issued. It was undoubtedly competent for the Legislature to impose such a liability for a failure by the constable to perform his duty, and the numerous cases cited to show that, as a general rule, the obligors upon a bond are only liable to respond in damages to the amount of the real injury occasioned by the breach complained of can have no application to this case, because the Legislature has declared what the measure of damages shall be.' And so we may say in this case that the rule stated by the authorities cited by the appellants is not the rule in Arkansas; and the fact that it does not apply here in suits like this is noted by Mr.

*Sutherland* in his treatise on Damages. 2 *Suth. Dam.* § 488, note 3." *Herr & Company v. Atkinson et al.*, 40 Ark. 377.

In *Jones v. Goodbar*, 60 Ark. 182, 186, 29 S. W. 462, 464, the court said:

"The penalty affixed by the statute, as applied to facts of this case, seems to be extremely severe. The defendant in the execution was insolvent. The justice made a memorandum in his docket of the substance of the report of the constable, and in attempting to renew the execution a second time—a proceeding for which we find no warrant in the statute—he copied this memorandum in the execution. Although this memorandum of the justice cannot be taken as the return of the constable, still it does not appear that the appellee could have been misled or injured in any way by the failure of the officer to make the return. But while we feel that the statute, in its application to cases such as this, is somewhat harsh, yet, as was said by the court in a case similar to this, the law is thus written, and the courts must enforce it."

A similar construction placed upon the statutes of Arkansas by the Supreme Court of that state has been placed upon a like statute of our own by this court. In *Henderson-Sturges Plano Co. v. Smith, Sheriff*, 33 Okl. 335, 125 Pac. 454, the syllabus reads:

"Section 5997, Comp. Laws 1909, which provides for the amercement of sheriffs, is imperative in its terms, and grants no discretion to the court. When a sheriff fails to make return of a writ of execution as required by statute, it is the duty of the court to amerce him, whether his omission results from willful wrong or mere neglect, and whether such omission has resulted in actual injury or not."

[2] Under these authorities there seems to be no escape from the penalty prescribed against the marshal and his sureties, and their liability for the amount of the execution and interest thereon under the agreed statement of facts. The execution was delivered to the marshal. He failed to return the same within 60 days as commanded therein, and thereby incurred the penalty prescribed by the statute. The trial court erred in holding otherwise and rendering judgment for the defendants.

This cause should be reversed and remanded to the district court of Pittsburg county, with directions to set aside the judgment rendered in favor of the defendants in error, and to render judgment against them, and in favor of the plaintiff in error for the amount of the execution, together with 6 per cent. interest thereon.

PER CURIAM. Adopted in whole.

FRUIT DISPATCH CO. v. WOOD et al.  
(No. 3121.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—DUTIES—INTERSTATE COMMERCE.

A foreign corporation, while engaged in interstate commerce within the state with a resident thereof, is not subject to the provision of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the act of March 22, 1909 (Sess. Laws 1909, p. 147), fixing the duties of foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

## 2. COMMERCE (§ 8\*)—INTERSTATE COMMERCE—POWER TO REGULATE.

The exclusive power to regulate commerce between the states is, by the federal Constitution, vested in Congress, and such authority is expressly recognized by the foregoing act, which provides: "This act shall not be effective in cases wherein its enforcement would conflict with the powers of Congress or the federal laws to regulate commerce between the states." Laws 1909, c. 10, art. 1, § 3.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by the Fruit Dispatch Company against W. B. Wood and another, copartners, doing business under the name of the Wood Produce Company. A demurrer to plaintiff's evidence was sustained, and he brings error. Reversed and remanded for a new trial.

Shartel, Keaton & Wells, of Oklahoma City, Edward Howell, of Shawnee, and Eugene W. Ong, of Boston, Mass., for plaintiff in error.

SHARP, C. This was an action begun in the superior court of Pottawatomie county by the Fruit Dispatch Company, a foreign corporation organized and doing business under the laws of the state of New Jersey, against W. B. Wood and R. H. Wood, copartners doing business under the name of Wood Produce Company, to recover the purchase price of a car load of bananas, sold by plaintiff to defendant. The answer, among other things, charged that plaintiff was a non-resident corporation transacting business in the state of Oklahoma, and had not complied with the laws of the state governing foreign corporations, by filing in the office of the Secretary of State a certified copy of its charter or articles of corporation, and paid the fees required by law, and had not appointed an agent upon whom service of process could be made. At the conclusion of plaintiff's testimony, the defendant demurred thereto, which demurrer was in part sustained and plaintiff's action dismissed, for the reason that the plaintiff had failed to comply with section 1540, Comp. Laws 1909.

Plaintiff's evidence showed that it was incorporated under the laws of the state of New Jersey, and was engaged in the importation and sale of perishable tropical fruits, principally bananas; that all commodities handled by it were consigned directly to it from foreign countries, and the consular invoices were made out accordingly; that as importer, it entered the bananas and other tropical products at the ports of importation in this country, and sold the same immediately after arrival, in wholesale lots, and

in the form and shape they were brought into the country; that its principal office in the United States was in New York City, with branch offices in various cities; that each branch office had the name of the company on the door, and a resident manager in charge, who solicited business in his territory and forwarded orders for fruit to the general offices at New York or New Orleans for acceptance. Most of these orders were received prior to the arrival of the fruit in the United States, and, under the company's "Uniform Conditions Governing Sales," were accepted by shipment of the fruit to the various purchasers, immediately after such arrival; that the uniform conditions which settled in advance the terms applying to all sales were necessary on account of the hazardous nature of the business of supplying the northern markets with perishable fruits from the tropics. One of plaintiff's branch offices was located at Oklahoma City, in charge of O. S. Bell, who on the 26th day of February, 1910, solicited of defendants and obtained from them an order for one rolling car of Chiriqui nine hand bananas, which order was by Bell wired to the home office at New Orleans, which in turn on the same day wired its acceptance of defendant's offer. From the testimony it appears that it was the practice of the southern division of the plaintiff company to advise its branch offices when a cargo of bananas was expected to arrive, and to instruct its local representatives to solicit orders for bananas at prevailing prices for fruit, delivered at the seaboard, either at New Orleans or Mobile. When, however, sufficient orders were not received at seaboard points for an entire cargo, the bananas, being highly perishable, were immediately loaded into cars and started "rolling" from the seaboard. If shortly after they left the seaboard the order was received from the territory towards which the car was "rolling," the New Orleans office issued to the railroad the necessary instructions diverting the shipment to the consignee. The car load of bananas in controversy left the wharf of the Mobile & Ohio Railroad at Mobile, 1:55 p. m., February 24, 1910, in car FGE 11026. This car reached Memphis, Ten., over the Frisco from Tupelo, Miss., at 2:10 p. m., February 25th, where the car was inspected, ventilated, and transferred to the Rock Island Railway, going out on the first train at 9:45 p. m., on the day of its arrival. At the time the order was taken, the train containing the car load of bananas was between Little Rock and Booneville, Ark. Plaintiff company maintained no storage or warehouses in Oklahoma. Collections made from its customers were deposited in the Western National Bank of Oklahoma City, and by said bank at stated intervals transferred to the company's New York office. No one connected with its

branch office within the state had any authority to check against said deposits, and its local employes were paid upon vouchers sent from New York City. All sales made in the southern division were under the direct authority and control, and subject to the approval of the New Orleans office.

[1, 2] Was the plaintiff at the time engaged in the transaction of business within this state, within the meaning of sections 1540, 1541, 1542, 1543, Comp. Laws 1909, prohibiting the transaction of business within this state by corporations, which have failed or neglected to comply with the provisions of said act? By the latter part of section 1542, *supra*, it is provided that said act shall not be effective in cases where its enforcement would conflict with the powers of Congress, or the federal laws regulating commerce between the states. Whatever the purpose of this provision may have been, obviously it recognizes a proper limitation upon the right of the state, where matters of commerce between the states are involved. Such is the question here presented. From the evidence there can be no question but that plaintiff was engaged in interstate or foreign commerce, and therefore it was not required to comply with the provisions of the act in question, relating to foreign corporations doing business in this state. *Freeman-Sipes Co. v. Corticelli Silk Co.*, 34 Okl. 229, 124 Pac. 972; *Cooper v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137. The question has frequently been before this court where, following a long line of authorities from the Supreme Court of the United States, it has been held that whatever power may be conceded to the state to prescribe conditions upon which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the states; for that would be to invade the jurisdiction, which by the terms of the Constitution of the United States is conferred exclusively upon Congress. The federal Constitution having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive wherever the subjects of it are national in their character, or admit of only one uniform system or plan of regulation. *Robbins v. Taxing District of Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Hannibal, etc., Ry. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Philadelphia, etc., Ry. Co. v. Pennsylvania*, 15 Wall. 232, 21 L. Ed. 146; *Caldwell v. State of North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; *Western Union Tel. Co. v. State of Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. To the same effect are the decisions of this court, in *Cooper v. Ft. Smith & Western Ry. Co.*, 23 Okl. 139, 99 Pac. 785;

*Chicago Crayon Co. v. Rogers*, 30 Okl. 299, 119 Pac. 680; *Harrell v. Peters Cartridge Co.*, 36 Okl. 684, 129 Pac. 872, 44 L. R. A. (N. S.) 1094.

For the reason shown, it was error for the court to sustain defendants' demurrer to plaintiff's evidence, and to dismiss plaintiff's action.

The judgment of the trial court should therefore be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

# WELEETKA LIGHT & WATER CO. v. NORTHROP. (No. 8694.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

## 1. ELECTRICITY (§ 19\*)—NEGLIGENCE—PRESUMPTION—TELEGRAPHS AND TELEPHONES.

The placing and maintaining of electric light wires above and in such close proximity to telephone wires in a street that the former, when charged with electric current, sag and come in injurious contact with the latter is sufficient to justify an inference of negligence against the owner of the former.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

## 2. DAMAGES (§ 113\*)—MEASURE—INJURY TO PERSONAL PROPERTY.

The measure of damages for injury to personal property that can be repaired is the cost of repair and the value of its use necessarily lost pending repair.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 279, 280; Dec. Dig. § 113.\*]

## 3. ELECTRICITY (§ 19\*)—ACTION FOR DAMAGES—PRESUMPTION.

It is not error to refuse to instruct jury that owner of telephone wires must prove right to use of street to be entitled to recover damages caused by negligence of owner of electric light wires in same street, resulting in injury to former wires and other portions of plant with which same are connected.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

## 4. APPEAL AND ERROR (§ 273\*)—RECITAL IN CASE-MADE—SUFFICIENCY—INSTRUCTIONS.

A recital in case-made that "to all of the instructions given by the court and to each of them the defendant excepts" is insufficient, where there are several paragraphs embodying different propositions in such instructions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.\*]

## 5. APPEAL AND ERROR (§ 209\*)—PRESENTATION BELOW—EVIDENCE.

Evidence imperfect or objectionable in detail, together with conclusions of witnesses as to amount of damages, may be sufficient to sustain a judgment, where no point is made on the trial in regard to absence of sufficient perfect or unobjectionable evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1290-1298, 1300, 1303; Dec. Dig. § 209.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Okfuskee County; A. W. Huser, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Mrs. A. L. Northrop against the Weleetka Light & Water Company for damages. Judgment for plaintiff, and defendant brings error. Affirmed.

E. G. Wilson, of Oklahoma City (F. W. Casner, of Kansas City, Mo., of counsel), for plaintiff in error. J. B. Patterson, of Okemah, for defendant in error.

THACKER, C. Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

Plaintiff owned and managed a telephone plant in the town of Weleetka. Defendant owned and operated wires for the conduct of electric current for lighting which, at places in the town, crossed and were above plaintiff's wires not more than 6 to 12 inches, notwithstanding, according to plaintiff's testimony, they should have been 3 feet above. Defendant's wires were so placed after plaintiff's wires had been strung. When these electric current wires were heavily charged with electricity, they sagged and at times thus came in contact with the phone wires. Plaintiff, before the injuries of which she complains, protested to defendant against the close proximity of the latter's wires to her own; but defendant nevertheless continued to maintain them as above stated.

On August 13, and again on September 16, 1908, at certain crossings defendant's wires, coming, as aforesaid, in contact with plaintiff's wires, transmitted to the latter electric current which, besides minor injury, burnt and destroyed some of her phones (boxes and wires therein), phone bells, "jumper wire," and, finally, on each such occasion, burnt in two her phone wires at places of contact; thus entailing upon her cost of repairs and loss suffered in disuse of her plant pending necessary repairs.

The petition (which was sufficiently definite and certain, in the absence of a motion to make more so) demanded \$119.25 as damages caused by the contact of wires on the first, and \$123 as damages for such contact on the second occasion of injuries mentioned above; and the verdict of the jury and judgment of the court was for \$242.25, the aggregate amount claimed; but the uncontradicted evidence tended to show the damages sustained to have been somewhat more than this amount.

[1] Defendant contends that there was no evidence of negligence that would render it liable for any damage whatever; but the placing and maintaining of electric light wires above and in such close proximity to telephone wires that the former, when charged with electric current, sag and come in contact with the latter is sufficient to justify an inference of negligence and make a prima facie case of right to recover for injuries upon that ground. 1 Joyce on Electrical Law, §§ 449a-450.

Besides Shawnee Light & Power Co. v. Sears, 21 Okl. 13, 95 Pac. 449, Oklahoma Gas & Electric Co. v. Lukert, 16 Okl. 397, 84 Pac. 1076, and Ladow v. Oklahoma Gas & Electric Co., 28 Okl. 15, 119 Pac. 250, as to the degree of care required of electric companies, see, as in point, the following: Lewis' Adm'r v. Bowling Green Gaslight Co., 135 Ky. 611, 117 S. W. 278, 22 L. R. A. (N. S.) 1169, and notes to the last-named report of this case, especially cases cited at pages 1171-1174 in such notes; Seith v. Commonwealth Elec. Co., 241 Ill. 252, 89 N. E. 425, 132 Am. St. Rep. 204, 24 L. R. A. (N. S.) 978, and notes to said last report of this case.

[3] Defendant also contends, and requested the court to instruct the jury, that the burden was upon plaintiff to prove that she had a right to maintain her wires in the street as a condition precedent to her right to recover; but, as indicated in Hamilton v. Bordentown Electric L. & M. Co., 68 N. J. Law, 85, 52 Atl. 290, should be done, it is assumed that the plaintiff and defendant were each maintaining wires in the public highway in the exercise of a franchise, in the absence of any showing to the contrary. 1 Joyce on Electrical Law, 449a.

[2] This case was apparently and properly tried upon the theory that plaintiff's measure of damages was the cost of making repairs and the value of the use of her property while she was necessarily deprived thereof pending repairs. Section 2639, Stat. 1890 (section 2872, Rev. Laws 1910); Berry v. Campbell, 118 Ill. App. 646; Davidson v. Chicago & A. Ry. Co., 98 Mo. App. 142, 71 S. W. 1069; Wilson v. Seattle, R. & S. Ry. Co., 55 Wash. 656, 104 Pac. 1114; Southern Ry. Co. v. Stearns, 8 Ga. App. 111, 68 S. E. 623; Crossen v. Chicago & Joliet Elec. Ry. Co., 158 Ill. App. 42; Latham v. Cleveland, C., C. & St. L. Ry. Co., 164 Ill. App. 559; McGuire v. Post Falls Lmbr. & Mfg. Co., 23 Idaho, 608, 181 Pac. 654.

[5] We think the evidence, while, in respect to some of its details and the conclusions of witnesses, subject to some criticism, on the whole sufficiently shows cost of repairs and the value of the use of the injured property pending the same to support the judgment; but, if this were not so, it appears that objection on the grounds of a failure of proof on the subject of damages is waived, unless made during the trial (Mercantile Trust Co. v. Hensey, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572); and no such objection was made either by request for instructed verdict or otherwise.

In Mercantile Trust Co. v. Hensey, supra, it is said:

"An assignment of error based on the ground that no evidence was given in the trial court to enable the jury to assess the damages awarded will not be considered, where it does not appear that the plaintiff in error made any point on the trial in regard to the absence of such

evidence, or that he asked the trial court to direct a verdict for him on account of its absence."

[4] It is urged that there is error in the instructions given by the court; but the only objection or exception thereto is the recital in the case-made next following the instructions given and refused that "to all of the instructions given by the court and to each of them the defendant excepts." The instructions given consisted of several paragraphs embodying different propositions.

In *Elsminger v. Beman*, 32 Okl. 818, 124 Pac. 289, such an exception is held insufficient.

Tested by the foregoing views, there does not appear to be any reversible error in this case, and, in our opinion, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

STREATER v. ESLICK. (No. 3455.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

WORK AND LABOR (§ 29\*)—EVIDENCE.

A verdict based upon the testimony of several witnesses that labor performed was reasonably worth \$1.50 per day, and labor and team \$3 per day, will not be set aside on the grounds that the verdict was excessive and prompted by the prejudice of the jury.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 56-58; Dec. Dig. § 29.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Johnston County; T. C. Cobb, Judge.

Action by Harrison Eslick against E. E. Streater. Judgment for plaintiff, and defendant brings error. Affirmed.

C. Guy Cutlip and J. A. Baker, both of Wewoka, for plaintiff in error. Crump, Fowler & Skinner, of Wewoka, for defendant in error.

RITTENHOUSE, C. The only question involved in this appeal is whether or not the judgment was excessive. The action is based upon reasonable compensation for labor and team; the allegations of the petition being that the plaintiff performed labor for defendant for 43 days at \$1.50 per day, and 72½ days with team at \$3 per day. Four witnesses testified that the charge for said labor and team was reasonably worth the amount asked. The jury returned a verdict for \$275.80.

This court cannot say that \$1.50 per day for a laborer, and \$3 per day for a laborer and team, is excessive. There is sufficient evidence tending to support the judgment of the trial court, and no showing that the judgment was rendered by prejudice or passion.

The judgment of the lower court should therefore be affirmed.

PER CURIAM. Adopted in whole.

ANDERSON v. STATE. (No. 3319.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. BASTARDS (§ 49\*)—PROCEEDINGS—COMPLAINT—RESIDENCE.

In an action sought to be brought under article 3, c. 13, Comp. Laws 1909 (Article 3, c. 55, Rev. Laws 1910), against the father of an illegitimate child for bastardy, the fact of the residence of the mother of such child is jurisdictional, and a complaint which fails to state that the mother of such child is a resident of the county in which the action is brought, is not sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 66-68, 138-141; Dec. Dig. § 49.\*]

2. PLEADING (§ 87\*)—PLEADINGS AUTHORIZED—Plea in Bar.

Under section 4736, Rev. Laws 1910, the only pleadings allowed are: "First. The petition by the plaintiff. Second. The answer or demurrer by the defendant. Third. The demurrer or reply by the plaintiff. Fourth. The demurrer by the defendant to the reply of the plaintiff."

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 180; Dec. Dig. § 87.\*]

3. BASTARDS (§ 19\*)—NATURE OF PROCEEDING—PLEADINGS AND PROCEDURE.

An action brought under article 3, c. 55, Rev. Laws 1910, against the father of an illegitimate child for bastardy, is in the nature of a special proceeding to be tried as a civil action and should be governed by the pleadings and procedure prescribed by the chapter of our statute on procedure civil.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 35, 35½; Dec. Dig. § 19.\*]

4. ISSUES OF FACT—TRIAL—STATUTES.

Section 4993, Rev. Laws 1910, provides: "Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as herein provided."

5. JURY (§ 14\*)—RIGHT TO JURY TRIAL—BASTARDY PROCEEDING.

In an action against the father of an illegitimate child for bastardy, where the issue of fact is joined as to whether full settlement had been made with the mother of such child, and as to whether such settlement was entered into as the free and voluntary act of the parties, or whether obtained through duress, demand having been made by the defendant, it is error to refuse a trial by jury.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Payne County; W. H. Wilcox, Judge.

Bastardy proceedings by the State, on the complaint of Susie M. Robinson, prosecuted by D. W. Weldon, County Attorney of Payne County, against Nicholas A. Anderson. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

James M. Springer, of Stillwater, for plaintiff in error. Chas. West, Atty. Gen., and D. W. Weldon, Co. Atty., of Cushing, for the State.

**HARRISON, C.** This was an action prosecuted by D. W. Weldon, county attorney of Payne county, in the name of the state of Oklahoma, upon complaint of Susie M. Robinson against Nicholas A. Anderson, as the father of an illegitimate child. The action was sought to be brought under article 3, c. 13, Comp. Laws 1909 (article 3, c. 55, Rev. Laws 1910), upon the following complaint, omitting the caption, to wit:

"Susie M. Robinson, of lawful age, being first duly sworn deposes and says: That on the 6th day of April, 1909, she was delivered of a bastard child in the county of Payne and state of Oklahoma; that said child is living and in her custody and under her control at this time; that Nicholas A. Anderson, of the county of Payne and state of Oklahoma, is the father thereof. Further affiant saith not. Susie M. Robinson.

"Subscribed and sworn to before me this 24th day of January, 1911. W. H. Wilcox, County Judge."

Afterwards, upon a warrant for his arrest, the defendant was brought into court and placed under a \$500 bond for his appearance at the next term of court. When the cause came on for trial at the following term, defendant demurred to the complaint on the ground that it neither stated facts sufficient to constitute an offense against the state nor facts sufficient to constitute a cause of action against him. Demurrer was overruled, and defendant excepted. Whereupon defendant filed what he styled a "plea in bar," wherein he sought to set up a settlement with complainant, and wherein he pleaded a written release signed by complainant, purporting to be an acknowledged receipt in full settlement, and demanded a jury to try the issues of fact; the state having filed a reply to the so-called plea in bar, wherein it was alleged that the receipt set out in defendant's plea had been obtained through duress and coercion. The court denied defendant the right of trial by jury and proceeded to try the cause and render judgment in the sum of \$900 to be paid by defendant to complainant according to the terms set forth in the judgment, and from such judgment defendant appeals.

We think the court erred both in overruling the demurrer to the sufficiency of the complaint and in denying defendant the right to have the issues of fact as to whether settlement had been made with complainant, and as to whether such settlement were obtained through duress, submitted to a jury.

[3] It might be well in this connection to state that no such plea as a formal plea in bar is prescribed by our statute. Proceedings under article 3, *supra*, have been construed to be a special proceeding in the form of a civil action. See *Bell v. Territory*, 8 Okl. 75, 56 Pac. 853; *In re Comstock*, Petitioner, 10

Okl. 299, 61 Pac. 921. And, being in the nature of a special proceeding to be tried as a civil action, it would be governed by the pleadings prescribed by our Civil Code.

[2] Section 4736, Rev. Laws 1910, is as follows:

"The only pleadings allowed are: First. The petition by the plaintiff. Second. The answer or demurrer by the defendant. Third. The demurrer or reply by the plaintiff. Fourth. The demurrer by the defendant to the reply of the plaintiff."

Hence, if defendant's plea were sufficient for any purpose, it would be as an answer to the plaintiff's complaint, and, from an examination of the plea in question, we think it sufficient to state a defense to such complaint, provided, of course, such complaint be treated as stating facts sufficient to give the court jurisdiction of the subject-matter, and should therefore be treated as an answer to such complaint. However, we think the complaint is insufficient upon demurrer to constitute a cause of action over which the court had jurisdiction.

[1] For one reason, it fails to state that the complainant is a resident of the county in which the action was brought. Section 4401, being the first section of article 3, c. 55, *supra*, Rev. Laws 1910, reads as follows:

"Whenever any woman residing in any county of this state is delivered of a bastard child. \* \* \*"

It is clear from this section that the fact of residence in the county is jurisdictional, and that therefore the court erred in overruling the demurrer to the complaint.

[4, 5] It is also true that the court erred in refusing to submit the issues of fact made by the pleadings to a jury. Section 4993, Rev. Laws 1910, provides:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

See, also, *Taylor Welch v. Insurance Co.*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; *Railway Co. v. Wehrman*, 25 Okl. 147, 105 Pac. 328; *McCoy v. McCoy*, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146.

It also appears from the record that the complainant in question was of lawful age, and that the defendant was under 18 years of age at the time of the alleged settlement between the parties. Hence, under all the circumstances, we think the issues of fact as requested by defendant should have been submitted to a jury.

For the reasons stated, the judgment is reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

**CROWLEY-SOUTHERLAND COMMISSION**  
**OO. et al. v. HUSBAND.**  
 (No. 3100.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**JUDGMENT (§ 384\*)—VACATION—PETITION—**  
**VERIFICATION.**

In proceeding under section 4466, Stat. 1893 (section 5269, Rev. Laws 1910) to vacate a judgment, the petition therefor is insufficient when neither verified by the petitioner nor, as authorized by section 3992, Stat. 1893 (section 4765, Rev. Laws 1910), by his agent or attorney.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 727-732; Dec. Dig. § 384.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Coal County; R. H. Wells, Judge.

Action by J. W. Husband against the Crowley-Southerland Commission Company and J. C. Campbell, resulting in dismissal as to said Commission Company and judgment by default against Campbell, followed by petition by Campbell to vacate and set aside judgment, which petition the trial court overruled, from which Campbell brings error. Affirmed.

Fooshee & Brunson, of Coalgate, for plaintiff in error. Charles T. Gibson, of Oklahoma City, for defendant in error.

THACKER, C. Plaintiff in error Campbell will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

This is an appeal from the action of the county court overruling petition of this defendant to vacate and set aside judgment by default in favor of plaintiff theretofore rendered by said court against him.

The petition to vacate said judgment is signed, "J. C. Campbell, Defendant, by Fooshee & Brunson, his Attys.," and the verification of same, while naming J. C. Campbell as the affiant in the body thereof, is signed "D. D. Brunson," without explanation as to why same is so signed.

Section 4466, Stat. 1893 (section 5269, Rev. Laws 1910), under which this proceeding is brought, provides that such proceedings "shall be by petition, verified by affidavit," which we construe to mean that same shall be verified by the affidavit of the party petitioning, or by his agent or attorney, as provided in section 3992, Stat. 1893 (section 4765, Rev. Laws 1910). Said section 3992 reads as follows:

"Where the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: First, when the facts are within the personal knowledge of the agent or attorney. Second, when the plaintiff is an infant, or of unsound mind, or imprisoned. Third, when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney. Fourth,

when the party is not a resident of, or is absent from the county."

The petition in this case seems insufficiently verified to warrant an examination into the facts therein alleged as grounds for vacating and setting aside the judgment.

In the case of *McAdams v. Latham*, 21 Okl. 511, 96 Pac. 584, referring to the provisions of the statute under which this action is brought, it is said:

"Judgments, decrees, or orders should never be vacated, except where the party \* \* \* has complied substantially with the provisions" of this section.

In our opinion the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

**SCHOOL DIST. NO. 38, LE FLORE COUNTY,**  
**v. SCHOOL DIST. NO. 92, LE**  
**FLORE COUNTY. (No. 3578.)**

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 671\*)—PRESENTA-**  
**TION FOR REVIEW—CASE-MADE—EVIDENCE.**

Where a case-made upon appeal does not contain a statement that it contains all the evidence presented upon the trial, no error assigned which requires an examination and review of the evidence can be reviewed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

**2. NEW TRIAL (§ 159\*)—HEARING BEFORE**  
**NEW JUDGE—PRESENTATION OF ERROR—DIS-**  
**POSITION OF MOTION.**

Where a motion for a new trial is filed, and the judge who tried the cause retires from the bench leaving such motion pending and undisposed of, his successor will, ordinarily, grant a new trial, where the motion involves a review of the evidence taken upon the trial, and the proceedings before the former judge, and the same has not been preserved by case-made or other record so the new judge can review the grounds for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 319; Dec. Dig. § 159.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Le Flore County; P. C. Bolger, Judge.

Action by School District No. 92, Le Flore County, against School District No. 38, Le Flore County. Judgment for plaintiff granting new trial, and defendant brings error. Affirmed.

John R. Pollan, of Poteau, for plaintiff in error. White & Dubois, of Poteau, for defendant in error.

RITTENHOUSE, C. This action was brought in the county court of Le Flore county, Okl., by school district No. 92, Le Flore county, against school district No. 38, Le Flore county, for judgment in the sum of \$150. A jury was waived, and the cause submitted to the court, presided over by Hon.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

James L. Hale, county judge, and the court, after being fully advised in the premises, found for the defendant, and on the 2d day of June, 1910, rendered judgment according to such finding. On June 4, 1910, the plaintiff filed a motion for a new trial, and on the 4th day of February, 1911, said motion came on for hearing before the county court of Le Flore county; Hon. P. C. Bolger, having succeeded said Hon. James L. Hale as judge of said court, was at said time presiding over such court as such judge. The motion for a new trial was sustained by Hon. P. C. Bolger, judge of said court, and a new trial granted.

There is only one assignment of error presented to this court by the petition in error, and that is: "The said court erred in sustaining a motion for a new trial, and in granting a new trial." The motion contains seven grounds for a new trial, as follows:

"First, because the court erred in holding that the county superintendent had no authority to make the order introduced in evidence, directing defendant to pay plaintiff \$300; second, because the court erred in finding the facts in favor of the defendant and against the plaintiff; third, because the court erred in finding the law in favor of the defendant and against the plaintiff; fourth, because the court erred in rendering judgment for the defendant and against the plaintiff; fifth, because the court erred in holding that the award of the county superintendent was a division of the taxes levied and uncollected, and not an equitable distribution of the property of said school district No. 38; sixth, because the judgment of the court is contrary to the evidence; seventh, because the judgment of the court is contrary to the law."

[1] In order to pass upon any of the grounds contained in the motion for a new trial in this cause, it would be necessary to examine the evidence, and the record does not affirmatively show a recital or statement that the same contains all the evidence introduced at the trial. This court cannot, in the absence of such recital or statement, consider an assignment which would require such examination and review of the evidence. *Exendine v. Goldstine*, 14 Okl. 100, 77 Pac. 45; *Sawyer & Austin Lbr. Co. v. Champlain Lbr. Co.*, 16 Okl. 90, 84 Pac. 1093; *Martin v. Gassert*, 17 Okl. 177, 87 Pac. 586; *Schriber v. Buckner*, 18 Okl. 298, 90 Pac. 10; *Wagner v. Sattley Mfg. Co.*, 23 Okl. 52, 99 Pac. 643; *Insurance Co. of North America v. Gish, Brook & Co.*, 25 Okl. 73, 105 Pac. 672; *Turner v. Mills*, 32 Okl. 191, 120 Pac. 1092.

There is nothing in the record which indicates upon which ground of the motion the court granted a new trial, and, if any one of the several grounds for a new trial was sufficient upon which to base the judgment, the action of the court sustaining the motion will not be disturbed. There is no evidence before this court, and we will presume, in the absence of an affirmative showing in the record, that there was no evidence before the trial judge at the time of the hearing of the motion for a new trial.

[2] It is admitted in the record that Hon. P. C. Bolger succeeded Hon. Jas. L. Hale as judge of the county court of Le Flore county, before whom this cause was tried, and that the motion for a new trial was pending in said court and undisposed of at the time Hon. P. C. Bolger was inducted into office as such judge, and he, not having heard the evidence, seen the witnesses, observed their conduct, demeanor, and appearances while they were testifying, could not intelligently determine whether the judgment was contrary to the law and evidence, unless he had presided at the trial and was familiar with the evidence and the demeanor of such witnesses. The litigants are entitled to a judicial determination of the facts by the court who tried the cause, as well as by the jury which heard the evidence, and the court, in the exercise of its discretion under the circumstances in this cause, had a right to grant a new trial, and this court will not hold that there has been an abuse of discretion.

It was held in the case of *Atyeo v. Kelsey*, 13 Kan. 212, that:

"Where a new trial has been granted, both parties have another opportunity of having a fair and impartial trial upon the merits of the action; but, where a new trial has been refused, the matter is ended, unless a reversal can be had. Hence new trials should be favored instead of being disfavored, wherever any question can arise as to the correctness of the verdict. As a rule, no verdict should be allowed to stand unless both the jury and the court trying the cause can say that they believe that the verdict is correct. While the question is before the jury, they are the sole and exclusive judges of all questions of fact; but, when the matter comes before the court upon a motion for a new trial, it then becomes the duty of the court to determine for itself whether the verdict is sustained by sufficient evidence."

In the case of *Woodfolk v. Tate*, 25 Mo. 598, the court held:

"A party to a suit has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action. An acknowledged ground for granting new trials is that a verdict is against the weight of evidence; and if, in this case, the court was embarrassed by the circumstances, and could not pass on the merits of the motion, it ought to have directed a new trial. It is better to allow a new trial, where the court for any cause cannot consider the merits of an application for that purpose, than to refuse it; for, by denying the motion, without giving the party the benefit of being heard or of having his reasons considered, irreparable injury may be done; while, on the other hand, the prevailing party in the verdict will only suffer by delay, and generally will secure another verdict, if he is entitled to it."

In the case of *Bass v. Swingley*, 42 Kan. 738, 22 Pac. 717, the court held:

"Where a case is tried before both the court and a jury, each party is entitled to have the intelligent opinion of both the court and the jury upon the evidence introduced; and to permit another judge, who did not hear the evidence, to determine whether the verdict of the jury is sustained by sufficient evidence or not would be very much like permitting another jury that did not hear the evidence introduced on the trial to render the verdict in the case."

If a party in such a case may, against his will, be deprived of the opinion of the court upon the evidence introduced, why may he not also against his will be deprived of the opinion of the jury upon the evidence? Why, indeed, may not a trial upon a single cause of action be divided into parts, and one part be before one judge and jury upon a portion of the evidence, and another part be before another judge and jury and upon another portion of the evidence? This would all be wrong. Each party, we think, in a trial before the court and a jury, is entitled to the intelligent opinion of both the court and the jury, and no judgment could properly be rendered in the case against the will of either party until he has had the intelligent opinion of both the court and the jury." *State v. Bridges*, 29 Kan. 138; *State v. McClintock*, 37 Kan. 40, 14 Pac. 511; *Ohms v. State*, 49 Wis. 415, 5 N. W. 827; *People ex rel. Wright v. Judge of Superior Court of Detroit*, 41 Mich. 726, 49 N. W. 925; *Cocker v. Cocker*, 56 Mo. 180; *State v. Boogher*, 3 Mo. App. 442; *Jones v. Holmes*, 83 N. C. 108; *U. S. v. Harding*, 1 Wall. Jr. 127, Fed. Cas. No. 15,301; *Boynnton v. Crockett*, 12 Okl. 57, 69 Pac. 869; *Lookabaugh v. Bowmaker*, 30 Okl. 242, 122 Pac. 200.

Under the facts in this case, we have concluded that the court properly sustained the motion for a new trial, and the cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

#### WILLS v. BUZBEE. (No. 3528.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 564\*)—CASE-MADE—TIME—EXTENSION.

An order extending the time for making and serving a case-made, made after the expiration of the time theretofore fixed by order of the court or trial judge, is void.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

#### 2. APPEAL AND ERROR (§ 564\*)—CASE-MADE—SERVICE—TIME.

A purported case-made, which is not served within three days after the judgment or order is entered, or within an extension of time duly allowed, is a nullity, and cannot be considered by this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

Commissioners' Opinion, Division No. 1. Error from Greer County Court; Jarret Todd, Judge.

Action by John G. Wills against J. R. Buzbee. From a judgment for defendant, plaintiff brings error. Dismissed.

B. F. Van Dyke, of Granite, for plaintiff in error. S. D. Williams, of Granite, and J. L. Carpenter, of Mangum, for defendant in error.

SHARP, C. [1] The motion for a new trial in this case was overruled August 17, 1911, at which time plaintiff was granted 60 days in which to make and serve case-made for the Supreme Court. October 19th thereafter,

after the expiration of the time originally granted, the court made an order granting an extension of 30 days for preparing, serving, and filing said case-made, and on November 21st a further extension of 30 days was granted by the court. Neither of the latter two orders were valid, because made after the expiration of the time originally granted. *Lathim v. Schlack*, 27 Okl. 522, 112 Pac. 968; *Lawson et al. v. Zeigler*, 33 Okl. 368, 125 Pac. 724; *Hurst et al. v. Wheeler*, 35 Okl. 639, 130 Pac. 934; *Williams v. New State Bank*, 38 Okl. 326, 132 Pac. 1087; *Campbell v. Ruble*, 135 Pac. 1050. The case-made was served December 21, 1911, after the time originally granted had expired, as well as after the expiration of the additional periods allowed by the subsequent orders, if they had been valid.

[2] The plaintiff, at the time this appeal was attempted, had three days by statute in which to make and serve his case-made upon the defendant, after the judgment was entered, and, not having done so within that time, or the extension of 60 days granted by the court, the case cannot be considered by this court. *Carr v. Thompson et al.*, 27 Okl. 7, 110 Pac. 667; *Foulds v. Hubbard*, 38 Okl. 146, 128 Pac. 108; *St. Louis & S. F. R. Co. v. Rickey*, 33 Okl. 481, 126 Pac. 735; *Brown-Beane Co. et al. v. Rucker et al.*, 136 Pac. 1075.

The appeal should therefore be dismissed.

PER CURIAM. Adopted in whole.

#### CUMMINS v. BRIDGES. (No. 3505.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 1001\*)—VERDICT—EVIDENCE.

Where there is competent evidence reasonably tending to support the verdict of the jury, under proper instructions from the court, this court will not disturb the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Jefferson County; B. T. Price, Judge.

Action by W. J. Bridges against B. V. Cummins. Judgment for plaintiff, and defendant brings error. Affirmed.

Bridges & Vertress, of Waurika, for plaintiff in error. J. G. Clift, of Waurika, for defendant in error.

RITTENHOUSE, C. This is an action on a promissory note for \$280.15, balance due on an open account for lumber. Defendant filed an answer, asking for credit of \$223.39 for material returned; \$7.05 for broken glass; \$7 expended in obtaining glass; \$50 for difference in price and grade of lumber; and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



\$50 for damages. These questions were properly submitted to the jury and a verdict returned in favor of W. J. Bridges and against B. V. Cummins for \$180.76. There being sufficient evidence to support the verdict, this court will not disturb the same.

The judgment of the lower court should therefore be affirmed.

PER CURIAM. Adopted in whole.

WRIGHT et al. v. STATE. (No. 3711.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—WANT OF BRIEFS—AFFIRMANCE.

On account of the failure of the plaintiffs in error to serve and file briefs, as prescribed by rule 7 of this court (137 Pac. ix), the judgment rendered against them in the trial court should be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Pottowatomie County; Geo. C. Abernathy, Judge.

Action by the State against Thomas H. Wright and others. Judgment for plaintiff, and defendants bring error. Affirmed.

S. P. Freeling, of Shawnee, for plaintiffs in error. C. P. Holt, Co. Atty., of Shawnee, for the State.

GALBRAITH, C. This is an appeal from a judgment rendered in favor of the state of Oklahoma in the sum of \$1,500, and against the plaintiffs in error, as principal and sureties on a forfeited bail bond. The petition in error with case-made was filed in this court March 20, 1912, and the cause was regularly set down for submission and submitted on the 16th day of April, 1914. The plaintiffs in error have not served or filed briefs as required to do by rule 7 of this court (137 Pac. ix).

On account of such default and failure, as prescribed in said rule, the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

BOARD OF COM'RS OF TULSA COUNTY  
v. BRECKINRIDGE. (No. 3526.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—FAILURE TO FILE BRIEF—DISMISSAL.

Where plaintiff in error does not file brief within the time allowed by rule 7 of this court (137 Pac. ix), nor before case is due to be taken on submission, the appeal will be treated as abandoned and dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by M. A. Breckinridge against the Board of County Commissioners of Tulsa County, Okl., on salary claim. Judgment for plaintiff, and defendant brings error. Appeal dismissed.

Hainer, Martin, Bush & Murry, of Tulsa, for plaintiff in error.

THACKER, C. On January 19, 1912, the case-made was filed in this court; on January 13, 1914, this case was due to be taken on submission; but the plaintiff in error has wholly failed to file briefs as required by rule 7 of this court (137 Pac. ix), and has thus abandoned the appeal. See Wallingford v. Wood et al., 139 Pac. 252 (not yet officially reported); Howard Mer. Co. et al. v. Squires, County Judge, et al., 139 Pac. 253 (not yet officially reported); Clinton & O. W. R. Co. v. Kansas City, M. & O. R. Co., 134 Pac. 422.

We are therefore of the opinion that the case should be treated as abandoned and dismissed.

Dismissed.

PER CURIAM. Adopted in whole.

BOARD OF COM'RS OF TULSA COUNTY v.  
CLINE. (No. 3527.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—BRIEFS—FILING—TIME.

Where plaintiff in error does not file brief within the time allowed by rule 7 of this court (137 Pac. ix), nor before case is due to be taken on submission, the appeal will be treated as abandoned and dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by M. E. Cline against the Board of County Commissioners of Tulsa County, on salary claimed. Judgment for plaintiff, and defendant brings error. Dismissed.

Hainer, Martin, Bush & Murry, of Tulsa, for plaintiff in error.

THACKER, C. On January 19, 1912, the case-made was filed in this court; on January 13, 1914, this case was due to be taken on submission; but the plaintiff in error has wholly failed to file briefs as required by rule 7 of this court (137 Pac. ix), and has thus abandoned the appeal. See Wallingford v. Wood et al., 139 Pac. 252 (not yet officially reported); Howard Mercantile Co. et al. v. Squires, County Judge, et al., 139 Pac. 253 (not yet officially reported); Clinton & O. W.

R. Co. v. Kansas City, M. & O. R. Co., 134 Pac. 442.

We are therefore of the opinion that the case should be treated as abandoned and dismissed.

Dismissed.

PER CURIAM. Adopted in whole.

BOORIGIE v. CAMP, Justice of the Peace.  
(No. 3721.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§§ 141, 164\*)—MANDAMUS—JURISDICTION—APPEAL.

After the adoption of the Constitution and prior to the time the Revised Laws of 1910 (section 5465) became effective, appeals from judgments of justices of the peace were to the county court, and a justice of the peace refusing to make out and file with the county court a transcript of the proceedings had in his court in a cause sought to be appealed, after having approved and filed an appeal bond, may be compelled to perform such duty by mandamus from the county court in aid of its appellate jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476, 607-636; Dec. Dig. §§ 141, 164.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Cherokee County; J. F. Parks, Judge.

Mandamus by William Boorigie against Carl M. Camp, a justice of the peace. Judgment was for the defendant, and plaintiff brings error. Reversed.

Bruce L. Keenan, of Tahlequah, for plaintiff in error.

GALBRAITH, C. The plaintiff in error, on the 15th day of September, 1911, filed a petition in the county court of Cherokee county, praying a writ of mandamus against the defendant in error, Carl M. Camp, a justice of the peace for precinct No. 1 of said county, requiring him to certify an appeal from the judgment rendered in a designated case in his court to the said county court. It was alleged in the petition that on the 21st day of June, 1911, in a certain cause pending in the justice court of the defendant in error, a judgment was rendered against the plaintiff in error, and that he gave notice of appeal therefrom, and on the 27th day of June, 1911, filed his appeal bond, which was duly approved on that day; that the defendant in error as such justice of the peace certified a transcript of such case to the district court and refused to certify the same to the county court, as he should have done, and as it was his duty to do, under the law. The prayer was for a writ of mandamus commanding the defendant in error, as justice of the peace, to prepare a certified transcript of the proceedings in said cause and deliver

same to the said county court. An alternative writ was issued and served returnable on September 20, 1911. It appears that no return to the writ was filed; but on the return day the respondent appeared and by oral motion requested that the proceedings be dismissed. This motion was granted, and afterwards the plaintiff in error came in and filed a motion for rehearing. Then the respondent was permitted to file a demurrer as of the return day, and the demurrer was sustained, and rehearing denied, and judgment entered against the plaintiff in error for costs. From this judgment, an appeal has been perfected to this court.

The petition in error and transcript were filed in this court on March 22, 1912, and the plaintiff in error served and filed a brief on April 6, 1914, and the cause was regularly submitted on April 16, 1914. The defendant in error has not filed briefs or attempted to show any reason for not doing so; but, since the plaintiff in error's brief was filed out of time, and without permission of the court, we are not inclined to invoke the penalty incurred by defendant in error by its default in this behalf, as prescribed in rule 7 (137 Pac. ix) of this court. We rather conclude that the ends of justice will be subserved by disposing of the cause on its merits, and shall do so.

The contentions of the plaintiff in error are supported by the law. Section 12, art. 7, § 197, Williams' Const. Okl., gave the county court jurisdiction in mandamus proceedings in this character of case, and, since the proceedings complained of were had prior to the taking effect of the Revised Laws of 1910 (section 5465), the appeal in this case was to the county court. *Holcomb v. C., R. I. & P. R. Co.*, 27 Okl. 367, 112 Pac. 1023; *Graham Paper Co. v. Bartlesville Pub. Co.*, 27 Okl. 781, 117 Pac. 199; *Farmers' Mill & Elev. Co. v. Lewis*, 29 Okl. 245, 116 Pac. 764; *A., T. & S. F. R. Co. v. McFarland*, 30 Okl. 595, 120 Pac. 559. The plaintiff in error had a right, after the approval of his appeal bond, to have the transcript lodged with the county court, and it was the duty of the defendant in error, as justice of the peace, to make out and deliver the transcript to said court, and upon his failure or refusal to perform this duty the aggrieved party was entitled to a mandamus from the county court to compel him to do so.

The county court was in error in sustaining the demurrer to the petition, and also in dismissing the cause. The exceptions are well taken. The judgment appealed from should be reversed, and the cause remanded to the county court of Cherokee county, with directions to set aside the judgment dismissing the cause, and to grant a peremptory writ of mandamus commanding the defendant in error, as justice of the peace, to make out a transcript of the judgment and pro-

ceedings in the cause in which the appeal was sought, and to lodge same with the county court.

PER CURIAM. Adopted in whole.

**KINNEY v. McPHERREN.** (No. 3532.)  
(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 564\*)—CASE-MADE—EXTENSION OF TIME TO FILE—SERVICE.**

An order granting an extension of time in which to make and file a case-made implies that it be served on the opposite party within the same time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

**2. APPEAL AND ERROR (§ 564\*)—CASE-MADE—TIME FOR SERVICE.**

A purported case-made, which is not served within three days after the judgment or order is entered, or within an extension of time duly allowed, is a nullity, and cannot be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Bryan County; J. L. Rappollee, Judge.

Action by Ward Kinney against Chas. E. McPherren. Judgment for defendant, and plaintiff brings error. Dismissed.

Crook & Kyle, of Durant, for plaintiff in error. McPherren & Abbott, of Durant, for defendant in error.

**SHARP, C.** The record in this case shows that judgment was rendered July 5, 1911, and a motion for new trial filed the following day. The motion for a new trial was overruled July 25, 1911, at which time an order was made by the court granting plaintiff "60 days in which to make and file a case-made." The case-made was served upon counsel for defendant in error September 25, 1911.

[1] It will be observed that the order granting an extension of 60 days did not expressly extend the time to "serve" the case-made, but only to "make and file." We think, however, that the plain intention of the court and counsel was that the case-made should be served within the time granted, and that the omission of the specific term "serve" was not designed. While it is true that the making and serving of a case-made may be more than a single act, yet in practice the preparation and delivery of a case-made to the opposite party is usually spoken of as the making of a case-made. *Chicago, B. & Q. R. Co. v. Guild*, 61 Kan. 213, 59 Pac. 283; *Butler et al. v. Scott*, 68 Kan. 512, 75 Pac. 496. See, in this connection, *Latham v. Schlack*, 27 Okl. 522, 112 Pac. 968.

[2] The case-made having been served 62 days after the order was made by the court allowing 60 days for that purpose, and no further extension having been asked during the time fixed, is a nullity, and cannot be considered by this court. *Carr v. Thompson et al.*, 27 Okl. 7, 110 Pac. 667; *First Nat. Bank v. Oklahoma Nat. Bank*, 29 Okl. 411, 118 Pac. 574; *Hengst v. Thompson Oil & Gas Co.*, 37 Okl. 295, 131 Pac. 1075; *Cunyan v. Clemmer*, 33 Okl. 480, 126 Pac. 578.

It follows that the appeal should be dismissed.

PER CURIAM. Adopted in whole.

**GLOYD v. MORRIS et al.** (No. 3090.)  
(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**MECHANICS' LIENS (§ 13\*)—PROPERTY SUBJECT —PROPERTY OF MUNICIPALITY.**

No lien authorized by section 4527, St. 1893 (section 3862, Rev. Laws 1910), will attach to any real property of a city used for public purposes, as such lien would be against public policy and unenforceable, and such property is not by statute expressly made subject thereto.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 14, 15; Dec. Dig. § 13.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by S. M. Gloyd against M. C. Morris and others, copartners doing business under the firm name of M. C. Morris & Co., contractors, and L. R. Moss, subcontractor, as debtors, for balances due on material furnished, and against the City of Okmulgee, Oklahoma, owner of real property, for foreclosure of alleged materialman's lien on said property. Judgment for plaintiff against said debtors, and for defendant City of Okmulgee denying lien. Plaintiff brings error. Affirmed.

Shartel, Keaton & Wells, of Oklahoma City, and Matthews & Ellison, of Okmulgee, for plaintiff in error.

**THACKER, C.** Plaintiff in error, who was plaintiff below, brought this action to recover of contractors doing business in the name of M. C. Morris & Co. and of a subcontractor by the name of L. R. Moss balances of \$1,289.55 and \$220.65, respectively, owing for material furnished them and by them used in the construction of a city hall and fire station for and owned by the city of Okmulgee, and to foreclose an alleged materialman's lien upon said property of said city. Judgment was given as prayed against contractors and subcontractor for the debts mentioned, but the prayer for judgment establishing and foreclosing said lien was denied and judgment given in favor of said city,

from which adverse judgment plaintiff brings error here for review.

The only question to be considered and determined here is as to whether the lien authorized by section 4527, Stat. 1893 (section 3862, Rev. Laws 1910), will attach to such property of a city; and, following prior decisions of this court, we are of the opinion that the lien claimed did not and could not so attach. *Western Terra Cotta Co. & Warren Smith Hdw. Co. v. Board of Education of City of Shawnee et al.*, 136 Pac. 595; *Hutchinson v. Krueger et al.*, 34 Okl. 23, 124 Pac. 591, 41 L. R. A. (N. S.) 315; *Minnetonka Lumber Co. et al. v. Board of Education of City of Sapulpa*, 139 Pac. 284 (not yet officially reported).

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

### FARMERS' STATE BANK OF GRANITE v. CITY STATE BANK OF MANGUM.

(No. 3529.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 361\*)—DISMISSAL.

A petition in error should describe the cause wherein it is claimed the error occurred, and the judgment sought to be reviewed. A petition in error failing to describe the judgment with reasonable certainty, or to set out in what cause or court the judgment was rendered, will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1941–1959; Dec. Dig. § 361.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Greer County; Jarret Todd, Judge.

Action by the City State Bank of Mangum against G. M. Knipe and the Farmers' State Bank of Granite, garnishee. Judgment for plaintiff, and garnishee brings error. Dismissed.

B. F. Van Dyke, of Granite, for plaintiff in error. J. L. Carpenter, of Mangum, for defendant in error.

RITTENHOUSE, C. The defendant in error moved to dismiss this appeal on the ground that no petition in error had been filed. The only pleading which could possibly be interpreted as a petition in error is as follows:

"In the Supreme Court of the State of Oklahoma. *Farmers' State Bank, Plaintiff in Error, v. City State Bank of Mangum, Defendant in Error. Assignment of Error.* Comes now the plaintiff in error and assigns as error of the trial court that the court erred in overruling the motion for a new trial filed in the lower court. B. F. Van Dyke, Attorney for Plaintiff in Error."

The petition in error should, with reasonable certainty, describe the cause wherein it is claimed that error has occurred, and the judgment should be described with the same reasonable certainty. The petition in error in this cause is not entitled a petition in error, does not describe the judgment appealed from, does not set forth the court or cause in which the judgment was rendered, does not contain a prayer for relief, nor is the case made referred to in any manner as a part of said petition.

The object of the petition in error, as provided by section 6069, Comp. Laws 1909, is to obtain a reversal, vacation, or modification of the judgment or final order, and, when such judgment or final order is not set forth in the petition in error with reasonable certainty, the same is insufficient.

In the case of *Ketner v. Dillingham*, 50 Pac. 1098,<sup>1</sup> the court held under a similar statute:

"Where the petition in error does not show in what case or court the judgment was rendered, nor what court tried the case, nor the pleadings, it will be dismissed."

See, also, *Higgins v. Higgins*, 52 Pac. 906;<sup>2</sup> *Marvel v. White*, 5 Okl. 736, 50 Pac. 87; *Board of Commissioners of Woods County v. Oxley*, 8 Okl. 502, 58 Pac. 651; *King v. Horse Chief Eagle*, 23 Okl. 532, 101 Pac. 1135; *Gwinnup et al. v. Griffins et al.*, 26 Okl. 866, 113 Pac. 909; *McMasters v. English et al.*, 26 Okl. 818, 110 Pac. 1070; *Wilson v. Mann*, 37 Okl. 475, 132 Pac. 487.

The purported petition in error in this cause is insufficient to confer jurisdiction on this court, and the motion to dismiss the cause on the ground of the insufficiency of such petition should be sustained, and the cause dismissed.

PER CURIAM. Adopted in whole.

<sup>1</sup> Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 6 Kan. App. 921.

<sup>2</sup> Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 7 Kan. App. 811.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## CENTRAL LIGHT &amp; FUEL CO. et al. v. TYRON. (No. 3184.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

## 1. MALICIOUS PROSECUTION (§ 22\*)—RIGHT OF ACTION—DEFENSES—DIRECTION OF VERDICT.

In an action for malicious prosecution, growing out of a criminal prosecution of the plaintiff, where the prosecutor, before instituting the criminal proceedings, obtained the advice of the county attorney, and then and there communicated to him all the facts bearing on the case, reasonably obtainable, and acted upon the advice given honestly and in good faith, the absence of malice is established, the want of probable cause negatived, and the action cannot be sustained.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 45-48; Dec. Dig. § 22.\*]

## 2. MALICIOUS PROSECUTION (§ 22\*)—DEFENSES—ADVICE OF COUNSEL.

Prior to the taking effect of the act of March 19, 1910 (Sess. Laws 1910, p. 129, c. 69), section 24 of which provides that county attorneys shall not engage in the private practice of law, the fact that the county attorney was a member of the prosecutor's regularly employed firm of attorneys was not of itself sufficient to affect the rule announced in the foregoing paragraph.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 45-48; Dec. Dig. § 22.\*]

## 3. MALICIOUS PROSECUTION (§ 24\*)—WANT OF PROBABLE CAUSE—PROOF.

In an action for malicious prosecution, proof of the acquittal of the accused, by a jury in a trial in a magistrate's court, on an information theretofore sworn out, does not of itself tend to show want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49-55; Dec. Dig. § 24.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by W. H. Tyron against the Central Light & Fuel Company and another. Judgment for plaintiff, and defendants bring error. Reversed.

George S. Ramsey and C. L. Thomas, both of Muskogee, and Mann & Thrift, of Sapulpa, for plaintiffs in error. Thompson & Smith, of Sapulpa, for defendant in error.

SHARP, C. In the trial court, plaintiff recovered judgment against the defendants for \$200 damages sustained on account of alleged malicious criminal prosecution instituted against plaintiff by defendant Cantrell, the local manager of the Central Light & Fuel Company. Defendants' answer put in issue all of the material allegations of plaintiff's petition, and specifically denied that the criminal prosecution was instituted maliciously and without probable and reasonable cause, and further charged that the defendant Cantrell, acting for the defendant Central Light & Fuel Company, prior to filing the information against plaintiff, advised with the county attorney of Creek county,

and in good faith put before him all the facts to him known concerning the controversy, and was by said county attorney advised to swear out an information against the plaintiff charging him with larceny, and that acting upon said advice, and in good faith, and believing the plaintiff guilty of larceny, the said defendant Cantrell made oath to the information upon which plaintiff's arrest was based. Defendants further averred that there was probable cause for the prosecution and arrest of plaintiff on the charge of larceny.

The criminal charge for which plaintiff was arrested was the larceny of a small 6x7 meter house, used as a cover or protection to defendant company's gas meter. The defendant company had owned two pipe lines and two meters, the former of which lay across the tract of land subsequently leased by the plaintiff, under an assignment of a pipe line right of way from the Martin Oil Company. One of the pipe lines had been removed from the premises in March preceding plaintiff's arrest. Shortly prior to the arrest, the valve in one of the meters on said premises needing repair, the meter was taken away, and in its removal the small house was turned over. Some three or four days thereafter, this house, which was situated about a quarter of a mile from plaintiff's barn, was found to have been moved from its former site to a place within 100 to 150 feet of plaintiff's barn. This fact was reported to defendant Cantrell by Eli Withrow, one of the company's employes. Thereafter J. D. Smith, the defendant company's pipe line superintendent, was instructed by defendant Cantrell to investigate the matter and let him know. Smith met plaintiff at Taneha and asked him if he would return the house, to which plaintiff gave no answer, except to tell him that he would not allow the company to put the meters back on the land; that they had agreed to take their stuff off in a former settlement had between them. Smith then called up Cantrell over the telephone and informed him that he could do nothing with the plaintiff, and that the company would have to proceed in some other way. Thereupon Cantrell, not knowing what steps to take, consulted the company's regularly retained attorneys, Mann & Jackson, for the purpose of obtaining legal advice as to how to obtain possession of the meter house. L. B. Jackson, of the firm of Mann & Jackson, was at the time county attorney for Creek county, and after Cantrell had related to him all of the facts growing out of the removal of the house, and his efforts to regain it, as reported to him by Withrow and Smith, the company's employes, Mr. Jackson informed him that Tyron was guilty of larceny and should be arrested. From the information in his possession, Cantrell at the time believed Tyron had stolen the house, but had called upon

counsel, not with a view of having Tyron arrested, but for the purpose of recovering possession of the company's property. When informed by Jackson that Tyron should be arrested, Cantrell stated: "I said I didn't know; you ought to know, being county attorney." Jackson then called in his stenographer and dictated a criminal information, which, after being signed by him, was also signed by Cantrell.

There is no testimony in the record tending to show ill will toward plaintiff on the part either of Cantrell or any other of the company's employes. Some two months prior to the time of plaintiff's arrest, and when defendant company was proceeding to take up one of its pipe lines which lay across the premises occupied by the plaintiff, the latter objected to its removal until he had been paid certain damages. This it appears was quickly adjusted and paid. There was no other evidence of ill will or malice. Subsequent to plaintiff's arrest, the defendant company replevined and obtained possession of the house. Both Cantrell and Jackson testified fully as to the former advising with the latter concerning the removal of the house. This evidence is undisputed.

On the part of plaintiff in error, it is insisted that there was a total want of any evidence tending to prove a want of probable cause on the part of defendants in the procuring of plaintiff's arrest; that defendant Cantrell, acting for the Central Light & Fuel Company, having communicated to Mr. Jackson, the county attorney, all of the facts bearing on the case, of which he had knowledge, and having been advised in the premises, and having acted upon the advice received honestly and in good faith, there was a total want of any evidence upon which to base a recovery. In this we think counsel are correct.

[3] Proof that plaintiff was arrested on the complaint of defendant, and thereafter acquitted, did not of itself tend to show want of probable cause. *Lindsey v. Couch*, 22 Okl. 4, 98 Pac. 973. The guilt or innocence of defendant in error of the charge laid against him was not an issue to be determined in the trial of the civil action for damages.

[1] As bearing upon the question of the existence of probable cause, the undisputed evidence showed that the defendant company was the owner of the meter house; that, shortly after the meter had been removed therefrom, this house, situated on lands occupied by plaintiff, had been removed from its former location to within a short distance of plaintiff's barn; that, being accused by one of defendant company's employes with having taken the house, plaintiff did not deny the charge, but, on the other hand, informed said employe that defendant company must remove its stuff from the premises. Notwithstanding plaintiff's acquittal,

there was reasonable ground for believing him guilty. However this may be, defendant company having taken legal advice, and communicated to its attorney all the facts bearing on the case, of which its manager had been able to procure information, and having been advised by said attorney, who was also the public prosecutor, that an offense had been committed, and having honestly and in good faith relied upon the legal advice so given, and said manager having signed a criminal complaint, made out and previously signed by said public prosecutor, neither are liable for damages, even though the party charged with such offense was afterwards acquitted.

[2] Section 24 of the county fee and salary act, prohibiting county attorneys from engaging in the private practice of law, approved March 19, 1910, not having taken effect until 90 days after the adjournment of the Legislature, and the arrest having been made on May 25th, immediately following, the question of the propriety or right of Mr. Jackson to give legal advice or counsel with clients, concerning other than public business, is not involved, nor is it in any way brought in question. *Sess. Laws 1910, p. 129.*

The facts are not unlike those in *El Reno Gas & Electric Co. v. Spurgeon*, 30 Okl. 88, 118 Pac. 397, where the question of the effect of advice of counsel as a defense is considered at some length. It is conceded by counsel for defendant in error that the principles of law as announced by this court in *Lindsey v. Couch*, supra, and *El Reno Gas & Electric Co. v. Spurgeon*, supra, correctly state the law, but that the facts of the instant case differ from those before the court in the cases mentioned. In this latter regard counsel are mistaken. The mere fact that Cantrell failed to tell Jackson that his company had paid plaintiff \$15 for damages some two months before was of no consideration. It was not even claimed by plaintiff that any ill feeling had grown out of this settlement. After the removal of the house had first been reported to Cantrell, he instructed his superintendent to see plaintiff concerning its return, and it was with this in mind that plaintiff consulted his attorneys. The county attorney is the proper officer designated by law for the purpose of giving advice concerning criminal prosecutions, and where a person, acting in good faith and under the advice of such counsel, is led to institute a criminal prosecution against another, and thereafter the prosecution fails, the prosecutor does not thereby render himself liable to an action for malicious prosecution or to any other action. *El Reno Gas & Electric Co. v. Spurgeon*, supra; *Ross v. Hixon*, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123, and note; *Cooper v. Fleming*, 114 Tenn. 40, 84 S. W. 801, 68 L. R. A. 849; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 28 L. R. A. 627.

For the reasons stated, the trial court erred in overruling the defendants' motion to direct a verdict in their behalf. The judgment of the trial court should therefore be reversed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. LINDSEY,  
County Treasurer, et al.  
(No. 3493.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

TAXATION (§ 608\*)—LIMITATION OF AMOUNT—  
STATUTORY PROVISION—INJUNCTION.

For syllabus, see St. Louis & San Francisco Railroad Co. v. Thompson, No. 2909, 35 Okl. 138, 128 Pac. 685.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Murray County; R. McMillan, Judge.

Injunction by the St. Louis & San Francisco Railroad Company against J. C. Lindsey, County Treasurer, and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

See, also, 135 Pac. 1053.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. E. W. Fagan, of Davis, and Ira M. Roberts, of Sulphur, for defendants in error.

RITTENHOUSE, C. This action was brought by the plaintiff in error to enjoin certain taxes in Murray county. A temporary injunction was granted, afterward dissolved, and a demurrer sustained to plaintiff's petition; then the cause brought here for review. Stipulation was entered into and filed in this cause as follows:

"It is hereby stipulated and agreed by and between the parties hereto that briefs are not to be filed by either party in this case until after the determination by this court of the case of St. Louis & San Francisco Railroad Company v. J. P. Thompson et al., No. 2909, in which the construction of the act of the Legislature of March 17, 1910, is involved.

"It is further stipulated and agreed that, should the contention of the plaintiff in error in said cause be sustained as to the invalidity of levies producing an amount in excess of the estimates under said 1910 law, then this cause should be reversed, and the demurrer overruled; should it be held by this court in that case that levies producing an amount in excess of the estimates under the said 1910 law are not invalid to that extent, then this case should be affirmed; should said case No. 2909 be decided by this court without passing upon the question of law involved, then the parties hereto shall file briefs prior to the submission of this cause to the Supreme Court."

The case referred to in the stipulation (St. Louis & S. F. R. Co. v. Thompson, No. 2909) was decided by this court on December 3, 1912, and is reported in 35 Okl. 138, 128 Pac.

685; and the question involved in that action was decided as contemplated by the above stipulation. The first paragraph of the syllabus is as follows:

"By reason of the act of the Legislature entitled 'An act to provide for the levying of taxes on an ad valorem basis,' etc. (chapter 64, Session Laws 1910, p. 109), the county excise board is without power to levy during any one year for township purposes in any township a tax in excess of the amount estimated by the directors of said township as necessary to defray the current expenses of said township during the ensuing fiscal year as approved by the county excise board and an additional amount of 10 per cent. thereon for delinquent taxes. Any tax levied by the excise board in excess of such an approved estimate of the township officers and an additional 10 per cent. for delinquent taxes is, as to such excess levied, illegal and void."

Upon the stipulation of the parties, and under the decision of this court in the case of St. Louis & S. F. R. Co. v. Thompson, supra, this cause should be reversed and remanded, with instructions to overrule the demurrer.

PER CURIAM. Adopted in whole.

STATE ex rel. LOZIER v. BOGLE et al.  
(No. 3439.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 781\*)—REVIEW—ABSTRACT QUESTIONS.

The syllabus in Fisher v. Lockridge, 35 Okl. 360, 130 Pac. 136, is made the syllabus in this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

Error from District Court, Creek County; Wade S. Stanfield, Judge.

Mandamus by the State, on the relation of F. S. Lozier, as guardian of Josie Tyler, minor, against H. H. Bogle and others. From judgment quashing the writ and overruling the relator's motion to tax costs to the defendants, he brings error. Dismissed.

Haskell B. Talley, of Tulsa, for plaintiff in error. Pryor & Rockwood, of Sapulpa, for defendants in error.

TURNER, J. On November 29, 1910, pursuant to the motion of F. S. Lozier, as guardian of Josie Tyler, a minor, filed in the district court of Creek county, that court, without notice, issued a peremptory writ of mandamus, directing H. H. Boyle, J. A. Helton, and W. J. Ladd to file in the county court of that county, in a certain proceeding therein pending, their appraisal of certain lands belonging to said minor, pursuant to an order of said court theretofore made, and which said appraisal they at that time had made, executed, and acknowledged as required by law, but had failed and refused to file.

On January 25, 1911, came defendants before Wade S. Stanfield, Judge, and made a showing to the court, whereupon the court found, among other things:

"That there never has been, at any time, an appraisal as required by law, made by the guardian appointed in this case, that the appointment of the appraisers by the county court was void, and that in the opinion of this court the writ of mandamus heretofore issued in this case ought not to have been issued until notice was served upon the parties and an opportunity given them to be heard."

It also appears that on December 2d the mandate of the court had been obeyed, and that the reason the appraisal had not been sooner filed was because the appraisers, acting under the advice of the county judge, had refused to file the same until their fees for making same were paid. Thereupon the court in effect quashed the writ and overruled the motion of the plaintiff to tax defendants with the costs. Plaintiff brings the case here.

As it appears from the journal entry that the hearing was for the purpose only of taxing the costs, we decline to say whether the court erred in quashing the writ, for the reason that a determination of that question can only be useful in determining who should pay these costs. This case is ruled by *Fisher v. Lockridge*, 35 Okl. 360, 130 Pac. 136, where we said:

"Abstract or hypothetical questions, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow, except the awarding of the costs, will not be determined on appeal, but the cause will be dismissed."

Dismissed.

# DE HART OIL CO. v. SMITH et al. (No. 3523.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

## 1. APPEAL AND ERROR (§ 773\*)—BRIEFS—DEFENDANT IN ERROR—FAILURE TO FILE—REVIEW.

Where plaintiff in error has, in compliance with the rules of the court, served and filed his brief, but the defendant in error has neither filed nor offered excuse for failure to file brief, the court is not required to search the record to find a theory upon which the judgment may be sustained, and may reverse the case in accordance with the prayer of the plaintiff in error if the brief filed appears reasonably to sustain such action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

## 2. REPLEVIN (§ 91\*)—PRIMA FACIE CASE—INSTRUCTIONS.

Where plaintiff in replevin has made out in evidence prima facie proof of ownership and right to immediate possession of property, it is error to instruct the jury that if they find "from all the evidence that the plaintiffs are the owners of the property, and that the same has never been sold by them, or through any court having jurisdiction to sell the same, and that there are no liens against the same in favor of the defend-

ants and against the plaintiffs, you would be authorized to find for the plaintiffs," as such instruction in effect places upon plaintiff the burden of proof specifically negating such sales and such liens and is too broad.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 354-359; Dec. Dig. § 91.\*]

## 3. REPLEVIN (§ 69\*)—GENERAL DENIAL—EFFECT.

In an action in replevin, a general denial of the petition entitles defendants to make any defense which would defeat the plaintiffs' claim of ownership and right of possession.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 257-279; Dec. Dig. § 69.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Rogers County; H. Tom McKnight, Judge.

Replevin by the De Hart Oil Company against Earl Smith and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

John T. Ezzard and C. B. Holtzendorff, both of Claremore, for plaintiff in error.

THACKER, C. Plaintiffs in error, as plaintiffs below, alleging ownership and right of immediate possession in themselves and that defendants in error, who were defendants below, unlawfully and wrongfully detained in their possession certain personal property of the value of \$400, to their damage by the detention amounting to \$200, brought this action in replevin for said property and said damages; and the defendants, besides certain affirmative allegations which at best do not enlarge the issues raised by a general denial (*Bancroft-Whitney Co. v. Mayfield*, Constable, et al., 36 Okl. 535, 129 Pac. 702, and *Street v. Morgan*, 64 Kan. 85, 67 Pac. 448), and need not be further noticed here, answered by a general denial, which entitled them to make any defense which would defeat plaintiffs' claim of ownership and right of possession as against them. *Payne v. McCormick Harvesting Machine Co.*, 11 Okl. 318, 66 Pac. 287. The case was tried to a jury, and the verdict and judgment were for defendants.

[1] Plaintiffs in error filed case-made with their petition in error in due time and, in accord with the rules of this court, have served and filed their brief; but the defendants have neither filed nor offered excuse for failure to file brief; and in such cases this court is not required to search the record for a theory upon which to sustain the judgment, but may reverse the same according to the prayer of the plaintiffs in error if their brief filed appears reasonably to sustain such action. See *First National Bank of Sallisaw v. Ballard et al.*, 139 Pac. 293, and cases there cited.

[2] The court, over objection by plaintiffs, in the fifth instruction to the jury, said:

"You are instructed, gentlemen of the jury, that if you find in this case, from all the evidence, that the plaintiffs are the owners of the property, and that the same has never been



sold by them, or through any court having jurisdiction to sell the same, and that there are no liens against the same in favor of the defendants and against the plaintiffs, you would be authorized to find for the plaintiffs."

This instruction is too broad, and in effect places the burden upon plaintiffs to prove that the property had never been sold by them, that there had been no judicial sale of the same without regard to whether such sale affected their rights, and that there was no lien upon the same in favor of defendants and against plaintiffs; and in our opinion this was error necessitating a reversal of this case.

[8] In the absence of proof that plaintiffs had sold the property so as to defeat their right of recovery in this action, and in the absence of proof of a judicial sale which would preclude their right of recovery, and in the absence of proof of a lien under which defendants acquired a right of possession, it appears that plaintiffs were entitled to recover in the present case merely upon their prima facie proof of ownership and right of possession; but the instruction under consideration, especially when considered in connection with instruction No. 3, to the effect that the burden was upon plaintiffs to make out their case, was not satisfied by such absence of proof of sales and liens, but required specific proof negating the same.

If defendants desired to overcome plaintiffs' prima facie proof of ownership and right to recover immediate possession and to defeat plaintiffs' action by showing that they had acquired title and right of possession or the right of possession alone by virtue of any sale of the property by plaintiffs, any judicial sale of the same, or any lien thereon, the burden of proof was upon the defendants and not the plaintiffs as to such showing.

At first blush and without more than a casual examination, there appear to be other errors which might require a reversal of this case; but, if there be such other errors, they are such that we cannot think that upon another trial they will be repeated, and we deem it unnecessary to discuss same.

For the reasons hereinbefore stated, this case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

NICHOLSON v. BARNES. (No. 3701.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—FAILURE TO FILE BRIEF—DISMISSAL.

Where plaintiff in error has filed no brief, as required by rule 7 of this court (38 Okl. vi, 137 Pac. ix), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 3108-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Cherokee County; John H. Pitchford, Judge.

Action by Mary C. Barnes against Sam P. Nicholson. Judgment for plaintiff, and defendant brings error. Dismissed.

A. A. Davidson, of Muskogee, and J. I. Coursey, of Tahlequah, for plaintiff in error. J. Berry King, of Tahlequah, for defendant in error.

RITTENHOUSE, C. The petition in error and transcript of the record in this case was filed in this court March 18, 1912; neither party has filed a brief, nor have they offered any excuse for the failure to do so. It is evident that the proceedings have been abandoned. The petition in error should therefore be dismissed for want of prosecution under rule 7 of this court (38 Okl. vi, 137 Pac. ix). *Eads v. Ottawa County et al.*, 138 Pac. 796; *Terry v. Coker*, 138 Pac. 814.

PER CURIAM. Adopted in whole.

CLOUGH v. CITY OF SULPHUR et al.  
(No. 3546.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 671\*)—SIDEWALK OBSTRUCTION—INJUNCTION—INDIVIDUAL RIGHT TO SUE.

When an obstruction merely affects an individual's right, in common with the public, to pass over a sidewalk, the individual suffers no injury different in kind from the public, and has no private right of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

2. MUNICIPAL CORPORATIONS (§ 671\*)—SIDEWALK OBSTRUCTION—INJUNCTION—PRIVATE INDIVIDUAL—SPECIAL INJURY.

A private person, invoking the aid of equity to restrain a public improvement alleged to be an obstruction, must allege some special injury peculiar to herself, aside from, and independent of, the general injury to the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

3. MUNICIPAL CORPORATIONS (§ 671\*)—SIDEWALK OBSTRUCTION—INJUNCTION—PRIVATE INDIVIDUAL—INCONVENIENCE.

The mere fact that the obstruction in the sidewalk would inconvenience the plaintiff in going to and from her home to other parts of the city does not constitute such a special damage as to entitle her to maintain injunction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Murray County; R. McMillan, Judge.

Suit by Mary Clough against the City of Sulphur, Okl., and Georgia Ward. Judgment for defendants, and plaintiff brings error. Affirmed.

This is an action to enjoin the defendants from constructing a cement sidewalk in front of lot 4, in block 42, of Sulphur, Okl. The grounds relied on for the injunction are: That the city had established a grade in front of lots 4 and 5, in said block; that the plaintiff had constructed a cement sidewalk in front of lot 5, on the grade so established; that, after the construction of said sidewalk by the plaintiff, the defendant Georgia Ward refused to construct a sidewalk in front of lot 4, in said block, on the grade so established, and that, because of such refusal, said grade was by the city changed; that, if the defendant be permitted to construct a cement sidewalk on the new grade, the step or drop caused thereby would be a dangerous obstruction in said sidewalk, making the same impassable, obstructing the passageway to the house and home of plaintiff, and preventing plaintiff and her family from using said sidewalk; that it will greatly depreciate the value of plaintiff's premises, will work a great and irreparable injury and damage thereto; and that said plaintiff has no adequate remedy at law. To these allegations the defendants demurred on the ground that the same failed to state facts sufficient to constitute a cause of action, which demurrer was by the court sustained, and the cause brought here for review.

Sam Clough and Geo. M. Nicholson, both of Sulphur, for plaintiff in error. Ira M. Roberts, of Sulphur, for defendants in error.

RITTENHOUSE, C. (after stating the facts as above). The plaintiff was not entitled to an injunction against the defendants, restraining them from constructing a sidewalk on the grade so changed, on the ground that the plaintiff would sustain damages as a result of such improvement. Plaintiff having an adequate remedy at law for any damages sustained, and there is no special damage or injury alleged in the petition. *Edward v. Thrash et al.*, 26 Okl. 472, 109 Pac. 832, 138 Am. St. Rep. 975; *Clemens v. Conn. Mutual Life Ins. Co.*, 184 Mo. 46, 82 S. W. 1, 87 L. R. A. 362, 105 Am. St. Rep. 526; *McMahon & Perrin v. St. Louis, Ark. & Texas R. Co.*, 41 La. Ann. 827, 6 South. 640; *Deleware County's Appeal*, 119 Pa. 159, 13 Atl. 62; *Spencer v. Point Pleasant Ohio R. Co.*, 23 W. Va. 406; *Moore v. City of Atlanta*, 70 Ga. 611; *Fleming v. City of Rome*, 130 Ga. 383, 61 S. E. 5; *Gray et al. v. Dallas Terminal R. & Union Depot Co.*, 13 Tex. Civ. App. 158, 36 S. W. 352; *Stetson v. C. & E. R. Co.*, 75 Ill. 74; *City of McAlester v. McMurray*, 26 Okl. 517, 109 Pac. 838.

It will be seen from the allegations of the petition that the obstruction and nuisance asked to be restrained is not such a special or peculiar injury to the plaintiff from which equity will relieve. From such obstruction and nuisance alleged to exist the plaintiff has an adequate remedy at law. In order to invoke equity, plaintiff would have to allege

that she would suffer some injury from the obstruction or nuisance which is in its nature special or peculiar to her, and different in kind from that to which the public is subjected. To constitute such special injury, there must be an invasion or violation of plaintiff's private rights, as distinguished from that to which the public is injured or damaged. The allegations contained in the petition are that the walk so constructed on the new grade would cause a step or drop of about two feet, which would be a dangerous obstruction and thereby obstruct said sidewalk, making the same impassable, and which would obstruct the passageway to the house and home of plaintiff and prevent her and her family from using said sidewalk. These are not allegations of a special injury peculiar to plaintiff, but such injury, if any, as would be common to the entire public.

It has been said in 2 Elliott on Roads and Streets, § 851, that where an unlawful obstruction merely affects an individual's right, in common with the public, to pass over the highway, the individual suffers no injury different in kind from the public and has no private right of action.

[1] In the case of *Brown v. Florida Chautauqua Ass'n*, 59 Fla. 447, 52 South. 802, it was held:

"If an unlawful obstruction in a public highway merely interferes with the right of passage that is common to all, and no individual rights are specially or peculiarly injured, relief should be had through the proper public authorities."

See, also, *Pedrick v. Raleigh & P. S. R. Co.*, 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554; *Bischof v. Merchants' Nat. Bank*, 75 Neb. 838, 106 N. W. 996, 5 L. R. A. (N. S.) 486; *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305; *Zettel v. West Bend*, 79 Wis. 316, 48 N. W. 379, 24 Am. St. Rep. 715; *Roberts v. S. C. & P. R. Co.*, 73 Neb. 8, 102 N. W. 60, 2 L. R. A. (N. S.) 272, 10 Ann. Cas. 992.

It was said in *Joyce on Nuisances*, § 218:

"In case of a public nuisance affecting the highway, the right of an individual to obtain an injunction is not recognized unless he has suffered some private and material damage or injury differing in kind from that suffered by the public at large. The gist of the action in this class of cases is the private injury, and the plaintiff must allege and prove some special damage different in kind from that suffered in common with the public."

[2] It was held in *Siskiyon L. & M. Co. v. Rostel*, 121 Cal. 511, 53 Pac. 1118, that anything which is an obstruction to a public street or highway constitutes a public nuisance, and a private individual could not maintain an action to abate such nuisance, without alleging that the plaintiff would suffer special injury.

In *McKay v. City of Enid*, 26 Okl. 275, 109 Pac. 520, 30 L. R. A. (N. S.) 1021, it was said:

"An action cannot be maintained by a private person for an interference with or an obstruction in a public highway constituting a public nuisance, unless he is thereby specially injured in some way not common to the public at large."

[3] It is alleged that the lots are in the city of Sulphur, and it necessarily follows that there are other lots and blocks in said city, and that the drop of two feet in the sidewalk would not only injure the plaintiff but would injure other owners of lots in said neighborhood to the same extent. This case is not one in which the only manner of ingress and egress to the plaintiff's house and home has been obstructed, but the allegation is that the plaintiff and her family cannot use this particular sidewalk on account of such drop of two feet. The mere fact that the obstruction in the sidewalk would inconvenience the plaintiff in going to and from her home to other parts of the city does not constitute such special damage as to entitle her to maintain injunction.

We therefore conclude that the petition does not state facts sufficient to constitute a cause of action, and that the demurrer was properly sustained. The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

NATIONAL UNION v. KELLEY. (No. 3200.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. INSURANCE (§ 292\*)—LIFE POLICY—BREACH OF WARRANTY.

A breach of warranty that insured has not had medical advice during the last five years will render void a contract of life insurance conditioned thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 691, 692; Dec. Dig. § 292.\*]

2. INSURANCE (§ 646\*)—LIFE POLICY—BREACH OF WARRANTY—BURDEN OF PROOF.

The burden of proof is on the insurer to show untrue the insured's warranty that he has not had medical advice during the last five years.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.\*]

3. INSURANCE (§ 668\*)—WARRANTY—BREACH—DETERMINATION—QUESTION OF FACT.

The question as to whether a statement of the insured, warranted to be true, is untrue is ordinarily one for the jury, or, where a jury is waived, for the judge as the trier of the facts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

4. EVIDENCE (§ 588\*)—CREDIT—MANNER OF TESTIFYING.

The manner in which a witness testifies may tend to discredit him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

5. INSURANCE (§ 665\*)—CONCLUSIVENESS OF TESTIMONY.

The jury, or judge where a jury is waived, is not bound to find a fact untrue which an insured has stated and warranted to be true, where, in order to do so, he must believe the indefinite testimony of a witness who is obviously deficient in memory in respect to the matter about which he testifies, whose answers were frequently not responsive to the questions,

and whose testimony is inconsistent with or in any manner contradicted by other evidence.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Pottawatomie County; Ross F. Lockridge, Judge.

Action by Onie M. Kelley, beneficiary, against the National Union, a life insurance corporation, on a policy. Judgment for plaintiff, and defendant brings error. Affirmed.

Gilbert & Bond, of Oklahoma City (Geo. P. Kirby, of Toledo, Ohio, of counsel), for plaintiff in error. S. P. Freeling, E. E. Hood, and I. C. Saunders, all of Shawnee, for defendant in error.

THACKER, C. Plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

Plaintiff, as beneficiary, sued and recovered judgment for \$1,000 against defendant, a fraternal, mutual, beneficial, insurance association, upon a policy of insurance, or benefit certificate, issued May 26, 1910, in compliance with the application and upon the life of plaintiff's husband, Alvis M. Kelley, who died November 28, 1910, a member of defendant's McLoud Council No. 41.

The said benefit certificate recites:

"This certificate is granted upon the express condition that all statements and recommendations made by said member in his application for membership in said council and all statements to the medical examiner by him are true.

\* \* \* The application of the member, a copy of which is hereto attached, and hereby made a part of this certificate. This certificate, the articles of incorporation of the National Union, the laws now in force or hereafter enacted, and the said application for membership shall constitute the contract between the said National Union and the said member. \* \* \* If these conditions are faithfully complied with, the National Union hereby promises and agrees to pay out of its benefit fund to Onie M. Kelley, wife, \$1,000.00," pursuant to the provisions of the laws of the order upon proof of death of said Alvis M. Kelley, and upon surrender of this certificate.

The application mentioned in said certificate contains, among other things, the following:

"I hereby consent and agree that any untrue statements made above, or to the medical examiner, or any concealment of facts by me in this application, in regard to my health, habits, or circumstances, personal or family history, or my suspension or expulsion from or voluntary severing of my connection with the order, shall forfeit the right of myself and my family or beneficiary, to all benefits and privileges therein. \* \* \*

"Medical Examiner's Blank.

\* \* \* \* \*  
"13. A. For what have you had medical advice during the last five years. A. No. B. Dates? B. \_\_\_\_\_. C. Duration? C. \_\_\_\_\_. D. Name and address of physician or physicians consulted? D. \_\_\_\_\_.  
"14. Have you named everything for which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

you have had medical advice during the last five years? Answer yes or no. Yes. \* \* \*

"16. Have you ever had any of the following disorders or diseases? \* \* \* Cancer or any tumor? No. \* \* \*

"I hereby warrant that the answers to the above questions are true. \* \* \*

The defendant's own medical examiner, Dr. M. C. Hill, made personal examination of the insured at the time of the latter's application, and, in answer to the 25 questions he was required to answer by defendant's printed form of application used, this examiner certified to facts indicating the insured to be in fit physical condition, including as one of his answers the fact that this examiner believed the insured's foregoing answers to be true.

The defendant's answer alleged that each and all of the foregoing answers of Alvis M. Kelley in said medical examination were not true, in that he had had medical advice during the last five years preceding the date of his application, in that he had not named everything for which he had had medical advice during the last five years preceding the date of his application, and in that he was afflicted with cancer at the time he made said application, and at said time knew and had been advised by his physician that he was so afflicted. The said answer further alleges that the said answers of the said Alvis M. Kelley were warranties on his part.

There is no allegation of fraud upon the part of the said Alvis M. Kelley, nor on the part of the plaintiff, and the defendant rests its defense entirely upon the proposition that said answers were warranties, and not mere representations, and were untrue.

[1] We think it clear that these answers were warranties, and, if untrue, the policy is void. *Eminent Household of Columbian Woodmen v. Prater*, 24 Okl. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287.

The journal entry of judgment recites, among others, the following findings by the court:

"\* \* \* And that all of the statements made to the said physician by the said Alvis M. Kelley at said time, he, the said Alvis M. Kelley, believed to be true. \* \* \* That all of the statements contained in the application of the said Alvis M. Kelley, deceased, at the time that he made application for said insurance, and that all of the statements made by the said Alvis M. Kelley to the examining physician, and that all of the statements contained in or made a part of the insurance policy made by the said Alvis M. Kelley, were made by him, believing that the same were true at the time they were made, and that, if any of said statements so made by the said Alvis M. Kelley were not true in fact, he had no knowledge of their falsity, and were made by him in good faith, believing that all of said statements were true."

These findings, in effect, admit that some one or more of the statements made by the insured may have been untrue; but they do not specify which ones may have been so, nor affirmatively find any untrue.

[2] The plaintiff having made out a prima facie case as to every material allegation

upon which she must rely for recovery, the burden of proof was upon defendant to show breach of warranty, and, in doing so, to prove that one or more of the said answers of the insured were untrue. 2 Briefs on Law of Insurance (Cooley) 1181; 8 Id. 1984-1971; 3 Joyce on Ins. § 1977; 11 Am. Dig. (Dec. Ed.) 646 (1); *Owen v. U. S. Surety Co.*, 38 Okl. 123, 131 Pac. 1091; *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084; *Rupert v. Sup. Ct. U. O. F.*, 94 Minn. 298, 102 N. W. 715.

The only remaining question in the case is as to whether the court, under all the evidence, was legally bound to have found that one or more of the said answers were untrue; and this brings us to a review of the authorities and of the evidence in this regard.

[3] The general principle that the question as to a breach of warranty is one for the jury (or judge where jury is waived) is stated in *Boos v. World Mutual Life Ins. Co.*, 64 N. Y. 236, and *Provident Savings Life Assurance Society v. Hadley*, 102 Fed. 856, 43 C. C. A. 25, affirming (C. C.) 90 Fed. 390; and it appears to be well settled that the question as to the falsity of the statement and the intent of the applicant is for the jury (or judge when a jury is waived). 3 Briefs on the Law of Insurance (Cooley) 1978, 1979.

[5] The case of *Moore v. First National Bank of Iowa City*, 30 Okl. 623, 121 Pac. 626, in effect, shows that, while the trier of a question of fact may not arbitrarily disregard the testimony of a witness which is not inherently improbable nor contradicted or discredited by other evidence or circumstances, such trier is not obliged to believe a witness where, as a conscientious person seeking the truth, such trier finds the witness discredited by his bias, by his inconsistent and contradictory statements, or by the lack in any respect of probative value in his testimony, especially where his testimony is also contradicted by or inconsistent with evidence extraneous to his own, or by the circumstances of the case, notwithstanding the absence of any evidence which immediately, directly, and specifically contradicts him. *Beatty v. Beatty*, 151 Ky. 547, 152 S. W. 540; *Great Falls Mfg. Co. v. New York Cent. & H. R. Co.*, 214 Mass. 446, 101 N. E. 997; *Bassity v. Welch*, 212 Mass. 338, 99 N. E. 95; *Schumacher v. Kansas City Breweries Co.*, 247 Mo. 141, 152 S. W. 13; *Leavitt v. Thurston*, 38 Utah, 351, 113 Pac. 77; *Zart v. Singer Sewing Mach. Co.*, 162 Mich. 387, 127 N. W. 272; *Succession of King*, 124 La. 805, 50 South. 735.

[4] That the manner in which a witness testifies may be a circumstance tending to discredit him, see the following additional cases: *Connelly v. Ill. Cent. Ry. Co.*, 133 Mo. App. 310, 113 S. W. 233; *Galveston, H. & S. A. R. Co. v. Murray* (Tex. Civ. App.) 99 S. W. 144. Also see *Wells v. Wells*, 136 Pac. 738.

The only evidence tending to prove that either of the foregoing warranted answers of the insured were untrue is the testimony of a witness produced by the defendant, who testified in effect that he was a physician; that he had known the insured ever since the latter came to McLoud; that the insured had come to witness on the street, in the drug store, and in his office, and had consulted witness about his condition; that he always prescribed for him at the office or drug store; that most of the medicines he prescribed "were just to take the malaria out of him"; that the insured stopped coming to him about in April, before the said application was made for insurance; that he detected that the insured had enlargement of the spleen and informed him of the fact about two years before his death, although he was not sure as to when it was; that the enlargement of the spleen, continued during witness' attention to him, was caused by malaria, which was common in that section of the country; that he attended upon the insured in his last sickness, which lasted about three weeks; that he certified to the insurance company that the insured died of cancer of the stomach and spleen (which certificate was under oath, and without qualification) as he had to specify something and thought that was the cause of death, but that he did not know that he had cancer, nor what caused his death; that he thought malaria had caused him to have cancer, and he had examined him for cancer; and that the insured had never been sick in bed, and he had never visited him at his home nor known of his quitting work until his last sickness, which terminated in his death about three weeks after it commenced. The testimony of this witness is somewhat unsatisfactory, in that it is not made clear as to what portion of the same relates to the condition of the insured before and what portion to his condition after his application, and is somewhat defective, in that there is manifest deficiency in memory of witness, especially in respect to dates and as to time in general, and in answer to one question by plaintiff's counsel he said that he had told counsel that he was in the dark and did not remember much about this case, in that his answers were frequently not responsive to the questions, and indicated want of efficient attention to the same, and in that the witness' testimony is not definite and certain in respect to the character of advice sought and given, or character of complaint made by insured, prior to the time of the insured's application to the defendant, although it seems that his testimony to the insured's com-

plaint of pain in his side and to consultations on account of bilious attacks must fairly, if not necessarily, be referred to that time. We do not mean to indicate, however, any opinion as to whether casual advice, without thought of compensation on account of slight indisposition, nor what else, will constitute "medical advice" within the meaning of the said questions answered by the insured.

The plaintiff testified in effect that she and the insured had been married about twenty-five years, and were living together at the time of his death; that they had lived in McLoud, where he died, about four years; that she did not think he would have had medical attention without her knowledge (to which statement there was no objection); and that until about three weeks before he died he had been in good health, had not consulted a physician, and had not had medical advice or attention, so far as she knew, during the four years they had lived in McLoud, except that after he was insured, and in June, 1910, the physician upon whose testimony defendant relies attended upon him and treated him for biliousness, and that until his last three weeks of sickness, which came on suddenly, he had worked steadily. Two other witnesses who knew the deceased during the time of his residence in McLoud testified substantially to the same effect as did plaintiff, and the report and testimony of defendant's medical examiner also tends to disprove the testimony of the physician testifying that the insured's answers were untrue.

It must be conceded that the record discloses very few, and not very strong, considerations which tend to warrant the trial court's declination to accept the testimony of defendant's said witness, together with the reasonable inferences which might have been deduced therefrom in favor of defendant, as establishing the untruthfulness of the insured's answers to the aforesaid questions to the effect that he had not had medical advice during the last five years preceding his application; but, in view of the presumptions we are bound to indulge in favor of the truth of the answers of the insured, and of the correctness of the judgment rendered by the trial court, and upon a consideration of the whole case, we are of opinion that we should not say that the trial court was unwarranted in not finding an untruth and consequent breach of warranty in said answers, and we are therefore of the opinion that the judgment of that court should be affirmed.

PER CURIAM. Adopted in whole.

**CHICAGO, R. I. & P. RY. CO. v. DIGGS.**

(No. 3475.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)***1. CARRIERS (§ 185\*)—CONNECTING CARRIERS—INJURY TO GOODS—PRESUMPTIONS.**

Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.\*]

**2. CARRIERS (§ 177\*)—CONNECTING CARRIERS—INITIAL CARRIER'S LIABILITY—TERMINATION—STATUTES.**

If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.\*]

**3. CARRIERS (§ 177\*)—CONNECTING CARRIERS—INJURY TO FREIGHT—NOTICE BY INITIAL CARRIER.**

If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-789, 791-803; Dec. Dig. § 177.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Johnston County; Nick Wolfe, Judge.

Action by L. A. Diggs against the Chicago Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

This action was brought to recover damages for delay in transportation of household goods from Milburn, Okl., to Crusher, Okl. The goods were delivered to the Chicago, Rock Island & Pacific Railway Company at their Milburn station on the 22d day of November, 1909, by L. A. Diggs, and consigned to C. C. Dues at Crusher, Okl., a town on the line of the Atchison, Topeka & Santa Fé Railway Company, and were received by the agent of the latter road on the 1st day of December, 1909, at the station of Daugherty, which was the nearest station to Crusher, Okl., at which an agent was maintained, the same was about four miles distant. Upon receipt of said household goods the agent at Daugherty notified C. C. Dues at Crusher, Okl., of the receipt of said goods, as provided by the rules of the railway company. The defendant was the initial carrier, and the Atchison, Topeka & Santa Fé Railway Company the delivering carrier, and the shipment was an intrastate one. The delivering carrier received the goods within a

reasonable time after the shipment was made from Milburn.

The petition sets forth that the goods were lost, and could not be found until May, 1910; that when found the goods were at Daugherty, Okl., in the possession of the Atchison, Topeka & Santa Fé Railway Company; that the canned fruit in said shipment was frozen during the delay, the cans bursting and spilling their contents over the various goods, greatly damaging same; that the negligence charged consisted of allowing the goods to become lost and remain uncared for for a long period of time.

The agent at Daugherty testified that he received the goods on December 1, 1909, and held them until June, 1910, when they were returned to Milburn upon the order of the consignor.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. P. B. H. Shearer, of Tishomingo, for defendant in error.

RITTENHOUSE, C. (after stating the facts as above). The record in this case is silent as to whether the injury to the household goods occurred while the same were in the possession of the initial carrier or the connecting carrier. In the absence of proof on the question as to whether the injury occurred while the goods were in possession of the initial or the connecting carrier, it will be presumed that the goods were in the same condition when delivered to the connecting carrier that they were in when received by the initial carrier, and, if the shipment was damaged when it reached its destination, there is no presumption that the injury occurred while the goods were in the hands of the initial carrier.

[1] "Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier." Farmington Mercantile Co. v. C., B. & Q. R. Co., 166 Mass. 154, 44 N. E. 131; St. L. & S. F. Ry. Co. v. McGivney, 19 Okl. 361, 91 Pac. 693; St. L. I. M. & S. Ry. Co. v. Carlile, 35 Okl. 118, 128 Pac. 690.

It is argued by the plaintiff that inasmuch as he demanded, within a reasonable time, proof that the loss or injury did not occur while the shipment was in charge of the defendant, that, under section 515, Comp. Laws 1909, the initial carrier would be liable for such injury. We have examined the evidence of the plaintiff very carefully, and cannot find where a demand of this character was made. The evidence we are asked to construe to bring the plaintiff within the provisions of said section is as follows:

"Q. Then what? A. We started in and went back down to Milburn. Q. What did you do when you got there? A. I asked about the goods. Q. Who? A. I asked the agent. He said he sent them off on Saturday after we telephoned. Q. Where to? A. To Crusher.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

\* \* \* Q. How long did you wait for an answer? A. We waited on; I don't remember just how long; it was two or three months I reckon. Q. Before you got any word at all? A. We never did get any word or hear. Q. Did you ever get any hearing at all? A. Not from that complaint. Q. What information did Mr. Marshall ever give you? A. He never did give me none. Q. How often did you go there to the agent? A. We were down there every week or so trying to see if he could hear where they were. Q. What did he say? A. They could not find where they were."

It will be noticed that the demand made consisted of an inquiry about the goods; that is, the consignor wanted to know where the goods were, not that he wanted to lay the foundation for a damage suit against the initial carrier by demanding whether the loss or injury occurred on the initial or connecting lines, as provided by section 515, supra, but wanted to locate the present whereabouts of his shipment.

It was held in the case of *St. L. & S. F. R. Co. v. McGivney*, supra:

"The statute was enacted primarily for the benefit of the shipper, but, when he fails to avail himself of its conditions in the first instance, and sues the first carrier without such demand, he cannot then take advantage of its provisions after the first carrier has been put to the trouble and expense of defending an action against it."

It is evident that the plaintiff did not bring himself within the provisions of section 515, supra, and therefore cannot claim the benefits derived from that section.

[2] The next question arising: "When does the liability of the initial carrier cease?" Under section 514, Comp. Laws 1909, it is provided:

"If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

Under this statute the initial carrier, in accepting an intrastate shipment of freight to a point beyond its own line, must deliver the same to the connecting carrier, and, having made such delivery, its liability ceases. *C. R. I. & P. Ry. Co. v. Walker*, 29 Okl. 856, 119 Pac. 993; *St. L. & S. F. R. Co. v. McGivney*, supra; *Mich. C. R. Co. v. Min. Springs Mfg. Co.*, 83 U. S. (16 Wall.) 318 (see notes), 21 L. Ed. 297; *A. T. & S. F. R. Co. v. Rutherford*, 29 Okl. 850, 120 Pac. 266.

The defendant, at the close of the evidence, asked for a peremptory instruction, on the theory that it was presumed from the evidence that the shipment was in the same condition when it was delivered to the connecting carrier that it was in when received by the initial carrier, and that the liability of the initial carrier ceased when a delivery was made to the connecting carrier.

[3] The evidence offered by the plaintiff was insufficient to establish a cause of action: First, plaintiff failed to prove that the

defendant, the Chicago, Rock Island & Pacific Railway Company, which was the initial carrier, lost or injured the shipment complained of; and, second, the plaintiff failed to show that a demand was made on the initial carrier for satisfactory proof that the loss or injury complained of did not occur while it was in the charge of the first carrier; and, third, that plaintiff alleged and proved that the goods were delivered by the initial carrier to the connecting carrier, Atchison, Topeka & Santa Fé Railway Company, and held by said connecting carrier at Daugherty, Okl., until May, 1910.

It is therefore apparent that the plaintiff failed to prove the allegations of his petition, and, as all the legal questions involved in this cause have been heretofore decided by our own Supreme Court, we do not deem it necessary to discuss the subject further.

The cause should therefore be reversed and remanded.

PER CURIAM. Adopted in whole.

McKELLOP et ux. v. DEWITZ et al.  
(No. 3561.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. BROKERS (§ 10\*)—RIGHT TO TERMINATE RELATION.

A written contract, whereby the owner of real estate platted into lots and blocks as an addition to a city, designates the other party to the contract as his agent to sell such lots at a specified price, and agrees to pay the agent a named per cent. of the proceeds of sale as his compensation, and also to allow him a definite interest in the lots remaining after a sufficient number have been disposed of to discharge a mortgage debt against the property, and wherein the agent agrees to pay all the expenses incurred in selling the lots, and also one-half of the mortgage indebtedness against the same. *Held*, that such contract is not "a power coupled with an interest," and creates between the parties the relation of principal and agent, and the relationship may be terminated at the will of the principal.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 11; Dec. Dig. § 10.\*]

2. PRINCIPAL AND AGENT (§ 33\*)—RIGHT TO TERMINATE RELATION—A POWER COUPLED WITH AN INTEREST.

A contract of agency is revocable at the will of the principal, unless the contract constitutes "a power coupled with an interest."

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 54; Dec. Dig. § 33.\*]

3. PRINCIPAL AND AGENT (§ 34\*)—AGENCY—"POWER COUPLED WITH AN INTEREST."

The phrase "a power coupled with an interest" means a writing creating in, conveying to, or vesting in the agent an interest or estate in the thing or property which is the subject of the agency, as distinguished from the proceeds or result of the exercise of the agency. The estate or interest vested or created in the agent must be such as the agent could convey in his

own name in the event of the death of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5478-5480; vol. 8, p. 7758.]

#### 4. PRINCIPAL AND AGENT (§ 41\*)—REVOCA-TION OF AGENCY—DAMAGES.

The principal, having the power to revoke an agency, is liable in damages if, by the revocation, substantial injury is sustained by the agent.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by A. A. McKellop and wife against P. W. H. Dewitz and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

P. J. Hurley, Hainer & Martin, and W. J. Gregg, all of Tulsa, for plaintiffs in error. Geo. A. Murphy and W. W. Noffsinger, both of Muskogee, for defendants in error.

**GALBRAITH, C.** The one question presented by this appeal is whether or not the written contract created an agency in the defendant in error, P. W. H. Dewitz, coupled with an interest in the property therein described. The contract is as follows:

"This agreement, made and entered into this 18th day of January, 1909, by and between A. A. McKellop and Myrtle McKellop, his wife, of Muskogee, Oklahoma, parties of the first part, and P. W. H. Dewitz, of the same place, party of the second part, witnesseth: That, whereas, the said parties of the first part are the owners of the following described real property, situate in the county of Muskogee, state of Oklahoma, to wit: The southeast quarter of the northeast quarter of section thirty-six (36) township fifteen (15) north, range eighteen (18) east, known as Cream Ridge addition to the city of Muskogee, according to the plat thereof on file in the office of the register of deeds of Muskogee county, the legal title to which is now held in trust by the Oklahoma Trust Company, of Muskogee, Oklahoma, for the parties of the first part. Now, therefore, in consideration of the mutual covenants and considerations herein-after set out, it is agreed as follows: The said parties of the first part hereby give and grant to the party of the second part, the sole and exclusive privilege of selling the lots in said addition. Said party of the second part may sell said lots for such price as he deems proper, but for not less than one hundred dollars for inside lots of twenty-five foot frontage, and not less than one hundred and twenty-five dollars for corner lots of twenty-five foot frontage, unless otherwise agreed upon by the parties hereto. Such sales may be made for cash or in installments. If installments, the first payment shall not be less than ten dollars in cash, the balance of the purchase price to be in notes payable at the rate of \$5.00 per month. Such first payment of \$10.00 may be retained by party of the second part or his agents, as commission. Upon a sale of any lot, the Oklahoma Trust Company shall execute with the purchaser a proper contract evidencing such sale, and upon full payment being made, shall execute a good and sufficient warranty deed conveying such lot to the purchaser, free from any incumbrance. In the event of failure of any

such purchaser to complete his payment, his contract and the amount thereon shall be forfeited, and said second party shall have the exclusive privilege of reselling the lot or lots upon the same terms as the original sale. All moneys paid by the purchaser of such lots shall be paid to the said Oklahoma Trust Company, which company shall, in turn, immediately pay two-fifths of such money to the party of the second part and three-fifths to the parties of the first part. The party of the second part hereby agrees and binds himself to use his best efforts to sell all of the level lots in said addition as soon as practicable, and to give his time and attention to the work of selling such lots. Each party to this agreement shall have the right at any time to examine all papers and records in the hands of said Oklahoma Trust Company, relating to the sale of said lots. All the expenses of placing said lots on the market and of selling the same, including the cost of grading streets and alleys, printing abstracts and all other necessary expenses, shall be borne, one-half by the parties of the first part and one-half by the party of the second part. It is also agreed that one-half of the amount necessary to pay and discharge a certain note and mortgage of \$3,300.00, bearing ten per cent. interest, held by R. B. Beard, of Muskogee, shall be paid one-half by the parties of the first part and one-half by the party of the second part. This agreement shall extend to and be binding upon the heirs, successors, representatives and assigns of the parties hereto. In testimony whereof, the parties to this instrument have executed the same in duplicate the day and year first above written."

On the 20th day of January, 1909, the McKellops, Dewitz, and Beard joined in a contract with the Oklahoma Trust Company by which the legal title in the premises was conveyed to it to be held in trust to secure the mortgage to Beard and providing for the payment of the mortgage out of the proceeds of the sale of the lots.

The plaintiffs in error, A. McKellop and wife, elected to revoke the agency created by the written contract in the defendant in error P. W. H. Dewitz, and on January 27, 1910, instituted this action seeking to have the title to the land described in the contract quieted in them as against the defendants in error P. W. H. Dewitz and the Oklahoma Trust Company. It was charged in the petition that the defendant Dewitz had defaulted in the performance of his part of the contract in this: That he had failed and refused to pay one-half of the annual interest due on the Beard mortgage for the year 1909, and that he had failed to give his whole time to the sale and disposition of the lots, and in fact had abandoned effort to sell same and had declared that he would not attempt to make further sales thereof. The prayer was that the Oklahoma Trust Company be decreed to have no title in the land except the naked legal title, and that it be required to convey to the plaintiffs this property by good and sufficient warranty deed, and that the defendant P. W. H. Dewitz be decreed to have no right, title, or interest in and to the land, and that he be required to give an accounting of whatever sums that it be found he received from the sale of the lots, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that plaintiffs have credit for the same on the mortgage held by R. B. Beard, as provided in the written contract.

The defendant P. W. H. Dewitz answered by general denial, and by way of affirmative defense admitted the entering into of the contract hereinabove set out, and averred that by the terms thereof he was created agent of the plaintiffs for the sale of the property described in the contract, and that he also agreed to pay one-half of the \$3,800 mortgage against said property held by R. B. Beard, and that he agreed to devote his time and best efforts to the sale of said lots. He also admitted the execution of the contract of January 20, 1909, with the Oklahoma Trust Company, and alleged that there had been no breach of the contract on his part, and that he had fully performed each and every condition as he had agreed to perform it, and that he was entitled to the benefits and profits arising from the contract, and was entitled and asked a specific performance of the same, and prayed that the plaintiff take nothing by the action, and that he have judgment for costs.

The cause was tried to the court, and on March 27, 1911, a decree entered to the effect:

"That the contract of agency sought to be canceled between the parties hereto creates an agency in the defendant P. W. H. Dewitz, coupled with an interest in the property therein described, and that the said defendant P. W. H. Dewitz paid a valuable consideration for said contract of agency, and that the same is irrevocable, and that from the testimony no cause exists for the termination of said contract, and that the mortgage held by the defendant R. B. Beard is in force and effect, and the interest has been paid thereon to January 11, 1911."

The decree further dismissed the suit and rendered judgment against the plaintiffs for costs. A motion for new trial was overruled, and the plaintiffs perfected an appeal to this court.

[1, 2] The assignments of error present the one question as to whether or not the agency created in Dewitz by the written contract was "an agency coupled with an interest," and not subject to be revoked by the McKellops at their pleasure. As to this character of agency, the rule is announced by Mr. Mechem in his work on Agency, par. 204:

"The authority of the agent to represent the principal depends upon the will and license of the latter. It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent obviously, except in the instance mentioned, can have no right to insist upon a further execution of the authority if the principal himself desires it to terminate. It is the general rule of law, therefore, that, as between the agent and his principal, the authority of the agent may be revoked by the principal at his will at any time, and with or without good reason therefor, except in those cases where the authority is coupled with a sufficient interest in the agent."

And again the same authority says in paragraph 205:

"What interest in the agent will be sufficient to render the authority irrevocable is not easy of exact and comprehensive definition. Certain it is, however, that it is not any interest which will suffice. But it must be an interest or estate in the thing itself or in the property which is the subject of the power; the power and the estate must be united and coexistent, and generally of such a nature that the power would survive the principal in such a way as to be capable of execution in the agent's name after the death of the principal."

And again in paragraph 207 the same authority says:

"Thus, where one is given authority to sell the lands or other property of another, and is to have a certain commission or share out of the proceeds for making the sale, the authority may be revoked at the will of the principal, even though in terms it was declared to be exclusive or irrevocable. \* \* \* The interest in the commissions to be earned and in the moneys expended in endeavoring to carry out the agency is not sufficient to prevent revocation."

[3] Chief Justice Marshall, in discussing the meaning of the expression "a power coupled with an interest," said:

"It is an interest \* \* \* to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it. But the substantial basis of the opinion of the court on this point is found in the legal reason of the principle. The interest or title in the thing, being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle." *Hunt v. Rousmanier*, 8 Wheat. 204, 5 L. Ed. 589.

A similar contract to that involved in the instant case was before the court in *Kimmell v. Powers*, 19 Okl. 339, 91 Pac. 687, and was

held by the Supreme Court of Oklahoma territory that such a contract created the relation of principal and agent, and did not vest the agent with any interest in the real estate itself.

The contract before the court in *Schilling v. Moore*, 34 Okl. 155, 125 Pac. 487, was analogous in some respects to that under consideration in the instant case, and it was held that the contract in that case constituted a contract of employment and conveyed no interest in the real estate, and that it was not a power coupled with an interest, and that, in order to be such, the instrument must convey or create in the agent an interest in the property upon which the power is to operate, and that merely giving him an interest in the exercise of the power was not sufficient. See, also, *Taylor v. Burns*, 8 Ariz. 463, 78 Pac. 623; *Id.*, 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116; *Title Insurance & Trust Co. v. Grider*, 152 Cal. 746, 94 Pac. 601; *Hicks v. Post*, 154 Cal. 22, 96 Pac. 878.

A careful consideration of the contract clearly shows that no interest in the real estate was conveyed by it to the agent, Dewitz. The terms of the contract do not justify the conclusion that there was any attempt or intention to convey to the agent any part of the title or any distinct interest or estate in the real estate itself. The interest created in or conveyed to the agent was a definite part of the proceeds of sales, an interest in the result—the thing produced by the exercise of the power—and therefore the contract cannot be properly said to be "a power coupled with an interest." It is true that, if the agreement had been fully completed, the agent might have claimed under it an interest in that part of the property remaining after a sufficient amount had been sold to satisfy the Beard mortgage; yet this particular interest was contingent and did not vest upon the execution and delivery of the contract. It was not such an interest as the agent could have conveyed in his own name in the event of the death of the principals. It is equally clear that there is nothing in the terms of the contract to justify the claim that it was the purpose or intention of the parties to create a lien on the land in favor of the agent to secure his stipulated contingent commissions, as in *American Loan & Trust Co. v. Billings*, 58 Minn. 187, 59 N. W. 998. The most that can be claimed for this writing is that it was a contract of employment and that the relation created by it might be terminated at the will of the principal.

We therefore conclude that the trial court was in error in holding that the contract created in the agent an interest in the property itself and was a "power coupled with an interest," and therefore irrecoverable by the principal.

[4] However, it does not follow from this

conclusion that the power to revoke the agency was rightfully exercised by the principal. If the power was not rightfully exercised, the principal may be liable to respond in damages for any wrong inflicted upon the agent by the revocation. The contract is silent as to the time the agency or employment should exist, but it is stipulated that the agent should pay certain expenses and give his entire time in accomplishing the purposes of the agency. It is alleged in the answer that the agent had paid out large sums of money under the contract, and that he had faithfully kept and performed each and every part of the contract to be by him kept and performed. If these things are true, he has been damaged by the revocation of the agency, and the principal may be liable to respond in damages. *Cloe v. Rogers*, 31 Okl. 255, 121 Pac. 201, 38 L. R. A. (N. S.) 366. Although the pleadings were not cast, and the case tried upon the theory of the law as announced in *Cloe v. Rogers*, supra, we are inclined to the opinion that, when the case gets back in the trial court, permission should be given to amend the pleadings so as to include that theory of the law, if the parties wish to do so.

We therefore recommend that the judgment appealed from be reversed, and said cause be remanded, with directions to vacate the judgment entered and to grant a new trial.

PER CURIAM. Adopted in whole.

SEAY v. COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, ENGLAND. (No. 3126.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. INSURANCE (§ 622\*)—LIMITATION ON TIME TO SUE—VALIDITY.

An action on a tornado insurance policy, executed April 10, 1907, for a term of three years, for a loss thereunder arising October, 1908, is commenced on December 12, 1910. *Held*, that such action is not barred by limitation, although the policy contained the following clause: "No suit or action for the recovery of a claim under this policy shall be sustainable in any court of law or equity until after a full compliance by the insured with all the requirements of this policy, nor if commenced after the expiration of twelve months from the date of loss"—for the reason that such clause was ineffectual and void under section 1128, Comp. Laws 1909.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1540, 1544–1550; Dec. Dig. § 622.\*]

2. INSURANCE (§ 622\*)—LIMITATION ON TIME TO SUE—OPERATION OF STATUTE.

The act of the Legislature of March 25, 1909 (Laws 1909, c. 21, art. 2), prescribing the standard form of insurance policy in which a limitation of one year after the loss is provided for bringing actions thereon, in no way affected the rights of the parties under a policy exe-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cuted and a claim for a loss occurring prior to the adoption of such statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Kingfisher County; A. H. Houston, Judge.

Action by A. J. Seay against the Commercial Union Assurance Company, Limited, of London, England. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Hinch & Bradley, of Kingfisher, for plaintiff in error. Scothorn, Caldwell & McRill, and Burwell, Crockett & Johnson, all of Oklahoma City, for defendant in error.

GALBRAITH, C. This was an action on a contract of insurance against loss by wind-storm, cyclone, or tornado, issued April 10, 1907, for a term of three years thereafter. The loss was charged to have occurred on the 15th, 16th, and 17th of October, 1908; the action was commenced December 12, 1910. The answer was a general denial and numerous affirmative defenses not necessary to enumerate. A trial was had to the court and a jury. At the close of the evidence the court sustained the motion of the insurance company for an instructed verdict, and directed the jury to return a verdict for it on the ground that the evidence showed the action to be barred by limitations, inasmuch as suit had not been commenced within 12 months after the loss, as stipulated in the contract of insurance. To reverse the judgment rendered on such verdict, the plaintiff has appealed to this court.

[1] The limitation fixed in the contract for the commencement of an action thereunder, and relied upon by the company to defeat the plaintiff's claim, reads as follows:

"No suit or action for the recovery of a claim under this policy shall be sustainable in any court of law or equity until after a full compliance by the insured with all the requirements of this policy; nor if commenced after the expiration of twelve months from the date of loss."

The plaintiff in error contends that this provision in the policy is void under section 1128, Comp. L. 1909, which reads as follows:

"Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void."

This statute was in force and effect at the time the policy in suit was issued. That the provision of the policy above quoted and relied upon by the insurance company to defeat the action, and under which the court below directed a verdict for the insurance company, is void and of no legal force or effect has been distinctly held a number of times by this court. In the case of Okla-

ma Fire Insurance Co. v. Wagester, 88 Okl. 291, 132 Pac. 1071, the policy sued upon was issued on the 23d day of September, 1908, and the loss occurred on the 6th day of November, 1908, and contained a similar provision as to the limitation, except the time for bringing suit was limited to six months instead of one year. The company relied upon this clause to defeat the action. Chief Justice Hayes, in denying the contention of the company, said:

"There is also evidence to support a waiver of this provision; but the defense cannot be maintained for a greater reason. By section 1128, Comp. Laws 1909, every stipulation or condition in a contract by which a party limits the time within which he may enforce his rights by legal proceedings is made void. The above-cited statute was in force at the time of the execution of the policy \* \* \* and therefore renders the provision of the policy now under consideration invalid."

In the case of Keyes & Keyes v. Warrensburg City Fire Ins. Co. of Brooklyn, 37 Okl. 482, 132 Pac. 818, the policy in suit was issued May 25, 1908, and the loss occurred November 9, 1908, and the action was not commenced until January 9, 1910, a similar provision of the policy limiting the time for bringing the action to one year was relied upon in that case, and the insurance company defended on the same ground as in the Wagester Case, and the court held the provision void, and that the action could be maintained, although commenced more than one year after the loss. See, also, Keys & Keys v. Mechanics' Ins. Co. of La., 37 Okl. 480, 132 Pac. 819; Keyes et al. v. Phoenix Ins. Co., 37 Okl. 514, 132 Pac. 820; St. L. & S. F. R. Co. v. James et al., 36 Okl. 196, 128 Pac. 279.

[2] It is argued on behalf of the insurance company that the enactment by the Legislature of Oklahoma of the act of March 25, 1909 (Laws 1909, c. 21, art. 2), in which a standard form of insurance policy was prescribed, in which a limitation of one year for commencement of an action for loss under such policy was provided, that this enactment was, in effect, an adoption of a new and special statute of limitation for actions on insurance contracts, and that, since the statute of limitation in force at the time of the commencement of an action governs in such case, the one-year limitation controls in this action, and, this time having run after the adoption of the standard form of policy, and before the commencement of this action, it is therefore barred, and this suit cannot be maintained. This argument is not sound. It is sufficient to say in answer thereto that, inasmuch as the contract involved in this suit and the loss claimed thereunder both antedate the adoption of the act of March 25, 1909, the rights of the parties under the policy in suit were not in any way affected by said act.

Numerous other errors are assigned and argued in the briefs; but, since most of

these, if not all of them, have been adjudicated in cases that have been decided since the trial of this cause in the district court, and those cases are available to counsel on a retrial of the cause, it is not considered necessary to discuss them here.

On account of the error of the court in instructing a verdict for the defendant, the judgment appealed from should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

# CHICAGO, R. I. & P. RY. CO. v. TEESE.

(No. 3476.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

## EVIDENCE (§ 472\*)—QUANTUM OF DAMAGES—CONCLUSIONS.

In an action against a railroad company for damages for personal injuries, it is prejudicial error to allow the plaintiff to testify as to the quantum of damages sustained, as it is an invasion of the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195, 2248; Dec. Dig. § 472.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Johnston County; Nick Wolfe, Judge.

Action by G. M. Teese against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

This is an action brought by plaintiff for personal injuries, asking judgment for \$1,000, against the defendant, the Chicago, Rock Island & Pacific Railway Company. The material allegations of the plaintiff's petition are as follows:

"Second. That on or about the 28th day of March, 1910, the defendant employed plaintiff as a laborer to help other employes of said defendant to construct and repair its bridges. Third. That on said day, while at work on the Washita Bridge near the town of Tishomingo, Okl., for defendant company, its foreman and employes, under the instruction and by the direction of said foreman, carelessly and negligently, and without any negligence on the part of the plaintiff, rolled upon the right foot of plaintiff a large bridge timber, weighing no less than 1,000 pounds and breaking the big toe on plaintiff's right foot, and caused this plaintiff to lose about two months' time from work, which was well worth the sum of \$150, and caused plaintiff great physical pain during said time. Fourth. Plaintiff states that said toe has never to this time wholly recovered its original strength and usefulness, and that it never will be as useful to him as it was prior to the time when defendant company through its negligence broke it. That it has been permanently injured, and by reason of said injury this plaintiff has been damaged in the further sum of \$750. Fifth. That said large toe because of said injury is crooked and deformed, although plaintiff did all he could to prevent said deformity. Sixth. That because of said deformity, impaired usefulness of said toe, physical suffering, loss of time from work, occasioned, as above set out, through negligence of the employes and agents of defendant company, the plaintiff has been greatly damaged, namely, in the sum of \$1,000."

An answer was filed in the form of a general denial, together with other defenses; the cause was tried on the 25th day of March, 1911, resulting in a judgment against the defendant in the sum of \$750. The plaintiff offered evidence as to the quantum of damage measured by dollars and cents, which was admitted in evidence over the objection of the defendant. Motion for new trial was overruled, and the cause brought here for review.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. P. B. H. Shearer, of Tishomingo, for defendant in error.

RITTENHOUSE, C. (after stating the facts as above). Plaintiff in error will be designated as defendant, and defendant in error will be designated as plaintiff, in accord with their relative titles in the trial court.

The defendant has assigned numerous errors, but in the view we take of this case it will only be necessary to consider one of them.

The attorney for plaintiff was permitted to ask, and the plaintiff to answer, over objections on the part of the defendant, the following questions:

"Q. You are asking \$1,000 damages in this case. How do you arrive at the amount of damages which you have sustained? (Objection by the defendant because not the proper method of proving damages, and it is immaterial for witness to state how he arrived at the amount. Objection sustained.) Q. How much do you consider that you have been damaged? (Objection.)

"The Court: That is improper, it strikes me.

"Mr. Shearer: I was trying to get at it specifically. (Objection sustained.)

"Mr. Shearer: Will the court or counsel tell me the proper form to put the question in?

"The Court: No; that is your business.

"Mr. Shearer: I thought so.

"Q. Have you been out any money in this matter, expenses? A. Well, some.

"The Court: Well, how much, Mr. Witness?

A. I was out the doctor's dressing my toe. Q.

What doctor? A. Dr. Caton at Ravia. Q. Was that after you returned from McAlester? A.

Yes, sir. Q. How much was that? A. \$4. I think.

Q. Nothing for medicine? A. No, sir.

Q. How much do you estimate your physical and mental suffering worth? (Objection by the

defendant because incompetent, irrelevant, and immaterial and calling for a conclusion from the witness.)

Q. State what your mental suffering was and the physical pain. A. Well, I

can hardly say as to how much I suffered, but I suffered a lot. Q. Well, what do you think it

was worth? (Objection by defendant because incompetent, irrelevant, and immaterial and calling for a conclusion of the witness, and not

the proper way to prove amount of damages. Defendant's objection overruled, to which it excepts.)

Q. How much was it worth to you to have to go through that suffering? (Objection

by the defendant because incompetent, irrelevant, and immaterial, and calling for a conclusion of the witness and not the proper way to prove amount of damages.)

A. I would not want to go through the same experience again. (Motion to strike sustained.)

Q. Now state how much you have been damaged. A. \$750 all told. (Objection by defendant because the question is

incompetent, irrelevant, and immaterial, calling for a conclusion of the witness and not the

proper way to prove amount of damages.)

A. I would not want to go through the same experience again. (Motion to strike sustained.)

Q. Now state how much you have been damaged. A. \$750 all told. (Objection by defendant because the question is

incompetent, irrelevant, and immaterial, calling for a conclusion of the witness and not the

proper way to prove amount of damages.)

A. I would not want to go through the same experience again. (Motion to strike sustained.)

Q. Now state how much you have been damaged. A. \$750 all told. (Objection by defendant because the question is

incompetent, irrelevant, and immaterial, calling for a conclusion of the witness and not the

proper way to prove amount of damages.)

A. I would not want to go through the same experience again. (Motion to strike sustained.)

Q. Now state how much you have been damaged. A. \$750 all told. (Objection by defendant because the question is

incompetent, irrelevant, and immaterial, calling for a conclusion of the witness and not the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proper way to prove the amount of damages. Objection overruled. Exception by defendant.) A. I don't know that I still understand the question. Q. How much was it worth to you to undergo the agony and suffering that you underwent? (Defendant objected to the question as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and not the proper way to prove the amount of damage. Objection overruled. Defendant excepts.) A. It was worth \$100 at the least. Q. How much have you been damaged by the permanent injuries of the toe as to injuring your ability to make a livelihood, and influencing your ability to travel about on foot? (Defendant objects because incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and not the proper way to prove the amount of damages. Overruled. Exception allowed defendant.) A. Well, as I stated a while ago, I think it is worth \$750 at the least."

It is apparent that this testimony was not as to a fact but as to a conclusion. In an action of this character, the plaintiff would be allowed to state facts showing the extent of the damage and other pertinent matters, but it was error for the court to allow the plaintiff to measure his damage in dollars and cents. Such testimony could only be conclusions of the witness and an invasion of the duties belonging to the jury.

It has been held in numerous cases that a witness is never permitted to establish the quantum of damage which a party may have sustained, as it is the province of the jury to arrive at the damage sustained from the evidence. Nothing could be accomplished by testimony of such opinions and conclusions, except to invade the province of the jury.

In the case of *Little Rock, M. R. & T. Ry. Co. v. Haynes*, 47 Ark. 497, 500, 1 S. W. 774, 775, the court said:

"After detailing the nature and extent of his injuries, and the circumstances under which he was struck, the plaintiff was asked this question: 'Taking into consideration the amount you have expended in attempting to cure yourself of your injuries, the present and prospective condition of your leg, the bodily pain and mental anguish, the time you have lost from your labor, your inability to labor and follow and attend to your business affairs in the future, how much were you damaged by the injury?' Plaintiff answered: '\$4,500.' To the question and answer defendant objected, and, his objection being overruled, defendant at the time excepted. The impropriety of such a line of examination was pointed out by this court, nearly 40 years ago, in *Pierson v. Wallace*, 7 Ark. 282. This is one of the few subjects upon which there is absolutely no conflict in the authorities. A witness is never permitted to estimate the amount of damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury, and a witness cannot be allowed to usurp it. He may state facts showing the extent of the damages, and any other pertinent matters. But the measuring of the amount of damages in dollars and cents is not a fact. It is a matter of opinion or speculation."

In the case of *Burton v. Severance*, 22 Or. 91, 29 Pac. 200, the court had under consideration the following question and answer:

"How much have you been damaged on account of all the inconvenience and trouble that you have been put to in loss of time, labor, and

so forth, by reason of this obstruction? How much have you been damaged in not being able to come to the post office, and bring down your wood and your flour, and the general use of the river, up to the time this suit was brought? \* \* \* A. Well, about \$1,300, I think; that is what I think I ought to have."

The court, in passing upon the objection to this testimony, said:

"In the case at bar the witness should have stated facts—what she had seen and knew in respect to the matters in issue—and from those facts left the jury to draw the inferences or form an opinion. It is clear the evidence was improperly admitted, for as *Dargan, C. J.*, said: 'I have not been able to find any case that holds the opinions of witnesses as to the quantum of damages resulting from any act competent proof.' *Railroad Co. v. Varner*, 19 Ala. 187."

Other cases on the subject are *Chandler v. Bush*, 84 Ala. 102, 4 South. 207; *Razzo v. Varni*, 3 Cal. Unrep. 94, 21 Pac. 762; *Old v. Kenner*, 22 Colo. 6, 43 Pac. 127; *Hartley et al. v. Keokuk & M. W. Ry. Co.*, 85 Iowa, 455, 52 N. W. 352; *A. T. & S. F. Ry. Co. v. Wilkinson*, 55 Kan. 88, 89 Pac. 1048; and cases cited; *Howell v. Medler*, 41 Mich. 641, 2 N. W. 911; *Wellington v. Moore*, 37 Neb. 560, 56 N. W. 200; *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96; *Webster v. White*, 8 S. D. 479, 66 N. W. 1145; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Midland Valley R. Co. v. Ezell*, 36 Okl. 517, 129 Pac. 734; *Tootie, Wheeler & Motter v. Kent et al.*, 12 Okl. 674, 73 Pac. 310.

No case has been cited by counsel for plaintiff where the evidence of opinions or conclusions as to the quantum of damage sustained in a personal injury case has ever been upheld as legal.

The jury evidently followed the testimony of plaintiff in arriving at their verdict; and, inasmuch as that evidence was irrelevant and incompetent as to the quantum of damage, its admission was necessarily prejudicial to the defendant.

The judgment, therefore, should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

McCONNELL v. WATKINS. (No. 3537.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001\*)—VERDICT—REVIEW.

Where there is competent evidence reasonably tending to support the verdict of a jury, under proper instructions from the court, this court will not disturb the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

2. REPLEVIN (§ 95\*)—ANIMALS—IDENTIFICATION.

A verdict in an action of replevin, which describes the animal sued for as "one three year old dark gray filly," sufficiently identifies the animal in controversy, and a judgment based

on such verdict will not be set aside, on the ground that the identification is insufficient.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 370; Dec. Dig. § 95.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Osage County; O. T. Bennett, Judge.

Action by F. M. Watkins against W. G. McConnell. Judgment for plaintiff, and defendant brings error. Affirmed.

S. H. King, of Tulsa, for plaintiff in error. J. M. Worten, of Pawhuska, for defendant in error.

RITTENHOUSE, C. This is an action to replevin a three year old dark gray filly, of the value of \$50. Issues were joined, the cause was tried to a jury, and verdict returned as follows:

"We, the jury, impaneled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find the issues for the plaintiff, and that the plaintiff at the commencement of said action was the owner and entitled to the immediate possession of one three year old dark gray filly. Pat Lynn, Foreman."

Judgment was rendered on this verdict, and motion for a new trial overruled.

The assignments of error presented but two questions:

"(1) That the verdict is not sustained by the evidence; and (2) that the verdict is insufficient, in form and substance, to bind the plaintiff in error, and that the verdict is void; that the judgment rendered upon such verdict is null and void."

The plaintiff below testified that he was the owner of the animal in controversy; that it was three years old, dark iron-gray in color, and a filly. Other witnesses testified as to the color, age, and sex of the animal in controversy, and that it belonged to plaintiff. The defendant offered evidence to show that the animal was not the one owned by the plaintiff. The testimony was very conflicting as to the identity of the animal.

[1] This court has held in a great number of cases that, although there may be a doubt as to the correctness of the verdict reached by the jury, yet it will not, when the evidence is conflicting, examine and weigh the same to determine where the preponderance of the evidence lies, but will sustain such verdict whenever there is any competent evidence reasonably tending to support the same. *Lynch v. Halsell*, 34 Okl. 307, 125 Pac. 725; *Enid City Ry. Co. v. Reynolds*, 34 Okl. 405, 126 Pac. 193; *Brissey v. Trotter*, 34 Okl. 445, 125 Pac. 1119; *Estee v. Estee*, 34 Okl. 305, 125 Pac. 455.

[2] Under the second assignment raised by the plaintiff in error, it is argued very extensively that to describe the chattel property as "one three year old dark gray filly" is insufficient in law to identify the animal in controversy. We cannot agree with this contention; a description of an animal, giving its age, sex, and color, is all that is required;

and a verdict of a jury, in an action of replevin, containing such description is sufficient to sustain a judgment.

In *Wey v. City Bank of Hobart*, 29 Okl. 313, 116 Pac. 943, it was held that a petition in replevin which described the chattel sued for as "two young mules" was good as against a demurrer.

In *Onstatt v. Beam*, 80 Ind. 259, 95 Am. Dec. 695, it was held that:

"Description of property in complaint in replevin as 'one white shoat of the value of \$14' is sufficiently explicit."

In *Nollkamper v. Wyatt*, 27 Neb. 565, 43 N. W. 357, it was held that chattel property described in an action of replevin as "two bay mares five years old" was sufficient. *Pomeroy v. Trimper*, 8 Allen (Mass.) 398, 85 Am. Dec. 714; *Wells on Replevin* (2d Ed.) c. 7; *Wood v. Darnell*, 1 Ind. App. 215, 27 N. E. 447; *Farwell v. Fox*, 18 Mich. 166; *Crum v. Ellison*, 33 Mo. App. 591; Cent. Dig. vol. 42, p. 2244.

We therefore conclude that the verdict sufficiently described the animal in controversy, and that said verdict was in proper form, and a judgment based thereon is valid.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

#### ALTON MERCANTILE CO. v. SPINDEL et al. (No. 3536.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

#### 1. HOMESTEAD (§ 187\*)—EXEMPTION.

The homestead of a family, whether title to the same shall be lodged in or owned by the husband or wife, shall be reserved to every family in the state, exempt from attachment or execution, and every other specie of forced sale for the payment of debts.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 356; Dec. Dig. § 187.\*]

#### 2. HOMESTEAD (§§ 62, 81\*)—COUNTRY HOMESTEAD—EXTENT—OWNERSHIP.

Under section 1, art. 12, of the Constitution, and section 3346, Comp. Laws 1909, the homestead of a family, not in a city, town or village, may consist of 160 acres of land, and may be owned by either husband or wife, or by both jointly.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 90, 114-118; Dec. Dig. §§ 62, 81.\*]

#### 3. HOMESTEAD (§ 169\*)—EXEMPTION—TERMINATION—ACT OF HUSBAND.

When property has once been impressed with the homestead character, no act or omission on the part of the husband, without the consent of his spouse, can result in an abandonment of the homestead by the family. The homestead is for the benefit of the entire family, and such joint interest is to be regarded as paramount to the rights of any individual member thereof.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 335; Dec. Dig. § 169.\*]

#### 4. HOMESTEAD (§ 154\*)—ABANDONMENT—CONSENT—INSANE SPOUSE.

An insane spouse is incapable of giving her free consent to an abandonment of the homestead, although confined in an insane asylum in another state.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 307; Dec. Dig. § 154.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action by the Alton Mercantile Company against George Spindel and Everet Spindel, partners as Spindel Bros. Judgment for defendant George Spindel, and plaintiff brings error. Affirmed.

This is an action to sell the northeast quarter of section 21 in township 17 north of range 6 west of the Indian Meridian, belonging to George Spindel, to satisfy a judgment for \$281.26, and interest and costs, in favor of the Alton Mercantile Company and against George Spindel and Everet Spindel, partners as Spindel Bros. The property was sold, and motion for confirmation filed. An objection was made to the confirmation by George Spindel, on the ground that the land was the homestead of his family, consisting of three minor children, who were under his individual care, custody, and control, and were supported and maintained by him; that his wife was still living, but confined in an insane asylum in Jacksonville, Ill., on account of her mental condition; that she had never lived upon the land or acquired an actual residence in this state, but that said absence was caused by her mental condition and through no fault of her own.

The evidence further shows that George Spindel and his children lived upon this land and occupied the same as a homestead from the spring of 1905 until the year 1907, when they moved to Kingfisher to educate the children, and were residing in said city at the time of the levy of the execution in this case, but that they still maintained the premises in controversy as their homestead; the same being temporarily rented. The motion for confirmation of the sale was overruled, and the matter brought to this court for review.

F. L. Boynton, of Kingfisher, and McKeever & Walker, of Enid, for plaintiff in error. D. K. Cunningham, of Kingfisher, for defendant in error.

RITTENHOUSE, C. (after stating the facts as above). There are no disputed facts in this record. The only witness offered was the defendant George Spindel; and the sole question necessary for a complete determination of this case is whether the husband, who has an insane wife in another state, can by his own acts so conduct himself as to constitute an abandonment of the homestead without the consent of his wife.

[1] Section 3346, Comp. Laws 1909, re-

serves to every family residing in the state a homestead, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife, and said section exempts such homestead from attachment or execution or any other specie of forced sale for the payment of a debt.

[2] Section 3347, Comp. Laws 1909, defines a homestead of a family, not in a city or town, to consist of not more than 160 acres of land.

[3] Sections 1 and 2, art. 12, of the Constitution, and the foregoing sections of the statute provide for the exemption of 160 acres of land not within a city or town, as a homestead for the family, which cannot be alienated or incumbered unless the instrument be subscribed by both husband and wife. The requirement of a joint act on the part of the husband and wife to affect the homestead is a provision for the protection of the children as well as for either parent, and the only exception to the rule is provided by section 3352, Comp. Laws 1909, where the husband and wife became hopelessly insane, a sale could be made by application to and upon order from the proper court.

[4] The contention that George Spindel and his children occupied the premises as their homestead from the spring of 1905 until some time during the year 1907 is not disputed, nor is the fact that his wife was insane and confined in an asylum in Jacksonville, Ill., disputed. When George Spindel and his minor children moved upon this land in the spring of 1905, with the intention of making it their home, the premises became impressed with the homestead character, and no act or omission on the part of George Spindel, without the consent of his spouse, could result in an abandonment of the homestead by the family. The homestead is for the benefit of the entire family, and such joint interest is to be regarded as paramount to the rights of any individual member thereof. It was held in *Morris v. Ward*, 5 Kan. 239, that:

"No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he alone can do, or suffer to be done can cast the slightest cloud upon the title to the homestead; it remains absolutely free from all liens and incumbrances." *Coughlin v. Coughlin*, 26 Kan. 116; *Howell, Jewett & Co. v. McCrie*, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584; *Wallace v. Trav. Ins. Co.*, 54 Kan. 442, 38 Pac. 439, 26 L. R. A. 806, 45 Am. St. Rep. 288; *Pilcher v. A. T. & S. F. Ry. Co.*, 38 Kan. 516, 16 Pac. 945, 5 Am. St. Rep. 770.

George Spindel, a married man, having selected the premises in controversy as a homestead, could not divest the premises of the homestead character by abandonment, without the free consent of his spouse; and, she being insane and thereby unable to give her free consent, no act or omission on the part of George Spindel would operate to divest the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—74

premises of its homestead character. *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, 12 Ann. Cas. 715; *Weatherington v. Smith*, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430, 124 Am. St. Rep. 855; *Panton v. Manley*, 4 Ill. App. 210.

In the case of *Whitlock v. Gosson*, 35 Neb. 829, 53 N. W. 980, the husband attempted to incumber the homestead while the wife was insane and living in another state, and in that case the court held that the transaction was void.

In the case of *Way v. Scott*, 118 Iowa, 197, 91 N. W. 1034, it was held that the abandonment of a homestead by the husband and father, while his wife was confined in an insane asylum, did not deprive the wife of her interest or right therein, and their adult children were a part of the family and were entitled to the occupancy and possession of the premises as long as such right remained to either parent. *Weatherington v. Smith*, supra; *Withers v. Love*, 72 Kan. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514; *Central Kentucky Lunatic Asylum v. Cravens*, 98 Ky. 105, 32 S. W. 291, 56 Am. St. Rep. 323; *Holburn v. Pfannmiller*, 114 Ky. 831, 71 S. W. 940; *Chambers v. Cox*, 23 Kan. 393.

In order to constitute an abandonment of the homestead, the abandonment must be voluntary, and the confinement of a person in an asylum in another state on account of her mental condition cannot be said to be a voluntary abandonment of the homestead.

We therefore conclude that the premises in controversy were impressed with the homestead character in 1906, and that the said premises are still the homestead of the family of George Spindel, and not subject to a lien under the judgment of the Alton Mercantile Company, and that the court properly refused to confirm the sale of said premises under said judgment.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

# NORTHWEST THRESHER CO. v. McNINCH. (No. 3446.)

(Supreme Court of Oklahoma. May 12, 1914.)

## (Syllabus by the Court.)

### 1. PLEADING (§ 236\*)—ANSWER—AMENDMENT DURING TRIAL.

The trial court abused its discretion in allowing the defendant to allege mutual mistake of law, over the objection of plaintiff, after the evidence was closed on both sides, witnesses discharged, the jury instructed, and counsel for defendant having made his opening argument to the jury, without granting the plaintiff a continuance in order to meet the issue presented by the plea of mutual mistake of law.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

### 2. PLEADING (§ 237\*)—ANSWER—AMENDMENT TO CONFORM TO PROOF.

An amendment to an answer cannot be made on the theory of conforming the answer

to the facts proven, when the evidence relied on to support the amendment was immaterial and incompetent to any issue in the case, and was introduced over the objection of the plaintiff.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

### 3. BILLS AND NOTES (§ 520\*)—MUTUAL MISTAKE—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held insufficient to constitute a mutual mistake of law from which relief can be had.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.\*]

### 4. CONTRACTS (§ 93\*)—"MUTUAL MISTAKE OF LAW."

A "mutual mistake of law" is a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4650, 4651.]

### 5. CONTRACTS (§ 93\*)—DEFENSES—MUTUAL MISTAKE OF LAW.

It is an essential element of the defense of a mutual mistake of law that the mistake must be of a material nature and be the determining ground of the transaction.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 415-419; Dec. Dig. § 93.\*]

### 6. PRINCIPAL AND AGENT (§ 101\*)—CONTRACTS—MISTAKE OF LAW—PRINCIPAL AND AGENT.

Where defendant relies upon a mutual mistake of law as a defense, and the proof shows that the mutual mistake of law is based upon a collateral oral agreement in the name of the agent, independent of the written agreement entered into on behalf of the principal, evidence that the defendant and the agent misapprehended the law relative to such oral agreement, both supposing that they knew and understood it, and both making substantially the same mistake as to the law, is not sufficient to establish a mutual mistake of law on the part of the principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 262-273, 345, 364, 368-373; Dec. Dig. § 101.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Canadian County; John J. Carney, Judge.

Action by the Northwest Thresher Company against W. E. McNinch. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

On the 26th day of September, 1906, the Northwest Thresher Company instituted this suit on a promissory note for \$150. It appears from the record that the plaintiff through its agent, George Gill, took an order from one J. R. McClung, for a threshing machine; under the terms of said order he was required to furnish farmers' notes in the sum of \$1,000 as collateral security to said indebtedness, payable directly to the Northwest Thresher Company, and said notes contained a clause that the same were executed in consideration of credit extended to the said J. R. McClung in the purchase of said machine. Prior to that time, a contract was entered into between the parties,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



providing for the execution of said note by the defendant upon the delivery of the threshing machine to McClung, and the note sued on was executed under said contract. The defendant answered on the 24th day of October, 1906, a copy of which answer is found in *McNinch v. Northwest Thresher Co.*, 23 Okl. 388, 100 Pac. 524, 138 Am. St. Rep. 803, the defense being: First, a failure of consideration other than that stipulated in the writing; and second, that by fraud and mistake of fact the written agreement stipulates for a particular consideration which was not the true consideration, and that the true consideration failed. This answer was amended on December 21, 1906; a demurrer was sustained to the first defense, and a motion to make more definite and certain to the second defense, and the cause appealed to this court, and decided in the case of *McNinch v. Northwest Thresher Co.*, supra, sustaining the demurrer to the first defense, and holding that the defendant had measurably complied with the order to make more definite and certain as to the second defense. On August 19, 1909, defendant again amended his answer by alleging, in substance, the same as his former allegation, and again, on December 27, 1909, defendant amended his answer by filing an amendment to, and substitution for, the second count of his answer. Issues were joined by the plaintiff, and on January 10, 1910, the trial was commenced. At that time there was no allegation of mutual mistake of law. During the first day of the trial the defendant again filed an amendment to his answer, setting forth an alleged defense relative to the execution of the contract dated May 12, 1905, and again, during the trial defendant asked and was permitted to file an additional amendment to his amended answer, by alleging the defense of fraud and mistake. Issues were joined on these amendments and the cause submitted to the jury; after the instructions were given and the argument under way, the defense asked leave to file an amendment, alleging "mutual mistake of law," in order to conform his answer to the facts proven, which was allowed by the court. The court then withdrew from the jury all the grounds of defense, except mutual mistake of law. The facts relating to mutual mistake of law will be found in the body of the opinion. All the amendments were made over the objection of the plaintiff, the cause was submitted to a jury, and resulted in a verdict in favor of the defendant, and the plaintiff brings the cause here for review.

M. D. Libby, of El Reno, for plaintiff in error. Jas. L. Brown and Floyd Wheeler, both of Oklahoma City, for defendant in error.

RITTENHOUSE, C. There are numerous assignments of error presented by plaintiff, but it will only be necessary for us to consider two of the questions raised. (1) Did

the court abuse its discretion in allowing defendant to amend its answer by alleging mutual mistake of law, after the evidence was submitted and the opening argument of defendant closed? (2) Did the evidence offered by the defendant prove the allegations of mutual mistake of law? The answer of defendant was amended four times before trial, three times during trial, and once during the argument.

[1] The trial court abused its discretion in allowing the defendant to amend his answer to allege mutual mistake of law, after the evidence had been closed on both sides, witnesses excused, the jury instructed, and counsel for defendant having made his opening argument to the jury; such amendment being over the objection of the plaintiff, and without giving the plaintiff an opportunity to defend as against the defense of mutual mistake of law. Under section 5679 (Comp. Laws 1909), the court is vested with considerable discretion in allowing amendments, where such amendments do not change substantially the claim or defense. *Gross Construction Co. v. Hale*, 37 Okl. 131, 129 Pac. 28. The plaintiff objected to the amendment on the ground that the same was a surprise, and that it was not prepared to meet the issue raised by the amendment, the witnesses having been excused and not in attendance on the court, it was therefore an abuse of discretion to allow the amendment alleging mutual mistake of law, without granting to the plaintiff an opportunity to meet such issue.

[2] The order allowing defendant to amend by alleging mutual mistake of law was improper for another reason; at the time the evidence, relied on as establishing the defense of mutual mistake of law, was offered, plaintiff objected to such evidence upon the ground that the same was immaterial and incompetent to any issue in the case; the court, therefore, erred in permitting the amendment to conform to the facts proven when such facts were admitted over the objection of the plaintiff, and were not within the issue.

"A motion, after the close of the evidence, to conform the pleadings to the proof, can never be granted where the admission of the evidence was properly objected to when it was offered, upon the ground that it did not tend to support the allegations of the pleadings." 1 *Ency. Pl. & Pr.* 585; *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894; *Worthington v. La Violette*, 60 Wash. 525, 111 Pac. 784; *Mendenhall v. Harrisburgh Water Co.*, 27 Or. 38, 39 Pac. 399; *Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co.*, 48 Or. 359, 86 Pac. 357, 87 Pac. 530; *St. Louis, I. M. & S. R. Co. v. Holmes*, 88 Ark. 181, 114 S. W. 221; *Buxton v. Sargent*, 7 N. D. 503, 75 N. W. 811.

[3] The next question involved in this action is whether the evidence offered by the defendant proves the allegation of mutual mistake of law. In our opinion, there is no subject-matter in this case on which a mutual mistake of law could be based. The defense of mutual mistake of law should only be allowed in extreme cases, and then only

when the mistake of law is of a material nature and was the determining ground of the transaction. It will be seen from an examination of the evidence that the facts proven are not sufficient to bring the defense within the class of mutual mistake of law from which relief can be had. The testimony of McNinch on the issue of mistake of law was, in substance, as follows: That he was a farmer; that he was not acquainted and familiar with the laws of the territory of Oklahoma and their technical application; that he knew nothing about them; that he did not know and apprehend that by making the writing of May 12, 1905, the law would prevent him from proving an oral agreement outside to do the threshing; that he understood and apprehended the law to be that he could make that oral agreement outside, and that it would be good, notwithstanding it was not in writing; that he did not learn the law to be the contrary until "now"; that this agent whose name was Gill said that if anything happened to the wheat, if it was a failure or the threshing was not done, the notes would be void and could not be collected by law; that was his comprehension of the law and belief of the law at that time; that the oral promise referred to didn't need to be included in the contract " \* \* \* the statement that he made to me; \* \* \* he said that in case the threshing was not done the notes would be void; he said the threshing would be done; that they would make McClung thresh it, and if he didn't thresh it, he (Gill) would thresh it; I would not have signed the contract had I known the law to be as I now find it to be when I come into court, to wit, that everything oral must be put in the contract or it would not be any good; he (Gill) told me in case anything happened to the wheat, that the notes could not be collected by law, for the reason that they could not get something for nothing; I have run a meat market for three or four years; I can read and write; in the transaction of my business I execute many checks, and have signed a good many notes in my business, in one way and another; that a written contract was better evidence of what the transaction really was; well, I suppose it would be where. \* \* \* I also supposed throughout my business that any executed note for which a man received nothing was uncollectible in law."

The testimony of the agent, Gill, on cross-examination as to the issue of mistake of law was, in substance, as follows:

"Q. Did not you, yourself, have the belief at that time that if he did not get the threshing done the debt could not be collected off him? A. I don't know. I wasn't a lawyer. Q. That was your idea of the law? A. I cannot say it was. Q. Can you say it was not? A. In fact it was the first collateral note contract I had ever had anything to do with. Q. Are you sure you did not say as an inducement to get him to sign it, 'Now, if you sign this contract and you don't get your threshing done, that

the contract nor the note cannot be collected in law, because you would not get anything for it?' A. There was no note at that time. I don't remember making any such statement. Q. And you don't remember that you didn't? A. I would not swear that I didn't."

There is no showing in this testimony that Gill was mistaken as to the law; the mere expression of an opinion as to the law is not sufficient to show what Gill understood or apprehended the law to be. The parties dealt with each other on equal terms; there was no mistake in the execution of the note they intended to execute; no request was made to have the private oral promise of Gill put in the note, nor was there an attempt to do so; the parties did just what they intended to do, that is, that the plaintiff should sell to McClung a threshing machine, and McClung was to secure the indebtedness by farmers' notes, one of which was to be executed by McNinch for \$150; the machine was delivered to and accepted by McClung, and the plaintiff, under the evidence in this case, could not be restored substantially to its rights as they existed previous to the sale. *Crosier v. Acer*, 7 Paige (N. Y.) 138; *Hope v. Bourland*, 21 Okl. 864, 98 Pac. 580.

[4-8] The question as to whether Gill was to thresh McNinch's wheat in case McClung failed to do so is not material to the transaction, and was not the determining ground of the sale and the execution of the collateral note; nor the subject-matter on which to base the defense of a mutual mistake of law. It is one of the essential elements of the defense of mutual mistake of law that the mistake must be of a material nature and be the determining ground of the transaction.

"Mistake in matter of law or matter of fact, to be a ground for equitable relief, must be of a material nature, and must be the determining ground of the transaction. (Italics ours.) A man who seeks relief against mistake must be able to satisfy the court that his conduct has been determined by the mistake. Mistake in matters which are only incidental to, and are not of the essence of a transaction, and without, or in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing. If the mistake has not been the only cause by which the conduct of a man has been induced, but another motive has intervened, the mistake cannot be set up as a ground for relief." *Kerr on Fraud & Mistake* (old edition) p. 408.

"Mistake of law, to be a ground for relief in equity, must be of a material nature, and the determining ground of the transaction." *Kerr on Fraud & Mistake* (4th Ed. 1910) p. 468; *Stone v. Godfrey*, 5 D. M. & G. 76; 1 Page on Contracts, §§ 53, 60, 71, 82, 84; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; *Segur v. Tingley*, 11 Conn. 134; *Dambmann v. Schulting*, 75 N. Y. 55; *Marshall v. Homier*, 13 Okl. 264, 74 Pac. 368; *Stettheimer v. Killip*, 75 N. Y. 282; 2 Pom. Eq. Jur. 839; *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 153; *Town of Essex v. Day*, 52 Conn. 483, 1 Atl. 620; *Farmers' & Merchants' Nat. Bank v. Hoyt*, 29 Okl. 772, 120 Pac. 264.

In order to say that the oral promise of Gill was of a material nature, it would be

necessary to change the absolute substance of the agreement; the consideration expressed in the note, and sustained by the testimony of McNinch, is the sale of the machine to McClung and the note given as collateral only to that indebtedness. In order to make the oral promise to do the threshing material, the consideration of the note must not have been the sale of the machine to McClung, but the consideration must have been the oral promise of Gill to do the threshing, which latter theory is disputed by the contract of May 12, 1905, the note sued on, and all the circumstances of the case. The oral contract of Gill not being of a material nature in the consummation of said sale, his mistake of law based on said oral contract would be immaterial.

This is a plain case of ignorance of the law on the part of McNinch, and if ignorance of the law, pure and simple, on a collateral matter, as this case apparently is, was allowed to be the subject of a defense in actions of this character, there would be no certainty in one's legal rights and no end to litigation.

The defendant construes the evidence to mean that Gill, the agent of plaintiff, understood the law to be that the note could not be collected unless the threshing was done for defendant. It is neither alleged nor proven what the plaintiff understood the law to be; the only allegation or attempted proof is what the agent, Gill, understood and apprehended the law to be, and the question of the agent's understanding or apprehension of the law, under the evidence in this case, is immaterial and destructive of the very essence of his defense of mutual mistake of law. Gill, the agent, was not the real party to the written contract, and his understanding of the law, relative to his private oral contract, could not be imputed to his principal. There is no claim in this action that Gill promised that plaintiff would thresh the wheat, the contention is that he, Gill, would thresh the wheat if McClung failed to do so. This state of facts is admitted in the pleading and by the testimony of the defendant. Had the principal acted for himself in such transaction, his understanding and apprehension of the law would be material, but under the evidence in this case such knowledge or views of an agent relative to his own separate oral contract, could not be imputed to the principal. It has been held by numerous authorities that an agent cannot bind his employer by an agreement in his own name, in the absence of special authority. *Tollerton & Warfield Co. v. Gilruth et al.*, 21 S. D. 820, 112 N. W. 843; *Funk et al. v. Church & Fitzgerald et al.*, 132 Iowa, 1, 109 N. W. 286.

Inasmuch as all the evidence on the question of mutual mistake of law is before this court, and nothing can be gained by a new trial, this cause is therefore reversed and

remanded, with instructions to the trial court to render judgment against W. E. McNinch in favor of the Northwest Thresher Company in the sum of \$150, with interest at 8 per cent. per annum from August 1, 1905, and costs.

PER CURIAM. Adopted in whole.

# NORTHWEST THRESHER CO. v. PRUITT. (No. 3447.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

## ACTION ON NOTE.

For syllabus, see *Northwest Thresher Company, a Corporation, v. W. E. McNinch* (No. 3446) 140 Pac. 1170, not yet officially reported.

Commissioners' Opinion, Division No. 1. Error from District Court, Canadian County; John J. Carney, Judge.

Action by the Northwest Thresher Company against W. R. Pruitt. Judgment for defendant, and plaintiff brings error. Reversed and remanded with instructions.

M. D. Libby, of El Reno, for plaintiff in error. Jas. L. Brown and Floyd Wheeler, both of Oklahoma City, for defendant in error.

RITTENHOUSE, C. This action was begun in the district court of Canadian county on a promissory note for \$100, given as collateral security to an indebtedness of J. R. McClung. On the 13th day of June, 1910, there was filed in said cause a stipulation in the case of *Northwest Thresher Company v. W. E. McNinch* (No. 3446) 140 Pac. 1170, not yet officially reported, wherein it was provided:

"Third. If appeal be taken to the Supreme Court from the final judgment in any or all said actions, by either party, including the final judgment in the said action wherein the said W. E. McNinch is defendant, then briefs shall be filed in that action only wherein the said W. E. McNinch is a party to the appeal, and the judgment, order, or mandate of the Supreme Court in the latter action shall be the judgment, order, or mandate of that court in each of the said other appealed actions.

"Fourth. It is not intended hereby to consolidate said actions for trial, but merely that the trial and judgment in the one case in the district court, or upon appeal to the Supreme Court, shall furnish the rule for judgment in each of the other cases pending in such court."

Following the rule advanced in the case of *Northwest Thresher Company v. W. E. McNinch*, not yet officially reported, the above cause is reversed and remanded, with instructions to the trial court to render judgment against W. R. Pruitt in favor of the Northwest Thresher Company in the sum of \$100, with interest at 8 per cent. per annum from August 1, 1905, and costs.

PER CURIAM. Adopted in whole.

**NORTHWEST THRESHER CO. v. BELL**  
(No. 3448.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**ACTION ON NOTES.**

For syllabus, see Northwest Thresher Company, a Corporation, v. W. E. McNinch (No. 3446) 140 Pac. 1170, not yet officially reported.

Commissioners' Opinion, Division No. 1. Error from District Court, Canadian County; John J. Carney, Judge.

Action by the Northwest Thresher Company against J. H. Bell. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

M. D. Libby, of El Reno, for plaintiff in error. Jas. L. Brown and Floyd Wheeler, both of Oklahoma City, for defendant in error.

**RITTENHOUSE, C.** This action was begun in the district court of Canadian county on a promissory note for \$75, given as collateral security to an indebtedness of J. R. McClung. On the 13th day of June, 1910, there was filed in said cause a stipulation in the case of Northwest Thresher Company v. W. E. McNinch (No. 3446) 140 Pac. 1170, not yet officially reported, wherein it was provided:

"Third. If appeal be taken to the Supreme Court from the final judgment in any or all said actions, by either party, including the final judgment in the said action wherein the said W. E. McNinch is defendant, then briefs shall be filed in that action only wherein the said W. E. McNinch is a party to the appeal, and the judgment, order, or mandate of the Supreme Court in the latter action shall be the judgment, order, or mandate of that court in each of the said other appealed actions.

"Fourth. It is not intended hereby to consolidate said actions for trial, but merely that the trial and judgment in the one case in the district court, or upon appeal to the Supreme Court, shall furnish the rule for judgment in each of the other cases pending in such court."

Following the rule advanced in the case of Northwest Thresher Company v. W. E. McNinch, not yet officially reported, the above cause is reversed and remanded, with instructions to the trial court to render judgment against J. H. Bell in favor of the Northwest Thresher Company in the sum of \$75, with interest at 8 per cent. per annum from August 1, 1905, and costs.

**PER CURIAM.** Adopted in whole.

**YATES v. FIRST NAT. BANK OF MILL CREEK.** (No. 3185.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 362\*)—PRESENTATION FOR REVIEW—PETITION IN ERROR.**

This court will not review an alleged error of a trial court, unless the error complained of

is assigned for review by the petition in error, as well as by the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961, 3282-3284; Dec. Dig. § 362.\*]

**2. APPEAL AND ERROR (§ 301\*)—EXCESSIVE RECOVERY—ASSIGNMENT OF ERROR—MOTION FOR NEW TRIAL.**

Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon contract, cannot be considered on appeal, unless such error is assigned in the motion for a new trial as a ground therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

**3. APPEAL AND ERROR (§ 301\*)—USURY (§ 102\*)—NEW TRIAL—MOTION—ESSENTIALS.**

An action to recover usury is one arising on an implied contract; and, where the plaintiff, in an action to recover usurious charges, complains of the amount of the verdict in his favor, it is necessary that the motion for a new trial contain as a ground therefor the fifth subdivision of section 5825, Comp. Laws 1909.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\* Usury, Cent. Dig. §§ 197, 241, 242, 244-253; Dec. Dig. § 102.\*]

**4. APPEAL AND ERROR (§ 301\*)—EXCESSIVE RECOVERY—PRESENTATION FOR REVIEW—MOTION FOR NEW TRIAL.**

Where the evidence is sufficient to sustain a verdict for a greater sum than that found by the jury, this court will not examine the record to ascertain whether the sum so found was the correct amount, where error in the assessment of the amount of recovery is omitted from the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Johnston County; A. T. West, Judge.

Action by E. M. Yates against the First National Bank of Mill Creek. Judgment for defendant, and plaintiff brings error. Affirmed.

P. B. H. Shearer and J. B. O'Bryan, both of Tishomingo, for plaintiff in error. Horton & Smith, of McAlester, and Stephen C. Treadwell, of Oklahoma City, for defendant in error.

**SHARP, C.** Plaintiff brought suit to recover usurious interest amounting to \$1,242.70. The jury returned a verdict in his favor for \$1.

[1-3] Plaintiff's motion for a new trial contains numerous grounds, but wholly omits to assign the fifth subdivision of section 5825, Comp. Laws 1909, authorizing the trial court to vacate the verdict of a jury and grant a new trial, where there is error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for injury or detention of property.

Plaintiff's several causes of action arose upon an implied contract. State Bank of Paden v. Lanam, 34 Okl. 485, 126 Pac. 220; Washington-Alaska Bank v. Stewart, 184

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Fed. 673, 108 C. C. A. 273. In the former case, adopting the language of the court in the latter, and in which a like statute was under consideration, it was said that the causes of action there sued upon arose under an implied contract; that, when the plaintiffs paid to the defendant interest in excess of the amount allowed by law, there arose an implication tantamount to an implied promise to repay the amount so unlawfully exacted, and, in addition thereto, the law imposed an obligation to pay an equal amount. That obligation was enforceable under the Code pleading as a promise to pay, just as at common-law assumpsit lay on an implied promise to discharge a legal obligation.

While in each of the above cases the court held that causes of action to recover usury paid at different times and on different loans, being of the same class, and affecting the same parties, might properly be joined in one petition, being contracts implied within the meaning of the Code provision authorizing joinder of causes of action, in our opinion, a like construction must be given the fifth subdivision of section 5825, *supra*, which furnishes the means whereby a verdict may be set aside, and a new trial granted, where there is error in the assessment of the amount of recovery, whether it be too large or too small, where the action is upon contract. There is nothing in the statute indicating that the action must be upon an express, and not an implied, contract; neither can there be reason for giving to said provision so restricted a construction. First Nat. Bank of Nashua v. Van Vooris, 6 S. D. 548, 62 N. W. 378; Fire Dept. of the City of Oshkosh v. Tuttle, 50 Wis. 552, 7 N. W. 549; Crandall v. White et al., 164 Mass. 54, 41 N. E. 205; Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312; Dalton v. Laudahn, 30 Mich. 349; Republic Iron Mining Co. v. Jones (C. C.) 87 Fed. 721, 2 L. R. A. 746. Plaintiffs' several causes of action being founded upon an implied contract, and the amount of his recovery not being that to which it is claimed the evidence entitled him, he should have moved for a new trial under the fifth subdivision of section 5825. It was not from an adverse verdict that a new trial was asked, but from a favorable verdict for an insufficient sum.

[4] The motion for a new trial, having failed to assign the section of the statute in question, although it was charged that the verdict was contrary both to the law and the evidence, was insufficient. Error in the amount of recovery constituted the sole objection urged to the judgment, and that, not being specified as one of the grounds for a new trial, was not presented to the trial court, and hence is no cause for reversal on appeal.

This same statute was before the court in

Southwestern Cotton Seed Oil Co. v. Bank of Stroud et al., 12 Okl. 168, 70 Pac. 205, and Graham v. Yates et al., 36 Okl. 148, 123 Pac. 119. In the latter case it was said that there is a wide distinction between an adverse verdict and one favorable to the complaining party, where only the amount of recovery is the error sought to be reviewed, and it was doubtless this distinction that caused the Legislature to assign as one of the several grounds for a new trial the one under consideration. It is unnecessary to add to what has heretofore been said by this court in the foregoing cases, each of which are supported by abundant authority.

The judgment of the trial court should, for the reason stated, be affirmed.

PER CURIAM. Adopted in whole.

LEE v. LOWERY et al. (No. 3803.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 262\*) — LANDLORD'S LIEN—PETITION.

In order to enforce a landlord's lien against the crops of a tenant under sections 3809, 3810, Rev. Laws 1910, a petition which fails to state facts sufficient to show wherein the plaintiff is entitled to the portion of the crop claimed, by failing to allege any contract between him and the tenant, or to show that anything was due from the tenant to him, or that the tenant was under any obligation to plaintiff to pay him the portion of the crop claimed, does not state facts sufficient to constitute a landlord's lien under said sections.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 955, 969, 1049-1058; Dec. Dig. § 262.\*]

2. ATTACHMENT (§ 306\*) — PLEA OF INTERPLEADER—SUFFICIENCY—LANDLORD'S LIEN.

A plea, whereby an interpleader attempts to set up claim to property which had been attached by another party claiming a landlord's lien under sections 3809, 3810, Rev. Laws 1910, which states, "Plaintiff states that the property claimed by plaintiff in his bill of particulars herein filed belongs to him, the said Robert E. Lee by virtue of a certain written rental contract made and entered into between himself and Mrs. Mattie E. Dunlap in the year 1910, and that the plaintiff herein has no right, title, or interest in and to the said property whatever," does not state facts on the part of the interpleader sufficient to conform to the requirements of the statute.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1096-1101; Dec. Dig. § 306.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Le Flore County; P. C. Bolger, Judge.

Action in attachment by John A. and M. O. Lowery, partners, doing business as Lowery Bros., against M. L. Glaze, Robert E. Lee, interpleader. Judgment for plaintiffs, and R. E. Lee, interpleader, brings error. Affirmed.

Hale & Lunsford and R. G. Bulgin, all of Poteau, for plaintiff in error. T. T. Varner, of Poteau, for defendants in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**HARRISON, C.** This action was originally begun in the justice court of Le Flore county by the firm of Lowery Bros., by a proceeding in attachment against M. L. Glaze, wherein certain crops, gathered and ungathered, were sought to be attached in satisfaction of rent alleged to be due to the firm of Lowery Bros. Before the cause between Lowery Bros. and Glaze was tried, Robert E. Lee was given leave to interplead claiming the attached property as his. Judgment was rendered in favor of Lowery Bros. and Robert E. Lee, interpleader, appealed to the county court. In the county court Robert E. Lee was given leave to substitute his interplea, which was alleged to have been lost from among the papers in the justice court. Lowery Bros. demurred to the interplea upon the ground that it failed to state facts sufficient to show Lee entitled to the attached property. The court overruled the demurrer and allowed Lee to introduce testimony in support of his claim to the property. To all of which Lowery Bros. objected and excepted. But after hearing testimony, upon motion of Lowery Bros., the court gave a peremptory instruction for a verdict in favor of Lowery Bros., pursuant to which the verdict was returned and judgment rendered in Lowery Bros.' favor. From such judgment, Robert E. Lee, interpleader, appeals.

[1, 2] In determining whether the court erred in instructing a verdict in favor of Lowery Bros., it is necessary to determine the nature of Robert E. Lee, the interpleader's claim. The original defendant, M. L. Glaze, was a tenant on a certain tract of land, and made no defense against either plaintiff or the interpleader, but merely awaited the judgment of the court as to whom he should pay the rents. Both claims for the rent were in the nature of a landlord's lien. Lee claimed it by virtue of a lease contract with Mattie F. Dunlap, the then owner. Lowery Bros. claimed it by virtue of an unexpired five-year contract executed to them prior to the purchase of the land by Mattie F. Dunlap and by virtue of a contract with M. L. Glaze for the year 1910; the property attached being a portion of the crop raised by Glaze during said year. Lee based his claim upon the following interplea:

"Comes now Robert E. Lee, interpleader herein, and states that the interplea heretofore filed in the court below has been lost and misplaced and does not appear in the transcript, wherefore he files this interplea at this time. Plaintiff further states that the property claimed by plaintiff in his bill of particulars herein filed, belongs to him, the said Robert E. Lee, by virtue of a certain written rental contract made and entered into between himself and Mrs. Mattie F. Dunlap in the year 1910, and that the plaintiff herein has no right, title, or interest in and to the said property whatever. Wherefore the interpleader prays that he have judgment. \* \* \*

The rental contract which Lee claimed to have relied upon was not attached to or made a part of the interplea. Therefore we

think the interplea was in itself insufficient to show the interpleader entitled to the attached property, as his claim to the attached property, being in the nature of a landlord's lien, under sections 3809, 3810, Rev. Laws 1910, should have stated facts sufficient to show wherein he was entitled to a portion of the crop raised by M. L. Glaze, the tenant. Nor does it show that he had any contract with M. L. Glaze for the rents for that year, nor that any sum was due from Glaze to him out of the rent for that year.

In *Greeley v. Greeley & Greeley*, 12 Okl. 659, 73 Pac. 295, which was an action to enforce a landlord's lien for rent, under the statute, the question of the sufficiency of the affidavit in attachment to entitle the plaintiff to the enforcement of the landlord's lien was before this court. Mr. Justice Burford, in rendering the opinion, said:

"Does the affidavit filed in the case conform to the requirements of the statute? The statute requires the defendant to 'state that there is due from the defendant to the plaintiff a certain sum, naming it, for rent of farming lands, describing the same, and that the plaintiff claims a lien on the crop made on such land.' The only allegation of the affidavit filed in this case, so far as the rent for the year 1901 is concerned, is in the following language: 'That said claim is just and due, and that plaintiff believes she ought to recover from said defendant the sum of \$480, rent as aforesaid.' It is manifest that this part of the affidavit was made under the general attachment law, and does not meet the requirements of the special statute under consideration, for the reason that it does not, either in terms or effect, 'claim a lien on the crop made on such land.' This we think was necessary. \* \* \*

See, also, *Robinson v. Kruse*, 29 Ark. 575; *Constantine v. Fresche* (Lone Star Brew. Co., Intervener), 17 Tex. Civ. App. 444, 43 S. W. 1045; 25 Cyc. 62.

We think, therefore, that although the court erred in overruling the demurrer to the interplea and admitting testimony in support of same over the objection and exception of Lowery Bros., upon final consideration of same, after the testimony was introduced, it was correct in giving a peremptory instruction in favor of Lowery Bros. We think that neither the interplea nor the evidence, nor both, were sufficient to show that the interpleader had no right to enforce a landlord's lien against M. L. Glaze for a portion of his crop for the year 1910, and that the judgment of the county court should be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. RY. CO. v. CLOSE  
(No. 3251.)

(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. CARRIERS (§ 174\*)—CONNECTING CARRIERS—LIABILITY—TERMINATION.

If a common carrier accepts freight for a place beyond his usual route, he must, unless

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 747-765; Dec. Dig. § 174.\*]

**2. CARRIERS (§ 176\*)—CONNECTING CARRIERS—DELAY—EXCESSIVE FREIGHT CHARGE.**

"Every railroad, car, or express company, shall each respectively receive and transport without delay or discrimination each other's cars, loaded or empty, tonnage, and passengers, under such rules and regulations as may be prescribed by law or any commission created by this Constitution or by act of the Legislature for that purpose." Section 3, art. 9, Const. of Okl. And such connecting carrier cannot avoid liability for delay in forwarding a shipment because of an alleged excessive freight charge, because it is not bound to collect more than legal charges, and can adjust the same after collection.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 766-774; Dec. Dig. § 176.\*]

**3. CARRIERS (§ 176\*)—CONNECTING CARRIERS—DELIVERY—DELAY.**

An initial carrier, which receives freight to be shipped beyond its lines under a bill of lading which expressly provides "that agents must not in any case receipt beyond points on this road," where such freight is promptly and without delay delivered to a connecting carrier, cannot be held liable under our statutes for delay caused by the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 766-774; Dec. Dig. § 176.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by W. D. Close against the St. Louis & San Francisco Railway Company for damages for delay in shipment of freight. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error. Benj. F. Rice and Thos. D. Lyons, both of Tulsa, for defendant in error.

**HARRISON, C.** W. D. Close brought this action in the district court of Tulsa county in August, 1908, for damages resulting from a delay in the shipment of a merry-go-round from Ardmore to Pawhuska. The cause was tried in March, 1911, and judgment rendered upon a verdict in favor of plaintiff in the sum of \$500. From such judgment the railway company appeals upon 11 assignments of error.

There is one decisive proposition of law involved which renders the other assignments immaterial to a proper determination of this case, to wit, whether, under the circumstances of this case, the initial carrier, which was the defendant below, should be held liable for a delay in shipment occurring on a connecting, and in this case the terminal, carrier. The record discloses that the machinery necessary to the operation of the merry-go-round in question, and all the accouterments, were

delivered to the Frisco road on May 19th; that the Frisco promptly and without delay transported such shipment to Tulsa on the 20th of May, the day following, and then and there tendered it to the Midland Valley Railway Company for shipment from there to Pawhuska; that the Midland Valley Railroad failed to deliver such shipment to Pawhuska, and did not deliver it until June 1st, during which time plaintiff alleged that, owing to certain entertainments in the town of Pawhuska which brought a great many people to town, plaintiff was damaged by being deprived of the operation of the merry-go-round in the sum of \$800. The question then is whether the initial carrier, who it is not denied delivered the goods promptly to the connecting carrier, should be held liable for damages resulting from the delay in the shipment by the connecting carrier.

Section 3, art. 9, of the Constitution (section 219, Williams' Ann. Const.) provides:

"Every railroad, car, or express company, shall each respectively receive and transport without delay or discrimination each other's cars, loaded or empty, tonnage, and passengers, under such rules and regulations as may be prescribed by law or any commission created by this Constitution or by act of the Legislature, for that purpose."

[1] Section 514, Comp. Laws 1909, provides:

"If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

This section of the statute was construed in the case of *St. L. & S. F. R. Co. v. McGivney*, 19 Okl. 361, 91 Pac. 693, wherein it was held:

"If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon his making such delivery."

The plaintiff alleged that he delivered the shipment in question to the Frisco on May 19th for shipment to Pawhuska over its and its connecting lines, and that the Frisco accepted such shipment and agreed to transport the same under the terms of a certain bill of lading, one of the provisions of which is as follows: "Agents must not in any case receipt beyond points on this road."

[2] It is clear from our constitutional and statutory provisions that it is the duty of the connecting carrier to accept shipments of freight under such circumstances, unless a valid reason for refusal exists, and that the liability of the initial carrier ceases when such delivery is made. There is no denial but what the Frisco Road delivered the shipment promptly and tendered same to the Midland Valley Road, and that all the delay in further transportation was chargeable to

the Midland Valley. True, it appears from the record that the Midland Valley declined to receive the shipment because of a pretended overcharge in freight, claiming that the shipment should be reweighed, but it does not appear that the Midland Valley had any valid reasons for assuming that a reweighing was necessary, nor that, as a fact, there had been an overcharge of freight. Hence there was no excuse, so far as the record discloses, for the Midland Valley's declining to receive the shipment. But, admitting for argument's sake that such were the case, still it has been held:

"A carrier receiving goods in the usual way from a connecting carrier on which charges are to be collected at their destination cannot avoid liability for delay in forwarding the same because of excessive freight charges, since it is not bound to collect more than legal charges, and can adjust the same after collection." *T. & P. Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54; also, *Inman v. St. L. & S. W. R. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 38; *H. & T. C. R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676, 48 S. W. 619; *Gulf, etc., R. Co. v. Lone Star Salt Co.*, 26 Tex. Civ. App. 531, 63 S. W. 1025.

[3] It follows, therefore, that the initial carrier was under no further obligation than to promptly deliver the shipment to a connecting carrier, and that is the duty of such connecting carrier to forward same without undue delay.

It is apparent, under the record and the foregoing provisions of our Constitution and statutes and the authorities above, that whatever damages the plaintiff may have shown himself entitled to recover, the Frisco Railroad was not liable therefor. It had discharged every obligation which the law imposed upon it under the circumstances.

It is not necessary to pass upon the amount of damages recoverable or the measure of damages applicable to the issues under the circumstances, but we are forced to hold, under the record before us, that the Frisco Road was not liable. The judgment is therefore reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

BLASDEL v. FINKS. (No. 8171.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. INDIANS (§ 19\*)—ALLOTTED LAND—TRESPASS—ANIMALS.

Under section 18 of the Creek Supplemental Agreement (Act June 30, 1902, c. 1323, § 500) the inhibition against the trespass of live stock owned by a noncitizen upon the allotted lands of a citizen and the remedy therefor runs with the land to an occupying non-citizen tenant of such allottee.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 51; Dec. Dig. § 19.\*]

2. ANIMALS (§ 90\*)—TRESPASS—CULTIVATED LANDS HELD IN SEVERALTY.

Where lands held in severalty are within a common fenced inclosure devoted to the culti-

vation of agricultural crops, even in a "free range" country, an occupant of any portion of such lands must prevent his live stock from trespassing upon the lands of other occupants. [Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 327, 328; Dec. Dig. § 90.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Okfuskee County; W. A. Huser, Special Judge.

Action by J. S. Blasdel against P. M. Finks for damages for trespass of defendant's cattle on plaintiff's crop. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

C. W. Brewer, of Okemah, for plaintiff in error. John L. Norman, of Okemah, for defendant in error.

THACKER, C. Plaintiff in error was plaintiff and defendant in error was defendant in the trial court.

Plaintiff, a noncitizen and a tenant, had corn and cotton standing upon the lands of a citizen allottee of lands in the Creek Nation from whom he had rented; and these crops were within a common inclosure of lands upon which were grown in 1905 the crops of several other tenants, including one A. L. Black, who cultivated the lands of another allottee. Plaintiff's crops were damaged by cattle going upon the lands upon which the same stood in 1905 and during the first part of 1906; and he sues defendant, a non-citizen of said Nation, for \$100 as such damages.

Defendant purchased Black's interest as tenant in the land occupied by him some time during the year 1905; and it was a controverted question as to whether defendant kept his cattle thereon in both 1905 and 1906, and as to whether his cattle either from these lands or from elsewhere went upon the lands occupied by plaintiff and damaged the latter's crops, also as to whether defendant, as succeeding tenant, was entitled to the use and possession of the lands occupied by plaintiff on and after January 1, 1906, which involved a controverted claim of agreement between these parties in this regard. In the evidence for plaintiff, it appeared that with defendant's trespassing cattle were generally cattle owned by one or two other persons; and there was little, if any, evidence from which the pro rata amount of damages by defendant's cattle might be determined.

[1, 2] The only question necessary to a decision in this case arises upon the following paragraph of the court's instructions to the jury:

"The jury is instructed that, if they believe from a preponderance of the evidence that there was included in one common fenced inclosure the lands upon which plaintiff's crops claimed to have been damaged were situate and other lands upon which defendant, Finks, owned a crop and was entitled to possession of, the defendant, Finks, was under no obligation to maintain any fence between himself and plaintiff, but, on the contrary, it was the duty of



plaintiff, Bladel, to maintain a sufficient fence himself against defendant's cattle, and, if such fence was not so maintained by plaintiff, Bladel, he should not recover any damage which you may find from a preponderance of the evidence was committed upon his said crops by the cattle of defendant, Finks."

In our opinion, this instruction was error, notwithstanding the fact that on September 23, 1903, in a case which arose in 1901 (*Perry v. Cobb*, 4 Ind. T. 717, 76 S. W. 289), the Court of Appeals of the Indian Territory held as follows:

"In the Southern and Western states, where it is largely a grazing country, the owner of cattle is not liable for trespass committed by them, unless they have broken through a sufficient fence."

In the case of *Perry v. Cobb*, supra, there was, of course, no question as to the effect of the Creek Supplemental Agreement of June 30, 1902; nor was there any reference to that agreement. Section 18 of said agreement, which is pertinent here, reads as follows:

"Cattle so introduced and all other live stock owned or controlled by noncitizens of the nation shall be kept upon inclosed lands, and if any such cattle or other live stock trespass upon lands allotted to or selected for allotment by any citizen of such nation, the owner thereof shall, for the first trespass, make reparation to the party injured for the true value of the damages he may have sustained, and for every trespass thereafter double damages to be recovered with cost, whether the land upon which trespass is made is inclosed or not." *Bledsoe's Indian Laws*, 442.

In our opinion, this section of this agreement is not susceptible of such interpretation or construction that no benefit may be demanded or action be maintained by any person other than the allottee, and such interpretation or construction would deprive the allottee of an element of value in his allotment—the value arising from the ability to transfer his rights to his tenant; and we must hold that the benefits of this section run with the land to tenants of the allottees.

It seems equally clear that lands within a common fenced inclosure devoted to the cultivation of such agricultural crops as these, even in a free range country, would, upon the ground of an implied agreement, be subject to the rule that each occupant of the inclosure must keep his live stock from trespassing upon the crops of other occupants. 2 Cyc. 392 and 397, 398; *Kobayashi v. Strangeway*, 64 Wash. 36, 116 Pac. 461; *Johnson v. Wing*, 3 Mich. 163; *Coxe v. Robbins*, 9 N. J. Law, 384; *Winters v. Jacobs*, 29 Iowa,

115; *Montgomery v. Handy*, 63 Miss. 43; *Miligan v. Wehinger*, 68 Pa. 235; *Baker v. Robbins*, 9 Kan. 303; *Markin v. Priddy*, 40 Kan. 684, 20 Pac. 474; *O'Riley v. Dias*, 41 Mo. App. 184; *Broadwell v. Wilcox*, 22 Iowa, 568, 92 Am. Dec. 404; *Sturtevant v. Merrill*, 33 Me. 62; *McBride v. Lynd*, 55 Ill. 411; *Thayer v. Arnold*, 4 Metc. (Mass.) 589; *Gooch v. Stephenson*, 13 Me. 371; *Eastman v. Rice*, 14 Me. 419; *Little v. Lathrop*, 5 Me. (5 Greenl.) 856; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233; *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Angell v. Hill*, 18 N. Y. Supp. 824.

If the inclosure had been devoted to and maintained for grazing, it would seem evident that such use and purpose would forbid the view that any occupant was bound to keep his live stock upon his own lands; and, upon the same reasoning, it would seem inconsistent with the use and purpose of growing such agricultural crops as corn and cotton, to which it was devoted, to say that any occupant could rightfully violate such use and purpose by giving his live stock "free range" therein.

Defendant contends that, if the giving of the foregoing instruction to the jury was error, the same was harmless, for the reason that there is no sufficient evidence of damage chargeable to him; but with this proposition we are unable to agree.

There was at least evidence tending to prove that defendant's cattle, with others, trespassed upon and damaged plaintiff's crops; and, if the evidence does not show what portion of the whole amount is properly apportionable as a charge against defendant, or what per cent. of the damage was done by his cattle, which we deem it unnecessary to determine, the plaintiff would at least be entitled to nominal damages, if such evidence is found to be true.

Upon another trial the following cases may be found helpful in respect to the question as to how damages may be proven where crops have been injured or destroyed: *Chicago, R. I. & P. Ry. Co. v. Johnson*, 25 Okl. 760, 107 Pac. 662, 27 L. R. A. (N. S.) 879; *St. Louis & S. F. Ry. Co. v. Ramsey*, 37 Okl. 448, 132 Pac. 478.

In our opinion, this case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 633.

**ST. LOUIS & S. F. RY. CO. v. COBB.**  
(No. 3275.)

(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§§ 434, 773\*)—ASSIGNMENTS OF ERROR—BRIEFS.**

Where a cause has been assigned for submission, and no briefs filed or appearance made by the defendant in error, the assignments of error in plaintiff in error's brief will be sustained, if such assignments appear to be borne out by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2183, 3104, 3108-3110; Dec. Dig. §§ 434, 773.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Muskogee County; Thomas W. Leahy, Judge.

Action by J. C. Cobb against the St. Louis & San Francisco Railway Company, for loss of suit case. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and W. T. Stratton, both of Oklahoma City, for plaintiff in error.

**HARRISON, C.** This action was originally begun in the justice court of Muskogee county by J. C. Cobb against the St. Louis & San Francisco Railway Company for the alleged loss of a suit case containing articles of the alleged value of \$112.75. Judgment was rendered in favor of Cobb in the justice court, and the railway company appealed to the county court, and, judgment being rendered in the county court in favor of Cobb, the railway company appeals to this court upon the following assignments of error: First, error of the court in overruling defendant's demurrer to plaintiff's evidence; second, error in not requiring the jury to assess the amount of recovery; third, error in refusing the several written instructions requested by defendant; fourth, error in instructions given to the jury; fifth, error in refusing to set the verdict aside upon the grounds presented in the motion for new trial.

This cause was filed in this court November 7, 1911, and assigned for trial ——. Plaintiff in error filed brief January 12, 1912. No brief has been filed by defendant in error, and no appearance made by counsel. From an examination of the record and the authorities cited in plaintiff in error's brief, the contentions therein made seem to be well founded, and, under rule 25, should be sustained.

There is an apparent lack of any testimony tending to show a liability on the part of the company. The grips in question were delivered to a baggageman not in the employ of the railway company, nor having any connection with the company, nor is there any testimony tending to show that such baggage was delivered to the railroad com-

pany by plaintiff, nor that plaintiff was a passenger on such road, nor that such road was in any wise accountable to plaintiff for such baggage, if, in fact, the baggage was lost.

The second contention is based upon the fact that the jury, in returning the verdict in favor of plaintiff, failed to state the amount which plaintiff was entitled to recover, the verdict being as follows:

"We, the jury in the above-entitled action, duly impaneled and sworn, upon our oaths find the issues in favor of the plaintiff."

Upon this verdict the court rendered judgment in the sum of \$112.75.

Section 5807, Comp. Laws 1909 (section 5015, Rev. Laws 1910) reads as follows:

"When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery."

See, also, 38 Cyc. 879, and cases cited; 11 Pl. & Pr. 910; Choctaw, O. & G. R. Co. v. Deperade, 12 Okl. 367, 71 Pac. 629.

The verdict was duly excepted to by defendant at the time, and these errors duly presented in the motion for new trial.

We think therefore the court erred in refusing to set the verdict aside, and for these reasons, following rule 25 of this court (137 Pac. xi), the judgment is reversed, and the court below instructed to render judgment in favor of defendant.

**PER CURIAM.** Adopted in whole.

**BURGESS et al. v. FELIX.** (No. 3490.)  
(Supreme Court of Oklahoma. May 12, 1914.)

*(Syllabus by the Court.)*

**1. SALES (§§ 441, 442\*)—BREACH OF WARRANTY—DAMAGES—PURCHASE PRICE—EVIDENCE.**

The general rule as to the measure of damages recoverable for a breach of warranty of personal property is the difference between the actual value of the property at the time of sale and what its value would have been if it had conformed to the warranty. But, in the absence of other evidence, the purchase price is prima facie its value as warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1301; Dec. Dig. §§ 441, 442.\*]

**2. TRIAL (§ 251\*)—INSTRUCTIONS—PLEADING—EXPRESS WARRANTY—BREACH.**

In an action for damages for the breach of an express warranty, where the court instructs the jury on the question of an express warranty as alleged in the petition, and also instructs the jury on the question of an implied warranty, *held*, that it was error to give an instruction as to an implied warranty, because it permits a recovery for the breach of an implied warranty not alleged in the petition, the nature and terms of which implied warranty were not alleged in the petition or defined in the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**3. TRIAL (§ 251\*)—INSTRUCTIONS—PLEADING—EXPRESS WARRANTY—BREACH.**

Where the plaintiff relies in his pleadings upon an express warranty, the court should

limit the recovery to a breach of the express warranty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Grant County; J. W. Bird, Judge.

Action by John Felix against H. L. Burgess and B. F. Venn, partners as Burgess & Venn. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

McKeever & Walker, of Enid, for plaintiffs in error. Sam P. Ridings, of Medford, and F. G. Walling, of Tulsa, for defendant in error.

RITTENHOUSE, C. Plaintiffs in error will be designated as defendants, and defendant in error will be designated as plaintiff, in accord with their respective titles in the trial court.

On the 18th day of September, 1911, the plaintiff instituted suit for damages for breach of warranty upon the sale of two French draft mares. The petition sets forth substantially the same allegations in the two causes of action, which refer separately to each of the mares. The allegations are that defendants expressly warranted each of said mares to be sound, well, gentle, well-broken, and good breeders, and further alleges that said mares were not gentle or well-broken, but were wild and ungovernable, and that they could not be safely driven, worked, and handled, and were worthless for breeding purposes. Issues were joined by a general denial, and the cause submitted to a jury, resulting in a verdict and judgment for \$500 in favor of plaintiff.

The testimony shows that the mare Mabel was purchased for \$400, and the mare Mildred was purchased for \$500, and that the actual value of said mares was not more than \$300. This is all the evidence contained in the record as to the value of the mares. There was no objection to the introduction of this evidence on the part of the defendants, nor was there any contention in the court below that the purchase price was not the true value of the mares as warranted. The proof of the purchase price of the mares by the plaintiff, and that proof not being controverted in any manner, is strong and convincing proof of the value of the mares as warranted, and, in the absence of other evidence as to the value of said mares, the purchase price is prima facie its value as warranted.

[1] "The general rule as to the measure of damages on a breach of warranty is that the buyer is entitled to recover the difference between the actual value of the goods and what the value would have been if the goods had been as warranted, and, in the application of the rule, it is held that the fact that the goods were actually worth the price which was paid for them is immaterial. The difference between

the purchase price and the actual value cannot be regarded as the measure of damages, as in such case the purchaser recovers too small a sum if he has made a bad bargain and paid more than the goods were worth, and too great a sum if he has made a good bargain, paying less than the goods were worth. It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase price and the actual value of the goods; but in nearly all of these cases the theory undoubtedly is that, in accordance with the general rule, if there is no other evidence of the actual value of the goods, the purchase price will be regarded as such value." 35 Cyc. 468; 30 A. & E. Enc. of Law, p. 212; Tatum v. Mohr, 21 Ark. 349; Ash v. Beck (Tex. Civ. App.) 68 S. W. 53; Beard v. Miller (Tex. App.) 16 S. W. 655; South Covington, etc., St. R. Co. v. Gest (C. C.) 34 Fed. 628; Overbay's Adm'r v. Lighty, 27 Ind. 27; J. I. Case Plow Works v. Niles, etc., Co., 90 Wis. 590, 63 N. W. 1018; Seigworth v. Lefel, 76 Pa. 476; Street v. Chapman, 29 Ind. 124; Cary v. Gruman, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Minneapolis Harvester Works v. Bonnallie, 29 Minn. 373, 13 N. W. 149; Carr v. Moore, 41 N. H. 131; 80 A. & E. Enc. of Law, p. 212.

This holding is not in conflict with the case of Spaulding Mfg. Co. v. Holiday, 82 Okl. 823, 124 Pac. 35, wherein the court construes section 2900, Comp. Laws 1909, which section defines the measure of damage for breach of warranty of the quality of personal property, as in that case the court held that there was an absolute failure of proof as to the measure of damages, there being no evidence whatever of the actual value of the property, and the testimony of the purchase price, without any evidence of the actual value, would be insufficient from which to measure such damage. In the instant case there is no controversy as to the value of the mares as warranted. The plaintiff testified that the purchase price of one mare was \$400, and the purchase price of the other was \$500. This is prima facie evidence of the value of the property as warranted, inasmuch as there was no attempt to show that the purchase price was not the true value of the mares as warranted, and, in the absence of any other evidence of the value of said mares, the purchase price will be presumed to be the true value.

[2] The only remaining assignment of error necessary to be considered is that the court erred in instructing the jury. The defendant saved his exceptions to the instructions complained of, but it is contended by the defendants that the exception to the instructions given brings the case within the previous holdings of this court, where it has been repeatedly held that general exception to each and every instruction given by the court to the jury, adverse to the defendant, and to each and every part thereof, and to the instructions as a whole, is not sufficient to challenge the attention of the court to any specific instruction, and insufficient to bring to the consideration of this court such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

separate instruction, and will therefore not avail as an exception unless the whole charge is erroneous. *McCabe & Steen Construction Co. v. Wilson*, 17 Okl. 355, 87 Pac. 320; *Glaser et al. v. Glaser et al.*, 13 Okl. 389, 74 Pac. 944; *Elsminger v. Beman*, 32 Okl. 818, 124 Pac. 289; *Finch v. Brown*, 27 Okl. 217, 111 Pac. 391; *Incorporated Town of Stigler v. Wiley*, 36 Okl. 291, 128 Pac. 118; *Shelby v. Shaner*, 28 Okl. 605, 115 Pac. 785, 34 L. R. A. (N. S.) 621; *Farquhar v. Sherman et al.*, 22 Okl. 17, 97 Pac. 585; *Insurance Co. v. Davis*, 59 Kan. 521, 53 Pac. 856.

We have examined the foregoing authorities, and it is apparent that, in each of the cases cited, the exception was a general exception and did not challenge specifically each individual instruction. In the case at bar, the exceptions were taken at the time the instructions were given, and pointed out specifically the several instructions complained of, giving to the trial court ample opportunity to know, before the instructions were given, the several separate instructions complained of, and this case therefore does not come within the authorities cited.

It is contended that, inasmuch as the petition alleged an express warranty, the two mares were sound, well, gentle, well-broken, and good breeders and the evidence supported these allegations and the court properly instructed the jury on the law of express warranties that it was error for the court to give an additional instruction relative to implied warranties; there being no allegation in the petition nor any proof of an implied warranty in the trial of the case. The court instructed the jury relative to implied warranties as follows:

"Third. If property is sold to any person for any particular purpose, there is an implied warranty that such property is reasonably suitable for the purpose intended, and if the party selling knows that the party buying is making the purchase for such particular purpose, and there are no obvious or apparent things existing in connection with such property that the purchaser can plainly see that it would not answer such purpose, there is an implied warranty on the part of the seller that it is reasonably suited for such purpose."

This instruction was erroneous, because it permitted recovery for the breach of an implied warranty not alleged in the petition, the nature and terms of which warranty were not defined. The recovery must be upon the particular warranty alleged, and an instruction which does not conform to the issue should not be given.

[3] The testimony as to the express warranty was very conflicting; the plaintiff testifying that the defendant warranted the animals to be sound, well, gentle, well-broken, and good breeders. This was denied by the defendant, and in view of the conflicting condition of the testimony as to the express warranty it was error for the court to instruct the jury relative to an implied warranty, as such instruction could only con-

fuse the jury as to the real issue and cause them to draw an incorrect inference from the pleading and the evidence. Upon an allegation for damage for breach of an express warranty, no recovery can be had upon a claim of implied warranty, as an express warranty excludes an implied warranty. *Pemberton v. Dean*, 88 Minn. 60, 92 N. W. 478, 60 L. R. A. 831, 97 Am. St. Rep. 503; *Texas Star Flour Milling Co. v. Moore (C. C.)* 177 Fed. 745; *Reynolds v. General Electric Co.*, 141 Fed. 551, 73 C. C. A. 23; 16 Current Law, 1989; *Christierson v. Hendrie & Bolt-hoff Mfg. & Supply Co.*, 26 S. D. 519, 128 N. W. 603; 15 A. & E. Enc. of Law (2d Ed.) p. 1249; *Osborne & Co. v. Walther*, 12 Okl. 20, 69 Pac. 953; *Kennedy v. Goodman*, 135 Pac. 936.

Inasmuch as the plaintiff relies in his pleadings and evidence upon an express warranty, the court should have limited the recovery to a breach of the express warranty.

The clause should therefore be reversed and remanded.

PER CURIAM. Adopted in whole.

KING v. HOWETH & CO. et al. (No. 3462.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. FRAUD (§ 50\*)—ELEMENTS—BURDEN OF PROOF.

To substantiate the allegation of fraud, the plaintiff must prove that the defendant made a material representation which was false, and known to be false at the time, and made with the intention that it should be acted upon by the plaintiff, and that plaintiff relied upon such false representation to his injury.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

2. CORPORATIONS (§ 80\*)—STOCK SUBSCRIPTION—CANCELLATION FOR FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held not sufficient to support the allegation of fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

3. INSURANCE (§ 83\*)—LICENSE OF INSURANCE COMPANY—PRIOR ACCEPTANCE OF STOCK SUBSCRIPTION.

A domestic life insurance company has the authority to accept a contract of subscription to its capital stock, after its incorporation and before it has been granted a license to commence business under section 3756, Comp. Laws, 1909, such acceptance being necessary in order to show that the corporation has a paid-up capital of not less than \$100,000, as provided by section 3765, Comp. Laws, 1909; the acceptance of such subscription to the capital stock being a part of the initial organization of the company, and not the doing of business as contemplated by section 3756, supra.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 38; Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. CORPORATIONS (§ 83\*) — STOCK SUBSCRIPTION—RIGHT TO CANCEL.

After a valid subscription to the capital stock of a corporation has been made, either before or after organization of the corporation, and which subscription has been accepted by the organized corporation, there can be no cancellation or withdrawal from the obligation without the consent of the corporation and all the stockholders, except on the grounds of fraud or mistake.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 328-336; Dec. Dig. § 83.\*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by W. M. King against Howeth & Co. and others. Judgment for defendants and plaintiff brings error. Affirmed.

Lee F. Wilson and E. G. Wilson, both of Oklahoma City, for plaintiff in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendants in error.

RITTENHOUSE, C. On the 1st day of April, 1909, the plaintiff entered into a contract of subscription with Howeth & Co., for the purchase of 250 shares of stock in the Oklahoma National Life Insurance Company. The contract is as follows:

"The Oklahoma National Life Insurance Company, Oklahoma City, Oklahoma. Subscription to Capital Stock. No. 687. Whereas, Howeth & Co., of Oklahoma City, Oklahoma, are promoting the organization of a life insurance company, incorporated in pursuance of the laws of the state of Oklahoma, under the name of the Oklahoma National Life Insurance Company, with an authorized capital stock of five hundred thousand dollars, and a paid-up capital of at least one hundred thousand dollars, and a net surplus of at least fifty thousand dollars, paid-up and free from promotion and organization expenses; and, whereas, by their acceptance of this subscription, said Howeth & Co., agree to endeavor with all reasonable diligence to accomplish on or before December 31, 1909, the organization of said corporation with capital stock and surplus fully paid as aforesaid, they defraying all expenses of promotion and incorporation: Now, therefore, I do hereby subscribe for 250 shares of the par value of ten dollars each, of the capital stock of the said Oklahoma National Life Insurance Company; and I do hereby agree with the said company and with the said Howeth & Co., to pay therefor the sum of five thousand dollars, as follows: The sum of thirty-seven hundred fifty dollars, I agree to pay to said Oklahoma National Life Insurance Company at any time after July 1, 1909, immediately upon receipt of notice from said Howeth & Co., that the capital stock of said Life Insurance Company has been subscribed in good faith in amounts and at rates netting the company at least one hundred thousand dollars of capital and at least fifty thousand dollars of surplus in the aggregate when paid. The remaining sum of twelve hundred fifty dollars, I agree to pay and do pay concurrently with this subscription, to the said Howeth & Co., in consideration of their agreement hereinbefore recited, and in lieu of any further or other contribution to the expenses of promoting and incorporating said company. Witness my hand, this, the 1st day of April 1909. W. M. King, M. D."

[1, 2] Plaintiff alleges that the Oklahoma National Life Insurance Company was a corporation, organized under the laws of the

state of Oklahoma, and was such corporation on the 1st day of April, 1909, but had not yet received a license to do an insurance business within the state at such time; that in pursuance of said contract plaintiff paid Howeth & Co. the sum of \$1,250 in lieu of any further or other contribution to the expenses of promoting and incorporating said insurance company, and was to pay at any time after July 1, 1909, upon receipt of notice, the sum of \$3,750, the same being consideration for 250 shares of stock in said insurance company; that plaintiff demanded a cancellation of the contract of subscription and return of the \$1,250 paid to Howeth & Co., as expenses, etc., on the ground of fraud, and alleged that he had withdrawn his subscription prior to the organization of said corporation and acceptance of said contract of subscription.

Stipulation was entered into admitting the execution of subscription to the capital stock of said Oklahoma National Life Insurance Company; the agency of Howeth & Co.; the payment of the \$1,250; that plaintiff had demanded of Howeth & Co., prior to bringing suit, the return of the \$1,250, and cancellation of the subscription contract; that no license was issued to the Oklahoma National Life Insurance Company at the time of demand; that Howeth & Co., as promoters and agents of the Oklahoma National Life Insurance Company, had secured subscriptions to said capital stock, sufficient to obtain for said company the aggregate sum of \$150,000; that at the time of making said subscription contract with Howeth & Co., they represented to plaintiff that said stock was taken and to be taken in serial form, \$22.50 per share for the second 10,000 shares, \$27.50 for the fourth 10,000 shares, and \$30 per share for the fifth 10,000 shares, and that all money received for said shares over and above \$10 per share and the expenses, etc., would constitute a surplus capital stock of said Oklahoma National Life Insurance Company; that Howeth & Co. and the Oklahoma National Life Insurance Company failed and refused to return to plaintiff the \$1,250, or to cancel said subscription contract, said contract having been placed on file at once with the secretary of said Oklahoma National Life Insurance Company; that at the time of bringing this suit the defendant Oklahoma National Life Insurance Company had perfected its initial organization and received its certificate of incorporation, subject to the constitutional and statutory requirements of the state of Oklahoma. In addition to said stipulation, witness R. B. Howeth, testified that he was secretary of the Oklahoma National Life Insurance Company; that he placed the name of plaintiff, and the number of shares subscribed for by him, on a book kept for that purpose by the Oklahoma National Life Insurance Company at the time it came into the office, and notified plaintiff by letter of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

acceptance of such subscription by the Oklahoma National Life Insurance Company, on the 2d or 3d day of April, 1909.

The stipulation and testimony of R. B. Howeth constitute all the evidence in this case. The plaintiff failed to furnish any evidence to substantiate his allegation of fraud. If he desired to rely upon his allegation of fraud, he should have proven that the defendant made a material representation which was false, and known to be false at the time, and made with the intention that it should be acted upon by the plaintiff, and that plaintiff relied upon such false representation to his injury. Inasmuch as the allegation of fraud is not proven, that question is eliminated from this cause.

[3] The remaining question to be determined by this court is as to whether a subscriber to the capital stock of a corporation can withdraw his subscription after acceptance by the corporation. It is admitted that the insurance company was incorporated, and it is not denied that the corporation accepted the contract of subscription, the only contention being that the corporation had no power to accept the contract of subscription until a license was issued under section 3756, Comp. Laws 1909, permitting the insurance company to commence business. This was not essential in order to give the corporation the power to accept the subscription. Section 3756, Comp. Laws 1909, provides that no domestic insurance company shall commence business until it has filed with the insurance commissioner a properly certified copy of its charter and articles of incorporation and a statement of its financial condition, and has received from the insurance commissioner a certificate to do business. Section 3765 provides that no domestic life insurance company shall be licensed to transact business in this state unless possessed of at least \$100,000 paid-up capital stock. The contention of plaintiff is that the insurance company, not having received a license to commence business, could not accept the contract of subscription until such license was issued. It is apparent that before an insurance company could comply with section 3765, supra, by showing that it had a paid-up capital of \$100,000, it would have to first accept the subscription for that amount to its capital stock, in order to make such showing. This would not be commencing business as contemplated by section 3756, supra, but would only be a part of its initial organization.

[4] The insurance company was duly incorporated and organized, and the subscription was filed and accepted by the insurance company before a demand was made for a withdrawal of such subscription. This being true, the plaintiff could not withdraw his subscription without the consent of the corporation and all the stockholders, except on the ground of fraud or mistake.

It was held in *Chicago Building & Mfg. Co. v. Lyon*, 10 Okl. 704, 64 Pac. 8:

"One cannot withdraw his subscription to the capital stock of a corporation without the consent of all persons who subscribed to such stock, prior to such withdrawal."

In 1 *Thompson on Corporations*, § 760, it is said:

"It may be asserted, as the first rule under this proposition, that, after a valid subscription to the capital stock of a corporation has been made and accepted, there can be no cancellation or release from the obligation without the consent of the corporation and all the stockholders; in other words, the subscriber cannot withdraw from the corporation at his pleasure."

In 1 *Purdy's Beach, Private Corporations*, § 240, it is said:

"A subscription may, of course, be withdrawn any time before its acceptance by the corporation and without its consent, whether made before or after organization of the corporation; but after it has been accepted, the subscriber cannot, without consent of the corporation, surrender his shares in a way to avoid liability to payment of his subscription. \* \* \* To effect such a surrender of shares the express or implied consent of all the parties in interest is requisite." *Sanford Starrett v. Rockland Fire & Marine Ins. Co.*, 65 Me. 374; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701; *Hudson R. E. Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; *Id.*, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Marysville Electric L. & P. Co. v. Johnson*, 98 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; *Mill Co. v. Felt*, 87 Me. 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. Rep. 323; *Cook on Corporations*, vol. 1, § 169.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

WEATHERFORD MILLING CO. v. DUNCAN, County Treasurer. (No. 3645.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

1. TAXATION (§ 605\*)—BACK TAX PROCEEDINGS—APPEAL TO COUNTY COURT—STATUTES—OTHER REMEDY—INJUNCTION.

Section 1, of chapter 81, art. 9, Session Laws 1908, allowing an appeal to the county court from the action of the county treasurer in assessing property thereunder, did not, by implication, repeal section 4440, Wilson's Rev. & Ann. St. 1903 (section 4881, Rev. Laws 1910), of the Code of Civil Procedure, permitting an injunction to restrain the levy and collection of an illegal tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1229; Dec. Dig. § 606.\*]

2. TAXATION (§§ 495, 608\*)—BACK TAX PROCEEDINGS—ILLEGAL ASSESSMENT—REMEDIES OF TAXPAYER.

Where the taxes sought to be assessed or collected under the above chapter are illegal, the aggrieved party had two concurrent remedies; one by appeal from the action of the treasurer to the county court, the other by an injunction as prescribed in section 4881 of the Code of Civil Procedure.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 889, 1230-1241; Dec. Dig. §§ 495, 608.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**2. TAXATION (§ 608\*)—BACK ASSESSMENT—CORPORATION—CAPITAL STOCK.**

Where a milling corporation has disposed of all of its capital stock and invested the proceeds in tangible property, real and personal, and an attempt is made to assess its capital stock to the corporation, as omitted property, under the provisions of the Tax Ferret Statute, such attempt is illegal, and not warranted by the statutes, and the action of the treasurer making such assessment or attempt to collect the taxes thereon may be restrained by injunction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Custer County; Jas. R. Tolbert, Judge.

Action by the Weatherford Milling Company against James T. Duncan, Treasurer of Custer County. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

T. W. Jones, of Weatherford, and Keaton, Wells & Johnston, of Oklahoma City, for plaintiff in error. Thomas & Thomas, of Wagoner, for defendant in error.

**GALBRAITH, C.** On the 23d day of April, 1909, the Weatherford Milling Company filed its petition in the district court of Custer county, seeking an injunction against Jas. T. Duncan, treasurer of Custer county, to prevent him from levying and collecting certain taxes, which it was charged he was attempting to levy and collect against the property of the plaintiff. It was charged in the petition that the defendant had served notice on it that certain property, to wit, its capital stock, had been omitted from the assessment and tax rolls for the years 1908-1908, and that, at the time therein specified, unless sufficient cause was shown for not doing so, he would proceed to assess such property for taxes for said years; that the plaintiff appeared at the time and place mentioned in the notice and filed a protest against the assessment being made on the grounds that it did not own its capital stock, and that the same had been sold to various and sundry parties, and the proceeds thereof had been invested in real and personal property, all of which had been assessed for said years, and the taxes paid thereon; that this protest was overruled by the county treasurer, and the full amount of the plaintiff's capital stock, \$25,000, was assessed by said treasurer for each of said years, and that said taxes amounted in the aggregate to the sum of \$3,517.50; that the treasurer intended to and would, unless restrained by order of court, extend said taxes on the tax rolls of said county, and the same would become a lien on the plaintiff's property; and that said taxes were void, and asked for an injunction against the treasurer preventing him from extending said taxes on the tax rolls, and from taking any further steps to collect the

same. On April 23, 1909, a temporary injunction was granted. On the 21st of June thereafter a motion to dissolve the injunction order was filed and argued and thereafter overruled by the district judge, and the defendant given time to answer. On May 25, 1911, the defendant answered. On August 7, 1911, the defendant was permitted by the court to withdraw his answer and file a motion to dismiss. The ground of this motion was that the plaintiff had a plain, adequate, and complete remedy at law, inasmuch as the statute provided that it might appeal to the county court from the action of the treasurer in assessing said property. This motion was sustained, and the action dismissed. To review this order of the district court, the plaintiff has perfected an appeal to this court.

It is argued by the plaintiff in error that the taxes sought to be levied and assessed against its capital stock were illegal and void; and, second, that, being illegal and void, it had a right to proceed by injunction to restrain the action of the treasurer.

[1] The county treasurer was proceeding under what is known as the "Tax Ferret Law," being chapter 81, art. 9, of the Session Laws of 1908, section 2 of which reads:

"Property that has been omitted from assessment through a series of years, shall be listed and assessed for each year that it has been omitted and charged with the levy for that year."

Section 1 of this act, being brought forward as section 7449, Rev. Laws 1910, reads as follows:

"The board of county commissioners of any county in this state may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed, as required by existing laws, and fix the compensation at not to exceed fifteen per cent. of the taxes recovered under this article. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days' notice thereof by registered letter, addressed to him at his last known place of residence, fixing the time and place when objections in writing to such proposed listing and assessment may be made. An appeal may be taken to the county court for the final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the district court."

[2] It will be observed that the last section above quoted provides that an appeal may be taken to the county court from the action of the treasurer within ten days in the same manner as appeals are taken from the board of county commissioners to the district court. Section 4440 of the Laws of 1903, brought forward as section 4881, Rev. Laws 1910, reads in part:

"An injunction may be granted to enjoin the enforcement of a void judgment, the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment or any proceeding to enforce the same. \* \* \*"

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 140 P.—75

It is contended on behalf of the defendant in error that the Tax Ferret Statute, above quoted, by providing an appeal to the county court from the action of the treasurer in making an assessment, provided a plain, adequate, and complete remedy for any person aggrieved by such assessment, and that such remedy is exclusive and repealed by implication section 4881, and therefore denies to the aggrieved person the right to pursue the equitable remedy by injunction against the treasurer in such cases. The first question, therefore, presented is whether or not the person aggrieved by the act of the treasurer proceeding under this Tax Ferret Statute has the concurrent remedies of an appeal as provided in that statute, and the right to an injunction as provided in the Code of Civil Procedure.

It is clear that there is nothing in the Tax Ferret Statute that in any way conflicts with the statute giving the right to an injunction, and also that the later statute does not by any direct reference repeal the former, and that, if the adoption of the Tax Ferret Statute effectuates a repeal of the former statute allowing a remedy by injunction, the same was by implication. The repealing clause in the Tax Ferret Statute reading, "repealing all laws and parts of laws in conflict therewith," adds nothing to the repealing force of such statute. As was said by the Circuit Court of Appeals for the Eighth Circuit, in *Great Northern Ry. Co. v. U. S.*, 155 Fed. 945, 84 C. C. A. 93:

"A clause generally repealing 'all laws and parts of laws in conflict with' the act of which it is a part repeals nothing that would not be equally repealed without it."

Repeals by implication are not favored in law. In *re Application of State to Issue Bonds, etc.*, 33 Okl. 797, 127 Pac. 1065. For a full and exhaustive discussion of this question, and the effect of a later statute on the earlier one, covering the same subject, where there is not a clear and express provision in the later repealing the former, see the opinion of the court in *Huston v. Scott*, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721.

The court below, in dismissing the cause, held that the provision of section 1 of this Tax Ferret Statute allowing an appeal by the party aggrieved from the county treasurer to the county court was a plain, adequate, and complete remedy, and was the only remedy allowed the aggrieved party. In this the court was clearly in error, since it has been held that no appeal lies from the action of the county court in such cases to the Supreme Court. *State v. Cawthorn's Estate*, 31 Okl. 561, 122 Pac. 522. It follows that the judgment of the county court in such cases is final.

We cannot hold that the proceedings for review as provided in this Tax Ferret Statute by appeal from the action of the county treasurer to the county court, in cases of such great importance, is in law language

in any sense a plain, adequate, and complete remedy. It seems to be more in keeping with reason and justice and the authorities to hold that the party aggrieved at the action of the county treasurer had two concurrent remedies to select from: (1) If he is willing to accept the judgment of the county court in the matter as final, he may appeal from the order of the county treasurer to that court; but (2) if he wishes to have the district court pass upon the question involved, with the privilege of having its judgment reviewed by the Supreme Court, he had the right to proceed by injunction. At any rate the statutes of Oklahoma provide these two remedies, and they are concurrent and availing to the aggrieved party in all cases where the taxes sought to be assessed and levied are illegal and void. It was alleged in the petition in the instant case that the taxes sought to be levied and assessed were illegal and void, and this fact, we assume, was admitted by the defendant and taken as true by the trial court in making the order complained of.

Attention has been called to the case of *Williams, County Clerk, v. Garfield Exchange Bank*, 38 Okl. 539, 134 Pac. 863, and a line of cases to the same effect, which hold that, where the statute provides a mode of review by an appeal from an order making "an assessment or equalization" of property for taxation, that remedy is exclusive, and equitable remedies cannot be resorted to. Those cases arose under a later statute, and were all cases growing out of the action of the board of equalization in raising the aggregate valuation of the property in a taxing district, and the statute under which these cases arose also provided that appeals from the action of the board of equalization shall be the sole method by which assessments shall be corrected or taxes abated, and prohibited resort to equitable remedies except in one instance. This statute which became effective June 17, 1910, after the cause of action in the instant case arose, reads:

Section 7370, Rev. Laws 1910: "The proceedings before the board of equalization and appeals therefrom shall be the sole method by which assessments or equalizations shall be corrected or taxes abated. Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made."

It will thus be seen that the statute under which the question in those cases arose provided specifically that the method for review by appeal should be exclusive with only one exception, and specifically forbid the resort to equitable remedies. It will be observed that no such provision as that last above quoted is found in the Tax Ferret Statute, and there is no expressed prohibition in it that would deny the aggrieved party the right to resort to equitable relief if he wishes to do so.

[3] The second question argued in this appeal is that the taxes attempted to be assessed and levied in the instant case were



void. It was charged in the petition, and admitted by the defendant for the purposes of the motion, that the plaintiff did not own any of its capital stock, and that it had all been sold, and the proceeds invested in tangible property, real and personal, which had been duly assessed, and the taxes paid thereon for the several years for which it was attempted to assess its capital stock in this proceeding.

Article 2 of chapter 75 of the Laws of 1903, § 5929, provides for listing as taxable property "to each person" the amount of stock or shares in any incorporated company or company not incorporated. This section seems to provide for the assessing of capital stock of all incorporated or unincorporated companies to the individual owners of the stock, except the stock in banking corporations, and, since the subsequent provision of that chapter provides a special method for assessing the stock of banking corporations in a different manner from the stock in other incorporated and unincorporated companies, the inference is justifiable that the latter sections of the statute refer to the method of assessing the stock in banking corporations only. So, if it is true, as alleged in the petition, that the plaintiff did not own any of its capital stock it could not be rightfully assessed with the value of such stock. It is alleged in the bill and admitted by the motion that all of its capital stock was invested in tangible, real, and personal property, and had been listed for taxes, and the taxes paid thereon, and under such allegations it appears that the plaintiff had borne its full share of the burdens of government, and the provision that "taxes shall be uniform upon the same class of subjects" (Williams' Okl. Const. § 270) would protect it from the action attempted by the treasurer, since such taxation would be unequal with other property in the taxing district, and, in effect, would amount to double taxation. Mr. Cooley, in his work on Taxation (3d Ed.) vol. 1, pp. 394-397, in discussing this question, said:

"There is a sense, however, in which duplicate taxes may be understood—and which we think is a proper sense—which would render it wholly inadmissible under any Constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while the other subjects of taxation belonging to the same class are required to contribute but once.

"We do not see, for instance, how a tax on a merchant's stock distinctively by value could be supported, when, by the same authority, and for the same purpose, the same stock was taxed by value as a part of his whole property. This is a very different thing from one tax upon the property and another upon the business, though the latter may indirectly reach the property; here is no circumlocution, no question of ultimate effects, but a tax levied twice on the same subject, only under different names. The same may be said of a tax on

the property of a corporation, and also on the capital stock which is invested in the property; if the latter is taxed as property, this also is duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value when on the same basis it is taxed as a part of his general property. When, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery, these are what then represent the capital, and to tax the capital as valuable property distinct from that which then represents it would be to tax a mere shadow; it would be to make the shadow stand for the substance in order that it might be taxed, when the substance itself is taxed directly under its own proper designation. We do not speak here of a taxation of the property, and also of the franchise, those being two things, as will be seen further on."

For cases illustrating the application of these principles, see *Wheeler v. Board of Commissioners*, 88 Me. 174, 33 Atl. 983; *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335, 26 N. E. 672; *Lewiston Water & Power Co. v. Asotin Co.*, 24 Wash. 371, 64 Pac. 544.

We conclude that, if the facts alleged in the petition are true, the plaintiff was not liable to be assessed on its capital stock, as attempted to be done by the county treasurer, and that therefore the taxes were illegal and void, and that the action of the treasurer in assessing and attempting to collect the tax should have been restrained. There is a question of fact in the case which must be determined in the trial court, and the case should be reversed and remanded to the district court of Custer county, with directions to set aside the judgment dismissing the case, and to reinstate the cause, and the defendant should be allowed to answer, and the court should proceed to determine the facts and apply the law as herein declared.

PER CURIAM. Adopted in whole.

CORNELIUS, Register of Deeds, v. STATE  
ex rel. CRUCE, Governor, et al. (No. 5917.)  
(Supreme Court of Oklahoma. May 12, 1914.)

(Syllabus by the Court.)

MANDAMUS (§ 82\*)—TAXATION (§ 213\*)—MORTGAGES—RECORDING TAX—"REVENUE BILL."  
A mortgage, conveying to the Commissioners of the Land Office, for and on behalf of the state, certain land to secure a loan of \$1,000 of the permanent school funds, is the property of the state, and as such, by virtue of Const. art. 10, § 6, is exempt from the tax thereon sought to be imposed by act approved July 12, 1913 (Laws 1913, c. 246), which is not a revenue bill within the meaning of Const. art. 5, § 33.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 139, 177-179; Dec. Dig. § 82;\* *Taxation*, Cent. Dig. § 353; Dec. Dig. § 213.\*]

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Mandamus by the State, on relation of Lee Cruce, Governor, and others, against M. Cornelius, Register of Deeds of Oklahoma County, to compel the recording of the mortgage for loan of permanent school funds without

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

payment of the mortgage registration tax imposed by Laws 1913, c. 246. From a judgment granting the writ, the register brings error. Affirmed.

D. K. Pope and A. L. Hilpert, both of Oklahoma City, for plaintiff in error. J. H. Chambers, of Oklahoma City, and R. E. Wood, of Shawnee, for defendants in error.

TURNER, J. On March 29, 1913, the commissioners of the land office, pursuant to Const. art. 6, § 32, and Revised Laws of 1910, § 7652, loaned to J. H. Morton and wife \$1,000 of the permanent school funds, and, as security therefor took back from them a mortgage conveying to said commissioners for and on behalf of the state, the "northwest quarter (N. W. ¼) of section fourteen (14), township fourteen (14) north range four (4), west of the Indian meridian, containing one hundred and sixty (160) acres, payable in five years." Later they presented said mortgage to M. Cornelius, register of deeds of Oklahoma county, for recording, and they tendered him \$1.85 as his fee for so doing, which he refused to accept and record said mortgage, for the reason that nowhere indorsed thereupon or accompanying the same was there a receipt of or from the county treasurer of Oklahoma county or other evidence showing payment of \$5, the tax sought to be imposed thereon by act approved July 12, 1913, Session Laws of 1913, c. 246. The question before us is whether mandamus will lie to compel him to record the mortgage. As the act was passed during the last five days of the Fourth Legislature, it is conceded by all concerned that mandamus will not lie if said act is a revenue bill within the contemplation of Const. art. 5, § 33. Said act is entitled:

"An act providing for exemption from ad valorem tax of mortgages on real estate and the indebtedness thereby secured, the payment of a registration tax when filing mortgages for record and providing for a procedure for collecting such special tax [sic] for other purposes."

After defining section 1, "real estate mortgage," which includes the one in question, section 2 provides:

"All mortgages of real property situated within the state which are taxed by this article, and the debts and obligations which they secure, together with the paper writings evincing the same, shall be exempt from ad valorem and all other taxation by the state, counties, towns, cities, villages, school district and other local subdivisions of the state, except this act shall not affect in any manner the collection of any income tax payable in whole or in part from the interest received from such mortgage indebtedness. The exemption conferred by this exemption shall not be construed to impair or in any manner affect the purchaser of real estate which may be sold for nonpayment of taxes levied by any local authority."

Section 3 then provides:

"No mortgage of real property situated within this state shall be exempt, and no person or corporation owning any debt or obligation secured by mortgage of real property situated within this state shall be exempt from the

tax imposed by this article by reason of anything contained in any other statute, or by reason of nonresidence within this state, or for any other cause."

That part of section 4 applicable, if at all, to this mortgage then provides for a tax of 50 cents on each \$100 secured thereby. It is unnecessary to quote further from the act. It is apparent that this act is not a revenue bill within the contemplation of said section of the Constitution, for the reason that the revenue to be derived therefrom is merely an incident to the main object of the bill, and that its general purpose was not that of raising revenue.

In *Twin City National Bank of New Brighton v. Nebeker*, 3 App. D. C. 190, in the body of the opinion it is said:

"While the primary object of all taxation is the raising of revenue for the support of the government, and all bills for that general purpose are 'bills for raising revenue,' in the sense of the Constitution, and therefore must originate in the House of Representatives, it does not necessarily follow that every bill for some other legitimate and well-defined general purpose becomes a revenue bill in the same sense, because, as an incident to the main object, it may contain a provision for the payment of certain dues, license fees, or special taxes."

In the syllabus the court says:

"The fact that that portion of National Bank Act June 3, 1904, § 41 (18 Stat. 111), which imposes a semiannual tax upon the circulating notes of the national banks organized under the act had its origin in the Senate by amendment to the bill as originally introduced in the House does not invalidate it," as "the amendment was not an independent measure and did not convert it into a bill for raising revenue in the sense of Const. art. 1, § 7," providing that bills for raising revenue must originate in the House of Representatives.

In *Mumford v. Sewell*, 11 Or. 67, 4 Pac. 585, 50 Am. Rep. 462, the act assailed was of October 26, 1882, and entitled:

"An act to define the terms 'land' and 'real property' for the purpose of taxation and to provide where the same shall be assessed and taxed, and to declare what instrument whereby land or real property is made security for the payment of a debt shall be void, and to repeal sections 2 and 7 of c. 50 of Misc. Laws of Oregon."

Among other things the act provided that mortgages on real estate should, for the purpose of taxation, be deemed to be real property, and should be assessed and taxed to the owner thereof in the county where recorded. The act made it the duty of the county clerk, where requested by the owner of a mortgage recorded in his office, to record in the margin of the record of the mortgage all payments made on the indebtedness which such mortgage was given to secure. Pursuant to the act, respondent requested the appellant, the county clerk of a certain county in the state, to record in the margin of a certain mortgage recorded in his office certain payments made thereon, which he refused to do, whereupon respondent instituted certain proceedings, which resulted in a peremptory writ of mandamus requiring him so to do. On appeal the clerk urged among other defenses that the

bill was unconstitutional; on this point the court said:

"Some of us have considerable doubt whether the bill is not properly a bill for raising revenue, and therefore in violation of section 18 of article 4 of the state Constitution, because it originated in the Senate. But it is not sufficiently clear that a law, which merely declares that certain property theretofore exempt from taxation shall thereafter be subject to taxation, is strictly a law for raising revenue. We do not feel warranted, therefore, as at present advised, in declaring the law unconstitutional on this ground," and affirm the judgment.

This same act was again brought in question, and the same point raised, in *Dundee Mortgage Trust Investment Co. v. Parrish et al.* (C.C.), 11 Sawyer, 92, 24 Fed. 197, where Judge Deady, after quoting from *Mumford v. Sewell*, supra, as we have done, puts the question left open in this case beyond doubt. He said:

"But I am clear that this is not a bill for raising revenue. True, it provides that when revenue is to be raised mortgages shall contribute thereto as land; but it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue, or a 'money bill,' as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the county for a public purpose; and the assessment, or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon. The Constitution of the United States (section 7, art. 1) contains a provision on this subject similar to the one in the state Constitution. It reads: 'All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills.' In speaking of this clause, Story, in his commentaries on the Constitution (section 880) says: 'And, indeed, the history of the origin of the power, already suggested, abundantly proves that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which may incidentally create revenue.'"

See, also, *Anderson v. Ritterbusch*, County Treasurer, 22 Okl. 761, 98 Pac. 1002.

We are therefore of the opinion that there is no merit in the contention that the act is a revenue bill within the contemplation of said section of the Constitution.

The next question for us to determine is whether this mortgage, securing as it does a loan of moneys from the permanent school fund, is exempt from the tax imposed by the act. Stripped to the point, Const. art. 10, § 6, provides:

"All \* \* \* property used exclusively for schools, \* \* \* and all property of this \* \* \* state; \* \* \* shall be exempt from taxation."

There can be no doubt that this money was loaned from a fund the property of the state. Enabling Act, § 7, provides that upon the admission of the state into the Union sections 16 and 36 in every township in Oklahoma Territory and all indemnity lands theretofore selected in lieu thereof are "hereby granted

to the state for the use and benefit of the common schools."

Section 9 provides that the proceeds of these lands, if sold, shall "constitute a permanent school fund, the interest of which only shall be expended in the support of such schools."

Section 7 of said act also appropriated to the state out of the treasury of the United States \$5,000,000 "for the use and benefit of the common schools of the state," in lieu of certain lands in the Indian Territory. It also provides that:

Said sum "shall be paid to said state for the use and benefit of its public schools. Said" sum to "be held and invested by said state, in trust, for the use and benefit of said schools, and the interest thereon shall be used exclusively in the support and maintenance of said schools. \* \* \*"

By Const. art. 11, § 1, the state accepted "all grants of lands and donations of money made by the United States under the provisions of the Enabling Act, \* \* \* for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated," and pledged the faith of the state to preserve such lands and moneys, and all moneys derived from the sale of any of said lands, as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated. It will then be seen that the state is the owner of such lands and moneys by virtue of grants and donations which implies that the title thereto is in the state. *Betts v. Com. of the Land Office*, 27 Okl. 64, 110 Pac. 766; *State ex rel. Dunlop v. Cruce et al.* Com. Land Office, 31 Okl. 486, 122 Pac. 237.

The next section provides:

"All proceeds of the sale of public lands that have heretofore been or may be hereafter given by the United States for the use and benefit of the common schools of this state, all such per centum as may be granted by the United States on the sales of public lands, the sum of five million dollars appropriated to the state for the use and benefit of the common schools in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory, the proceeds of all property that shall fall to the state by escheat, the proceeds of all gifts or donations to the state for common schools not otherwise appropriated by the terms of the gifts, and such other appropriations, gifts, or donations as shall be made by the Legislature for the benefit of the common schools, shall constitute the permanent school fund, the income from which shall be used for the maintenance of the common schools in the state. The principal shall be deemed a trust fund held by the state, and shall forever remain inviolate. It may be increased, but shall never be diminished. The state shall reimburse said permanent school fund for all losses thereof which may in any manner occur, and no portion of said fund shall be diverted for any other use or purpose."

And section 6:

"The permanent common school and other educational funds shall be invested in first mortgages upon good and improved farm lands within the state. \* \* \*"

Nothing further is required to show that the \$1,000 evidenced by the mortgage in ques-

tion was loaned from the property of the state. Not only that, but the mortgage itself, which evidences the loan and which is sought by the act to be taxed, is also the property of the state, and as such is within the contemplation of the section of the Constitution, supra, and exempt from taxation.

We say the mortgage is the property of the state, and it is as much so as a promissory note would be my property which is made payable to me and evidenced a loan made out of funds belonging to me. The proposition is so simple as not to require authority to support it.

It follows that the judgment of the trial court is affirmed, and the suit dismissed. All the Justices concur.

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**SHULTISE v. TOWN OF TALOGA et al.**  
(No. 3046.)

(Supreme Court of Oklahoma. May 12, 1914.)

(*Syllabus by the Court.*)

1. CONSTITUTIONAL LAW (§§ 289, 290\*)—MUNICIPAL CORPORATIONS (§§ 266, 407\*)—IMPROVEMENTS—SIDEWALKS—SPECIAL ASSESSMENTS.

The board of trustees of an incorporated town, organized in pursuance of the laws of Oklahoma Territory, as extended in force in the state by the terms of section 2 of the schedule to the Constitution, and the provisions of section 10 of said schedule, has the power to levy special assessments against abutting property for the purpose of laying sidewalks. *Leatherman v. Town of Addington*, 37 Okl. 436, 182 Pac. 129.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-875; Dec. Dig. §§ 289, 290; \* Municipal Corporations, Cent. Dig. §§ 712, 1003, 1004; Dec. Dig. §§ 266, 407.\*]

2. EMINENT DOMAIN (§ 2\*)—TAKING PRIVATE PROPERTY WITHOUT COMPENSATION—STATUTES.

A statute that authorizes the trustees of an incorporated town, after notice to the abutting property owners, to construct sidewalks in front of their property, and, upon failure of owners to construct same, to construct such improvements and assess the cost thereof to the abutting property upon a frontage basis, and to issue a tax warrant for the actual cost of labor and material, obtained at the market price, and used for such improvements, and to make such tax warrant a lien against the property therein described, contravenes neither section 7 or 24 of article 2 of the Constitution; hence such statute is not invalid on that account.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.\*]

3. ELECTIONS (§ 120\*)—PRIMARIES—STATUTES—APPEAL.

The act of March 13, 1909, entitled "An act regulating elections in cities and towns; requiring nominations by primaries; prescribing the time for such elections; repealing section 8, article 1, chapter 14, of the Statutes of Oklahoma, 1893, as amended by section 1, article 1, chapter 6, Session Laws of Oklahoma, 1897; also repealing sections 9 and 10 of article 1, chapter 14, of the Statutes of Oklahoma, 1893; also repealing sections 12, 13, 14, 15, 16 and 17 of said Statutes of Oklahoma, 1893, and declaring an emergency" (Sess. Laws 1909, c. 16, art. 2, p. 262)—repealed section 841, Comp. Laws 1909, which provides that the inspectors at municipal

elections shall make a certified statement over their signatures of the persons elected to fill the several offices in such municipality, and file the same with the county clerk in the county within ten days after the date of such election.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Dewey County; C. A. Brown, Judge.

Action by Milton Shultise against the Town of Taloga, D. R. Wright, R. E. Carmichael, and G. W. Kouns, as the board of trustees of the Town of Taloga, W. T. Bell, John Bremer, and J. M. Williams, as the County Treasurer of Dewey County, and his successor in office. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

W. P. Hickok, of Taloga, for plaintiff in error. Robert E. Adams, of Taloga, for defendants in error.

SHARP, C. Plaintiff's action was instituted in the district court of Dewey county January 3, 1911, and, after answer was filed, the parties filed the following agreed statement of facts:

"Comes now Milton Shultise, the plaintiff above named, by his attorney, W. P. Hickok, and the town of Taloga, D. R. Wright, G. W. Kouns, and R. E. Carmichael, as the board of trustees of the town of Taloga, in Dewey county, Oklahoma, W. T. Bell, and John Bremer, and J. M. Williams, as the county treasurer of Dewey county, and E. L. Porter, his successor in office, defendants, by their attorney, Robt. E. Adams, and all of said parties do hereby submit the following agreed statement of facts as and for all of the relevant, material, and competent evidence in said cause above named, and ask the court to consider same as the evidence in the case. Said facts are as follows, to wit:

"I. That the town of Taloga, in Dewey county, Oklahoma, is, and was at all times hereinafter mentioned, a duly and legally incorporated town or village, organized, incorporated, and existing under and by virtue of the statutes of Oklahoma Territory, now state of Oklahoma.

"II. That D. R. Wright, G. W. Kouns, and R. E. Carmichael constitute the duly elected, qualified, and acting board of trustees of the said town of Taloga, and were such duly elected, qualified, and acting trustees at all times hereinafter mentioned.

"III. That Milton Shultise, plaintiff herein, is, and was at all times hereinafter mentioned, the owner in fee simple and in possession of the following described real estate in Dewey county, Oklahoma, to wit: Lots 1 and 2, in block 68, and lots 11 and 12, in block 54, all in the original town of Taloga, Oklahoma, according to the official plat thereof on file in the office of the register of deeds of Dewey county, Oklahoma.

"IV. That the board of trustees did, on or about the 6th day of July, A. D. 1909, in a duly and regularly called and constituted meeting of said board, introduce, consider, and pass an ordinance designated as Ordinance No. 14, a copy of which said Ordinance No. 14 is hereto attached, referred to, and marked Exhibit A, and made a part hereof. That said ordinance was duly and legally signed by the president of said board of trustees, D. R. Wright, with the seal of said board attached and attested by the clerk of said town, and was duly and legally published as required by the laws

of the state of Oklahoma relating to cities, towns, and villages, and that all of the requirements of the laws of the state of Oklahoma governing cities, towns, and villages were complied with in the passage of said ordinance and the adoption thereof.

"V. That thereafter, and prior to the institution of this suit, the said board of trustees, in pursuance of and in accordance with said Ordinance No. 14, passed resolutions levying special taxes against the lots herein described, for a sidewalk along said lots, on the streets of said town, and that all of the notices, steps, and proceedings required and provided by the laws of the state of Oklahoma then in force and applicable to towns and villages in said state, relating to the building of sidewalks, and levying of special taxes therefor by such municipalities, and including all notices, assessments, and estimates, were by said board of trustees and the town clerk and marshal of the town of Taloga made, given, and served, as provided by the laws of the state of Oklahoma in force at said time, and true and correct copies of said proceedings are hereto attached and referred to and made a part hereof. That ten days' notice of said assessment, resolution, and intention to build said sidewalk was given and served on the plaintiff herein, and proof of service filed as required by law.

"VI. That the plaintiff, after notice as aforesaid, failed and refused to build said sidewalk, or any part thereof, and the same was thereafter built by John Bremer and W. C. Bell, defendants herein, at the instance and request of the said board of trustees acting for the town of Taloga.

"VII. That said sidewalk was built and constructed according to the provisions and requirements of said Ordinance No. 14, and a tax warrant issued by said town of Taloga against each separate lot aforesaid abutting said improvement, and said tax warrants were filed with the clerk of said town of Taloga, as required by law, and a notice of their issuance published in the Taloga Advocate, a newspaper published in said corporation and located therein, for four weeks successively. That at the expiration of said notice the said plaintiff herein did not, nor did any one for him, pay the amount named in said warrant, with fees of the clerk and costs of publication, nor any part thereof, and thereafter the said board of trustees caused a penalty of 25 per cent. to be added to said fees and costs and made a part of the original assessment, and the clerk of said town listed each of said tax warrants as aforesaid, with full description of the property therein, with all the costs and penalties thereon, and presented the same to the county clerk of Dewey county, Oklahoma, at the time for said clerk to transmit the annual levy of said town of Taloga, and the same were by said clerk extended on the tax rolls and entered for collection and delivered to the treasurer of Dewey county, Oklahoma.

"VIII. That all the requirements of the laws of the state of Oklahoma respecting said levy and the certification thereof, and extending same on the tax rolls for collection, were regularly and legally done by the proper and duly qualified officers of said town and county.

"IX. That the parties hereto further agree that no point is to be made in the trial of this cause on the regularity of any of the proceedings taken by said officers in said matter, but same are admitted to be regular and in compliance with the statutes of the state of Oklahoma in force at such time.

"X. It is further agreed that the plaintiff, before the building of said sidewalk, and before any steps were taken toward building same, notified the defendants to refrain from building same, and from interfering with, tearing up, or destroying the sidewalk already built adjacent to the said lots, and served upon the defendants such notice in writing.

"XI. That the said special assessment, tax, and penalty thereto added are spread upon the tax rolls of the county of Dewey as liens and tax charges against the said lots, prima facie, and apparently valid liens and charges against the said lots, and that the county treasurer threatens, and will if not restrained, or if said special tax and assessment be not paid, sell the said lots and collect the said special tax and assessments and penalties thereto added, as well as the other taxes against said lots. That all other taxes against said lots are as follows, to wit.: Against lot 1, in block 68, the sum of \$15.86; against lot 2, block 68, the sum of \$6.34; against lot 11, block 54, the sum of \$22.20; against lot 12, block 54, the sum of \$3.56—and that several sums against the said several lots were tendered in lawful money of the United States to the county treasurer at his office in Dewey county, Oklahoma, on the 27th day of December, 1910, as and for the payment of the taxes other than said special tax and penalty thereon added. That such tender and offer was by the county treasurer refused, and is still refused, and that such tender has been kept good. And plaintiff is and has been at all times ready and willing to pay all taxes against said lots except the said special tax and penalties thereon added. That the said special tax and assessment so of record and spread upon the tax rolls as aforesaid constitutes an apparently valid lien on said lands, and to the extent of the amount of such special tax depreciates the value of said lots in the market.

"XII. That the tax and penalty thereon are not designated separately in the county treasurer's office aforesaid.

"XIII. It is further agreed by the parties hereto that the precinct election inspectors or the official counters of the election board of the election at which said board of trustees were elected as trustees of said town of Taloga never executed any certificate showing the officers, or any officer, elected at such election to offices in said town of Taloga, nor filed the same, or any such certificate, with the county clerk of Dewey county, Oklahoma, or elsewhere, within ten days after said election was held as required by law. That said election was held under the election laws in force in the state of Oklahoma on the first Tuesday in April, A. D. 1909, governing elections in cities, towns, and villages. But it is agreed that the official counters of the said election made and executed their official counters' certificate of the vote at said election and returned the same to the county election board as required by law.

"Wherefore the parties hereto pray the court to render judgment according to their respective rights in the premises, and as prayed in the petition and answer, as the case may be.

"[Signed] W. P. Hickok,

"Attorney for Plaintiff.

"Robt. E. Adams,

"Attorney for Defendants."

The case coming on to be heard May 6, 1911, the temporary injunction theretofore granted was dissolved, and judgment rendered in favor of defendants. Motion for a new trial, being filed, was overruled, and an appeal duly prosecuted to this court. The three principal assignments of error requiring our consideration are: (1) Has the board of trustees of incorporated towns in this state a statutory grant of power to levy special assessments? (2) If such power is given for street improvements and the construction of sidewalks, that the statute, and ordinance enacted by the town of Taloga thereafter, and proceedings had in pursuance thereof, are unconstitutional. (3) If the boards of trustees of incorporated towns have power to

levy special assessments for the purpose of constructing sidewalks, the board of trustees of the town of Taloga could not exercise that authority because of the failure to comply with the requirements of section 2, art. 10, c. 8, Sess. Laws 1905. The assignments will be considered in the order named.

[1] It will be unnecessary to refer to the various sections of the different statutes bearing upon the question of the authority of a town board in incorporated towns and villages to levy special assessments for the purpose of building sidewalks, as the exact question was before this court in *Leatherman v. Incorporated Town of Addington*, 37 Okl. 436, 132 Pac. 129, in which the authority was upheld. It was there said, after reviewing the organic and statutory law of the state:

"It seems clear, in view of all these statutes, that incorporated towns and villages have the right to levy assessments upon abutting property for the purpose of building sidewalks."

Attention was there called to a former opinion of this court (*Edwards v. Thrash*, 28 Okl. 472, 109 Pac. 832, 138 Am. St. Rep. 975), in which it was said that the trustees of an incorporated town or village, organized under the laws of Oklahoma Territory, as extended in force in the state after its erection, are authorized and empowered to lay out, open, grade, and otherwise improve the streets, alleys, sewers, sidewalks, and crossings therein, and to keep them in repair, and to vacate the same (section 847, Comp. Laws 1909).

[2] Upon the second proposition, it is insisted that both the statute and town ordinance contravene section 7, art. 2, and section 24, art. 2, of the state Constitution. The former inhibition provides: "No person shall be deprived of life, liberty, or property, without due process of law." The latter in part reads: "Private property shall not be taken or damaged for public use without just compensation." Plaintiff's principal insistence under the former section is that neither the statute nor the ordinance under which the special assessments were made contain any provision for a consideration of the "benefits the property shall receive" by reason of the improvement, and that neither the statute nor ordinance makes provision for any hearing wherein the property owner may be heard on the subject of benefits or any other matter. The same contention was made in *Block v. Patrick*, County Treasurer, 35 Okl. 408, 130 Pac. 588, where it was claimed that on account of the failure of the statute to provide notice to the property owners, and opportunity for a hearing upon the assessment, which should be made against their property, they were denied the due process of law guaranteed by the fourteenth amendment to the federal Constitution. The language of this amendment is the same in effect as section 7, art. 2, of our Constitution. Disposing of the constitutional objection urged, in *Block v. Patrick*, supra, it was held by this court that a statute that authorizes the trustees of an

incorporated town, after notice to abutting property owners to construct sidewalks and gutters in front of their property, and, upon failure of such property owners, to construct such improvements and assess the costs thereof to the abutting property upon the frontage basis, and to issue a tax warrant for the actual cost of labor and material obtained at the market price, and used for such improvements, and make such tax warrant a lien against the property therein described, does not constitute a taking of property without due process of law, and should not upon that ground be declared invalid. One of the leading cases upon this subject, and which was cited and relied upon by this court in *Block v. Patrick*, supra, is *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, in which the earlier decisions of that court are reviewed at length, and the conclusion reached that an apportionment of the entire costs of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to their benefits, may be authorized by the Legislature, and this will not constitute a taking of property without due process of law. It would be futile for us to attempt to add to the very thorough and ably considered discussion to be found in that case. The same conclusion was reached by the territorial Supreme Court in *City of Perry v. Davis*, 18 Okl. 427, 446, 90 Pac. 865, and the rule there announced followed and adhered to in *Lonsinger v. Ponca City*, 27 Okl. 397, 112 Pac. 1006.

Recurring to the further objection that under section 24 of article 2 of the Constitution, providing that private property shall not be taken or damaged for public use without just compensation, it is now very generally held by the courts of last resort that similar provisions of state Constitutions have to do with restrictions upon the power of eminent domain, and require compensation to be made for property taken in the exercise of that power, but that such organic provisions have nothing to do with the power of taxation, and therefore have no application to local assessments which are a branch of the taxing power (Law of Special Assessments, Hamilton, §§ 47, 48, 49, 50, 51, 52, 53; *Gilman v. City of Sheboygan*, 67 U. S. [2 Black] 510, 17 L. Ed. 305; *People v. Mayor of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266). In *Riley*, County Clerk, v. *Carico*, 27 Okl. 33, 110 Pac. 738, this court held that, according to the current weight of authority, a special assessment for local improvements, whilst of a species of taxation, is neither a tax within the meaning of the constitutional requirements that all taxes shall be uniform throughout the state, nor does the levying of such assessment constitute a taking of property without due process of law.

No question is made in this court that the assessment made against the plaintiff's abutting property was in excess of the benefits re-

ceived, and the question, therefore, of the extent of the benefit incurred, not being involved, is not decided.

[3] Plaintiff in error's third contention is predicated upon a failure of the election inspectors to make a certified statement over their signatures of the persons elected to fill the several offices at the town election held on the first Tuesday of April, 1909, and to file the same with the county clerk of Dewey county within ten days after the date of such election. This was the requirement of section 2, art. 10, c. 8, of the Session Laws of 1905 (section 841, Comp. Laws 1909), and which section further provided:

"No act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with."

In the thirteenth paragraph of the agreed statement of facts, it is conceded that no such certificate was ever filed, but that, on the other hand, the official counters at said election made and executed their official counters' certificate of the vote cast thereat, and returned the same to the county election board. The foregoing section of the statute was not in force on the date of the election in question, but had been superseded by the provisions of an act entitled: "An act regulating elections in cities and towns; requiring nominations by primaries; prescribing the time for such elections; repealing section 8, article 1, chapter 14, of the Statutes of Oklahoma, 1893, as amended by section 1, article 1, chapter 6, Session Laws of Oklahoma, 1897; also repealing sections 9 and 10 of article 1, chapter 14, of the Statutes of Oklahoma, 1893; also repealing sections 12, 13, 14, 15, 16 and 17 of said Statutes of Oklahoma, 1893, and declaring an emergency"—which was approved March 13, 1909 (chapter 16, art. 2, p. 262, Sess. Laws 1909).

This latter statute was before the court in *Erwin v. Wheeler*, 31 Okl. 331, 120 Pac. 1098, where it was held that section 841, Comp. Laws 1909, providing that the inspectors at municipal elections should make a certified statement over their signatures of the persons elected to fill the several offices in such municipality, and should file the same with the county clerk of said county within ten days after the date of such election, was repealed by the passage of the act of March 13, 1909. Obviously, such was the legislative intent. While it is true there was error in the title of the act, as well as in section 4 of article 3, p. 268, in omitting to name the chapter in which sections 12, 13, 14, 15, 16,

and 17 of the Statutes of 1893 were to be found, yet, even though there be doubt as to the sufficiency of said latter act to expressly repeal that provision of the former act involved, it nevertheless worked a repeal by implication. It is a familiar rule that a statute revising the whole subject-matter of former acts, containing in the main the provisions of the former, and evidently intended as a substitute for them, although it contained no express words to that effect, operates to repeal the former acts. *Spencer v. Rippe*, 7 Okl. 608, 56 Pac. 1070; *Fritz v. Brown*, 20 Okl. 263, 95 Pac. 437; *Smock v. Farmers' State Bank*, 22 Okl. 825, 98 Pac. 945; *Ripey & Son v. Art Wall Paper Co.*, 27 Okl. 600, 112 Pac. 1119; *Hudson v. Ely*, 30 Okl. 576, 129 Pac. 11.

As was said in *Erwin v. Wheeler*, supra, the act of March 13, 1909, is complete within itself, and provides, among other things, that the election of officers in cities, towns, and villages shall be governed by the general election laws of the state, except wherein it is otherwise provided by said act, and that the regular precinct election board for and within both cities of the first class and incorporated towns and villages shall conduct all elections therein provided for, and that in incorporated towns and villages the precinct election board shall perform all duties imposed upon official counters in general elections.

If, as charged, plaintiff tendered the general tax on the lots and any penalty or accrued charges then due, the county treasurer should have accepted the same and issued his tax receipt therefor, and no additional penalty or interest should be added to the amount then tendered. The special assessment was no part of the regular tax theretofore levied and due. They were entirely disconnected, separate, and distinct charges, made by wholly different authorities, and entered and spread on the tax rolls as separate and distinct items in separate and distinct entries. We are aware of no statute or principle of law making the payment of the regular tax dependent upon the payment, at the same time, of special assessments for public improvements, levied upon the same property. It was the plaintiff's privilege to resist the payment of the latter and to pay the former.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.



## MEMORANDUM DECISIONS

**BEARD v. STATE.** (No. A-2035.) (Criminal Court of Appeals of Oklahoma. May 16, 1914.) Appeal from County Court, Murray County; Harry W. Fielding, Judge. Jake Beard was convicted of unlawfully conveying intoxicating liquor, and appeals. Affirmed. W. N. Lewis, of Davis, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Jake Beard, was convicted at the May, 1913, term of the county court of Murray county on a charge of unlawfully conveying intoxicating liquor from one place in Murray county to another, and his punishment fixed at a fine of \$50 and imprisonment in the county jail for a period of 30 days. Upon a careful examination of this record, we are of opinion that the judgment should be affirmed; and it is so ordered.

**BOWERS v. STATE.** (Criminal Court of Appeals of Oklahoma. March 17, 1914.) Appeal from County Court, Rogers County; Walter W. Shaw, Judge. Walter Bowers was convicted of violating the prohibitory law, and appeals. Affirmed. D. G. Elliott, of Claremore, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Walter Bowers, was convicted at the February, 1913, term of the county court of Rogers county on a charge of selling intoxicating liquors, and his punishment fixed at a fine of \$250 and imprisonment for 60 days. The appeal was taken to this court on the 18th day of April, 1913, and the cause submitted in this court for final determination on the 5th day of March, 1914. No briefs have been filed on behalf of the plaintiff in error, and no appearance made for oral argument. The Assistant Attorney General, on the hearing, moved for an affirmation of this cause on the ground that the appeal had been abandoned. We have examined the record, and find no error. The judgment of the trial court is therefore affirmed.

**BROCKHAUS v. STATE.** (Criminal Court of Appeals of Oklahoma. March 31, 1914.) Appeal from County Court, Kingfisher County; R. F. Shutler, Judge. William Brockhaus was convicted of selling intoxicating liquor, and appeals. Affirmed. D. K. Cunningham, of Kingfisher, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the state.

**PER CURIAM.** The plaintiff in error, William Brockhaus, was convicted at the January, 1913, term of the county court of Kingfisher county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$200 and imprisonment in the county jail for a period of 30 days. The testimony on behalf of the state was by two witnesses, a deputy sheriff and a man named Anderson. Each testified that they went into the place of business belonging to the accused and got a pint bottle of whisky about the 17th day of January, 1913. Counsel contend that the evidence does not show a sale, but, if anything, a gift. Witness Rutherford testified on cross-examination as follows: "Q. Where did you say you got this bottle? A. I bought it from this man Brockhaus. Q. Who give you this bottle? A. This man Brockhaus. Q. You asked him for a bottle of whisky? A. Yes, sir." The witness had previously testified that the bottle contained

whisky. It was opened in the presence of the court and jury, and submitted to the jury for inspection. This is the only testimony bearing on the question of the sale. In our judgment, it was amply sufficient to warrant the jury in finding the accused guilty as charged. We find no error sufficient to justify a reversal. The judgment of the trial court is therefore affirmed.

**CAUDILL v. STATE.** (Criminal Court of Appeals of Oklahoma. March 21, 1914.) Appeal from District Court, Beckham County; G. A. Brown, Judge. Oscar Caudill was convicted of assault and battery, and appeals. Affirmed. Hendrix & Tracy, of Sayre, and W. B. Merrill, of Elk City, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Oscar Caudill, was convicted on December 7, 1912, in the district court of Beckham county on a charge of assault and battery, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. Upon a careful examination of the record, we feel that the judgment of the trial court should be affirmed; and it is so ordered.

**Ex parte CLIFT.** (No. A-2252.) (Criminal Court of Appeals of Oklahoma. June 3, 1914.) Application for writ of habeas corpus by C. S. Clift. Writ allowed. S. A. Byers and Lee F. Wilson, both of Oklahoma City, for petitioner. The Attorney General, for respondent.

**PER CURIAM.** This is a petition for writ of habeas corpus, filed for the purpose of setting at liberty C. S. Clift. Petitioner avers that he is illegally restrained of his liberty, and is unlawfully imprisoned in the county jail of Oklahoma county, by M. C. Binion, sheriff of said county, by virtue of an illegal order of the Governor revoking a parole and ordering his rearrest and imprisonment upon a judgment of conviction in the county court of Oklahoma county, rendered on the 30th day of April, 1910, wherein petitioner was sentenced to serve 90 days in the county jail of Oklahoma county and to pay a fine of \$50 and costs and for the further reason that said judgment has been fully and lawfully executed and satisfied. It appearing from the record that the fine and costs were paid, and that said parole was granted and accepted 52 days after the judgment was rendered, and that petitioner has been imprisoned an additional 38 days at the time his amended petition herein was filed, it is our opinion that said judgment and sentence has been fully executed and satisfied, and that petitioner is therefore unlawfully imprisoned. Wherefore the writ of habeas corpus is allowed, and it is ordered that petitioner be forthwith discharged from further imprisonment under said judgment and sentence, and order revoking his said parole.

**CONLEY v. STATE.** (No. A-2027.) (Criminal Court of Appeals of Oklahoma. May 16, 1914.) Appeal from County Court, Oklahoma County; John W. Haysen, Judge. Ed Conley was convicted of violating the prohibitory law, and appeals. Reversed. Giddings & Giddings, of Oklahoma City, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Ed Conley, was convicted at the March, 1913, term of the county court of Oklahoma county on a



charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$300 and imprisonment in the county jail for a period of 60 days. Upon a careful examination of the record and briefs in this case, it is conclusively apparent that the state did not make a case of unlawful possession of intoxicating liquor with intent to sell the same against the accused. The competent proof in the record establishes the fact that an enforcement officer purchased a half pint of whisky on the 5th day of August, 1912, at a place on West California street from some person whom he says was not the accused. There is no testimony which tends to connect the accused with the transaction. This prosecution should have been against the person who made said sale for having made same. There is no evidence in the record tending to show that the accused ever received a shipment of whisky or other intoxicating liquor of any kind. There is no connection of any kind shown between the party making the sale and the accused. In order to justify a conviction, the state should show the possession of intoxicating liquor as charged, as well as facts which warrant a legitimate deduction of intent to sell. Possession may be had by a person through his agent, but the connection must be established. In other words, the crime must be proved, and the accused connected with the commission thereof. We cannot conscientiously say that this was done in this case. The judgment is therefore reversed.

**CONNERS v. STATE.** (No. A-2074.) (Criminal Court of Appeals of Oklahoma. April 25, 1914.) Appeal from County Court, Canadian County; W. A. Maurer, Judge. Charles Conners was convicted of violating the prohibitory law, and appeals. Dismissed. J. N. Roberson, of El Reno, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Charles Conners, was convicted at the March, 1913, term of the county court of Canadian county on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at imprisonment in the county jail for a term of 6 months and a fine of \$500. Judgment was pronounced by the trial court on the 27th day of May, 1913, at which time plaintiff in error was given 80 days to prepare and serve case-made and 60 days within which to lodge his appeal in the Criminal Court of Appeals. The appeal was filed in this court on the 23d day of August, 1913, more than 60 days after the rendition of the judgment; no order having been made by the trial court extending the time beyond 60 days. An appeal is taken to this court by filing a petition in error and attaching a case-made. In this case it appears that the case-made was filed in July, and that the petition in error was not filed until the 23d of August. The appeal therefore was not perfected in the manner provided by law. We therefore have no jurisdiction to determine any of the questions raised or attempted to be raised, and have jurisdiction only to dismiss the appeal and direct the trial court to enforce the judgment; and it is so ordered.

**FISHER v. STATE.** (No. A-2110.) (Criminal Court of Appeals of Oklahoma. April 29, 1914.) Appeal from County Court, Kiowa County; J. S. Carpenter, Judge. J. T. Fisher was convicted of suppressing evidence, and appeals. Dismissed. Hays & Hughes, of Hobart, for plaintiff in error.

**PER CURIAM.** Plaintiff in error was tried and convicted in the county court of Kiowa county upon an information which charged a violation of section 2258 (Rev. Laws) of the Penal Code. On the 16th day of August, 1913,

he was by the court sentenced in accordance with the verdict of the jury to be confined in the county jail for a period of 365 days. To reverse the judgment an appeal was perfected. On April 15, 1914, plaintiff in error filed a motion to dismiss his appeal, which motion is by this court allowed, and the appeal herein is ordered to be dismissed, and the cause remanded to the lower court.

**FLEEMAN v. STATE.** (Criminal Court of Appeals of Oklahoma. March 28, 1914.) Appeal from County Court, Greer County; Jarrett Todd, Judge. Tom Fleeman was convicted of a violation of the prohibitory law, and appeals. Reversed. J. A. Powers, of Mangum, for plaintiff in error. Chas. West, Atty. Gen., Smith O. Matson, Asst. Atty. Gen., and H. D. Henry, Co. Atty., of Mangum, for the State.

**PER CURIAM.** This appeal is prosecuted from a conviction had in the county court of Greer county, in which plaintiff in error was by the judgment of the court sentenced to be confined in the county jail for 80 days and to pay a fine of \$50. The Attorney General has filed a confession of error, which is in part as follows: "Among other instructions the trial court gave the following, which said instruction was excepted to at the time by plaintiff in error, and exceptions allowed by the court: 'If you believe from the evidence that any witness has willfully sworn falsely, then you may disregard the testimony of such witness only in so far as it is corroborated by other testimony which you do believe.' This is equivalent to saying that perjured testimony cannot be believed, when it is corroborated by credible testimony; in other words, it leaves the impression that such testimony must be believed, if uncorroborated by credible evidence. This instruction is plainly erroneous, and in view of the evidence in this case and the circumstances under which this alleged offense was committed, we think the giving of the same prejudicial to the plaintiff in error. The trial court evidently intended to word instruction 5 similarly to the one given in the case of *Gibbons v. Territory*, 5 Okl. Cr. 212, 115 Pac. 129; that is to say, that the jury could disregard such testimony, except in so far as the same was corroborated by other credible evidence; but even such instructions have been severely criticised by this court and in several cases held to be reversible error. *Gibbons v. Territory*, 5 Okl. Cr. 212, 115 Pac. 129; *Rea v. State*, 3 Okl. Cr. 281, 105 Pac. 386, 106 Pac. 982; *Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278. This court has on all occasions indicated plainly an intent to discourage the giving of such instructions, and has even gone so far as to point out the proper one to give on this subject. *Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278. For the reasons above given, we think instruction No. 5 given by the court and excepted to was erroneous, and we confess error accordingly." We are of opinion that the confession of error should be sustained. The judgment of conviction herein is therefore reversed, and a new trial granted. Mandate forthwith.

**GARDNER v. STATE.** (Criminal Court of Appeals of Oklahoma. March 28, 1914.) Appeal from County Court, Comanche County; H. N. Whalin, Judge. Val Gardner was convicted of conducting a gambling game, and appeals. Reversed. Fain & Young, of Lawton, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** This appeal is prosecuted from a conviction had in the county court of Comanche county on the 7th day of February, of this year, in which plaintiff in error was found guilty of conducting a gambling game. The petition in error, with case-made, was filed in this court on March 25, 1912. The next day

the Attorney General filed a confession of error, which, omitting the title, reads as follows: "Comes now the state of Oklahoma, by the Attorney General, and respectfully calls this honorable court's attention to the charging part of the information filed in this case, which is as follows: 'On the 16th day of August, 1913, Val Gardner, then and there being, did then and there willfully, unlawfully conduct as owner thereof a game of roulette for money, checks, and credit,' etc. To this information the defendant filed a demurrer upon the ground that the facts stated in said information did not constitute a public offense. This demurrer was overruled by the court, to which ruling the defendant excepted at the time, and the error of the court in so overruling the demurrer was set up in the motion for new trial, as well as in the motion in arrest of judgment, and the motion for a new trial was overruled, to which the defendant excepted, and the ruling of the court as aforesaid is assigned as error in the petition in error filed in this case. Under the holding of this court in the cases of *Brown v. State*, 5 Okl. Cr. 41, 113 Pac. 219, *Morgan et al. v. State*, 7 Okl. Cr. 45, 121 Pac. 1088, and *Proctor v. State*, 9 Okl. Cr. 81, 130 Pac. 819, the overruling of this demurrer constitutes reversible error, for the information must allege that those who played at the game so conducted played for money or some representative of value. For the above reason the Attorney General believes that under the holdings of this court sufficient error appears of record to require a reversal of this judgment, and confesses error accordingly, and moves the court for a speedy disposition of the case." We are of opinion that the confession of error is well founded, and should be sustained. The judgment of conviction herein is therefore reversed, and the cause remanded, with direction to sustain the demurrer to the information. Mandate forthwith.

**GRANT v. STATE.** (Criminal Court of Appeals of Oklahoma. March 17, 1914.) Appeal from District Court, Pontotoc County; Tom D. McKeown, Judge. T. W. Grant was convicted of embezzlement, and appeals. Reversed. O. F. Green and J. F. McKeel, both of Ada, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, T. W. Grant, was convicted at the November, 1912, term of the district court of Pontotoc county on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a period of one year. We have carefully read the record in this case, and to our minds there is no offense disclosed by the proof, and also no question of fact which should have been submitted to the jury. The plaintiff in error was prosecuted for embezzlement upon the theory that as agent of one Starritt he embezzled the proceeds of certain ties. The relation of principal and agent did not exist. The facts clearly disclose the relation of debtor and creditor instead, and the case must therefore fall. We are of the opinion that a statement of the facts and an elaborate discussion of the questions involved would serve no good purpose. The judgment of the trial court is reversed, and the cause remanded, with directions to dismiss.

**GRAY v. STATE.** (Criminal Court of Appeals of Oklahoma. April 11, 1914.) Appeal from County Court, Le Flore County; B. C. Bolger, Judge. John Gray was convicted of pointing a pistol, and appeals. Affirmed. Tom W. Neal, of Poteau, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted upon an information which, after alleging date and venue, charged: "That the said John Gray did then and there willfully and unlaw-

fully point a pistol at and towards one W. E. Sweeney." In accordance with the verdict of the jury, he was sentenced to be confined in the county jail for three months and pay a fine of \$50. After a careful examination of the record, we have discovered no error in the rulings complained of. The judgment of the county court of Le Flore county herein is therefore affirmed.

**HESTER v. STATE.** (No. A-1977.) (Criminal Court of Appeals of Oklahoma. May 16, 1914.) Appeal from County Court, Pottawatomie County; Hal Johnson, Judge. John Hester was convicted of gaming, and appeals. Affirmed. Pitman & Goode, of Shawnee, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, John Hester, was convicted at the January, 1913, term of the county court of Pottawatomie county on a charge of conducting a gambling game, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 30 days. Upon a careful examination of this record we are of opinion that the accused had a fair and impartial trial and that no prejudicial error occurred in the trial court. The judgment is therefore affirmed.

**JACKSON v. STATE.** (Criminal Court of Appeals of Oklahoma. April 15, 1914.) Appeal from County Court, Okmulgee County; Mark Bozarth, Judge. H. W. Jackson was convicted of violating the prohibitory law, and appeals. Affirmed. Wallace & Stephens, of Okmulgee, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, H. W. Jackson, was convicted at the January, 1913, term of the county court of Okmulgee county on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. Upon a careful examination of the record, we are of opinion that the judgment should be affirmed; and it is so ordered. Mandate ordered forthwith.

**JELTS v. STATE.** (Criminal Court of Appeals of Oklahoma. March 21, 1914.) Appeal from County Court, Pottawatomie County; Hal Johnson, Judge. Nelson Jelts was convicted of violating the prohibitory law, and appeals. Dismissed. G. A. Outcalt, of Tecumseh, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Nelson Jelts, was tried and convicted at the January, 1913, term of the county court of Pottawatomie county on a charge of maintaining a place wherein intoxicating liquors were received and kept for the purpose of sale. Judgment was rendered on the 28th day of February, 1913, at which time the court allowed 30 days for preparing and serving a case-made, and 60 days within which to effect the appeal under the statute. The petition in error and case-made were not filed until the 8d day of May, 1913, more than 60 days after rendition of the judgment; no further extension of time having been made as provided by law. The Attorney General has filed a motion to dismiss the appeal, on the ground that the same was not filed within the time allowed by the statute and under the orders of the court. The motion is well founded, and is therefore sustained. The appeal is accordingly dismissed.

**JONES v. STATE.** (Criminal Court of Appeals of Oklahoma. March 21, 1914.) Appeal from County Court, Kiowa County; J. W.

Mansell, Judge. Wylie Jones was convicted of violating the prohibitory law, and appeals. Affirmed. Bummoms & Logan, of Hobart, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted of the offense of unlawfully transporting intoxicating liquor. On the 13th day of November, 1912, in accordance with the verdict of the jury, he was sentenced to be confined for 30 days in the county jail and to pay a fine of \$50. No brief has been filed, nor oral argument made. The Attorney General has filed a motion to affirm for failure to prosecute the appeal, which motion is sustained, and the judgment of the county court of Kiowa county is hereby affirmed. Mandate forthwith.

**KENDRICK v. STATE (No. A-2024.)** (Criminal Court of Appeals of Oklahoma. May 11, 1914.) Appeal from County Court, Tillman County; W. C. Lukenbill, Judge. Jack Kendrick was convicted of a violation of the prohibition law, and appeals. Affirmed. Johnson & Red, of Frederick, for plaintiff in error. The Attorney General, for the State.

**PER CURIAM.** Plaintiff in error was tried and convicted upon an information charging that Jack Kendrick did, in Tillman county, Okl., on or about the 11th day of January, 1913, sell one quart of whisky. On the 28th day of February, 1913, the court rendered judgment and sentenced the defendant, in accordance with the verdict of the jury, to be confined in the county jail for a period of 5 months and to pay a fine of \$350. After a careful examination of the record, we are of opinion that no reversible error was committed upon the trial. The judgment of the county court of Tillman county is therefore affirmed. Mandate forthwith.

**LANCASTER v. STATE.** (Criminal Court of Appeals of Oklahoma. March 21, 1914.) Appeal from County Court, Pontotoc County; I. M. King, Judge. Mark Lancaster was convicted of conducting a gambling house, and appeals. Affirmed. Crawford & Bolen, of Ada, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Mark Lancaster, was convicted at the January, 1913, term of the county court of Pontotoc county on a charge of conducting a gambling house, and his punishment fixed at a fine of \$200 and imprisonment in the county jail for a period of 60 days. A careful examination of the record discloses no fundamental error. There were no briefs filed on behalf of the plaintiff in error, and no appearance made for oral argument. No fundamental error appearing, the judgment of the trial court is affirmed.

**McALEXANDER v. STATE.** (Criminal Court of Appeals of Oklahoma. March 21, 1914.) Appeal from County Court, Johnston County; Nick Wolf, Judge. A. P. McAlexander was convicted of a violation of the prohibitory law, and appeals. Reversed. P. B. H. Shearer and J. S. Ratliff, both of Tishomingo, for plaintiff in error. The Attorney General, for the State.

**PER CURIAM.** Plaintiff in error was tried and convicted upon an information which charged that he "did unlawfully and willfully make a malt liquor to wit, Choctaw beer, in the amount of ten gallons, contrary," etc. The state's evidence was substantially as follows: Mart Miller testified that he was undersheriff, and went to Mr. McAlexander's residence with Ras Chance, and found no one there, so they opened the door and went in and found two kegs, one of them full of Choctaw beer; that he turned the faucet on the one that was full,

and let the gas out of it; that he did not know what Choctaw beer is made out of; that some of it is intoxicating; that he did not drink any of this beer; that he heard the sheriff say he destroyed it. Ras Chance testified that he was a deputy sheriff, and was with Mart Miller when they searched Mr. McAlexander's house and found the keg; that Choctaw beer "is made out of copperas, yeast, and something"; that Mr. McAlexander told him he made Choctaw beer and root beer. The defendant moved to direct a verdict of not guilty, which was overruled. We think the motion should have been sustained. The evidence is insufficient to show that the keg contained intoxicating liquor, or that the defendant had manufactured intoxicating liquor, as charged. The judgment of conviction is therefore reversed.

**NEAL v. STATE.** (Criminal Court of Appeals of Oklahoma. April 18, 1914.) Appeal from County Court, Washington County; James T. Shipman, Judge. Clarence Neal was convicted of violating the prohibitory law, and appeals. Dismissed. C. O. Julian, of Bartlesville, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Clarence Neal, was convicted at the November, 1913, term of the Washington county court on a charge of maintaining a place wherein intoxicating liquors were kept for sale, and his punishment fixed at a fine of \$75 and imprisonment in the county jail for a term of 30 days. Judgment was pronounced on the 15th day of November, at which time the court allowed 60 days in which to make and serve the case-made, but fixed no additional time, other than that allowed by the statute, within which the appeal should be lodged in this court. At a later date a supplementary order was made allowing 10 days' additional time for making and serving the case-made; but no order was made at this time extending the time for filing the appeal, and the record does not indicate that any was requested. The appeal was filed in this court on the 21st day of February, 1914, long after the expiration of the time fixed by the statute in which the appeal could be taken without additional time allowed by proper orders from the trial court. The Attorney General has filed a motion to dismiss this appeal, on the ground that the same was not taken in the manner and filed within the time provided by law. No response has been made to the motion. We have no alternative except to dismiss the appeal, and direct the trial court to enforce the judgment and sentence; and it is so ordered. Mandate forthwith.

**OLIVER v. STATE.** (Criminal Court of Appeals of Oklahoma. April 18, 1914.) Appeal from County Court, Rogers County; Walter W. Shaw, Judge. Joe Oliver was convicted of selling intoxicating liquor, and appeals. Dismissed. H. Tom Kight, of Claremore, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Joe Oliver, was convicted at the March, 1913, term of the county court of Rogers county, on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a term of 90 days. The Attorney General has filed a motion to dismiss the appeal, on the ground that the same was not taken in the manner and perfected within the time provided by law. Counsel for plaintiff in error filed a motion to dismiss the appeal, on the ground that the plaintiff in error has become a fugitive from justice and the appeal therefore abandoned. There is no question but that the appeal should be dismissed, and for all practical purposes it is imma-

terial which motion is sustained. The appeal is dismissed. Mandate ordered forthwith.

**REAMS v. STATE.** (Criminal Court of Appeals of Oklahoma. April 4, 1914.) Appeal from County Court, Oklahoma County; John W. Hayson, Judge. S. D. Reams was convicted of a violation of the prohibitory law, and appeals. Reversed. Vaught & Ready and Ledru Guthrie, all of Oklahoma City, for plaintiff in error. Charles West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was tried and convicted upon an information which charged that "S. D. Reams did, in Oklahoma county, on the 7th day of August, 1912, commit the crime of having intoxicating liquors in his possession with the unlawful intent on the part of said defendant to sell, barter, give away, and otherwise furnish the same to parties unknown." Many alleged errors are assigned as grounds for a reversal of the judgment, but it is only necessary to notice the one, "that the court erred in overruling a motion of the defendant to direct a verdict of not guilty." A. E. Smith and J. R. Dalton testified that they were deputy enforcement officers and went into the pool hall at 128 West First street in Oklahoma City, and had a conversation with a colored man, and Smith asked him for a half pint of whisky; that the negro went out "through the back door, the rear door some place," and when he came back he had a half pint of whisky, and Smith gave him 50 cents for it. The defendant was not present, and there was no proof that the negro was employed by him, or connected with him in any way. In order to support a conviction for the offense charged, there must be some evidence tending to show the defendant's possession of the intoxicating liquor. There was no such evidence in this case. Therefore the evidence was not sufficient to support the conviction, and the motion to direct a verdict of not guilty should have been sustained. The judgment of conviction is reversed.

**SHOCKEY v. STATE.** (Criminal Court of Appeals of Oklahoma. March 21, 1914.) Appeal from County Court, Pawnee County; Geo. E. Merritt, Judge. J. W. Shockey was convicted of a violation of the prohibitory law, and appeals. Affirmed. J. P. Evers, of Tulsa, for plaintiff in error. The Attorney General, for the State.

**PER CURIAM.** The plaintiff in error was tried and convicted upon an information which charged the possession of intoxicating liquors with the unlawful intent to violate provisions of the prohibitory law, and in accordance with the verdict of the jury he was on the 18th day of March, 1913, sentenced to be confined in the county jail for a term of 60 days and to pay a fine of \$500. The evidence for the state shows that the defendant was arrested with four boxes of whisky in his possession and 15 or 20 gunny sacks of liquor in a wagon. The defendant offered no evidence. A careful review of the record discloses no reversible error. The judgment of conviction is therefore affirmed.

**SPEARS v. STATE.** (Criminal Court of Appeals of Oklahoma. March 31, 1914.) Appeal from County Court, Jackson County; B. N. Woodson, Judge. Hubert Spears was convicted of violating the prohibitory law, and appeals. Affirmed. Lawson & Dabney, of Altus, for plaintiff in error. Chas. West, Atty. Gen., and C. E. Hall, Co. Atty., of Altus, for the State.

**PER CURIAM.** Plaintiff in error, Hubert Spears, was tried and convicted at the January, 1913, term of the county court of Jackson county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$175 and imprisonment in the county jail for a period

of 30 days. We have carefully examined the record, and are of opinion that the judgment should be affirmed. It is therefore so ordered.

**TORR v. STATE.** (Criminal Court of Appeals of Oklahoma. April 18, 1914.) Appeal from District Court, Muskogee County; R. C. Allen, Judge. Charles L. Torr was convicted for embezzlement, and appeals. Dismissed. Kistler & McAdams, of Oklahoma City, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Charles L. Torr, was convicted at the September, 1912, term of the district court of Muskogee county on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a term of one year. Upon motion of counsel for plaintiff in error, the appeal in this case is dismissed.

**TRINKLE v. STATE.** (No. A-2111.) (Criminal Court of Appeals of Oklahoma. April 25, 1914.) Appeal from County Court, Hughes County; J. Ross Bailey, Judge. C. G. Trinkle was convicted of violating the prohibitory law, and appeals. Dismissed. Witty & Meyer, of Holdenville, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, C. G. Trinkle, was convicted of a violation of the prohibitory law, and in accordance with the verdict of the jury he was on the 9th day of July, 1913, by the court sentenced to be confined in the county jail for a term of 90 days and to pay a fine of \$150. To reverse this judgment an appeal was attempted to be taken by filing in this court on October 17, 1913, a petition in error with case-made. The Attorney General has filed a motion to dismiss the appeal, for the reason that the same was not filed in this court within 60 days from the rendition of the judgment. It appearing from the record that the statutory time had not been extended by order of the court, and it appearing, further, that appeal was not lodged in this court within the time limit fixed by the statute, the motion to dismiss must be sustained. The purported appeal is therefore dismissed, and the cause remanded.

**TRINKLE v. STATE.** (No. A-2112.) (Criminal Court of Appeals of Oklahoma. April 25, 1914.) Appeal from County Court, Hughes County; J. Ross Bailey, Judge. C. G. Trinkle was convicted of violating the prohibitory law, and appeals. Dismissed. Witty & Meyer, of Holdenville, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, C. G. Trinkle, was convicted in the July, 1913, term of the county court of Hughes county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$50 and imprisonment in the county jail for a period of 60 days. Judgment was rendered in the trial court on the 19th day of July, 1913. The appeal was filed in this court October 17, 1913. No order was made by the trial court extending the time within which the appeal could be filed. The statutory time of 60 days had long since expired when the record was filed in this court. The Attorney General has filed a motion to dismiss the appeal on the ground that the same was not filed within the time allowed by law. Motion is sustained, and appeal accordingly dismissed.

In re **BRESSLER'S ESTATE.** **SPIES et al. v. McARTHUR et al.** (Supreme Court of Washington. March 28, 1914.) Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge. Proceedings by Flora

Belle Spies and others against Grace McArthur and another to contest the will of Peter Bressler. Judgment for contestees and contestants appeal. Affirmed. Douglas, Lane & Douglas, of Seattle, for appellants. Tucker & Hyland, of Seattle, for respondents.

FULLERTON, J. On November 22, 1910, Peter Bressler, being then in his eighty-third year, executed his last will and testament, in which he made bequests to two of his four children of \$1,000 each, and distributed the remainder of his property equally between the four. He named his nephew, Frederick S. Ward, and his daughter, Flora Belle Spies, as executor and executrix of the will, and provided that they should act as such without bonds. On February 4, 1911, he made a codicil to his will, naming Frederick S. Ward as sole executor thereof, providing that he might act as such without bonds, but made no other change in the original will. Mr. Bressler died on February 8, 1913, and shortly thereafter his will and codicil thereto were admitted to probate, and Ward appointed as sole executor thereof. This proceeding was instituted by three of the beneficiaries under the will to have the codicil set aside as invalid and void and the appointment of Ward as sole executor annulled, on the ground of mental incapacity on the part of the testator at that time to make a will, and of undue influence exercised over him by Ward. Issue was taken on the allegations of the petition, and a trial had, which resulted in findings by the court to the effect that the testator had mental capacity at the time of the execution of the codicil, that he was not acting under undue influence of Ward, or of any person, and that Ward was a suitable and proper person to act as executor of the will. Judgment was entered, dismissing the contest proceedings. The sole contention in this court is that the findings and judgment of the trial court are not in accord with the evidence. We think it would serve no useful purpose or add to the value of this opinion to review the evidence at length. Suffice it to say, therefore, that we have carefully read the evidence as abstracted by the appellant, and can find no reason to depart from the conclusion reached by the trial court. The judgment is affirmed.

CROW, C. J., and MOUNT, MORRIS, and PARKER, JJ., concur.

CONNOLLY v. FREDERICKS et ux. (Supreme Court of Washington. March 6, 1914.) Department 1. Appeal from Superior Court, King County; Everett Smith, Judge. Action by Frank A. Connolly against O. F. Fredericks

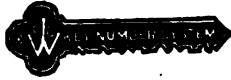
and wife. Judgment for defendants, and plaintiff appeals. Affirmed. Jay C. Allen, of Seattle, for appellant. A. J. Falknor, of Seattle, for respondents.

MAIN, J. The purpose of this action was to recover damages alleged to be due to false representations in a transaction involving the exchange of real estate. The cause was tried to the court sitting without a jury. Judgment was entered dismissing the action, from which the appeal follows. On the 8th day of December, 1911, Truman H. Heath and Margaret M. Heath, his wife, were the owners of an apartment house in Seattle, Wash., and O. F. Fredericks and wife were the owners of a farm consisting of about 160 acres located in Thurston county, in the state of Washington. At about this time the Heaths entered into a contract with the Fredericks whereby the apartment house was to be exchanged for the farm. The details of the contract or the deeds which followed need not be further set forth herein. At the same time Heath purchased from Fredericks certain personal property, which was then upon the farm, consisting of cattle, oats, hay, and chickens. Thereafter Heath took possession of the farm and Fredericks of the apartment house. After a time Heath concluded that Fredericks had been guilty of misrepresentations in the transaction, claiming that the number of acres of cleared land upon the farm was approximately 60, and that it had been represented that there were 80 acres; also that there had been misrepresentation as to the quantity of oats and hay, the health of the cattle, and the number of chickens. Heath assigned his alleged claim for damages to one Frank A. Connolly, the appellant herein, and the present action was begun. The evidence is conflicting as to whether there were fraudulent representations as to any of the matters claimed. If the respondents' evidence is to be believed, there is nothing to justify the claim of fraud. On the other hand, if the appellant's evidence establishes the facts, then it becomes a question of law whether under such facts fraud had been practiced. It has been frequently stated by this court that, where a charge of fraud is made, it must be established by evidence which is clear and convincing. The trial court, upon the conflicting evidence as to the facts, found in favor of the respondents. From a reading of the record, we think this finding must be sustained. It therefore becomes unnecessary to consider whether as a matter of law there was fraud, had the facts been as claimed by the appellant. The judgment will be affirmed.

CROW, C. J., and ELLIS, CHADWICK, and GOSE, JJ., concur.



# INDEX-DIGEST



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It Supplements the Decennial Digest, the Key-Number Series and  
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### II. NATURE AND FORM.

§ 27 (Colo.) An action to recover damages for false and fraudulent representations made in effecting an exchange of property is a tort action.—Mitchell v. Crowl, 140 P. 793.

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§ 3 (Wash.) In an action for damages because of defendants' negligent construction of a building on lower land which caused that of plaintiffs' to slide, evidence of the breaking of a retaining wall built by plaintiffs is admissible to show that the slide was the result of the general character of the soil in that vicinity and not defendant's negligence.—Elston v. McGlaufflin, 140 P. 396.

Where the sliding of plaintiffs' land resulted from the negligent construction of a building on lower land, plaintiffs' measure of damages is the depreciation in the value of their property, and they cannot recover the amount expended for the retaining wall.—Id.

### ADJUDICATION.

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### ADULTERY.

See Criminal Law, § 511; Divorce, §§ 51, 104, 135; Lewdness, § 1; Witnesses, § 58.

§ 1 (Okl.Cr.App.) Though Rev. Laws 1910, § 2431, requires that a prosecution for adultery be commenced on complaint of the injured spouse, adultery is an offense against the state as well as against the injured spouse.—Kitchens v. State, 140 P. 619; Mitchell v. Same, Id. 622.

§ 14 (Okl.Cr.App.) In a prosecution for adultery, carnal intercourse may be inferred from circumstances.—Kitchens v. State, 140 P. 619; Mitchell v. Same, Id. 622.

Evidence that the relation of master and servant existed between the parties held not to preclude conviction of adultery.—Id.

§ 14 (Utah) Evidence held sufficient to show that accused was married.—State v. Park, 140 P. 768.

### ADVERSE CLAIM.

See Quieting Title.

## ADVERSE POSSESSION.

See Champerty and Maintenance, § 7; Tenancy in Common, §§ 14, 15; Waters and Water Courses, § 138.

### I. NATURE AND REQUISITES.

#### (A) Acquisition of Rights by Prescription in General.

§ 7 (Cal.) A reservation of swamp lands of the state from sale by state statute is a mere restriction on the general power delegated to the officers of the state to sell swamp lands, and the lands may be acquired by adverse possession, unless dedicated to a public use.—*People v. Banning Co.*, 140 P. 587.

Ordinarily the mere possession of state swamp lands by one not in privity with the state nor claiming under it is not adverse to the state, but, where there has been actual adverse possession for more than ten years under a patent issued by the state, an action by the state to recover land is barred by the ten years' statute of limitations (Code Civ. Proc. § 315).—*Id.*

Under Civ. Code, § 1007, the running of limitations operates on the state with respect to any property not dedicated for a public use as soon as adverse possession thereof begins without reference to a presumed grant.—*Id.*

§ 7 (Kan.) As against the state, no title to the bed of a public stream can be acquired through private use or occupancy or by prescription.—*State v. Akers*, 140 P. 637.

§ 8 (Cal.) Where tidelands of the state have been dedicated to a public use, there can be no adverse possession thereof to start the running of limitations against any action by the state or its authorized agencies to assert the public right or such possession as will give title by prescription to the adverse claimants against the public right.—*People v. Banning Co.*, 140 P. 587.

#### (B) Actual Possession.

§ 25 (Or.) Possession by an agent is possession of the principal, though the principal never personally occupied the land.—*Strom v. Hancock Land Co.*, 140 P. 458.

#### (D) Distinct and Exclusive Possession.

§ 36 (Or.) Possession of part of a tract as one's own, and of the balance as agent, though the agent does not live on his own part, is not such a common or mixed possession as to interrupt disseisin of former owner.—*Strom v. Hancock Land Co.*, 140 P. 458.

#### (E) Duration and Continuity of Possession.

§ 45 (Colo.App.) Under Rev. St. 1908, § 4090, Mills' Ann. St. 1912, § 4656, providing that payment of taxes for seven years under color of title shall confer title, the only way the statute can be arrested after color of title has been acquired and taxes have been paid for seven years is by a suit within seven years after first payment under color.—*Newsom v. De Ford*, 140 P. 207.

#### (F) Hostile Character of Possession.

§ 79 (Colo.) Possession under a tax deed, void on its face, coupled with payment of taxes, will not set the seven-year statute of limitations in motion; such deed not constituting color of title.—*Dussart v. M. Abdo Mercantile Co.*, 140 P. 806.

§ 79 (Colo.App.) A tax deed void on its face did not set in motion the five-year statute of limitation.—*Miller v. Weldon*, 140 P. 930.

§ 84 (Colo.) Possession under a tax deed void on its face, coupled with payment of taxes, will not set the seven-year statute of limitations in motion, because not in good faith.—*Dussart v. M. Abdo Mercantile Co.*, 140 P. 806.

#### (G) Payment of Taxes.

§ 91 (Colo.App.) A decree, entered four years prior to the commencement of the present ac-

tion, does not constitute sufficient color of title to support a plea under the seven-year statute of limitation, and, if no other color of title is shown, proof of actual possession and payment of taxes is insufficient to support the plea.—*King v. Foster*, 140 P. 930.

§ 93 (Colo.App.) Where defendant acquired color of title to vacant land October 6, 1901, and paid the taxes assessed respectively for the years 1901 to 1907, both inclusive, he acquired absolute title under Rev. St. 1908, § 4090, Mills' Ann. St. 1912, § 4656, which was not affected by plaintiff's payment of the taxes assessed for 1908 and 1909.—*Newsom v. De Ford*, 140 P. 207.

§ 93 (Colo.App.) Where a tax deed void on its face was issued in 1901, the first payment of subsequent taxes thereunder that could be made to obtain title by payment of taxes for seven years under color of title was for the year 1901, which could not be made until 1902, and hence there could not be payment for seven years prior to August 28, 1908, when suit was begun to quiet title.—*Miller v. Weldon*, 140 P. 930.

## AFFIDAVITS.

See Appeal and Error, §§ 523, 544, 562; Continuance, § 46; Costs, § 123; Criminal Law, § 137; Highways, § 30; Judgment, §§ 153, 160; Justices of the Peace, § 141; Mandamus, § 154; New Trial, § 140; Pleading, § 403.

## AGENCY.

See Principal and Agent.

## AGGRAVATION.

See Damages, §§ 20, 34.

## AGREED CASE.

See Submission of Controversy.

## AGREEMENT.

See Contracts.

## AGRICULTURE.

See Mandamus, § 113.

§ 3 (Wash.) Under Laws 1909, c. 185, §§ 63, 64, requiring county commissioners to levy a tax to meet the expenses of horticultural inspection therein, and Laws 1911, c. 43, § 4, directing the Attorney General to bring action against any county failing to pay the amount "assessed or levied" against it for horticultural purposes, *held*, that an action might be maintained against a county which had not assessed or levied such tax.—*State v. Asotin County*, 140 P. 914.

## ALIBI.

See Criminal Law, §§ 815, 822.

## ALIENATION.

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## ALIENS.

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## ALIMONY.

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## ALTERATION OF INSTRUMENTS.

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**AMBIGUITIES.**

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**AMOUNT IN CONTROVERSY.**

See Courts, § 121.

**ANIMALS.**

See Carriers, § 218; Larceny, § 47; Mines and Minerals, § 119; Negligence, § 29; Pleading, § 127; Principal and Agent, § 22.

§ 90 (Okl.) Where lands in severalty are within a common fenced cultivated inclosure, an occupant of any portion of such lands must prevent his live stock from trespassing on the lands of other occupants, though the lands be in a "free range" country.—*Blasdel v. Finks*, 140 P. 1178.

**ANSWER.**

See Pleading.

**APPEAL AND ERROR.**

See Attorney and Client, § 190; Courts, §§ 212, 213, 489; Criminal Law, §§ 1035-1187; Eminent Domain, § 262; Exceptions, Bill of; Homicide, § 340; Intoxicating Liquors, § 108; Judgment, § 331; Justices of the Peace, §§ 141-187; Mandamus, §§ 31, 187; New Trial; Railroads, § 9; Receivers, § 189; Taxation, § 495; Waters and Water Courses, § 33.

**I. NATURE AND FORM OF REMEDY.**

§ 13 (Ariz.) While a valid, subsisting appeal is pending in the Supreme Court a writ of error, if prosecuted, will be dismissed.—*Landers v. Joerger*, 140 P. 209.

**III. DECISIONS REVIEWABLE.**

(B) Nature of Subject-Matter and Character of Parties.

§ 34 (Ariz.) If the power to enact a statute is fairly open to denial and is denied, the validity of the statute is drawn into question, so as to give the Supreme Court jurisdiction of the appeal, under Const. art. 6, § 4, though the amount in controversy does not exceed \$200, but it does not have jurisdiction on that ground if only its judicial construction or application is involved.—*Boehringer v. Yuma County*, 140 P. 507.

If statutes are constitutional, the fact that they have been misconstrued or misapplied by the trial court will not give the Supreme Court jurisdiction of an appeal under Const. art. 6, § 4, withholding jurisdiction from it, where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute.—*Id.*

The "validity of a statute" as that term is used in Const. art. 6, § 4, withholding jurisdiction from the Supreme Court where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute, is not to be determined by what has been done under the statute in a particular case, but by its general purpose and its validity to affect such purpose.—*Id.*

A reference to the Constitution to strengthen objections to a particular statutory construction is not sufficient to give the Supreme Court jurisdiction, under Const. art. 6, § 4, withholding jurisdiction from it, where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute.—*Id.*

While the construction of the Constitution may be involved in the question of the validity

of a statute, a constitutional construction may be necessary, where the "validity of a statute" is not involved.—*Id.*

The "validity of a statute" held not involved within Const. art. 6, § 4, withholding jurisdiction from the Supreme Court where the amount in controversy does not exceed \$200, unless the action involves the validity of a statute, so as to give that court jurisdiction of an appeal in an action for salary, as a county school superintendent, where plaintiff claimed compensation under Laws 1912, c. 93, and defendant claimed that plaintiff's salary was fixed by Rev. Stat. 1901, claimed to be made a part of state laws by Const. art. 22, § 2.—*Id.*

**IV. RIGHT OF REVIEW.**

(B) Estoppel, Waiver, or Agreements Affecting Right.

§ 164 (Cal.) Where a mortgagee, asserting priority for his mortgage over a mechanic's lien, appealed from so much of the decree foreclosing the lien and the mortgage as declared the lien paramount, the mortgagee, compelled to purchase at the foreclosure sale after his appeal to protect his interests, was not thereby estopped from prosecuting the appeal.—*Sunset Lumber Co. v. Bachelder*, 140 P. 35.

**V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.**

(A) Issues and Questions in Lower Court.

§ 171 (Cal.App.) Where the case was tried on the merits as an action for salary due under a contract of employment, without regard to whether it should have been brought on the contract or as an action for damages for breach thereof, the judgment for plaintiff should not be reversed because of any defect in the form of the action.—*Parr v. Baer*, 140 P. 712.

§ 171 (Colo.App.) Where a case was tried by the parties as though a special plea was denied, and no attempt was made to rely upon an admission thereof, and it is contended by the plaintiff that the admission of the plea was inadvertently made, the admission will be disregarded on appeal.—*Degge v. Carstarphen Electric Co.*, 140 P. 478.

§ 171 (Okl.) Where the answer and reply join issues inconsistent with the petition, and the case is submitted without objection on such issues, and judgment is rendered on that theory, the parties are bound by such theory on appeal.—*Wallace v. Killian*, 140 P. 162.

§ 171 (Utah) Where a case was tried as though at issue upon a material point, the plaintiff could not, for the first time on appeal, assume that the allegations regarding that point were not denied by the answer.—*Surbaugh v. Butterfield*, 140 P. 757.

§ 171 (Wash.) Where a cause was tried on the theory that it was brought under the federal Employers' Liability Act, and the court charged, without exception, that it was conceded that defendant was engaged in interstate commerce, the question of the sufficiency of the complaint to state a cause of action under that act could not be raised for the first time on appeal.—*Smith v. Northern Pac. Ry. Co.*, 140 P. 685.

§ 173 (Ariz.) Where, in an action on a note, defendant pleaded limitations, and plaintiff pleaded in reply a writing signed by defendant, as well as other written acknowledgments by defendant of the justness of plaintiff's claim, defendant cannot urge on appeal the question of whether the action is properly brought upon the original obligation, as continued by the acknowledgment of the indebtedness, or upon the substituted promise.—*Wooster v. Scorse*, 140 P. 819.

§ 173 (Wash.) Where defendant in a proceeding by directors of an irrigation district, under

Rem. & Bal. Code, §§ 6480-6494, for examination and approval of the proceedings to organize the district and to determine the amount of the bond issue needed, stood on his demurrer to the petition for want of facts, he cannot urge on appeal that the bond issue is too large, and the tax required will amount to confiscation.—Board of Directors of Quincy Valley Irr. Dist. v. Scott, 140 P. 391.

**(B) Objections and Motions, and Rulings Thereon.**

§ 187 (Cal.) Defects of parties plaintiff cannot be raised for the first time on appeal.—Kline v. Guaranty Oil Co., 140 P. 1.

§ 195 (Cal.App.) Objections to the allowance of an amendment cannot, on the first time, be raised on appeal.—Eldridge v. Mowry, 140 P. 978.

§ 198 (Kan.) Where defendants made no objection to an order referring a suit for an accounting of the proceeds of a sale of certain crops either before or during the trial, but appeared and participated therein, it was thereafter too late to object that the reference was not authorized.—Staley v. Weston, 140 P. 878.

§ 204 (Wash.) In an action by the widow and children of a homesteader, the defendant cannot, on appeal, contend that the marriage was not sufficiently proven to show the title of the widow and children, where testimony that the widow and decedent had lived together as husband and wife from the acquisition of the homestead was received without objection below that it was not the best evidence.—St. Martin v. Skamania Boom Co., 140 P. 355.

§ 209 (Okl.) Imperfect or objectionable evidence and conclusions of witnesses as to the amount of damages may be sufficient to sustain a judgment, where no objection to the absence of sufficient perfect or unobjectionable evidence was made below.—Weleetka Light & Water Co. v. Northrop, 140 P. 1140.

§ 215 (Colo.) Defendant not having objected to the instructions at the trial, nor requested the court to define certain terms, could not object on appeal to the instructions given because of the court's omission of such definitions.—Rogers v. Rogers, 140 P. 193.

§ 223 (Colo.) An objection to a decree establishing water rights not presented to the district court cannot be urged on a writ of error.—Louden Irrigating Canal & Reservoir Co. v. Town of Berthoud, 140 P. 802.

§ 232 (Nev.) Where an objection to evidence was sustained, not because of the form of the offer, but on the ground that the evidence was not admissible for the purpose offered, appellant cannot claim on appeal that the evidence was properly excluded because the offer was not in proper form.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

**(C) Exceptions.**

§ 263 (Wash.) An instruction, submitting a question as to the laws of another state to the jury on conflicting evidence, could not be reviewed, where no exception was taken thereto at the trial.—Watson v. Hecla Mining Co., 140 P. 317.

§ 272 (Wash.) Appellant, who files a motion for new trial, though there has been no service of the findings of fact or of notice of filing, must file exceptions within five days, or the sufficiency of the evidence will not be considered.—Fair v. Caswell, 140 P. 564.

§ 273 (Okl.) A recital in a case-made that "to all of the instructions \* \* \* and to each of them the defendant excepts" is insufficient, where such instructions include several paragraphs embodying different propositions.—Weleetka Light & Water Co. v. Northrop, 140 P. 1140.

§ 273 (Wash.) Where the court made separate findings of fact, each of which bore a distinctive number, an exception at the foot of the

findings and conclusions of law "to the above findings of fact and conclusions of law" is not sufficient to entitle the appellant to a review of the evidence.—Way v. Lyric Theater Co., 140 P. 320.

**(D) Motions for New Trial.**

§ 301 (Okl.) Error in the assessment of the amount of recovery in an action on contract cannot be considered, unless assigned as a ground for a new trial.—Yates v. First Nat. Bank, 140 P. 1174.

Where plaintiff, in an action to recover usurious charges, complains of the amount of the verdict in his favor, the motion for a new trial must contain, as a ground therefor, the fifth subdivision of Comp. Laws 1906, § 5825, relating to error in assessment of damages.—Id.

Where the evidence sustains a verdict for a greater sum than that found, and error in the assessment of the amount is omitted from the motion for new trial, the Supreme Court will not examine the record to ascertain whether the sum so found was correct.—Id.

§ 305 (Okl.) Where plaintiff in error fails to assign as error the overruling of the motion for new trial, errors during the progress of the trial cannot be reviewed.—O'Neil v. James, 140 P. 141.

**VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.**

**(A) Time of Taking Proceedings.**

§ 347 (Cal.) Notice of appeal from judgment of nonsuit and dismissal "entered" on January 18th held not defective; the judgment having been rendered on that date, but not entered until February 10th, such entry being a "judgment of nonsuit" under Code Civ. Proc. § 581.—Wilson v. Union Iron Works Dry Dock Co., 140 P. 250.

§ 356 (Okl.) Under Sess. Laws 1910-11, c. 18, proceedings in error will be dismissed when not brought within six months from the judgment or order appealed from.—May v. Roberts, 140 P. 399.

**(B) Petition or Prayer, Allowance, and Certificate or Affidavit.**

§ 361 (Okl.) A petition in error failing to describe the judgment with reasonable certainty, or set out in what cause or court it was rendered, will be dismissed.—Farmers' State Bank of Granite v. City State Bank of Mangum, 140 P. 1150.

§ 362 (Okl.) An alleged error will not be reviewed unless assigned for review by the petition in error, as well as by the motion for a new trial.—Yates v. First Nat. Bank, 140 P. 1174.

**(C) Payment of Fees or Costs, and Bonds or Other Securities.**

§ 374 (Mont.) It being only by reason of his acts as mayor and executive head of the police department that a cause of action is stated against defendant, he is within Rev. Codes, § 7196, dispensing with a bond on appeal by a municipal officer appealing in an action to which he is a party in his official capacity.—State v. Duncan, 140 P. 95.

§ 385 (Or.) Under L. O. L. § 551, the undertaking on appeal need not be signed by the appellant.—O'Connor v. Towey, 140 P. 625.

**(E) Entry, Docketing, and Appearance.**

§ 434 (Okl.) Under Supreme Court rule 25 (137 Pac. xi), where no appearance is made by defendant in error, the assignments of error will be sustained, if borne out by the record.—St. Louis & S. F. Ry. Co. v. Cobb, 140 P. 1180.

**X. RECORD AND PROCEEDINGS NOT IN RECORD.**

**(A) Matters to be Shown by Record.**

§ 502 (Cal.) The notice of intention to move for a new trial need not be included in the rec-

ord on an appeal from an order denying the motion.—*Cross v. Mayo*, 140 P. 283.

On appeal from an order denying a new trial, it must in some way be shown in the record what the grounds for the motion were.—*Id.*

§ 511 (Cal.) To deprive appellant of his right to the written notice of an entry of judgment pursuant to Code Civ. Proc. § 850, the record must show facts clearly indicating a waiver of such notice.—*Hughes Mfg. & Lumber Co. v. Elliott*, 140 P. 17.

#### (B) Scope and Contents of Record.

§ 523 (Wash.) Unless affidavits supporting a motion for a continuance are clearly identified by the motion, and the appellate court can fairly infer from the order denying the continuance that no other affidavits were considered by the trial court, the appellate court will not consider the affidavits unless they are made a part of the statement of facts.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

§ 528 (Cal.) A notice of motion for a new trial, contained in the transcript, but not contained in any bill of exceptions or statement, cannot be considered on appeal in determining when the notice was given.—*Cross v. Mayo*, 140 P. 283.

#### (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544 (Okla.) Where the only errors assigned are that the court erred in overruling motion for new trial and in entertaining a demurrer to the evidence, they cannot be considered on a transcript without bill of exceptions or case-made.—*Vannier v. Fraternal Aid Ass'n*, 140 P. 1021.

§ 544 (Wash.) The affidavits in support of or against a motion for new trial for the misconduct of the jury cannot be considered unless brought to the Supreme Court by bill of exceptions or statement of facts.—*Norton v. Pacific Power & Light Co.*, 140 P. 905.

§ 553 (Okla.) A ruling of the court on a demurrer to the petition may be presented by a transcript, without bill of exceptions or case-made, providing the ruling on the demurrer is one of the assignments of error in the petition in error.—*O'Neil v. James*, 140 P. 141.

#### (D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 562 (Wash.) Affidavits in support of motions in the trial court were not made a part of the record on appeal by being included in the clerk's transcript of the files in his office, as they were in the nature of evidence, which could only be brought up by a statement of facts, and hence were not entitled to consideration.—*Congdon v. Aumiller*, 140 P. 912.

§ 564 (Okla.) Where time for making and serving case-made has expired, a purported order of the trial court, attempting to extend the time, is a nullity under Rev. Laws 1910, § 5246.—*Vannier v. Fraternal Aid Ass'n*, 140 P. 1021.

§ 564 (Okla.) An order extending the time for making and serving a case-made after the expiration of the time fixed therefor is void.—*Wills v. Buzbee*, 140 P. 1146.

A purported case-made which is not served within three days after judgment or order, or within an extension of the time duly allowed, is a nullity.—*Id.*

§ 564 (Okla.) An order granting an extension of time to make and file a case-made implies that it may be served within the same time.—*Kinney v. McPherrin*, 140 P. 1149.

A purported case-made not served within three days after judgment or order, or within the extension of time duly allowed, cannot be considered.—*Id.*

#### (E) Abstracts of Record.

§ 581 (Or.) Under L. O. L. § 554, as amended by Laws 1913, p. 618, it is not necessary that the abstract contain the findings of fact, conclusions of law, and notice of and undertaking on appeal; it being sufficient that the transcript contains them.—*O'Connor v. Towey*, 140 P. 625.

#### (I) Defects, Objections, Amendment, and Correction.

§ 635 (Or.) That the record does not contain all the evidence is not ground for dismissal.—*O'Connor v. Towey*, 140 P. 625.

#### (K) Questions Presented for Review.

§ 671 (Okla.) An assignment of error calling for an examination of the evidence will not be considered, where the case-made does not disclose the evidence or does not show all of the evidence.—*In re Colling's Guardianship*, 140 P. 141.

§ 671 (Okla.) Any question depending on facts for its determination will not be reviewed, where the case-made fails to recite that it contains all the evidence.—*Van Arsdale-Osborne Brokerage Co. v. Wiley*, 140 P. 153.

A recital of the case-made that "this was all the evidence offered, \* \* \* and the parties \* \* \* rested their case," held to sufficiently comply with the requirements that the case-made recite that it contains all the evidence submitted or introduced.—*Id.*

§ 671 (Okla.) Where a case-made does not contain a statement that it contains all the evidence, no assignment of error requiring an examination of the evidence can be considered.—*School District No. 38, LeFlore County, v. School District No. 92, LeFlore County*, 140 P. 1144.

§ 694 (Mont.) On appeal by a railroad company, in an action to enjoin interference with a change in its line of road, from a judgment for defendant, where the evidence was in narrative form, held, that it was not entitled to a determination on the merits, in view of Supreme Court Rule 7, subd. 3 (44 Mont. xxx, 123 Pac. xi).—*Northern Pac. Ry. Co. v. Hauswirth*, 140 P. 516.

### XI. ASSIGNMENT OF ERRORS.

§ 719 (Cal.) Where there is no specification of insufficiency of the evidence to support a finding, the finding must be taken on appeal as conclusively establishing the facts stated therein.—*Cross v. Mayo*, 140 P. 283.

§ 724 (Okla.) Errors of law, such as rulings relating to process, service, motions, or demurrers, should be specially assigned.—*O'Neil v. James*, 140 P. 141.

§ 725 (Okla.) Error in overruling a demurrer to the petition is not presented for review by an assignment of error that "the judgment of the court in all these matters is contrary to law and against all the competent evidence."—*O'Neil v. James*, 140 P. 141.

§ 731 (Ariz.) Under Rev. St. 1901, par. 1586, as amended by Laws 1907, c. 74, § 21, and Supreme Court Rule 8, subd. 1 (126 Pac. xi), an assignment that the court gave a wrong judgment need not be considered, and the court will not review the sufficiency of the evidence, though, on a proper assignment, it will examine the evidence to determine its sufficiency.—*Landers v. Joerger*, 140 P. 209.

§ 750 (Utah) Where the court's ultimate conclusions disclosed by the judgment are contrary to law applicable to the undisputed facts, appellant, assigning error on the judgment, may have the error reviewed, regardless of whether he may have other assignments reviewed.—*Mellen v. Vondor-Horst Bros.*, 140 P. 130.

§ 753 (N.M.) Where appellant has failed to file an assignment of error as required by Laws

1907, c. 57, § 21, and no attempt is made to excuse the default, the appeal will be dismissed.—*In re Murray*, 140 P. 1042.

## XII. BRIEFS.

§ 757 (Okla.) Instructions will not be reviewed when not set out in the brief in totidem verbis as required by Supreme Court Rule 25 (137 Pac. xi).—*American Nat. Bank v. Halsell*, 140 P. 399.

§ 762 (Cal.App.) A point made for the first time in appellants' closing brief might properly be disregarded.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 773 (Okla.) Where plaintiff in error failed to serve and file briefs as required by Supreme Court rule 7 (137 Pac. ix), *held*, that the judgment against them should be affirmed.—*Wright v. State*, 140 P. 1147.

§ 773 (Okla.) Where plaintiff in error does not file a brief within the time allowed by Supreme Court rule 7 (137 Pac. ix), or before the case is due to be taken on submission, the appeal will be dismissed.—*Board of Com'rs of Tulsa County v. Breckinridge*, 140 P. 1147; *Same v. Cline, Id.*; *Nicholson v. Barnes*, 140 P. 1155.

§ 773 (Okla.) Where defendant in error filed no brief and offered no excuse, the court will not search the record, but will reverse in accordance with the prayer, if the brief of plaintiff in error appeared reasonably to sustain such action.—*De Hart Oil Co. v. Smith*, 140 P. 1154.

§ 773 (Okla.) Under Supreme Court rule 25 (137 Pac. xi), where no briefs are filed by the defendant in error, the assignments of error will be sustained, if borne out by the record.—*St. Louis & S. F. Ry. Co. v. Cobb*, 140 P. 1180.

## XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Colo.) Where the parties have formally settled a controversy in a personal injury action, the appellate court cannot grant either party any relief, and the writ of error will be dismissed.—*Nichols v. Katres*, 140 P. 792.

§ 781 (Okla.) Where it appears that the controversy has been determined and the showing thereof duly served is undenied by plaintiffs in error, the writ of error will be dismissed.—*Spaulding v. Yarbrough*, 140 P. 782.

§ 781 (Okla.) Abstract or hypothetical questions disconnected with the granting of actual relief will not be determined on a writ of error, but the writ will be dismissed.—*State v. Bogle*, 140 P. 1153.

§ 781 (Wash.) Where appellants admit that the controversy has ceased, the appeal will be dismissed.—*Vollman v. Industrial Workers of the World*, 140 P. 337.

§ 783 (Cal.App.) An appeal being given as a matter of right from an order granting or denying a new trial, the court must determine an appeal from such order, notwithstanding appellant failed to give notice before presenting the motion for new trial.—*Turner v. F. W. Ten Winkel Co.*, 140 P. 1086.

§ 784 (Ariz.) An appeal from a judgment alone will not be dismissed on the ground that the appeal was not taken from the order denying a new trial, but the right of review will be restricted.—*Landers v. Joerger*, 140 P. 209.

§ 793 (Colo.) Civ. Code, § 397, providing that the dismissal of an appeal by order of court may be made without prejudice to another appeal, is permissive, and not mandatory, and the discretion of the Supreme Court to refuse to enter such order is as absolute as it was before the section was enacted.—*National Surety Co. v. Schafer*, 140 P. 199.

## XVI. REVIEW.

### (A) Scope and Extent in General.

§ 842 (Cal.) Whether a party entitled to rescind a contract has acted promptly so as to avoid a waiver of the right was a question for the trial court.—*Cross v. Mayo*, 140 P. 283.

§ 843 (Wash.) Where defendant clerk of court, who is sought to be compelled to file a complaint, refused to file it solely on the ground that relator failed to pay the one dollar stenographers' costs required by Laws 1913, c. 126, § 4, and not because of any of the provisions of sections 6 and 7, relating to the use of the stenographers' transcript, the validity of sections 6 and 7 need not be determined on appeal.—*State v. Derbyshire*, 140 P. 540.

§ 854 (Cal.App.) Where a demurrer is well taken upon any ground, the decision will be affirmed, regardless of the reasons assigned therefor by the court below.—*Koch v. Speedwell Motor Car Co.*, 140 P. 598.

§ 866 (Or.) A motion for instructed verdict for defendant, demanding no affirmative relief, presents the same question on appeal as a motion for nonsuit.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

### (C) Parties Entitled to Allege Error.

§ 877 (Wash.) Where defendant could properly have been enjoined from impounding the waters of a stream to the injury of lower riparian owners, defendant cannot complain that the court allowed it two alternatives in accordance with an agreement between parties, instead of issuing an unqualified injunction.—*St. Martin v. Skamania Boom Co.*, 140 P. 355.

### (D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 889 (Mont.) Complaint will not be deemed amended where the bill of exceptions presented no evidence, and did not disclose that the essential facts were established by evidence received without objection.—*Manhattan Co. v. White*, 140 P. 90.

§ 894 (Or.) In a suit for accounting, where the abstract brings up only the record relating to the interlocutory decree, and not the account filed by defendant in obedience thereto, nor plaintiff's answer, the case on the accounting is not in the Supreme Court for retrial.—*Williamson v. Roberts*, 140 P. 633.

### (E) Presumptions.

§ 901 (Nev.) The parties claiming error on appeal must clearly establish it.—*Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519.

§ 901 (Okla.) A judgment will be affirmed where the record does not affirmatively show error.—*Hoehler v. Short*, 140 P. 146.

§ 907 (Ariz.) Where all the evidence was not in the record, it must be presumed by the Supreme Court that the evidence was sufficient to sustain a finding.—*Wooster v. Scorse*, 140 P. 819.

§ 928 (Colo.) Where the testimony is not preserved, it will be assumed on appeal that a refused instruction was not supported by the evidence.—*Rogers v. Rogers*, 140 P. 193.

§ 931 (Mont.) Essential findings will not be implied where the bill of exceptions presented no evidence, and did not disclose that the essential facts were established by evidence received without objection.—*Manhattan Co. v. White*, 140 P. 90.

§ 933 (Cal.) Where on appeal from an order denying a new trial, there is a statement or bill of exceptions containing specifications of insufficiency of evidence and assignments of errors, the presumption is that notice of the motion was duly given, and that the specifications and assignments conform to those in the notice, and constitute the grounds upon which the motion was made.—*Cross v. Mayo*, 140 P. 283.

§ 937 (Cal.) If the appellate record does not show when the bill of exceptions was presented and settled, it is presumed that it was presented within due time; all presumptions favoring the regularity of the proceedings.—*Hughes Mfg. & Lumber Co. v. Elliott*, 140 P. 17.

(F) Discretion of Lower Court.

§ 959 (Kan.) The matter of amending to conform to the proof being discretionary, the ruling thereon will not be disturbed.—*Wait v. McKibben*, 140 P. 860.

§ 966 (Colo.) Where the denial of a continuance for surprise was well within the discretion of the trial court, its action cannot be reviewed.—*Dussart v. M. Abdo Mercantile Co.*, 140 P. 806.

§ 970 (Wash.) The action of the court in granting, after motion for nonsuit but before decision thereon, the request of plaintiff to offer further evidence on an issue to which the motion was directed, will not be disturbed unless discretion was abused.—*Norton v. Pacific Power & Light Co.*, 140 P. 905.

§ 971 (Okla.) The court's discretion in limiting the cross-examination of a witness will not be disturbed, unless clearly abused.—*Cobb v. Oklahoma Pub. Co.*, 140 P. 1079.

§ 971 (Or.) The decision of the trial court on the preliminary question of fact whether a witness is qualified as an expert will not be disturbed by the appellate court, unless there is no evidence to sustain it.—*Rugenstein v. Ottenheimer*, 140 P. 747.

§ 977 (Wash.) The grant of a new trial after verdict for plaintiff, unless he will accept a reduced judgment, will not be disturbed, unless the court abused its discretion.—*Jett v. Old Nat. Bank Bldg. Co.*, 140 P. 554.

§ 984 (Or.) The Supreme Court can review allowances of attorneys' fees in suits to set aside marriages only for abuse of discretion.—*Taylor v. Taylor*, 140 P. 999.

(G) Questions of Fact, Verdicts, and Findings.

§ 1001 (Okla.) A verdict will not be disturbed when reasonably sustained by the evidence.—*Everett v. Combs*, 140 P. 152; *American Nat. Bank v. Halsell*, *Id.* 399.

§ 1001 (Okla.) A verdict sustained by evidence will not be disturbed, in the absence of error of law.—*Wallace v. Killian*, 140 P. 162.

§ 1001 (Okla.) A finding for defendant on the issue of fraud in an action on a note will not be disturbed, where the evidence of fraud is sufficient to satisfy the mind of the wrongful conduct charged.—*American Nat. Bank v. Halsell*, 140 P. 399.

§ 1001 (Okla.) Findings for plaintiff will not be disturbed, when reasonably supported by the evidence, where there is no error in the instructions.—*Thompson v. De Long*, 140 P. 421.

§ 1001 (Okla.) A verdict sustained by competent evidence, under proper instructions, will not be disturbed.—*Cummins v. Bridges*, 140 P. 1146; *McConnell v. Watkins*, *Id.* 1187.

§ 1001 (Or.) Evidence to support a verdict within Const. art. 7, § 3, must be legal evidence and must tend to prove every material fact as to which the prevailing party has the burden.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

§ 1001 (Wash.) Where there was sufficient evidence to take certain issues of fact to the jury, their verdict is conclusive on appeal.—*Auwarter v. Kroll*, 140 P. 326.

§ 1002 (Cal.App.) A verdict based upon conflicting evidence will not be disturbed on appeal, although a verdict for the opposite party would have been amply supported by the evidence.—*Webber v. Smith*, 140 P. 37.

§ 1002 (Idaho) A verdict for plaintiff will not be disturbed, where there is evidence sustaining the contention of each party, though the preponderance of the evidence is against plaintiff's contention.—*Swanstrom v. Frost*, 140 P. 1105.

§ 1002 (Okla.) A verdict will not be disturbed when supported by competent, though conflicting, evidence.—*Glockner v. Jacobs*, 140 P. 142.

§ 1002 (Okla.) A verdict on conflicting evidence, and made under instructions not complained of, will not be disturbed.—*Elwell v. Purcell*, 140 P. 412.

§ 1002 (Okla.) A verdict reasonably supported by conflicting evidence will not be set aside.—*Alfred v. St. Louis, I. M. & S. Ry. Co.*, 140 P. 415.

§ 1002 (Wash.) A verdict on conflicting evidence will not be disturbed.—*Culp v. Kirkman*, 140 P. 346.

§ 1002 (Wash.) A finding on conflicting evidence will not be disturbed.—*Edward Thompson Co. v. Murphine*, 140 P. 1073.

§ 1004 (Cal.App.) An award of damages in a personal injury action will not be disturbed on appeal, unless the amount is obviously so disproportionate to the injury as to warrant the conclusion that it was the result of passion or prejudice.—*Lynch v. Pacific Electric Ry. Co.*, 140 P. 298.

Where the trial court directed a new trial, unless remittitur should be entered, that does not show that the verdict was influenced by passion or prejudice, and should be set aside; the verdict after the remittitur being the amount found by the jury under the supervision of the court.—*Id.*

§ 1004 (Cal.App.) In an action for personal injuries, the law does not fix any precise rules for the admeasurement of damages, but necessarily leaves their assessment to the good sense and unbiased judgment of the jury, and the appellate courts will not interfere, unless the amount awarded is so grossly excessive as to show that the jury was actuated by passion or prejudice.—*Scragg v. Sallee*, 140 P. 706.

§ 1004 (Okla.) A verdict in a personal injury case will not be set aside as excessive, where it does not appear that the jury were influenced by bias, passion, or prejudice.—*St. Louis & S. F. R. Co. v. Fitts*, 140 P. 144.

§ 1004 (Okla.) A judgment will not be reversed because of an insufficient verdict, where it does not appear that the verdict is less than the actual pecuniary loss, or that the jury's estimate of the extent of the injuries was wrong.—*Henry v. Morris & Co.*, 140 P. 413.

§ 1005 (Okla.) A verdict reasonably supported by the evidence and approved by the trial court will not be disturbed for insufficiency of the evidence.—*Iowa Dairy Separator Co. v. Sanders*, 140 P. 406.

§ 1008 (Utah) The opinion of the trial court may be looked to on appeal to ascertain the reasons for the decision, but it is not a finding of any fact.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

§ 1009 (Mont.) In an action by a railroad company to enjoin interference with a change in its line of road involving a question as to the location of the right of way, trial court's finding *held* conclusive, where maps and charts by reference to which witnesses testified did not accompany the record.—*Northern Pac. Ry. Co. v. Hauswirth*, 140 P. 516.

§ 1009 (Utah) Under the Constitution, appellant may invoke the judgment of the Supreme Court on the facts and the law in an equity case; and where the findings are clearly against the evidence, or when the Supreme Court is satisfied that the correctness of the findings have been overcome by the record, the Supreme Court must make or direct findings according to the

evidence and the law applicable thereto.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

§ 1010 (Cal.) Findings of the trial court will not be disturbed, if any of the evidence, upon a reasonable view thereof, supports them.—*Davis v. John Breuner Co.*, 140 P. 586.

§ 1010 (Okl.) Findings of fact by the court reasonably supported by evidence will not be reviewed.—*Galer v. Berrian*, 140 P. 155.

§ 1010 (Or.) A finding that defendant did not sign a guaranty subject to an agreement that another guarantor should be secured, based on testimony that "we" in the contract was changed to "I" when he signed it, is conclusive on appeal.—*Wolf v. Eppenstein*, 140 P. 751.

§ 1011 (Cal.) Finding that party, suing to recover stock sold for delinquent assessment, made no tender, supported by evidence, held conclusive on appeal, though there was evidence which would have supported a contrary finding.—*Shannon v. Tooker*, 140 P. 10.

§ 1011 (Cal.) Findings upon conflicting evidence are conclusive upon appeal.—*Cross v. Mayo*, 140 P. 283.

§ 1011 (Colo.) Where there was abundant evidence to support defendant's defense, the finding of the court in favor of such defense is controlling upon review, though there was also contrary evidence.—*Sayre v. Leonard*, 140 P. 196.

§ 1011 (Colo.App.) Where the testimony of plaintiff and defendant was in direct conflict as to whether an automobile was sold with a specific guaranty, the finding of the trial court that there was no guaranty will not be disturbed.—*Degge v. Carstarphen Electric Co.*, 140 P. 478.

§ 1011 (Okl.) A judgment of a trial court reasonably supported by conflicting evidence, has the same force as a verdict.—*Franklin v. Wright*, 140 P. 403.

§ 1015 (Mont.) On an appeal from the determination of a motion for a new trial by a judge other than the one who presided at the trial, the same presumption does not attach to his ruling as if he had heard the witnesses, in view of Rev. Codes, § 6179, providing that, where the reason is the same, the rule should be the same, and section 6178, providing that, where the reason ceases, so should the rule itself.—*Gibson v. Morris State Bank*, 140 P. 76.

#### (H) Harmless Error.

§ 1026 (Idaho) A judgment will not be reversed for error not affecting the substantial rights of the parties.—*Richardson v. Bohnay*, 140 P. 1106.

§ 1027 (Colo.App.) Error in refusing to compel plaintiff to elect whether he would rely upon the cause of action for the reasonable value of an automobile, or upon one for an agreed value, was not prejudicial, where the trial was before the court, and the evidence disclosed no dispute as to the value or the promise by the defendant to pay it.—*Degge v. Carstarphen Electric Co.*, 140 P. 478.

§ 1027 (Nev.) Unless an error substantially affects the rights of the complaining party, so that it could be reasonably claimed that a different result might have been reached, had the error not occurred, it is harmless.—*Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519.

§ 1031 (Wash.) In an action tried to the court, where a view is had by the trial judge without the consent of the parties, and his judgment is partly based on the results of his inspection, it will be reversed on appeal because it cannot be determined whether the court erred in considering what he had before him.—*Elston v. McGlauffin*, 140 P. 396.

§ 1033 (Cal.) A finding in favor of appellant cannot be reviewed, but must be assumed to be supported by sufficient evidence.—*People v. Banning Co.*, 140 P. 587.

§ 1039 (Colo.) An allegation of a complaint in an action for wrongful death under Rev. St.

1908, § 2056, authorizing recovery for a death caused by the negligence of "any officer, agent, servant, or employe" of a railroad, of negligence on the part of the company, as well as its "officers, agents, and employes," being merely surplusage, was not reversible error.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

§ 1039 (Kan.) Where a petition on a policy pleaded generally compliance with its terms, and the answer pleaded breach of a condition against incumbrances, a departure resulting from a reply alleging that the insurer's agent had falsely stated in the application that the land was not mortgaged, without plaintiff's knowledge or authority, and without propounding the question to him, was not prejudicial to the insurer.—*Palin v. Insurance Co. of North America*, 140 P. 886.

Where there was a variance between the pleading and proof, but defendant did not observe the requirements of Civ. Code, § 134 (Gen. St. 1909, § 5727), with reference thereto, and the court instructed on the case made by the proof without going through the formality of an amendment, defendant was not prejudiced by the variance.—*Id.*

§ 1039 (Wash.) Error in refusal to require an election between allegations in a complaint for injuries caused by blasting, some of which relied upon the inherent danger of the work, and others upon the negligence of the defendant, is harmless, where the defendant was liable for such injuries regardless of its negligence.—*B. Schade Brewing Co. v. Chicago, M. & P. S. Ry. Co.*, 140 P. 897.

§ 1040 (Okl.) The overruling of a demurrer to the original petition held not ground for reversal, where such petition was superseded by an amended petition, to the sufficiency of which no objection was made.—*Jones v. Bennett*, 140 P. 148.

§ 1041 (Wash.) Where land did not contain the number of acres represented, and the purchaser assigned his contract, any error in allowing an amendment to the assignee's complaint, which did not show that the right to sue for the deficiency had been assigned was harmless, where the assignment carried no beneficial interest and the purchaser was made a plaintiff.—*Lyle v. Cunningham*, 140 P. 330.

§ 1042 (Cal.App.) The improper striking of allegations from the complaint is harmless, where all evidence which would have been admissible under those allegations was admitted without even objection.—*Klumpke v. Moreno*, 140 P. 313.

§ 1045 (Cal.App.) Defendant could not on appeal complain of error of the trial court in overruling his challenge for cause of a juror, where it did not appear that, after exhausting the remainder of his peremptory challenges after thus challenging the juror in question, he had occasion or desire to use any additional peremptory challenge, or that the jury as finally accepted was not satisfactory to him.—*Scragg v. Sallee*, 140 P. 706.

§ 1046 (Nev.) Remarks of the trial judge made in ruling on evidence held not reversible error.—*Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519.

§ 1046 (Wash.) Where the court, to whom an action for damages for the negligent construction of a building on defendant's land which plaintiffs claimed caused their property to slide was tried, viewed the premises without the consent of the parties, and because of his own theory and the result of the view disregarded defendant's evidence, the judgment for plaintiffs must be reversed.—*Elston v. McGlauffin*, 140 P. 396.

§ 1047 (Colo.App.) The erroneous ruling of the court, in an action by a teacher for breach of a contract of employment, that plaintiff should show the amount realized from other employment, instead of leaving such matters for the defendant to show, was not harmful to the

defendant, who brought out the facts on cross-examination.—School Dist. No. 3 in Clear Creek County v. Nash, 140 P. 473.

§ 1048 (Cal.App.) Certain questions to witnesses, though erroneous, *held* harmless, the answers being in the negative.—Scragg v. Sallee, 140 P. 706.

§ 1050 (Colo.) In an action for wrongful death under Rev. St. 1908, § 2056, authorizing the recovery of a penalty of \$3,000 to \$5,000 by the next of kin, it was reversible error to admit evidence of plaintiff's loss, as it might mislead the jury, who could only consider the defendant's culpability.—Denver & R. G. R. Co. v. Frederic, 140 P. 463.

§ 1050 (Nev.) Error in admitting evidence on material issue is reversible.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

§ 1050 (Okla.) The exclusion of immaterial evidence was harmless error.—Haslett v. Wilkin, 140 P. 410.

§ 1050 (Or.) In an action for death of an employé, the admission of evidence as to witness' understanding of the directions of defendant's superintendent to decedent is not ground for reversal, where it does not materially contradict the evidence of defendant on the subject.—McClagherty v. Rogue River Electric Co., 140 P. 64.

§ 1052 (Cal.App.) Error in excluding evidence was rendered harmless by its subsequent admission.—Scragg v. Sallee, 140 P. 706.

§ 1056 (Kan.) In a suit for an accounting of a landlord's portion of a crop which defendants had promised to pay the landlord's creditor, the exclusion of a question calling for the amount due on the debt *held* not prejudicial to defendants.—Staley v. Weston, 140 P. 878.

Defendants were not prejudiced by the exclusion of a question the answer to which must have involved substantially but a rehearsal of defendants' pleaded defense.—*Id.*

The amount of defendants' mortgage on a crop having been agreed on and settled, they were not prejudiced by the court's refusal to allow proof of the items making up the amount so settled.—*Id.*

§ 1056 (Nev.) Error in excluding evidence on material issues is reversible.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

§ 1058 (Wash.) Error in rejecting evidence was harmless, where it was afterwards admitted.—Wild Rose Orchard Co. v. Critzer, 140 P. 561.

§ 1061 (Or.) Though plaintiff did not prove a case sufficient to go to the jury, denial of a non-suit will not be disturbed if the testimony afterwards supplies the omission.—Scibor v. Oregon-Washington R. & Navigation Co., 140 P. 629.

§ 1062 (Kan.) Where, in an action for malicious attachment, defendants pleaded a former judgment in which the attachment was dissolved and alleged that plaintiff in that action counterclaimed for the same damages, error in omitting to submit that question was not prejudicial, where plaintiff had not been permitted to litigate the question of damage in the action to dissolve.—Murphree v. Anderson, 140 P. 880.

§ 1062 (Mont.) The error in failing to direct a finding on an issue and submitting it to the jury was harmless, where the jury found correctly.—McInness v. Republic Coal Co., 140 P. 235.

§ 1066 (Cal.) In an action for injuries to an employé caused by the negligence of a coemployé exercising control over the work and the men, refusal of an instruction *held* not prejudicial, in view of the undisputed evidence.—Foutz v. City of Los Angeles, 140 P. 20.

§ 1066 (Cal.) Error, if any, in modifying an instruction that a broker could not recover compensation if he represented, and the owner understood, that the paper signed was not a contract, by adding that, if defendant's own ad-

viser drafted it, he could not complain, was not prejudicial, where the evidence showed conclusively that defendant did regard the paper as a contract.—Sill v. Ceschi, 140 P. 949.

§ 1068 (Kan.) In a vendor's action for a purchaser's refusal to perform, an instruction that, subject to certain conditions, the measure of damages would be the difference between the contract price and the price on resale *held* not prejudicial to the purchaser, where the jury fixed the damages on the basis of market value, and not on the price obtained on resale.—First M. E. Church of Strong City v. North, 140 P. 888.

§ 1068 (Okla.) Failure to instruct that a construction company in charge of certain work was not an independent contractor, and submission of the question to the jury, *held* harmless, where the jury reached the right conclusion.—Oklahoma City Const. Co. v. Peppard, 140 P. 1064.

§ 1070 (Wash.) In an action for injuries to adjoining property caused by blasting by a railroad company, where the railroad was liable for such injuries, whether it was negligence or not, special findings by the jury that it was negligent were not prejudicial to the defendant.—B. Schade Brewing Co. v. Chicago, M. & P. S. Ry. Co., 140 P. 897.

#### (I) Error Waived in Appellate Court.

§ 1078 (Ariz.) Where assignments that the court erred in overruling the motion for a new trial were not argued, they will not be considered.—Machomich Mercantile Co. v. Hickey, 140 P. 63.

#### (K) Subsequent Appeals.

§ 1097 (Colo.App.) The rulings of the Supreme Court were binding on the Court of Appeals, on a subsequent appeal as the law of the case.—Tibbetts v. Terrill, 140 P. 936.

§ 1099 (Wash.) The holding on a former appeal that plaintiff's evidence in his action for personal injury made a case for the jury was the law of the case on a subsequent appeal, where there was no material difference in the evidence on the two trials.—Toupin v. Kent Lumber Co., 140 P. 903.

### XVII DETERMINATION AND DISPOSITION OF CAUSE.

#### (A) Decision in General.

§ 1121 (Colo.App.) Where an equitable suit to recover land conveyed in payment of corporate stock was tried on the theory that the conveyance was induced by actual and intentional fraud, but the evidence did not sustain a finding of fraud, a judgment granting relief will be reversed without prejudice to sue for rescission for mutual mistake.—Moore v. Carrick, 140 P. 485.

§ 1122 (Cal.) The Supreme Court cannot make findings of fact in a mechanic's lien foreclosure.—Pacific Sash & Door Co. v. Elderton, 140 P. 247.

#### (D) Reversal.

§ 1170 (Okla.) Under Wilson's Rev. & Ann. St. 1908, § 4344, the Supreme Court will disregard errors not affecting any substantial rights of the losing party.—Jones v. Bennett, 140 P. 148.

§ 1170 (Wash.) Where evidence admitted under objection showed sufficient ground for reforming a deed, the defect in the complaint for the reformation of the deed, arising from failure to state the mistake with sufficient definiteness, was technical, not availing on appeal.—Carlson v. Druse, 140 P. 570.

§ 1172 (Wash.) Where a case involves more than one cause of action, the judgment may be affirmed as to one, and there may be a remand for a new trial as to the others.—Auwarter v. Kroll, 140 P. 326.



§ 1176 (Mont.) Under Rev. Codes, § 7118, judgment for plaintiff for insufficient amount appealed from by him will be reversed, with directions to sustain the demurrer to the complaint, where it was insufficient to sustain any judgment.—*Manhattan Co. v. White*, 140 P. 90.

## **XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.**

§ 1231 (Colo.) Code Civ. Proc. § 422, requiring the appeal bond, in case of a money judgment, to provide that, if appellant does not make payment of the judgment within 30 days after filing of remittitur, judgment shall be rendered on motion in favor of the obligee in the appeal bond against the sureties, *held* not to apply, where the appeal was dismissed without prejudice.—*National Surety Co. v. Schafer*, 140 P. 199.

§ 1232 (Colo.) Under Civ. Code, § 397, construed with section 388 (Code Civ. Proc. 1908, § 422) as it was amended by Laws 1907, p. 278, and sections 401, 402, *held* that, where an appeal bond was filed on February 27th, and the appeal was dismissed, and remittitur issued on June 3d, and the record was entered in the Supreme Court as upon writ of error on August 8th, and a supersedeas allowed, it was error to render judgment against the sureties on motion for the amount of the judgment; liability thereon not maturing until the judgment is affirmed.—*National Surety Co. v. Schafer*, 140 P. 199.

## **APPEARANCE.**

See Appeal and Error, § 434; Criminal Law, § 1182; Garnishment, § 104; Pleading, § 433.

## **APPLIANCES.**

See Master and Servant, §§ 101-127.

## **APPOINTMENT.**

See Executors and Administrators, §§ 17-29; Officers, §§ 18, 20; Receivers, §§ 57, 58.

## **APPROPRIATION.**

See Municipal Corporations, §§ 904, 905; Waters and Water Courses, §§ 33-152.

## **ARBITRATION AND AWARD.**

See Submission of Controversy.

## **ARGUMENT OF COUNSEL.**

See Criminal Law, §§ 706, 730; Trial, § 115.

## **ARREST.**

See False Imprisonment.

## **II. ON CRIMINAL CHARGES.**

§ 68 (Or.) An instruction that the standard as to the amount of force an officer may use in making an arrest is the conduct of ordinarily prudent men under the existing circumstances is not error.—*Scibor v. Oregon-Washington R. & Navigation Co.*, 140 P. 629.

## **ARREST OF JUDGMENT.**

See Criminal Law, §§ 968, 970.

## **ARSON.**

See Criminal Law, § 1208.

## **ASSAULT AND BATTERY.**

## **II. CRIMINAL RESPONSIBILITY.**

### **(A) Offenses.**

§ 60 (Wash.) Under Rem. & Bal. Code, §§ 2413, 2414, where the evidence showed that an assault was made in a violent manner with a club about 1 by 3 inches, and 16 inches long,

and resulted in a number of serious wounds, accused *held* guilty of assault either in the first or second degree, and the court properly refused to submit assault in the third degree.—*State v. Hart*, 140 P. 321.

## **ASSESSMENT.**

See Eminent Domain, §§ 167-262; Municipal Corporations, §§ 406-506, 538, 576; Taxation, § 495; Waters and Water Courses, §§ 257, 266.

## **ASSIGNMENT OF ERRORS.**

See Appeal and Error, §§ 719-753; Criminal Law, §§ 1130, 1132.

## **ASSIGNMENTS.**

See Bills and Notes, § 209; Corporations, §§ 121-149; Fraudulent Conveyances; Patents, §§ 196-203; Pleading, § 205; Subscriptions, § 16.

## **II. OPERATION AND EFFECT.**

§ 89 (Colo.App.) Where a chose in action was assigned to B. for collection, with a right to retain 25 per cent. for his services, he held a judgment recovered thereon in trust for the assignor, coupled with an interest to the extent of 25 per cent. of the judgment, and he could not be required to release the same until his claim had been satisfied.—*Ballinger v. Vates*, 140 P. 931.

The assignment of a chose in action for collection creates a contract analogous to that of a bailment under which the bailee contracts to perform services for the bailor entitling the bailee to retain possession of the chose in action until paid.—*Id.*

## **III. RIGHTS AND LIABILITIES OF PARTIES.**

§ 92 (Colo.App.) Where a claim was assigned to B. for collection by suit, he to receive 25 per cent. of the judgment for his services, the debtor could not compromise or settle a judgment obtained, by payment to the creditor, except at his peril.—*Ballinger v. Vates*, 140 P. 931.

## **IV. ACTIONS.**

§ 121 (Colo.App.) Where a claim for money due was assigned to B. for collection, the legal title to the claim vested in him, and he could sue thereon in his own name.—*Ballinger v. Vates*, 140 P. 931.

## **ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

See Bankruptcy.

## **ASSOCIATIONS.**

See Building and Loan Associations; Charities, § 39.

## **ASSUMPSIT, ACTION OF.**

See Work and Labor.

## **ASSUMPTION.**

Of risks, see Master and Servant, §§ 204-219, 288.

## **ATTACHMENT.**

See Appeal and Error, § 1062; Execution; Garnishment; Homestead; Pleading, § 373; Venue, § 41.

## **I. NATURE AND GROUNDS.**

### **(B) Grounds of Attachment.**

§ 44 (Ok.) That a conveyance has been made with intent to defraud will not be inferred, as a basis of attachment, from the mere fact that



the defendant has disposed of his property to prefer a creditor, and to delay collection of plaintiff's claim until such creditor has been paid.—First State Bank of Durant v. Smith, 140 P. 150.

That a debtor in failing circumstances prefers one creditor to the exclusion of others is not alone sufficient to sustain an attachment on the ground that he has disposed of his property with intent to defraud, hinder, or delay his creditors.—Id.

§ 47 (Ok.) The burden is on the attaching creditor to prove intent to defraud, where the ground of attachment is that defendant has disposed of his property with such intent.—First State Bank of Durant v. Smith, 140 P. 150.

#### V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 164 (Kan.) It is not essential to a valid levy of an attachment that the officer make a manual seizure of personal property, but is sufficient that he assume control over it.—Parish v. Van Arsedale-Osborne Brokerage Co., 140 P. 835.

#### VIII. CLAIMS BY THIRD PERSONS.

§ 298 (Ariz.) A deposit of money in court pursuant to Laws 1909, c. 11, § 1, providing that, whenever bond is required of a party in any civil or criminal matter or proceeding, he may deposit in court a sum in lieu thereof, cannot be made in lieu of the bond required by Civ. Code 1901, para. 4128, 4129, on a trial of the right to personality attached which is claimed by a third person.—Otis v. Nelson, 140 P. 211.

§ 302 (Ariz.) To authorize the statutory proceeding known as the trial of the right of property which is attached, etc., claimant must bring himself within the terms of the statute providing such remedy (Civ. Code 1901, para. 4128-4152).—Otis v. Nelson, 140 P. 211.

§ 306 (Ok.) A plea whereby an interpleader attempted to set up a landlord's lien under Rev. Laws 1910, §§ 8809, 8810, on attached property held insufficient to show that the interpleader was entitled to the property.—Lee v. Lowery, 140 P. 1175.

#### X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 345 (Kan.) Where the sheriff stated to the owner that he intended to attach certain personalty, and the owner gave a forthcoming bond reciting an attachment, there was a sufficiently valid levy to render unavailable, in a subsequent action on the attachment bond, the defense that there was no valid levy.—Parish v. Van Arsedale-Osborne Brokerage Co., 140 P. 835.

§ 350 (Wash.) In an action upon an attachment bond, evidence held to sustain a finding that defendant, the attaching creditor, had no reasonable or probable cause to believe the grounds stated in the affidavit upon which the attachment was issued, viz.: That plaintiff was about to dispose of its property with intent to delay its creditors, or convert it into money to place it beyond the reach of its creditors.—Wild Rose Orchard Co. v. Critzer, 140 P. 561.

§ 351 (Kan.) Expenses necessarily incurred in procuring the dissolution of a wrongful attachment and release of the property seized, including attorney's fees and costs of depositions, are recoverable by the owner in an action on the attachment bond.—Parish v. Van Arsedale-Osborne Brokerage Co., 140 P. 835.

The depreciation in the value of the property and of the prices received, when they proximately result from an unlawful attachment, are recoverable in an action on the attachment bond.—Id.

§ 352 (Wash.) What facts and whether the particular facts in a given case constitute prob-

able cause for an attachment are exclusively for the court, and what are the facts, where there is any controversy in reference thereto, is exclusively for the jury, unless one is waived.—Wild Rose Orchard Co. v. Critzer, 140 P. 561.

### ATTESTATION.

See Taxation, § 765.

### ATTORNEY AND CLIENT.

See Appeal and Error, § 984; Attachment, § 351; Bills and Notes, § 160; Contracts, § 154; Covenants, § 130; District and Prosecuting Attorneys; Divorce, § 195; Evidence, §§ 332, 543; Insurance, § 675; Marriage, § 62; Mortgages, § 581; Principal and Agent, § 190; Replevin, § 123; Trial, § 115; Witnesses, §§ 139, 189.

#### II. RETAINER AND AUTHORITY.

§ 100 (Cal.App.) Attorneys for plaintiff in claim and delivery held authorized under Code Civ. Proc. § 283, subd. 2, to receive the property in satisfaction of the judgment.—Ely v. Liscomb, 140 P. 1086.

#### IV. COMPENSATION AND LIEN OF ATTORNEY.

##### (A) Fees and Other Remuneration.

§ 144 (Cal.App.) The courts will be reluctant to construe a contract for legal services as limiting the fee to an amount considerably less than the necessary expenditures made by the attorney.—Eldridge v. Mowry, 140 P. 978.

§ 149 (Colo.) Where an attorney's contract made his fee dependent upon the decision of the Supreme Court sustaining the validity of certain bonds, and it was admitted that he acted as attorney in the district court, and thereafter secured a favorable decision from the Supreme Court, it was immaterial what disposition was made of the case in the district court.—Keeler v. Hoyt, 140 P. 191.

§ 166 (Colo.) Where the opinion of the Supreme Court in an action to restrain the issuance of municipal bonds held that the three objections made to the bonds were not well taken, the opinion is at least prima facie evidence that the Supreme Court had upheld the validity of the bonds within an attorney's contract, which made his fee dependent upon such action by the court.—Keeler v. Hoyt, 140 P. 191.

In an action for an attorney's fee conditioned upon the upholding of the validity of certain bonds, the prima facie case established by the overruling of objections to the bonds presented in court is not rebutted by the testimony of the client that he himself, and perhaps others, had raised certain objections to the bonds not presented to the court.—Id.

##### (B) Lien.

§ 190 (Colo.) Where plaintiff's attorneys contracted for a contingent fee, and after suing out a writ of error a settlement was made without their consent, and the suit dismissed, the Supreme Court had no jurisdiction to enforce the attorney's lien, or permit further prosecution for that purpose; their right to a lien being only enforceable in a separate suit.—Lane v. Lyon, 140 P. 197.

§ 190 (Colo.) The appellate court will not determine in the first instance the question whether attorneys are entitled to a lien, so that, where plaintiff and defendants have settled a case, the fact that plaintiff's attorneys claim a lien will not prevent a dismissal of defendant's writ of error.—Nichols v. Katre, 140 P. 792.

### ATTORNEY GENERAL.

See Building and Loan Associations, § 45; Mandamus, § 78; States, § 192; Statutes, § 219.

## AUTHORITY.

See Brokers, § 10; Principal and Agent, §§ 97-131.

## AUTOMOBILES.

See Damages, § 131; Evidence, §§ 222, 500; Municipal Corporations, §§ 705, 706; Street Railroads, §§ 99, 114; Taxation, §§ 193, 211.

## BAILMENT.

See Assignments, § 89; Carriers, §§ 174-185; Embezzlement; Pledges.

## BALLOTS.

See Elections, § 180.

## BANKRUPTCY.

See Trial, §§ 192, 253.

### III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 159 (Idaho) A bankrupt's trustee, to recover an alleged preference, must prove that the bankrupt, while insolvent, and within four months prior to bankruptcy, made the transfer, and that the creditor receiving it would thereby obtain a greater percentage than other creditors of the same class.—*Soule v. First Nat. Bank of Ashton*, 140 P. 1098.

§ 166 (Idaho) A trustee, to recover an alleged preference, must prove that the creditor receiving it had reasonable cause to believe that the transfer would effect a preference.—*Soule v. First Nat. Bank of Ashton*, 140 P. 1098.

Under Bankruptcy Act 1898, as amended, the intent of the bankrupt to effect a preference is immaterial.—*Id.*

(E) Actions by or Against Trustee.

§ 303 (Idaho) In an action by a bankrupt's trustee to recover an alleged preference, the burden is on the trustee to prove that the creditor had reasonable cause to believe that the transfer would effect a preference.—*Soule v. First Nat. Bank of Ashton*, 140 P. 1098.

### V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 398 (Utah) Under Bankruptcy Act, § 67f, declaring liens obtained against an insolvent within four months of his adjudication in bankruptcy void, *held*, that a state district court had no power to condemn the wages of an insolvent in the hands of a garnishee, against his claim of exemption, within four months of the filing of his petition in bankruptcy.—*Southern Pac. Co. v. I. X. L. Furniture & Carpet Installment House*, 140 P. 685.

## BANKS AND BANKING.

See Bills and Notes, § 26; Corporations, § 123; Subscriptions, § 16.

### II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 77 (Colo.) In an action by the receiver of an insolvent state bank to recover property alleged to have been wrongfully purchased by defendant's husband, who was its president, with its funds, evidence *held* to sustain a finding that, when a house was constructed on one of the lots with assets of the bank, no legitimate debt was owing to defendant by her husband.—*Godding v. Hall*, 140 P. 165.

Evidence *held* to show that an alleged transfer of land by the husband to the bank in payment of his overdraft was not an actual sale

to the bank, but that the transfer was merely as a pretended security.—*Id.*

Evidence *held* to sustain a finding that defendant's husband, at the time involved, had actual control of the bank and conducted its affairs in fraud of the rights of the depositors for his own benefit.—*Id.*

Evidence *held* to sustain a finding that the president fraudulently used the bank's funds to construct a house upon the lot involved at a time when he was largely indebted to the bank.—*Id.*

### III. FUNCTIONS AND DEALINGS.

(C) Deposits.

§ 139 (Utah) Where plaintiff notified a bank not to honor any further checks drawn on her account by one purporting to act as her agent, and the bank honored his check for the entire amount of her deposit, it cannot escape liability for its act in honoring checks on other funds subsequently deposited, upon the theory that such subsequent deposit constituted a new account to which plaintiff's directions were not applicable.—*Stoll v. Commercial Nat. Bank*, 140 P. 115.

§ 154 (Utah) In an action by a depositor who claimed that the defendant bank had wrongfully honored checks drawn on her account by one purporting to act as her agent, evidence *held* insufficient to show that the bank was justified in believing that the agent whose authority had been revoked was entitled to draw checks.—*Stoll v. Commercial Nat. Bank*, 140 P. 115.

Where a depositor revoked the authority of her agent to draw checks, and he sold some of her property, depositing the proceeds to her account, and sending her a check therefor, signed in her name by himself as agent, the depositor's presentation of the check for payment after retention for some days is no evidence showing the bank's authority to cash checks drawn by the agent in the interim.—*Id.*

(E) Loans and Discounts.

§ 179 (Cal.App.) Where corporate stock indorsed in blank and delivered to a broker for sale was fraudulently pledged to secure an advancement upon a draft attached to the stock, the bank may rely on the pledge and allow the broker to withdraw other sums of money thereafter deposited, though they were sufficient to have discharged the advancement on the draft.—*Morgrage v. National Bank of California*, 140 P. 300.

(F) Exchange, Money, Securities, and Investments.

§ 189 (Cal.) A bank can rely on mistake as the defense to an action upon a cashier's check, though the mistake was not a mutual one.—*National Bank of California v. Miner*, 140 P. 27.

A finding that the cashier of a bank gave a check pursuant to his "supposition" that the drawer of the check, in exchange for which the cashier's check was given, had a deposit with the bank is a finding that the cashier believed the drawer had sufficient money on deposit to meet the check.—*Id.*

Evidence and findings *held* to show that a cashier's check would not have been issued if the bank had known that the drawer of a check, in exchange for which the cashier's check was given, was not a depositor at the bank.—*Id.*

The giving of credit to a debtor of plaintiff bank by it in reliance upon a cashier's check issued by the defendant bank *held* not to have changed the position of the plaintiff bank so as to prevent the defendant from relying upon mistake and want of consideration as defenses to the check.—*Id.*

### V. SAVINGS BANKS.

§ 293 (N.M.) Sess. Laws 1887, c. 68, § 14, *held* to impose no individual liability on stockholders

in a savings bank, for the debts of such bank, where the original subscribers have paid the full par value for the stock.—*Jones v. Rankin*, 140 P. 1120.

## BAR.

See Judgment, §§ 584, 743.

## BASTARDS.

See Jury, § 14.

### I. ILLEGITIMACY IN GENERAL.

§ 13 (Kan.) Whether an illegitimate son has been so recognized by his father as to constitute a "general and notorious" recognition of that relation within Gen. St. 1909, § 2956, is a question of fact.—*McLean v. McLean*, 140 P. 847.

### III. PROCEEDINGS UNDER BASTARDY LAWS.

§ 19 (Okl.) A bastardy proceeding under Rev. Laws 1910, c. 55, art. 3, is special and in the nature of a civil action; the pleadings and procedure being governed by the statutes relating to procedure in civil actions.—*Anderson v. State*, 140 P. 1142.

§ 49 (Okl.) In a bastardy proceeding, under Comp. Laws 1909, c. 13, art. 3 (Rev. Laws 1910, c. 55, art. 3), the residence of the mother within the county is jurisdictional, and a complaint failing to allege that she so resided was fatally defective.—*Anderson v. State*, 140 P. 1142.

## BENEFICIAL ASSOCIATIONS.

See Building and Loan Associations; Constitutional Law, § 92; Insurance, § 719.

## BEST AND SECONDARY EVIDENCE.

See Evidence, § 178.

## BETTING.

See Gaming.

## BILL OF EXCEPTIONS.

See Exceptions, Bill of.

## BILL OF EXCHANGE.

See Bills and Notes.

## BILLS AND NOTES.

See Corporations, §§ 414, 432; Estoppel, § 72; Evidence, §§ 18, 459; Executors and Administrators, § 450; Husband and Wife, §§ 156, 254, 268, 270; Pleading, § 248; Pledges, § 44; Principal and Surety, § 89; Sales, § 409.

### I. REQUISITES AND VALIDITY.

(A) Form and Contents of Bills of Exchange, Drafts, Checks, and Orders.

§ 26 (Utah) A bank which cashes for the payee a draft, on its face that of G. on E., though knowing G. was a buyer for E., may recover thereon of G. as drawer, it not knowing or having notice that it was given for goods sold by the payee to E., or that it was not drawn by G. for his own benefit.—*Merchants' Bank v. Goodfellow*, 140 P. 759.

(C) Execution and Delivery.

§ 64 (Colo.) Under Rev. St. 1908, § 4479, providing that, as between the immediate parties, the delivery of a negotiable instrument may be shown to have been conditional, the maker's answer, alleging that the note sued on by the payee was delivered on condition that it should not be obligatory if a certain condition be met, and that such condition was met, stated a sufficient defense, if proven.—*Sayre v. Leonard*, 140 P. 196.

## II. CONSTRUCTION AND OPERATION.

§ 119 (Utah) A draft signed G., though having the name E. both in its upper and lower left-hand corner, is on its face the draft of G., and not of E.—*Merchants' Bank v. Goodfellow*, 140 P. 759.

§ 129 (Cal.) Where the maker of a note mailed on an interest day a check for the interest to the payee, who received it on the following day, after he had directed his attorney to notify the payee of his election to declare the entire sum due, and the notice from the attorney was received by the maker the next day, the maker tendered payment of interest before the exercise of the option.—*Stalder v. Riverside Groves & Water Co.*, 140 P. 252.

The payee of a note stipulating that, on the failure to pay any interest when due, the principal and interest may at his option be declared due must do some act to indicate an exercise of the option, and the giving of a notice to fix the rights of the parties must be received by the maker before he tenders payment of matured interest.—*Id.*

The right of the payee, in a note on default in the interest, to declare the entire sum due at his option may be claimed or waived, and, until claimed, the maker may terminate the right by a proper tender of overdue interest.—*Id.*

### III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 140 (Ariz.) Under Negotiable Instruments Act, an accommodation maker is not discharged by an extension of the time of payment, pursuant to an agreement, made without his knowledge, by the holder and principal maker.—*Cowan v. Ramsey*, 140 P. 501.

## IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 160 (Okl.) A note executed prior to the act taking effect June, 1911, and containing a provision for attorney fees, is nonnegotiable.—*American Nat. Bank v. Halsell*, 140 P. 399.

(C) Transfer Without Indorsement.

§ 209 (Colo.) Independent of Rev. St. 1908, § 4512, if the rights of creditors are not involved, a note may be transferred by way of gift or for value by delivery without indorsement, so as to vest at least the transferor's title in the transferee.—*Lane v. Lane*, 140 P. 804.

## V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

§ 277 (Okl.) That the maker of a note is not liable thereon because of fraud in its procurement does not defeat the liability of the payee to the holder, where such payee participated in the fraud.—*American Nat. Bank v. Halsell*, 140 P. 399.

(D) Bona Fide Purchasers.

§ 371 (Wash.) Where the wives of the members of a firm indorsed their names on the back of a note given by their husbands for a firm debt, the wives were accommodation parties, as defined by Rem. & Bal. Code, § 3420, and were personally liable to the payee and to a holder for value, even with notice that they were accommodation parties.—*Northern Bank & Trust Co. v. Graves*, 140 P. 328.

## VIII. ACTIONS.

§ 462 (Colo.App.) A complaint, in an action on a note which sets out the note and alleges that the indorsement of payment thereon by a new note was fraudulent and that the original note has not been paid and is in force, advises the surety on the original note that plaintiff seeks a recovery thereon.—*Agnew v. Mathieson*, 140 P. 484.

§ 491 (Or.) Testimony that the note sued on has been assigned to a third party is rebutted by the production of the note in evidence, and does not prevent a recovery.—*Hewitt v. Andrews*, 140 P. 437.

§ 491 (Utah) A holder of notes, who obtains a judgment thereon, has no legal right to retain possession of the notes, and any presumption arising from the possession of the notes is without any force as to him.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

§ 519 (Or.) A defense that defendant paid plaintiff a certain sum for gasoline which was not delivered is not sustained by testimony that defendant paid for a certain quantity, without stating the price.—*Hewitt v. Andrews*, 140 P. 437.

§ 520 (Okla.) Evidence, in an action on a note, held insufficient to show, as to the contract pursuant to which the note was given, a mutual mistake of law from which relief could be had.—*Northwest Thresher Co. v. McNinch*, 140 P. 1170; *Same v. Pruitt*, *Id.* 1173; *Same v. Bell*, *Id.* 1174.

§ 523 (Colo.) Evidence held to show a parol transfer and delivery of notes.—*Lane v. Lane*, 140 P. 804.

§ 523 (Wash.) In an action on a note indorsed over to a third person, but later returned to plaintiffs, evidence held to show that plaintiffs were the owners.—*Carr v. Bonthius*, 140 P. 339.

§ 527 (Utah) Evidence held to show that a note sued on had been paid before the commencement of the action.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

§ 539 (Cal.) Findings that a note was given in settlement for failure to pay an installment due on a contract for the purchase of land, and that the vendor had sold the land prior to the execution of the note and concealed that fact from the makers thereof, but which do not state that the maker's rights under the contract were not preserved in the sale, do not establish a defense to the note.—*Brimmer v. Salisbury*, 140 P. 30.

## BOARDS.

See Colleges and Universities, §§ 7, 10; Highways, §§ 19, 41, 99½.

## BONA FIDE PURCHASERS.

See Bills and Notes, § 371; Corporations, § 149.

## BONDS.

See Appeal and Error, §§ 374, 1231, 1232; Attachment, §§ 298, 345-352; Constitutional Law, § 230; Costs, § 123; Counties, §§ 105, 173-175; Damages, § 150; Factors, § 2½; Intoxicating Liquors, § 108; Justices of the Peace, § 164; Municipal Corporations, §§ 346, 907; Pleading, § 373; Principal and Surety; Receivers, §§ 57, 58, 212, 218; Replevin, §§ 120, 123; Waters and Water Courses, § 230.

## BOOM COMPANIES.

See Logs and Logging, § 13.

## BOUNDARIES.

See Vendor and Purchaser, § 334.

### I. DESCRIPTION.

§ 13 (Cal.App.) The "usual" or "ordinary" high-water mark, constituting the boundary of one's lands on a tide bay is not the limit of the monthly spring tides, but the limit reached by the neap tides.—*Forgeus v. Santa Cruz County*, 140 P. 1092.

§ 20 (Wash.) Where the dedicators of plat- ted streets and alleys expressly reserve the fee, a warranty deed of the lots according to the

plat, without reservation or exception, will still pass the fee to the streets, as regards right to the streets on their subsequent vacation.—*Bradley v. Spokane & I. E. R. Co.*, 140 P. 688.

## II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 37 (Cal.App.) Evidence, in an action involving the southern boundary of plaintiff's land, depending on the northern limit of ordinary high water in a tide bay, held not to authorize the finding that it was as far north as the southerly boundary of a highway, granted by plaintiff's predecessor in title.—*Forgeus v. Santa Cruz County*, 140 P. 1092.

§ 37 (Idaho) In an action to determine boundary line between homestead entries, evidence held to sustain judgment for plaintiff.—*Richardson v. Bohnay*, 140 P. 1106.

§ 43 (Idaho) A decree which adjudges that a certain row of trees three feet in diameter constitute the line, and that the line of one tract is the east side of the row of trees, and the line of the adjoining tract is the west side of such row, held not sufficiently specific.—*Brinton v. Steele*, 140 P. 113.

## BREACH.

See Contracts, §§ 303, 312; Insurance, § 292; Sales, §§ 168-179, 246-254.

## BRIBERY.

§ 3 (Okla.Cr.App.) In a prosecution of defendant for holding himself out as an officer under color of authority, and soliciting and accepting a bribe, it was no defense that he had no right to act as such officer.—*Ex parte Winters*, 140 P. 164.

## BRIDGES.

See Counties, § 16.

## BRIEFS.

See Appeal and Error, §§ 757-773; Criminal Law, §§ 1130, 1132, 1182.

## BROKERS.

See Appeal and Error, § 1066; Banks and Banking, § 179; Constitutional Law, §§ 203, 230, 296; Courts, § 163; Factors; Insurance, § 20; Statutes, § 84.

## II. EMPLOYMENT AND AUTHORITY.

§ 10 (Cal.) A contract making a broker the owner's agent to sell certain real estate "for the term of thirty days from date, and until this agreement is canceled in writing by ten days' notice" could not be revoked within the 30 days if the broker had expended money and effort in seeking a purchaser.—*Sill v. Ceschi*, 140 P. 949.

§ 10 (Okla.) A contract that a broker should receive a named per cent. for selling land and have a definite interest in the remaining lots after a sufficient number to satisfy a mortgage were sold, he to pay all sale expenses and one-half of the mortgage indebtedness, held to create merely the relationship of principal and agent which could be terminated at will of the principal.—*McKellop v. Dewitz*, 140 P. 1161.

## III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 31 (Or.) A contract of sale by a real estate agent for his own benefit to one who acted for him, which omitted a provision desired by the owner and was never ratified, is not binding on the owner.—*Kuckenbergh v. Durkee*, 140 P. 627.

## IV. COMPENSATION AND LIEN.

§ 49 (Cal.) A real estate broker's obligation was fully performed when he procured from a prospective purchaser an enforceable contract

to purchase at the agreed price, and it was no concern of the owner, who agreed that the broker should receive all over that amount, that the excess was in the form of fruit that the purchaser agreed should go to the broker, rather than money.—*Sill v. Ceschi*, 140 P. 949.

§ 51 (Or.) Where a broker is employed to make sale and execute a binding contract of sale, that he brought together the owner and a purchaser who made a payment does not entitle him to commission where the sale is not consummated.—*Cunningham v. Friendly*, 140 P. 989.

§ 54 (Okla.) A real estate broker is entitled to his commission when he procures a purchaser ready, willing, and able to purchase on the terms agreed on.—*Everett v. Combs*, 140 P. 152.

§ 71 (Cal.) Where a broker who was to receive all over an agreed price as his commission procured a purchaser who agreed to pay the agreed price, and to pay for the growing fruit in addition, but the owner refused to carry out the contract, the measure of the broker's compensation was the value of such fruit.—*Sill v. Ceschi*, 140 P. 949.

### V. ACTIONS FOR COMPENSATION.

§ 82 (Colo.App.) Unless specially pleaded, the defendant, in an action by a broker for commission earned by producing a purchaser to whom defendant refused to convey, cannot rely on revocation of authority to sell.—*Mauser v. Hurdle*, 140 P. 479.

§ 82 (Or.) In an action for commission on a sale which failed because of refusal of title offered, defects in the title must be made specific issues, and plaintiff must allege in what respects the abstract is defective.—*Cunningham v. Friendly*, 140 P. 989.

§ 86 (Cal.) Evidence, in an action by a real estate broker for commissions, held sufficient to support a finding that the contract sued on had not been canceled, that plaintiff had performed his part of the contract so as to entitle him to the commission agreed upon, and to support a verdict for \$2,000.—*Sill v. Ceschi*, 140 P. 949.

§ 88 (Cal.) In an action by a broker for commissions, an instruction that one who signs a contract drafted by his own adviser cannot say he did not understand it was not in conflict with another that plaintiff could not recover if defendant understood that his apple crop was reserved, where the first related to defendant's claim that he did not know that he was signing a contract.—*Sill v. Ceschi*, 140 P. 949.

§ 88 (Colo.App.) In an action by a broker for commission earned by producing a purchaser to whom defendant refused to convey, evidence held not to raise the issue of revocation of authority to sell.—*Mauser v. Hurdle*, 140 P. 479.

§ 88 (Okla.) In an action by brokers for a commission, an instruction to find for plaintiffs if they procured a person ready, willing, and able to purchase on the "terms" authorized, held not erroneous for failure to use the expression "express terms."—*Thompson v. De Long*, 140 P. 421.

## BUILDING AND LOAN ASSOCIATIONS.

See Constitutional Law, § 328; Evidence, §§ 20, 83.

§ 2 (Utah) The state may exercise, under the police power, supervision and inspection over building and loan associations greater than over ordinary business corporations.—*Union Savings & Investment Co. v. District Court of Salt Lake County*, 140 P. 221.

§ 6 (Utah) An individual shareholder in a building and loan association may maintain an action to prevent its officers from doing some forbidden act, or from continuing a course of

mismanagement of its affairs or to require the association to obey the statute, or for the purpose of obtaining a judgment against the association.—*Union Savings & Investment Co. v. District Court of Salt Lake County*, 140 P. 221.

§ 42 (Utah) Whenever a building and loan association is declared insolvent, its right to collect the installments payable by its members ceases, and the mortgages of borrowing members at once become due and payable and may be foreclosed.—*Union Savings & Investment Co. v. District Court of Salt Lake County*, 140 P. 221.

§ 45 (Utah) The remedy given by Comp. Laws 1907, § 400, providing for the dissolution of domestic building and loan associations is exclusive, and the courts cannot appoint a receiver to wind up the affairs of such associations at the request of one or more shareholders.—*Union Savings & Investment Co. v. District Court of Salt Lake County*, 140 P. 221.

The right to dissolve a corporation and wind up its affairs for any cause against its consent, belongs to the sovereign state alone, and, in the absence of an express statute to that effect, the courts have no power to dissolve such corporation at the instance of an individual suitor.—*Id.*

An action by a shareholder to secure the appointment of a receiver to wind up the business of a building and loan association, while not technically an action to dissolve the association, has practically that effect, and cannot be entertained by the courts.—*Id.*

The danger that a shareholder in a building and loan association may suffer irreparable injury through the failure of the Attorney General to wind up the affairs of the association, as required by Comp. Laws 1907, § 400, does not authorize an action for that purpose by the shareholder.—*Id.*

Before an action for the dissolution of a building and loan association is brought under Comp. Laws 1907, § 400, the association should be given an opportunity to correct any abuses in its management, unless its affairs are such that, in the opinion of the Secretary of State or Attorney General they cannot be corrected.—*Id.*

It is the duty of the Attorney General to bring an action under Comp. Laws 1907, § 400, to dissolve a building and loan association if it is made to appear that the association is not complying with the law, although the Secretary of State refuses to perform the duties imposed upon him by that section.—*Id.*

## BURDEN OF PROOF.

See Trial, § 25.

## CANCELLATION OF INSTRUMENTS.

See Corporations, §§ 80, 83; Deeds, § 211; Insurance, §§ 229, 232; Mines and Minerals, § 78; Quieting Title; Reformation of Instruments.

## I. RIGHT OF ACTION AND DEFENSES.

§ 8 (Mont.) Under Rev. Codes, § 6115, plaintiff must show that injury may result if the instrument is outstanding, in order to have it canceled.—*Hicks v. Rupp*, 140 P. 97.

## II. PROCEEDINGS AND RELIEF.

§ 37 (Mont.) A complaint, in a suit to cancel a contract to convey land, which did not allege that the contract was in writing, or that it was executed so as to be entitled to record, but alleged that defendant renounced liability thereunder, and that plaintiffs rescinded it and resumed possession, held insufficient.—*Hicks v. Rupp*, 140 P. 97.

## CARGO.

See Shipping.

**CARNAL INTERCOURSE.**

See Adultery, § 14.

**CARNAL KNOWLEDGE.**

See Rape.

**CARRIERS.**

See Damages, §§ 20, 208; Evidence, § 127; Larceny, § 40.

**II. CARRIAGE OF GOODS.****(I) Connecting Carriers.**

§ 174 (Okla.) Under Comp. Laws 1909, § 514, a common carrier, accepting freight for a place beyond its usual route unless he stipulates otherwise, must deliver it at the end of its route to another competent carrier; the initial carrier's liability ceasing on such delivery.—*St. Louis & S. F. Ry. Co. v. Close*, 140 P. 1176.

§ 176 (Okla.) Under Const. art. 9, § 3, a connecting carrier cannot avoid liability for delay in forwarding a shipment because of an alleged excessive freight charge; it not being bound to collect more than the legal charges and being authorized to adjust the same after collection.—*St. Louis & S. F. Ry. Co. v. Close*, 140 P. 1176.

Where a carrier receives freight to be shipped beyond its line under a bill providing that its agent must not receipt beyond points on the carrier's own road and such freight is promptly delivered to a connecting carrier, the initial carrier is not liable for delay of the connecting carrier.—*Id.*

§ 177 (Okla.) Under Comp. Laws 1909, § 514, an initial carrier, on accepting an interstate shipment to a point beyond its line, must deliver to the next connecting carrier, and, having made such delivery, its liability ceases.—*Chicago, R. I. & P. Ry. Co. v. Diggs*, 140 P. 1160.

Where freight addressed to a place beyond the line of the initial carrier is lost or injured, such carrier will be liable, unless, within a reasonable time after demand, it affords satisfactory proof to the consignor that the loss did not occur while such goods were in its possession.—*Id.*

§ 185 (Okla.) Where goods shipped over several connecting lines are found to be injured at destination, there is no presumption that the injury occurred on the line of the first carrier.—*Chicago, R. I. & P. Ry. Co. v. Diggs*, 140 P. 1160.

**III. CARRIAGE OF LIVE STOCK.**

§ 218 (Kan.) In an action for damages from delay in transportation of live stock, *held* error to instruct that if the damages were the result of defendant's failure to comply with Gen. St. 1909, §§ 7116, 7117, requiring transportation of live stock at not less than 15 miles per hour, then plaintiff's failure to give notice of claim before removal of the stock, as required by the shipment contract, would be no defense.—*Giles v. Atchison, T. & S. F. Ry. Co.*, 140 P. 875.

Shrinkage in weight occasioned by the unnecessary length of time the cattle were on the road *held* to be an "injury during transportation" within a condition of the shipment contract requiring the shipper to give notice in writing of his claim before removal of the stock as a condition precedent to his right to recover damages for injury during transportation.—*Id.*

**IV. CARRIAGE OF PASSENGERS.****(A) Relation Between Carrier and Passenger.**

§ 236 (Mont.) Under Rev. Codes, §§ 6038, 6047, where it was shown that, though railway engineer saw signal to stop, he failed to stop for a passenger, exemplary damages might be awarded if the jury found oppression, malice or

fraud, section 4325 not limiting damages to actual compensation.—*Burles v. Oregon Short Line R. Co.*, 140 P. 513.

In an action for carrier's failure to stop train on signal for passenger suffering from internal hemorrhage, evidence that there were no accommodations at the place where she was compelled to wait for the next train *held* admissible.—*Id.*

§ 239 (Okla.) That no fare was paid for a child riding with an adult with the consent of the conductor did not prevent her from being a passenger.—*St. Louis & S. F. R. Co. v. Fitts*, 140 P. 144.

§ 246 (Cal.App.) In an action for the death of a passenger on a street car in a collision, evidence *held* to sustain a finding that decedent was on the car at the time of the collision.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

A person on a street car is presumptively a passenger, in the absence of countervailing circumstances.—*Id.*

**(D) Personal Injuries.**

§ 286 (Cal.) City ordinance requiring elevators to be provided with hatchways and automatic doors *held* to apply only to elevators constructed or installed subsequent to its passage and not inclosed in shafts.—*Kaufman v. Machin Shirt Co.*, 140 P. 15.

§ 305 (Cal.) Violation of ordinance requiring elevator doors to open only from the inside *held* not the proximate cause of an accident to a person who left the elevator to deliver a package and fell down the shaft upon his return, where the door was open when he reached that floor.—*Kaufman v. Machin Shirt Co.*, 140 P. 15.

§ 305 (Cal.App.) Where the negligence of the gripman operating one car colliding with another car was at least a contributory cause of the collision, and continued up to the very time of the collision, the fact that the passing of women in front of the other car was a proximate cause of the accident did not relieve the company of liability for the death of a passenger in the collision.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

§ 314 (Cal.) Allegation that elevator and shaft were to all appearances in the same condition in which person left them shortly before *held* not to negative negligence on his part in walking into the shaft; the elevator having been moved.—*Kaufman v. Machin Shirt Co.*, 140 P. 15.

§ 316 (Cal.App.) Where a street car passenger was injured in a collision between cars, the presumption of actionable negligence arose, and the carrier, to escape liability, must show that the accident was without negligence on its part.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

§ 316 (Okla.) Where, in an action for injuries to a child passenger from a sudden jerk of the train, the burden was on defendant to show that the exercise of due skill, foresight, and diligence could not have prevented the accident.—*St. Louis & S. F. R. Co. v. Fitts*, 140 P. 144.

§ 318 (Cal.App.) In an action for the death of a street car passenger in a collision between cars, evidence *held* to support a finding of negligence in the operation of the cars.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

§ 320 (Okla.) Where plaintiff's evidence in a passenger's action for injuries made out a prima facie case, the court properly refused to take the case from the jury, though such evidence was rebutted by that of the carrier.—*St. Louis & S. F. R. Co. v. Fitts*, 140 P. 144.

§ 320 (Wash.) Whether a street car was negligently started with a sudden jerk so as to cause injury to a passenger attempting to board the car *held* for the jury.—*Atwood v. Washington Water Power Co.*, 140 P. 343.

**(E) Contributory Negligence of Person Injured.**

§ 328 (Cal.) Person using elevator who saw that door was open when he reached a floor, *held* guilty of negligence in walking into the shaft on his return, assuming that an ordinance required an automatic device which would close the door when the elevator was moved, as he had notice that there was no such device or that it was not in working order.—Kaufman v. Machin Shirt Co., 140 P. 15.

A boy 15 years old, living and working in a large city where hundreds of elevators were in daily use, and who was sufficiently experienced to run an elevator in safety to the fourth story of a building, was charged with the duty of exercising ordinary caution in entering an elevator.—Id.

**CASE-MADE.**

See Appeal and Error, §§ 564, 671.

**CATALOGUES.**

See Colleges and Universities, § 9.

**CAVEAT EMPTOR.**

See Sales, § 41.

**CERTIFICATE.**

See Public Lands, §§ 41, 54.

**CHALLENGE.**

See Jury, § 85.

**CHAMPERTY AND MAINTENANCE.**

§ 7 (Okl.) Where land in the adverse possession of another is conveyed, the rule against champerty does not prevent the grantee from suing in his grantor's name to recover from the adverse holder.—Gannon v. Johnston, 140 P. 430.

**CHANCERY.**

See Equity.

**CHANGE OF VENUE.**

See Criminal Law, §§ 187, 1144, 1150; Venue, §§ 38, 41.

**CHARGE.**

See Waters and Water Courses, § 203.  
To jury, see Criminal Law, §§ 765-823; Trial, §§ 187-205.

**CHARITIES.****II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.**

§ 39 (Wash.) Purpose of an unincorporated association, known as the Brotherhood of the Co-Operative Commonwealth, *held* abandoned, where for seven years it did not hold meetings or attempt to organize any local bodies as provided by its constitution, and where all the members were in default under the by-laws.—Burgess v. Peth, 140 P. 351.

**CHARTER PARTIES.**

See Shipping, §§ 39, 58.

**CHATTEL MORTGAGES.****I. REQUISITES AND VALIDITY.**

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 17 (Cal.App.) Where R. had possession of an automobile belonging to defendant, R.'s act in mortgaging the machine did not affect de-

fendant's ownership.—Greene v. Carmichael, 140 P. 45.

One in possession of a chattel under a contract of conditional sale, by attempting to sell or create a lien thereon, cannot impair the rights of the owner.—Id.

**III. CONSTRUCTION AND OPERATION.****(D) Lien and Priority.**

§ 138 (Okl.) Where H. held a chattel mortgage, and R. procured a second mortgage thereon, and H. then took the property in satisfaction of his mortgage, instead of foreclosing pursuant to Ind. T. Ann. St. 1899, § 3070, and resold the property to one of the mortgagors while R.'s mortgage was in force, taking a mortgage to secure the price, *held*, that H.'s first mortgage was satisfied, and that his subsequent mortgage was subject to R.'s mortgage.—Hartsell v. Roberts, 140 P. 1019.

**VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.****(A) Rights and Liabilities of Parties.**

§ 227 (Kan.) A mortgagee cannot pursue the proceeds of a sale of mortgaged chattels by the mortgagor received by a creditor in payment of a valid debt, where the creditor had no knowledge of the mortgage though recorded and no lien on the property.—Rawlins County State Bank v. Walters, 140 P. 864.

The filing of a chattel mortgage in the proper office is not constructive notice to a creditor who receives in good faith from the mortgagor the proceeds of the sale by him of the mortgaged property.—Id.

**CHATELS.**

See Property.

**CHEAT.**

See Fraud.

**CHECKS.**

See Bills and Notes.

**CHILDREN.**

See Guardian and Ward; Infants; Parent and Child.

**CHOSE IN ACTION.**

See Assignments, § 89.

**CHURCHES.**

See Religious Societies.

**CITIES.**

See Municipal Corporations.

**CITIZENS.**

See Constitutional Law, §§ 205, 208, 230, 249; Husband and Wife.

**CIVIL RIGHTS.**

See Constitutional Law, §§ 205, 208, 230, 249; Officers, § 20.

**CLAIM AND DELIVERY.**

See Replevin.

**CLAIMS.**

See Executors and Administrators, § 256; Mechanics' Liens, § 132; Municipal Corporations, §§ 812, 816.

**CLASS LEGISLATION.**

See Constitutional Law, §§ 205, 208.

**CLERGYMEN.**

See Religious Societies, § 27.

**CLERKS OF COURTS.**

See Appeal and Error, § 843.

§ 29 (Kan.) The expense of an audit of the books and accounts of the clerk of the district court for his benefit by accountants employed by him should not be included in the \$2,000 allowance provided for salary of deputies and assistants by Laws 1901, c. 213.—Board of Com'rs of Shawnee County v. Thomas, 140 P. 849.

§ 35 (Kan.) Under Gen. St. 1909, § 3663, and Laws 1901, c. 213, construed together, *held*, that the salary of the clerk of the district court in the sum of \$3,000, together with the salaries of the deputies and assistants not exceeding \$2,000 annually should be deducted from the fees collected by the clerk and the remainder be divided equally between the clerk and the county.—Board of Com'rs of Shawnee County v. Thomas, 140 P. 849.

The county *held* entitled to interest on balances of fees wrongfully retained by the clerk of the district court.—Id.

**CLOUD ON TITLE.**

See Quieting Title.

**COLLATERAL ATTACK.**

See Judgment, §§ 489, 501.

**COLLATERAL SECURITY.**

See Pledges.

**COLLATERAL UNDERTAKINGS.**

See Frauds, Statute of, § 23.

**COLLECTION.**

See Taxation, §§ 605-608.

**COLLEGES AND UNIVERSITIES.**

See Evidence, § 318; Public Lands, § 54.

§ 7 (Idaho) Under Act March 6, 1913 (Sess. Laws 1913, c. 77), creating the State Board of Education and making it the successor to the old Board of Regents of the University of Idaho, such State Board of Education may defend an action previously brought against the old board for a pre-existing obligation.—First Nat. Bank v. Regents of University of Idaho, 140 P. 771.

§ 9 (Or.) The requirement of a dental college catalogue that a candidate for degree shall pass satisfactory examinations means that they shall be satisfactory to the faculty conducting them.—Tate v. North Pacific College, 140 P. 743.

The issuance by a college of a catalogue stating requirements for graduation and degree, and entrance, matriculation, and attendance of sessions with knowledge of requirements constitute a contract, requiring conferring of degree on compliance with requirements.—Id.

The decisions of college faculties as to whether students have performed all the conditions to entitle them to degrees are conclusive if within the faculty jurisdiction, in good faith, and not arbitrary.—Id.

§ 10 (Idaho) The district court has jurisdiction to try an action against the Board of Regents of the State University for money advanced and material furnished in the construction of a university building.—First Nat. Bank v. Regents of University of Idaho, 140 P. 771.

§ 10 (Or.) In a suit by a student to compel a college to confer a degree, it is incumbent on him to prove his allegations that the college faculty acted in bad faith in refusing him a passing grade and degree.—Tate v. North Pacific College, 140 P. 743.

Evidence *held* not to show that a college faculty acted in bad faith in refusing plaintiff a passing grade and degree.—Id.

**COLOR OF TITLE.**

See Adverse Possession.

**COMBINATIONS.**

See Conspiracy.

**COMITY.**

See Courts, § 8.

**COMMERCE.**

See Carriers; Shipping.

**I. POWER TO REGULATE IN GENERAL.**

§ 8 (Ok.) The exclusive power to regulate interstate commerce, which is vested in Congress by the federal Constitution, is recognized by Laws 1909, c. 10, art. 1, § 3, providing that "this act shall not be effective in \* \* \* conflict with the powers of Congress or the federal laws."—Fruit Dispatch Co. v. Wood, 140 P. 1138.

**III. MEANS AND METHODS OF REGULATION.**

§ 72 (Wash.) Where goods are brought into the state and stored in advance of sales, and orders therefor are filled from the store, the business is local commerce, and hence laws imposing taxes thereon are not invalid as interfering with interstate commerce; and the same rule applies where the goods reach their destination in this state for such storage and sale, even before they are unloaded from the cars.—Spaulding v. Adams County, 140 P. 367.

**COMMERCIAL PAPER.**

See Bills and Notes.

**COMMISSION AND COMMISSIONERS.**

See Corporations, § 394; Counties, §§ 13, 105; Insurance, §§ 12, 21; Railroads, § 9; Waters and Water Courses, §§ 257, 266.

**COMMISSION MERCHANTS.**

See Factors.

**COMMISSIONS.**

See Brokers, §§ 49-88; Principal and Agent, § 88; Sheriffs and Constables, § 48.

**COMMON CARRIERS.**

See Carriers.

**COMMON LAW.**

See Corporations, § 217; Courts, § 8; Husband and Wife, § 6; Lis Pendens, § 1; Officers, § 20.

§ 7 (Wash.) St. 13 Eliz. c. 5, declaring that conveyances with intent to defraud creditors shall be void, is a part of the common law of the state.—Allen v. Kane, 140 P. 534.

§ 12 (Kan.) The adoption of the common law in Kansas did not adopt the common-law definition of navigable waters, since prior thereto such definition had been repudiated by the Supreme Court of the United States and by many of the states.—State v. Akers, 140 P. 637.

§ 12 (N.M.) Under Comp. Laws 1897, § 2871, the common law is the rule of practice and de-



cision in New Mexico, except where modified by statute.—*State v. De Armijo*, 140 P. 1123.

Such political rights as were recognized by the common law and not in conflict with the Constitution and statutes and suitable to conditions in the territory were carried into the body of the territorial law by the statute enacted January 7, 1876 (Comp. Laws 1897, § 2871), providing that the common law shall be the rule of practice and decision in the territory of New Mexico.—*Id.*

## COMMON SCHOOLS.

See Schools and School Districts.

## COMMUNITY PROPERTY.

See Husband and Wife, §§ 246-270.

## COMPARATIVE.

See Negligence, § 98.

## COMPENSATION.

See Attorney and Client, §§ 144-190; Brokers, §§ 49-88; Clerks of Courts, §§ 29, 35; Eminent Domain, §§ 101, 106; Officers, § 100; Receivers, § 189; Waters and Water Courses, § 133.

## COMPETENCY.

See Evidence, §§ 536-545; Witnesses, §§ 53-199.

## COMPLAINT.

See Indictment and Information; Pleading.

## COMPROMISE AND SETTLEMENT.

See Assignments, § 92; Payment; Release.

## COMPUTATION.

See Interest, § 46.

## CONCLUSION.

See Evidence, §§ 472-500.

## CONCLUSIVENESS.

See Descent and Distribution, § 71.

## CONDEMNATION.

See Eminent Domain.

## CONDITIONAL SALES.

See Sales, §§ 465-479.

## CONDITIONS.

See Deeds, §§ 151, 155.

## CONDONEMENT.

See Divorce, §§ 48, 51, 135.

## CONFLICT OF LAWS.

See Descent and Distribution, § 4; Husband and Wife, § 246; Master and Servant, § 250½; Trial, § 242.

## CONNECTING CARRIERS.

See Carriers, §§ 174-185.

## CONSIDERATION.

See Contracts, § 128.

## CONSIGNMENT.

See Factors.

## CONSPIRACY.

See Criminal Law, §§ 112, 814; Deeds, § 211.

### II. CRIMINAL RESPONSIBILITY.

#### (A) Offenses.

§ 27 (Wash.) Where defendants were charged with conspiracy to prevent persons not members of a certain combination from fishing in Puget Sound, it was not essential that overt acts should be characterized by force, as they might consist of threats, intimidation, or interfering or threatening to interfere with the tools, implements, or property belonging to or used by another.—*State v. Mardesich*, 140 P. 573.

#### (B) Prosecution and Punishment.

§ 43 (Wash.) Where a conspiracy is not directed to any particular person, it may be charged as an intended wrong against a class of persons or the general public, without a more specific designation.—*State v. Mardesich*, 140 P. 573.

An information for conspiracy to prevent others not connected with defendants' organization from fishing in the waters of Puget Sound was not objectionable for failure to allege that the persons to be prevented had a lawful right to engage in that business.—*Id.*

§ 46 (Wash.) Where defendants were indicted for conspiracy to prevent any one outside a certain combination from fishing in Puget Sound, evidence of their interference with persons fishing on an Indian reservation held admissible as overt acts tending to show that the conspiracy continued up to that time.—*State v. Mardesich*, 140 P. 573.

§ 47 (Wash.) In a prosecution for conspiracy to prevent persons not connected with defendants' organization from fishing in Puget Sound, evidence held to sustain a conviction.—*State v. Mardesich*, 140 P. 573.

## CONSTABLES.

See Sheriffs and Constables.

## CONSTITUTIONAL LAW.

See Carriers, § 176; Common Law, § 12; Corporations, § 648; Eminent Domain, §§ 2, 106; Equity, § 39; Evidence, § 383; Factors, § 2½; Homestead, §§ 62, 81; Homicide, § 351; Husband and Wife, § 205; Insurance, § 21; Judges, § 16; Municipal Corporations, §§ 266, 407, 466, 907; Navigable Waters, §§ 38, 42; Officers, § 100; States, § 9; Statutes, §§ 23, 64, 76, 84, 87, 94, 105, 106, 109, 120, 121, 123, 125, 141; Taxation, §§ 40, 177, 193.

### II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 46 (Wash.) A court will not pass upon a constitutional question or decide that a statute is invalid unless the decision is necessary to a determination of the case.—*State v. Derbyshire*, 140 P. 540.

§ 48 (Cal.App.) No part of a statute will be declared void where, by applying a reasonable construction, it may be upheld.—*Hunt v. Manning*, 140 P. 39.

§ 48 (Mont.) The court, in construing a statute, will adopt that construction which, without doing violence to the fair meaning of the language, will render the statute valid.—*State v. Alderson*, 140 P. 82.

§ 48 (Wash.) It is presumed that a statute is constitutional, and it will only be held unconstitutional where it plainly appears to be so.—*Ferguson-Hendrix Co. v. Fidelity & Deposit Co. of Maryland*, 140 P. 700.

§ 48 (Wash.) A law is to be sustained as constitutional unless its invalidity is so apparent

as to leave no reasonable doubt on the question.—*State v. Pitney*, 140 P. 918.

### III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

#### (B) Judicial Powers and Functions.

§ 70 (Utah) The reason for the enactment of a statute is wholly immaterial, except as it may throw light on the intention of the Legislature.—*State v. Carman*, 140 P. 670.

#### (C) Executive Powers and Functions.

§ 80 (Kan.) Sess. Laws 1913, c. 259, authorizing executive council to impose a royalty on the taking of sand from navigable streams for commercial purposes, *held* not invalid as conferring judicial power on executive officers.—*State v. Akers*, 140 P. 637.

### IV. POLICE POWER IN GENERAL.

§ 81 (Wash.) The police power includes all regulations designed to promote the public convenience, general welfare, and general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety.—*State v. Pitney*, 140 P. 918.

In determining whether a law is within the police power, it is enough that a state of facts can reasonably be presumed to exist which would justify it, in which case it will be presumed that they did exist and that the law was passed for that reason.—*Id.*

### V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 87 (Cal.) The constitutional right to acquire and possess property includes a right to dispose of it by separating it into estates for successive periods, as well as the right to impose upon the grant of such estates any reservation which grantor may see fit to place upon the grant, provided such rights be exercised in a lawful manner.—*Tennant v. John Tennant Memorial Home*, 140 P. 242.

### VI. VESTED RIGHTS.

§ 92 (Wash.) Where a fraternal benefit policy provided that the member's rights should be subject to changes in the by-laws, an amendment after insured became a member so as to make the certificate void if insured committed suicide within five years, instead of within two years, as provided therein when the certificate was issued, did not destroy any vested right under the policy.—*Klein v. Knights and Ladies of Security*, 140 P. 72.

§ 100 (Okla.) Choctaw and Chickasaw allottees under the Atoka Agreement embodied in Act June 28, 1898 (30 Stat. 505, c. 517), under which such allottees were to receive allotments in severalty nontaxable for a specified period, acquired vested rights of exemption from state taxation, protected by Const. U. S. Amend. 5, from abrogation during such period, as was attempted by Act May 27, 1908 (35 Stat. 312, c. 199).—*Wood v. Gleason*, 140 P. 418.

### VII. OBLIGATION OF CONTRACTS.

#### (B) Contracts of States and Municipalities.

§ 134 (Cal.App.) Where a franchise to a railroad company required the company to pave along its tracks, but did not provide how the ties should be laid or how the concrete foundation should be placed or the rails secured, the municipality could make reasonable regulations concerning the same without impairing the obligation of the contract evidenced by the franchise.—*Town of St. Helena v. San Francisco, N. & C. Ry.*, 140 P. 600.

#### (C) Contracts of Individuals and Private Corporations.

§ 149 (Kan.) Laws 1911, c. 232, § 1, providing that when a mortgage has been in default for more than 15 years or the lien thereof ceases to exist, or when action to enforce such mortgage is barred by limitations, the owner of the land may sue to quiet his title, does not impair the obligation of the mortgage contract.—*Zuege v. Nebraska Mortgage Co.*, 140 P. 855.

### VIII. RETROSPECTIVE AND EX POST FACTO LAWS.

§ 203 (Okla.App.) Laws 1913, c. 113, providing for electrocution, and substituting the penitentiary for the county jail as the place of execution and changing the time limit therefor, *held* not violative of Const. U. S. art. 1, § 10, prohibiting the enactment of an ex post facto law, though applied to a person convicted of a murder committed before its enactment.—*Alberty v. State*, 140 P. 1025.

### IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 205 (Cal.App.) St. 1909, p. 969, as amended by St. 1911, p. 978, defining personal property brokers, and limiting the interest which they may charge, does not violate Const. art. 1, § 21, prohibiting special privileges and immunities.—*Eaker v. Bryant*, 140 P. 310.

§ 205 (Wash.) Laws 1913, c. 126, §§ 1-12, providing for appointment of official court reporters, *held* not to violate Const. art. 2, § 28, prohibiting special laws granting corporate privileges, and article 1, § 12, prohibiting the granting of privileges to one class of citizens or corporations not equally belonging to all corporations.—*State v. Derbyshire*, 140 P. 540.

§ 208 (Wash.) A statute is not class legislation if it applies alike to all persons similarly situated.—*State v. Derbyshire*, 140 P. 540.

### X. EQUAL PROTECTION OF LAWS.

§ 230 (Wash.) Laws 1907, p. 266, § 1, making it unlawful for a commission merchant to engage in selling farm products on commission, without obtaining a license, and giving a bond executed by a surety company authorized to do business in the state, is not unconstitutional for requiring a bond to be executed by a surety company doing business in the state, and denying the right to deposit money or give personal security instead.—*Ferguson-Hendrix Co. v. Fidelity & Deposit Co. of Maryland*, 140 P. 700.

§ 230 (Wash.) Laws 1913, c. 134, forbidding the use, in connection with the sale of goods, of trading stamps, unless a license fee be paid, does not violate the right of citizen to the equal protection of the laws.—*State v. Pitney*, 140 P. 918.

§ 249 (Wash.) Laws 1913, c. 126, §§ 1-13, providing for appointment of official court reporters, *held* not invalid as violating Const. U. S. Amend. 14, § 1, relating to the equal protection of the law.—*State v. Derbyshire*, 140 P. 540.

### XI. DUE PROCESS OF LAW.

§ 287 (Wash.) Laws 1913, c. 134, in effect prohibiting, by imposing an annual license fee of \$6,000, the use of trading stamps in the sale of goods, is within the police power, and so does not violate the due process of law clause.—*State v. Pitney*, 140 P. 918.

§ 289 (Okla.) Comp. Laws 1909, § 847, conferring on the trustees of an incorporated town power to improve streets, sidewalks, etc., is not in violation of Const. art. 2, § 7, prohibiting the deprivation of property without due process of law.—*Shultise v. Town of Taloga*, 140 P. 1190.

§ 290 (Okla.) Comp. Laws 1909, §§ 860-862, authorizing the levy of special assessments for

repairing sidewalks after notice, on a frontage basis, is not violative of Const. art. 2, § 7, prohibiting the deprivation of property without due process of law.—*Shultise v. Town of Taloga*, 140 P. 1190.

§ 296 (Cal.App.) St. 1909, p. 969, as amended by St. 1911, p. 978, defining personal property brokers, and limiting the interest which they may charge, does not violate Const. U. S. Amend. 14, § 1, prohibiting the taking of property without due process of law.—*Eaker v. Bryant*, 140 P. 310.

§ 296 (Wash.) The construction of the Insurance Code (3 Rem. & Bal. Code, §§ 6059–22, 6059–24), as requiring foreign insurance companies to keep at least \$200,000 in securities on deposit as therein provided, though the laws of the state of their incorporation do not require deposits, is not in conflict with the fourteenth amendment of the federal Constitution nor with the state Constitution.—*State v. Fishback*, 140 P. 387.

## XII. RIGHT TO JUSTICE AND REMEDIES FOR INJURIES.

§ 328 (Utah) Const. art. 1, § 11, requiring the courts to be open to all alike, does not prevent the state from reserving to itself the sole right to bring actions for the dissolution of building and loan associations.—*Union Savings & Investment Co. v. District Court of Salt Lake County*, 140 P. 221.

## CONSTRUCTION.

See Bills and Notes, §§ 119, 129; Constitutional Law, §§ 46, 48; Contracts, §§ 154–234; Deeds, §§ 96–155; Mortgages, §§ 144, 151; Sales, § 81; Statutes, §§ 181–267; Trial, §§ 295; Vendor and Purchaser, § 75; Wills, § 487.

## CONTEMPT.

See Divorce, § 195; Municipal Corporations, § 993; Witnesses, § 21.

### I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 20 (Wash.) A contempt proceeding in a court of equity in aid of its original jurisdiction and in the enforcement of its decree is within Rem. & Bal. Code, § 1049, subd. 5, and is not governed by section 2372, and willfulness need not be proved.—*Wright v. Suydam*, 140 P. 578.

### II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 50 (Wash.) A contempt proceeding in a court of equity in aid of the court's original jurisdiction and in the enforcement of its decree is not a new proceeding and is not within Rem. & Bal. Code, § 1054, and the state need not be made a party.—*Wright v. Suydam*, 140 P. 578.

### III. PUNISHMENT.

§ 75 (Wash.) Under Rem. & Bal. Code, §§ 1049, 1050, the court, adjudging one guilty of contempt for failing to execute a deed in conformity to a decree of specific performance, cannot impose a fine exceeding \$100, in the absence of anything to show that the remedy of the adverse party was prejudiced.—*Wright v. Suydam*, 140 P. 578.

## CONTEST.

See Elections, § 288.

## CONTINUANCE.

See Appeal and Error, §§ 523, 966; Criminal Law, § 603.

§ 7 (Wash.) A motion for a continuance is addressed to the sound discretion of the trial

court.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

§ 46 (Colo.) Affidavit in support of application for a continuance for absence of a witness held insufficient to show abuse of the trial court's discretion in denying the same.—*Rogers v. Rogers*, 140 P. 193.

## CONTRACTS.

See Appeal and Error, § 842; Assignments; Attorney and Client, §§ 144–190; Bills and Notes; Brokers; Cancellation of Instruments; Champerty and Maintenance; Chattel Mortgages; Colleges and Universities, § 9; Constitutional Law, §§ 134, 149; Corporations, § 187; Counties, § 105; Covenants; Damages, § 80; Deeds; Evidence, §§ 400–461; Franchises, § 3; Frauds, Statute of; Husband and Wife, § 152; Insurance; Interest; Landlord and Tenant, § 129; Limitation of Actions, § 40; Master and Servant, §§ 36, 39, 41; Mines and Minerals, § 114; Mortgages; Municipal Corporations, §§ 237, 339–373, 688; Parent and Child, § 14; Partnership; Patents, § 203; Payment; Pleading, §§ 86, 291; Pledges; Principal and Agent; Principal and Surety; Quieting Title, § 50; Reformation of Instruments; Release; Religious Societies, § 27; Sales; Schools and School Districts, § 138; Set-Off and Counterclaim, § 31; Shipping, §§ 39, 58; Specific Performance; Subrogation; Subscriptions; Trial, §§ 84, 374; Usury; Vendor and Purchaser; Waters and Water Courses, § 254; Work and Labor.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials in General.

§ 10 (Colo.) To make a contract of sale enforceable, the obligations must be mutual, and the covenant to convey and the covenant to pay are dependent obligations.—*Strauss v. Brier*, 140 P. 183.

#### (C) Formal Requisites.

§ 32 (Cal.App.) That it was the intention of the parties to reduce an agreement for the sale of the good will of a business to writing, which intention was never carried out, does not affect the validity of that agreement, nor show that it was not a completed transaction.—*Webber v. Smith*, 140 P. 37.

§ 33 (Kan.) Where the terms of a contract are in two writings supposed to conform thereto, that the copy retained by the party who prepared the writings does not conform to the agreement, and that the one given to the other party conforms to it only by reason of a not clearly legible addition made before its execution, will not render the contract unenforceable against the party who prepared the writings.—*Draper v. Miller*, 140 P. 890.

§ 35 (Cal.App.) Where a contract, engaging plaintiff's assignors to establish defendant's title to property, contained a stipulation below defendant's signature that the fee fixed should not apply in case of contest, defendant was bound by that stipulation, a party being presumed to be familiar with all of the terms of a written contract, and it being immaterial where his signature appears.—*Eldridge v. Mowry*, 140 P. 978.

#### (E) Validity of Assent.

§ 93 (Okl.) A "mutual mistake of law" is a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake.—*Northwest Thresher Co. v. McInch*, 140 P. 1170; *Same v. Pruitt*, Id. 1173; *Same v. Bell*, Id. 1174.

It is essential to the defense of mutual mistake of law that the mistake be material and the determining ground of the transaction.—Id.

§ 97 (Or.) One defrauded must act promptly, and any action in procuring an extension, to obtain an advantage, is a ratification of the original agreement.—Hewitt v. Andrews, 140 P. 437.

**(F) Legality of Object and of Consideration.**

§ 128 (Colo.) A deed executed by defendant in trust to sell the land and pay the proceeds to the depositors of an insolvent bank of which defendant's husband had been president, and the funds of which he had misappropriated, held not executed in consideration of an agreement not to prosecute defendant's husband.—Goddling v. Hall, 140 P. 165.

§ 138 (Colo.) The law leaves persons connected with an illegal contract or transaction where it finds them and will not enforce such contracts while executory or rescind them when executed.—Goddling v. Hall, 140 P. 165.

**II. CONSTRUCTION AND OPERATION.**

**(A) General Rules of Construction.**

§ 154 (Cal.App.) The courts in construing written agreements, follow, if possible, that construction which tends to prevent injustice, and hence will be reluctant to construe a contract for legal services as limiting the fee to an amount considerably less than the necessary expenditures made by the attorney.—Eldridge v. Mowry, 140 P. 978.

§ 175 (Cal.) Civ. Code, § 1640, does not authorize the court, in the absence of a showing of a right of reformation, to find that a contract reduced to writing should contain a provision and enforce it as a part of the contract.—Bradbury v. Higginson, 140 P. 254.

**(B) Parties.**

§ 187 (Kan.) Where it was agreed that a landlord's share of a crop should be delivered to defendants for sale and the proceeds paid to the landlord's creditor, the creditor was entitled to sue defendants for an accounting on the ground that defendants' promise to pay over the proceeds was made for the creditor's benefit.—Staley v. Weston, 140 P. 878.

**(F) Compensation.**

§ 234 (Kan.) Where a tenant on shares agreed to deliver his half of the crop to W. in Kansas City, and it was thereafter agreed that W. should sell the crop and pay over one-half of the net proceeds to the landlord's creditor, W., in a suit by such creditor for an accounting, was not entitled to an allowance for the amount paid the tenant for hauling the products to the city.—Staley v. Weston, 140 P. 878.

**IV. RESCISSION AND ABANDONMENT.**

§ 266 (Or.) The rule that one seeking rescission for fraud shall restore the consideration does not apply where the property has been destroyed, is worthless, or is taken from him without his fault.—Jones v. McGinn, 140 P. 994.

When courts cannot place the parties in statu quo, they are not precluded from granting relief from fraud; damages being given if either party cannot restore the property.—Id.

On affirmance of a decree rescinding contract for fraud, the trial court properly required defendants to restore consideration, though, by reason of a foreclosure since decree, plaintiff could not place them in statu quo.—Id.

§ 274 (Or.) "Rescission" means that both parties to a contract shall be wholly released as though it had not been made.—Jones v. McGinn, 140 P. 994.

**V. PERFORMANCE OR BREACH.**

§ 303 (Kan.) A property owner held not entitled to recover damages for a building con-

tractor's refusal to complete the work, where such refusal was due to his own repudiation of the contract provisions as to the price he was to pay.—Draper v. Miller, 140 P. 890.

§ 303 (Utah) Under a contract providing that the theater building to be built and leased by defendant should be equipped according to specifications, which, in fact, were prepared as the work progressed, the architect's failure to prepare complete specifications of fixtures and decorations held not to relieve defendant from his obligation to furnish such equipment as was usual and necessary.—Orpheus Vaudeville Co. v. Clayton Inv. Co., 140 P. 653.

§ 312 (Wash.) Where a contractor employed to prepare land and seed it to alfalfa for a specified sum per acre and a half of the crops prepared a tract as required, but the owner refused to permit him to prepare more land on seeding the tract prepared, the contractor could recover the damages sustained.—Culp v. Kirkman, 140 P. 846.

**VI. ACTIONS FOR BREACH.**

§ 329 (Wash.) Plaintiff, whose husband, in her name, without defendants' knowledge of her interest, entered into a grubstake contract in 1898, and whose action thereon was not commenced until 1911, held guilty of gross laches.—Troutman v. Polhill, 140 P. 319.

§ 332 (Okla.) In an action on a contract, a petition which is sufficiently explicit to raise an issue of fact on which plaintiff would be entitled to recover is not demurrable.—Thompson v. De Long, 140 P. 421.

**CONTRIBUTION.**

See Subscriptions.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, §§ 93, 98.

**CONVERSION.**

See Criminal Law, § 594; Trover and Conversion.

**CONVEYANCES.**

See Chattel Mortgages; Deeds; Fraudulent Conveyances; Homestead, §§ 117, 118; Mortgages, § 280; Navigable Waters, § 44; Partition.

**CONVICTS.**

See Pardon.

**CORONERS.**

See Witnesses, § 393.

**CORPORATIONS.**

See Banks and Banking; Building and Loan Associations; Carriers; Colleges and Universities; Criminal Law, § 587; Evidence, § 459; Fraud, §§ 11, 59; Insurance; Judgment, § 143; Municipal Corporations; Principal and Surety, §§ 89, 104; Railroads; Religious Societies; Sales, § 465; Street Railroads; Taxation, §§ 40, 708; Waters and Water Courses, §§ 188, 202, 238.

**I. INCORPORATION AND ORGANIZATION.**

§ 30 (Utah) Where the buyer of an undivided one-tenth interest in a business, on the understanding that a corporation should be formed and that he should receive a tenth of the stock, accepted one-tenth after deducting shares set apart for the benefit of the corporation, he could not thereafter compel the issuance to himself of any part of the shares so set apart.—Burdette v. Universal Cleanser & Mfg. Co., 140 P. 119.

A stockholder cannot claim a segregation of

his interest in the corporate property and, though entitled under a contract to a specific part of the stock of the corporation, cannot compel the issuance to himself of any part of the stock set apart for the benefit of the corporation.—Id.

#### IV. CAPITAL, STOCK, AND DIVIDENDS.

##### (B) Subscription to Stock.

§ 80 (Okla.) Evidence, in an action to cancel a stock subscription and recover money paid, *held* insufficient to show that the subscription was procured by fraud.—King v. Howeth & Co., 140 P. 1182.

§ 83 (Okla.) A stock subscription accepted by the corporation cannot be canceled or withdrawn, except for fraud or mistake, or withdrawn without consent of the corporation and all stockholders.—King v. Howeth & Co., 140 P. 1182.

§ 89 (Utah) A stockholder of a corporation, having used \$500 of his own money to pay corporate debts, *held* entitled to credit therefor on a subsequent assessment levied on his stock.—Dotson v. Hoggan, 140 P. 128.

§ 90 (Utah) Under Comp. Laws 1907, § 315, subd. 11, a stockholder may not be sued by a corporation the articles of which provide that private property of a stockholder shall not be liable for corporate debts, for an unpaid assessment on full-paid stock; the assessment being enforceable only by forfeiture and sale of the stock.—Dotson v. Hoggan, 140 P. 128.

§ 93 (Cal.) Where sale of stock for delinquent assessment was postponed for defect in publication of notice, and notice of the assessment was not republished, sale *held* irregular, under Civ. Code, § 346.—Shannon v. Tooker, 140 P. 10.

Offer to repurchase stock sold for delinquent assessment *held* not a tender of the sum paid, with subsequent assessments and interest, as required by Civ. Code, § 347.—Id.

##### (D) Transfer of Shares.

§ 121 (Colo.App.) An equitable suit to recover land conveyed in payment of corporate stock on the ground of actual and intentional fraud, involving moral turpitude, is within the rules governing an action for damages for such fraud.—Moore v. Carrick, 140 P. 485.

§ 123 (Cal.) A pledgee of stock to secure a debt had no authority to alienate it beyond the title actually possessed by him, or to pledge it to another as security for his debt, and his action in so doing was a fraud on the pledgor.—Fowles v. National Bank of California, 140 P. 271.

Bank to which stock transferred in blank as security for a debt was pledged by the transferee to secure his debt *held* entitled to hold the stock for its debt, if it took it in good faith, without notice, and for a valuable consideration.—Id.

Under Civ. Code, § 325, where stock standing on corporation's books in wife's name, though community property, was pledged with a transfer in blank thereon signed by the wife, pledgee's transferee *held* entitled to assume that she was the sole owner, and not put upon inquiry by the absence of the husband's signature.—Id.

One to whom pledgee of stock pledged it as security for a debt *held* not put upon inquiry as to the original pledgor's rights by its knowledge that dividends were being declared, where it did not know that they were being paid to such pledgor.—Id.

That one to whom stock was transferred in blank as security for a debt was a stockbroker did not put a bank with which he pledged it as

security for an indebtedness from him to it upon inquiry as to his right to pledge it.—Id.

Where pledgee of stock pledged it to a bank to secure his debt renewals and extensions, and the surrender of other pledged securities before the bank learned of the original pledgor's rights, *held* not to release the stock from the pledge.—Id.

Bank with which pledgee of stock, who was then apparently solvent, pledged it as security for a pre-existing indebtedness *held* a pledgee for value as against the original pledgor; its pledgor having subsequently become insolvent.—Id.

§ 123 (Cal.App.) In an action to recover stock indorsed in blank for sale and fraudulently pledged by the broker to whom it was delivered, *held* that, at the time of the pledge and when money was paid out, the defendant bank had no notice of the claims of third persons.—Morgage v. National Bank of California, 140 P. 300.

§ 149 (Cal.App.) Where certificates of stock are indorsed in blank to a broker for sale, a third person, who has no notice of any other title than that presumed from the indorsement, may rely upon the indorsement, and acquire rights superior to the true owner.—Morgage v. National Bank of California, 140 P. 300.

##### (B) Interest, Dividends, and New Stock.

§ 153 (Or.) A corporation which has disposed of its property and ceased to transact any business, thereby necessitating the employment of another corporation in clerical work necessary to the management of its affairs resulting in an approved claim for such service, without some restoration of its corporate life could not maintain a suit for the recovery of a dividend paid out to a stockholder in liquidation, but the suit should be brought by the creditor corporation.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

#### V. MEMBERS AND STOCKHOLDERS.

##### (A) Rights and Liabilities as to Corporation.

§ 187 (Okla.) The doctrine of equitable estoppel applies to the internal concerns of stock corporations.—Bass & Harbour Furniture & Carpet Co. v. Harbour, 140 P. 956.

Stockholders, except so far as involves public policy and the interests of third persons, may bind themselves between each other and in the corporation's favor by agreements; and acts binding the stockholders as to an obligation from the corporation to one member will bind the corporation.—Id.

##### (D) Liability for Corporate Debts and Acts.

§ 216 (Or.) In the absence of statute in the state in which a person resides, imposing upon him a particular liability as a stockholder in a foreign corporation, the statute of the state incorporating it, or the articles which it adopts, affords the rule regulating his liability to its creditors.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

§ 217 (N.M.) The additional liability imposed on stockholders by Sess. Laws 1887, c. 68 (Comp. Laws 1897, § 273) § 14, being in derogation of the common law, the statute cannot be extended beyond the words used.—Jones v. Rankin, 140 P. 1120.

The General Corporation Act did not repeal or change the liability of stockholders under Sess. Laws 1884, c. 36, and Sess. Laws 1887, c. 68.—Id.

§ 252 (Or.) It is not essential that a creditor should secure a judgment against an insolvent corporation and have an execution returned *nulla bona*, as a condition precedent to a suit in equity for relief against a stockholder.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

§ 254 (Or.) The trust fund doctrine, as applicable to the assets of a corporation which is a going concern, does not obtain in this state.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

§ 259 (Or.) The proper remedy of a creditor of an insolvent corporation to reach a fund alleged to have been paid to a stockholder as a dividend in liquidation is by a suit in equity and not by an action at law.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

§ 259 (Utah) A creditor of a corporation may not sue a stockholder directly to recover a debt due to the corporation on a stock assessment unless the stockholder has consented to be so sued, but may enforce such liability by garnishment only.—Dotson v. Hoggan, 140 P. 128.

§ 269 (Or.) Where the complaint, in an action by a foreign corporation to enforce a stockholder's liability, did not set forth the statutory provisions under which plaintiff was organized, or any charter provision as to the liability of its stockholders, it would be assumed that the charter was silent on that subject, and that the foreign law was the same as the common law or the statute declaratory thereof prevailing in this state.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

## VI. OFFICERS AND AGENTS.

### (B) Authority and Functions.

§ 298 (Cal.App.) The by-laws of a corporation that the service of notice of special meetings of the directors shall be entered on the minutes, and the minutes, approved at a subsequent meeting, shall be conclusive on the question of service, do not limit manner of proving service of notice.—Sferlazzo v. Oliphant, 140 P. 289.

Where the minutes of a special meeting of the directors of a corporation showed that a quorum was present, and that two members were absent, and the correctness of the minutes was not called in question, one assailing the legality of the meeting must show that it was not called and notice given as required by the by-laws.—Id.

## VII. CORPORATE POWERS AND LIABILITIES.

### (A) Extent and Exercise of Powers in General.

§ 370 (N.M.) Public utility companies may enforce reasonable regulations, but not those that are discriminatory.—State v. Water Supply Co. of Albuquerque, 140 P. 1059.

§ 388 (Ok.) Unanimous consent of stockholders, when acted on by the persons concerned so as to materially change their position, precludes such stockholders and the corporation from setting up legal informalities affecting only their interests to overthrow rights acquired on the faith of such consent.—Bass & Harbour Furniture & Carpet Co. v. Harbour, 140 P. 956.

§ 394 (Cal.) The Railroad Commission has no power to compel a corporation, which owns property in private right and has not dedicated it to any public use, to apply it to a public use of any kind.—Del Mar Water, Light & Power Co. v. Eshleman, 140 P. 591.

### (B) Representation of Corporation by Officers and Agents.

§ 414 (Cal.App.) The president and general manager of a corporation may by custom be invested with the power to indorse and transfer commercial paper of the corporation.—Sferlazzo v. Oliphant, 140 P. 289.

A by-law of a corporation, providing that the president shall sign stock certificates and other contracts which have been approved by the directors, does not prevent the president by custom from acquiring the right to indorse and transfer commercial paper.—Id.

§ 432 (Nev.) In an action against a corporation, upon a note defended upon the ground

that the person executing the note was not its president, either de jure or de facto, because not a stockholder, evidence held to sustain a finding that he was a stockholder and president, with authority to execute the note.—Darrough v. Nevada Milling & Ore Purchasing Co., 140 P. 724.

### (E) Torts.

§ 491 (Cal.) A corporation engaged in the production and distribution of electric power held not entitled to escape liability for injuries caused by the negligence of one of its truck drivers in bringing the automobile of another employé to defendant's shop for repairs, pursuant to orders of the driver's superior, on the ground that such act was ultra vires.—Chamberlain v. Southern California Edison Co., 140 P. 25.

§ 492 (Cal.) A corporation is civilly liable for torts committed by its servant acting within the scope of his employment, though it did not authorize the particular act or ratify it.—Chamberlain v. Southern California Edison Co., 140 P. 25.

### (F) Civil Actions.

§ 513 (Or.) In an action against a corporation for acts committed by an agent, the acts are to be alleged as the acts of the corporation and agency, and its scope need not be alleged.—Schior v. Oregon-Washington R. & Navigation Co., 140 P. 629.

§ 515 (Ariz.) A corporation must specifically plead its want of power to do an act upon which its liability is predicated.—Arizona Life Ins. Co. v. Lindell, 140 P. 60.

§ 518 (Mont.) A general denial of all the allegations of the complaint, not specifically admitted or denied, does not put in issue the corporate capacity of plaintiff.—Willoburn Ranch Co. v. Yegen, 140 P. 231.

## VIII. INSOLVENCY AND RECEIVERS.

§ 544 (Or.) When a corporation either suspends business or becomes insolvent and its assets are in possession of a court of equity for final settlement and distribution, its capital stock constitutes a trust fund upon which general creditors have a lien for the payment of their demands; but mere insolvency does not of itself convert corporate property into a trust fund.—Garetson-Hilton Lumber Co. v. Hinson, 140 P. 633.

## IX. REINCORPORATION AND REORGANIZATION.

§ 577 (Cal.App.) The identity of a corporation is not destroyed, nor its legal obligations obliterated, by mere reincorporation under the same or a different name; the transfer of the corporate assets from the old to the new corporation being considered in a proper case as having been done to hinder, delay, and defraud creditors.—Koch v. Speedwell Motor Car Co., 140 P. 598.

The mere fact that separately created and existing corporations bear the same name and deal in the same commodities will not suffice, even if the officers and stockholders of each corporation be the same, to create a merger of corporate capacity, identity, and liability.—Id.

§ 579 (Cal.App.) A corporation organized as the Pacific Coast branch of an Ohio motor company, under the same name, but not appearing to be a mere continuation of the Ohio corporation, and to which the Pacific Coast business and assets of the Ohio corporation were transferred, under circumstances not creating an inference of fraud, could not be sued upon a liability of the Ohio corporation, which was presumably in being and not shown to be insolvent.—Koch v. Speedwell Motor Car Co., 140 P. 598.

A corporation to which the Pacific Coast busi-

ness and assets of an Ohio motor company were transferred, to create a general agency for the Ohio corporation, was no more liable upon an obligation of the Ohio corporation than any other agent would be liable upon his principal's obligations.—*Id.*

## **XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.**

§ 609 (Utah) The power to wind up the affairs of a corporation and to dissolve it is not one which inheres in the courts, but exists only when conferred by statute.—*Union Savings & Investment Co. v. District Court of Salt Lake County*, 140 P. 221.

## **XII. FOREIGN CORPORATIONS.**

§ 636 (Mont.) The right of a foreign corporation to engage in purely local private business in the state is a matter of grace on the part of the state, and, in the absence of any contract right giving a foreign corporation the right to engage in the state, the state may exclude it, or may attach conditions which transgress a constitutional guaranty secured to the corporation in the state of its domicile.—*State v. Alderson*, 140 P. 82.

§ 642 (Okl.) A foreign corporation engaged in interstate commerce with a resident of the state is not subject to Act March 22, 1909 (Laws 1909, c. 10; Comp. Laws 1909, §§ 1540-1543), prohibiting the transaction of business within the state by foreign corporations which have not complied with such act.—*Fruit Dispatch Co. v. Wood*, 140 P. 1138.

§ 648 (Mont.) A decision of the Supreme Court that Rev. Codes, § 165, does not permit the imposition of the fee on a foreign corporation seeking to engage in interstate commerce does not prevent the Secretary of State from insisting on the payment of the fee for recording and filing the certificate of a foreign corporation intending to engage solely in private intrastate business.—*State v. Alderson*, 140 P. 82.

Rev. Codes, § 165, must be construed to apply only to foreign corporations seeking to conduct strictly private intrastate business, and, so construed, the statute is valid.—*Id.*

§ 670 (Wash.) Under Rem. & Bal. Code, § 687, providing that writs of garnishment shall be served the same as a summons, and section 226, subd. 9, providing that a summons may be served on a foreign corporation by delivery to "any agent, cashier, or secretary thereof," service of a writ of garnishment against an Illinois corporation on its local manager was sufficient.—*Frieze v. Powell*, 140 P. 690.

## **CORRECTION.**

See Judgment, §§ 297-331.

## **CORROBORATION.**

See Criminal Law, § 511.

## **COSTS.**

See Attachment, § 351; Dismissal and Nonsuit, § 37; Insurance, § 675; Receivers, § 189; Waters and Water Courses, § 225; Wills, § 405.

## **IV. SECURITY FOR PAYMENT.**

§ 123 (Kan.) Where a surety on a cost bond makes affidavit that he is worth \$50,000 over all debts and exemptions, the officer required to pass on its sufficiency cannot reject the bond without investigation, because the surety is a resident of another county.—*Cain v. Kinkade*, 140 P. 1039.

## **V. AMOUNT, RATE, AND ITEMS.**

§ 184 (Mont.) A successful party cannot recover as costs fees of a witness not called or examined, without showing that the testimony which he was expected to give could reasonably be offered as relevant, to the issues raised.—*In re Gallatin Irrigation Dist.*, 140 P. 92.

§ 184 (Wash.) Where the allegations of the complaint were put in issue by the answer, plaintiff could call witnesses to prove his case without anticipating admissions of defendant; and where plaintiff recovered judgment the fees of such witnesses were properly taxed as costs.—*Frair v. Caswell*, 140 P. 564.

## **COTENANCY.**

See Tenancy in Common.

## **COUNTERCLAIM.**

See Set-Off and Counterclaim.

## **COUNTIES.**

See Agriculture, § 3; Clerks of Courts, § 85; Highways, § 98½; Intoxicating Liquors, § 146; Limitation of Actions, § 34; Mandamus, §§ 85, 113.

## **I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.**

§ 13 (Mont.) Under the statute providing for new counties, a petition for a new county out of territory of two existing counties need only be signed by a majority of the qualified electors of the territory, as shown by the official registration books of the last general election.—*State v. Board of Com'rs of Teton County*, 140 P. 728.

A counter petition for the exclusion of territory from a new county sought to be organized must contain the signatures of at least 50 per cent. of the qualified electors resident in the territory sought to be excluded, and the burden is on the counter petitioners to show that fact on the hearing.—*Id.*

A verification to a counter petition asking for the exclusion of territory sought to be included in a new county, which avers that each affiant believes that the counter petition is signed by at least 50 per cent. of the qualified electors of the territory sought to be excluded, does not show that the counter petition was so signed.—*Id.*

Under the New Counties Act and Rev. Codes, §§ 7992-7998, an affidavit to a counter petition for the exclusion of territory is not evidence of the facts averred therein.—*Id.*

The board of county commissioners ordering an election on the subject of organizing a new county, and adjourning sine die, has no authority to grant a rehearing on petition by qualified electors residing in territory sought to be excluded from the new county.—*Id.*

§ 16 (Mont.) Bridges, which are declared by Rev. Codes, § 1337, as amended by Laws 1913, c. 72, § 3, to be a part of the public highway, are not county property within that term as used in Laws 1911, c. 112, § 7, requiring the value of such property to be considered in the adjustment of the property rights between an old county and a newly created county.—*State v. Ritch*, 140 P. 731.

## **II. GOVERNMENT AND OFFICERS.**

### **(B) County Seat.**

§ 26 (Colo.) Act of 1881 (Laws 1881, p. 103), relating to the removal and location of county seats, *held*, in view of Const. art. 5, § 25, and article 14, § 2, to abrogate Laws 1861, p. 57, relating to the location of county seats, as well as Rev. St. 1868, c. 20, § 42, relating to re-

moval.—*Town of Sugar City v. Board of Com'rs of Crowley County*, 140 P. 809.

Act of 1881 (Laws 1881, p. 103), requiring six months' residence in the county and 90 days in the precinct to entitle persons to vote on the location of county seats, is not, in view of Const. art. 7, § 1, and article 14, § 2, unconstitutional because requiring a longer residence in the county and precinct than is necessary to qualify electors to vote at general elections.—*Id.*

§ 29 (Colo.) A complaint, attacking the result of an election establishing a county seat on the ground that illegal votes were counted, which was filed under Rev. St. 1908, §§ 2308 to 2319, cannot be amended so as to insert a list of illegal voters, as required by section 2312.—*Town of Sugar City v. Board of Com'rs of Crowley County*, 140 P. 809.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (A) Public Buildings and Other Property.

§ 105 (Okl.) Rev. Laws 1910, § 1625, empowering the county commissioners to contract for the erection of courthouses and jails, and to issue bonds therefor when authorized by a majority of the qualified tax paying voters, does not affect the three-fifths percentage required by Const. art. 10, § 26 and is not a limitation on the qualification of a voter as stated in Const. art. 3, §§ 1, 4a.—*Faulk v. Board of Com'rs of Marshall County*, 140 P. 777.

County commissioners are authorized under Rev. Laws 1910, § 1625, to contract for the purchase and erection of a courthouse and jail, when a majority of those voting for the proposition submitted by the board are qualified property tax paying voters.—*Id.*

#### (C) County Expenses and Charges and Statutory Liabilities.

§ 132 (Kan.) Improvements charged by a city to the benefited property are so far public in nature that the Legislature may require the county to bear part of the expense of collecting the assessments, by giving a rebate for their prompt payment.—*Kansas City v. Stewart*, 140 P. 876.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 151 (Okl.) Under Const. art. 10, § 26, where three-fifths of the voters of a county vote to create an indebtedness, such indebtedness is allowed.—*Faulk v. Board of Com'rs of Marshall County*, 140 P. 777.

The qualification of a voter at an election to authorize a county indebtedness pursuant to Const. art. 10, § 26, is that prescribed by Const. art. 3, §§ 1, 4a, and does not depend on whether he is a property tax paying or nonproperty tax paying voter.—*Id.*

§ 173 (Ariz.) A county may not issue bonds unless the power is specifically conferred or necessarily implied from the law governing the powers of counties.—*Board of Sup'rs of Yavapai County v. Hawkins*, 140 P. 821.

§ 173 (Idaho) The expressed purpose of Laws 1913, c. 58, § 99, enacted pursuant to Const. art. 7, § 15, abrogating power to issue bonds, is to place the counties of the state on a cash basis.—*Peavy v. McCombs*, 140 P. 965.

§ 174 (Ariz.) Under Civ. Code 1913, pars. 5286-5285, relating to county and municipal indebtedness, a county may, as authorized by voters at an election, issue bonds for a courthouse where the existing indebtedness of the county and the indebtedness created by the bonds will not exceed 4 per cent. of the assessed valuation of the property of the county.—*Board of Sup'rs of Yavapai County v. Hawkins*, 140 P. 821.

§ 175 (Ariz.) Where bonds of a county are issued as the original evidence of an indebtedness contracted by it, the bonds are not a fund-

ing of the debt, as ordinarily understood.—*Board of Sup'rs of Yavapai County v. Hawkins*, 140 P. 821.

§ 175 (Idaho) Laws 1913, c. 58, § 99, abrogates the power of county commissioners to issue bonds for the redemption of outstanding county warrants issued before such law went into effect, as well as warrants issued since that time.—*Peavy v. McCombs*, 140 P. 965.

Laws 1913, c. 58, § 99, repeals Rev. Codes, § 1960, as amended by Laws 1913, c. 33, so far as section 1960 empowers county commissioners to issue county bonds to pay or to redeem outstanding warrant indebtedness.—*Id.*

## COURT REPORTERS.

See Statutes, § 124; Taxation, § 40.

## COURTS.

See Appeal and Error, §§ 34, 757, 773, 1097, 1122; Attorney and Client, § 190; Building and Loan Associations, § 45; Clerks of Courts; Colleges and Universities, § 10; Contempt; Equity, § 39; Infants, § 20; Intoxicating Liquors, § 108; Judges; Judgment, § 489; Justices of the Peace; Lis Pendens, § 5; Quietting Title, § 7; Statutes, §§ 76, 87; Trial, §§ 187-199, 370-404.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 7 (Wash.) In the absence of statute making a personal injury action local, it is deemed a transitory action and may be brought wherever service can be had upon defendant.—*Reynolds v. Day*, 140 P. 681.

§ 8 (Wash.) Where an action accruing in another state is transitory, and jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the forum or to good morals, and not injurious to the state of the forum or its citizens, will be recognized and enforced in actions ex delicto as well as ex contractu.—*Reynolds v. Day*, 140 P. 681.

Under the rule of comity, a transitory action, such as one for personal injuries, which accrued and was actionable in another state, may be maintained, though plaintiff could not have recovered had the injury occurred in the state of the forum.—*Id.*

To make an employe's common-law remedy contrary to the public policy of this state, so that it will not be enforced as a matter of comity, where the cause of action accrues in a state where it is enforceable, it must appear that the common-law remedy would never be enforced under any circumstances if the cause of action arose in this state.—*Id.*

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (A) Creation and Constitution, and Court Officers.

§ 42 (Wash.) Laws 1913, c. 126, §§ 1-13, providing for appointment of official court reporters, held not invalid.—*State v. Derbyshire*, 140 P. 540.

§ 56 (Ariz.) Under Civ. Code 1901, par. 2505, and Laws 1903, No. 91, § 1, a complaint against a county for interpreter's fees, failing to allege that the services were rendered in a civil case in which the county was a party or in a criminal case, did not state a cause of action.—*Cochise County v. Michelena*, 140 P. 62.

#### (D) Rules of Decision, Adjudications, Opinions, and Records.

§ 97 (Ariz.) In determining the conflicting rights of a minor child of a widow who, after making entry on public land remarried and died before she was entitled to a patent, and the second husband, the construction by the federal Supreme Court of the federal laws governing the



rights of entrymen is binding on the state courts.—*Harris v. Lyon*, 140 P. 985.

§ 102 (Cal.) In the Supreme Court in banc the concurrence of at least four justices is necessary to the determination of any proposition, stated as the basis of the judgment.—*Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 948.

### III. COURTS OF GENERAL ORIGINAL JURISDICTION.

#### (A) Grounds of Jurisdiction in General.

§ 121 (Okl.) Under Const. art. 7, § 10, and Comp. Laws 1909, § 1978, where the interest and principal on a contract exceed \$500, an action for the amount due on the contract is within the jurisdiction of the district court.—*Thompson v. De Long*, 140 P. 421.

### IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 163 (Okl.) Issues in a real estate broker's action for commission *held* not to involve title to the land so as to deprive the county court of jurisdiction.—*Everett v. Combs*, 140 P. 152.

### VI. COURTS OF APPELLATE JURISDICTION.

#### (B) Courts of Particular States.

§ 212 (Cal.) An action for a money judgment for less than \$2,000 is within the appellate jurisdiction of the District Court of Appeal, and an application to transfer the cause to the Supreme Court will be denied, though the complaint asked for equitable relief, but did not allege facts on which it could be granted.—*Koch v. Speedwell Motor Car Co.*, 140 P. 600.

§ 213 (Colo.) A judgment for \$5,000, being merely affirmed by Court of Appeals, is still only for \$5,000, within Sess. Laws 1911, pp. 268, 269, §§ 5, 6, limiting rehearing by the Supreme Court on error, to the Court of Appeals to a case where the decision relates to a judgment for more than \$5,000; the interest on a judgment, accruing under Rev. St. 1908, § 3162, not becoming part of it, but remaining incident to it.—*Colorado Midland Ry. Co. v. Edwards*, 140 P. 190.

### VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

#### (B) State Courts and United States Courts.

§ 489 (Colo.) Where, pending appeal from an order of the local land office rejecting a desert land entry, a patent for the same land was issued to a homestead entryman, the state court had jurisdiction of a suit to set aside the patent as wrongfully issued.—*Anderson v. Woodward*, 140 P. 198.

### COVENANTS.

See Landlord and Tenant, § 130.

### IV. ACTIONS FOR BREACH.

§ 130 (Kan.) The damages recoverable for breach of warranty *held* to include the necessary and reasonable expense of a forcible detainer action which plaintiff brought against the vendor's tenant to obtain possession, the attorney's fee, and what the possession of the tenant was reasonably worth.—*Burchfield v. Brinkman*, 140 P. 894.

### CREDITORS.

See Fraudulent Conveyances; Garnishment; Sales, § 474; Subrogation.

### CRIME AGAINST NATURE.

See Sodomy.

## CRIMINAL LAW.

See Adultery; Arrest; Assault and Battery; Bastards; Bribery; Conspiracy; Contempt; Embezzlement; Gaming; §§ 72½-98; Homicide; Indians, § 34; Indictment and Information; Intoxicating Liquors, §§ 196-236; Larceny; Lewdness; Libel and Slander, §§ 15, 18, 19, 86; Pardon; Prostitution; Rape; Sodomy.

### II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 48 (Okl. Cr. App.) Under Rev. Laws 1910, § 2094, the test of criminal responsibility for the commission of a crime depends on whether accused had mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequence of such act.—*Alberty v. State*, 140 P. 1025.

### V. VENUE.

#### (A) Place of Bringing Prosecution.

§ 108 (Cal. App.) Venue of offense of soliciting order for intoxicating liquor in no-license territory by means of a letter under *Wyllie Local Option Law*, § 15, *held* to be in the county where the letter was received.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.

§ 112 (Wash.) The venue of a prosecution for conspiracy was properly laid in a county where the conspiracy was continued, and an overt act committed, though it was originated in another county.—*State v. Mardesich*, 140 P. 573.

#### (B) Change of Venue.

§ 137 (Colo.) While on application for change of venue for prejudice of the judge, the judge can try the questions of law, yet, the petition and affidavits being sufficient, the judge, under Rev. St. 1908, §§ 6963, 6964, cannot try the question of fact of his prejudice, but must grant the change.—*Erbaugh v. People*, 140 P. 188.

Objection to time of filing petition for change of venue for prejudice of the judge, and absence of notice being waived, and form and substance of petition and affidavits not being questioned, it is error to deny the change solely on the ground that the alleged prejudice is not true.—*Id.*

### VII. FORMER JEOPARDY.

§ 193½ (Cal. App.) A verdict convicting defendant of involuntary manslaughter is an acquittal of the higher crimes embraced in the information.—*People v. Kelley*, 140 P. 302.

§ 195 (Kan.) The ultimate test in determining the validity of a plea of former conviction or former acquittal is identity of offenses, and it is not necessarily decisive that the two offenses have some material fact in common.—*State v. Schmidt*, 140 P. 843.

### VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 258 (Ariz.) Under Pen. Code 1913, § 1329, providing that a justice's judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine, construed with section 19 and Civ. Code 1913, par. 3829, *held*, that a justice's judgment in a prosecution for selling intoxicants in a local option district, imposing a fine of \$250, and, in default of its payment, imprisonment for 60 days, was valid.—*Ex parte Silvas*, 140 P. 988.

## IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 290 (Cal.) Under Pen. Code, §§ 995 and 1017, the defenses of former acquittal or former jeopardy must be presented by plea.—*People v. Strickler*, 140 P. 270.

### X. EVIDENCE.

(B) **Facts in Issue and Relevant to Issues, and Res Gestæ.**

§ 368 (Or.) An exclamation of decedent's daughter, during a scuffle between defendant and others, that defendant had killed her mother, was admissible as part of the *res gestæ*.—*State v. Davis*, 140 P. 448.

(C) **Other Offenses, and Character of Accused.**

§ 369 (Or.) In a prosecution for assault with intent to rape, the admission of evidence of a prior assault on another female infringes defendant's right to demand the nature and cause of the accusation against him.—*State v. Jensen*, 140 P. 740.

§ 369 (Wash.) On a trial for seduction, evidence of prior acts of intercourse between the parties is admissible.—*State v. Tilden*, 140 P. 680.

(D) **Materiality and Competency in General.**

§ 395 (Utah) In a prosecution of a railroad employé for larceny, a sheet of paper taken from accused after his arrest, containing an offer of money to the arresting officer if he would release him, *held* properly admitted.—*State v. Reese*, 140 P. 126.

(H) **Documentary Evidence and Exclusion of Parol Evidence Thereby.**

§ 429 (Kan.) Where the record of a previous conviction for violation of the prohibitory law discloses a conviction for such violation, the record is *prima facie* proof of such violation, without introducing the complaint or information.—*State v. Schmidt*, 140 P. 843.

§ 447 (Wash.) It was not error to permit prosecutrix to explain to the jury expressions contained in letters written to her by accused.—*State v. Tilden*, 140 P. 680.

### (I) Opinion Evidence.

§ 451 (N.M.) The statement of a witness that defendant and deceased appeared to be perfectly friendly five minutes before the killing *held* admissible to supplement the witness' language which was inadequate to convey the precise facts.—*State v. Cooley*, 140 P. 1111.

(J) **Testimony of Accomplices and Codefendants.**

§ 507 (Idaho) For a person to be an accomplice in the commission of a crime, some aiding, abetting, or actual encouragement by him is essential.—*State v. Grant*, 140 P. 959.

The mere presence of a person when a crime is plotted or his silent acquiescence in its commission does not, in the absence of legal duty to act, make him an accomplice within Rev. Codes, § 7871, requiring corroboration of the testimony of an accomplice.—*Id.*

A person's failure to disclose known facts regarding a crime does not render him an accomplice of the person committing the crime.—*Id.*

§ 511 (Idaho) Under Rev. Codes, § 7871, the corroborating evidence must be some material fact or circumstance, which, standing independent of the accomplice's testimony, tends to connect defendant with the offense.—*State v. Grant*, 140 P. 959.

§ 511 (Utah) On trial for adultery, girl's testimony *held* sufficiently corroborated within Comp. Laws 1907, § 4862, as to the corroboration of accomplices.—*State v. Park*, 140 P. 768.

### (M) Weight and Sufficiency.

§ 567 (Utah) In a prosecution for larceny, evidence *held* sufficient to show the corporate existence of a railroad company by general reputation.—*State v. Reese*, 140 P. 126.

## XI. TIME OF TRIAL AND CONTINUANCE.

§ 594 (Idaho) Refusal of continuance *held* an abuse of the discretion conferred by Rev. Codes, §§ 7795, 4872, where there was a reasonable possibility that the absent witness, in possession of material documentary evidence, would return within the jurisdiction with the document and testify if the trial was postponed.—*State v. Cannon*, 140 P. 963.

§ 603 (N.M.) Where a motion for a continuance failed to allege, as required by Comp. Laws 1897, § 2986, that affiant believed in the truth of the fact to be testified to by the absent witness, it was properly overruled.—*State v. Probert*, 140 P. 1108.

## XII. TRIAL.

### (A) Preliminary Proceedings.

§ 628 (Kan.) That the county attorney was allowed to indorse on the information the names of additional witnesses, including that of the witness on whose evidence the conviction was sustained, was within the discretion of the court.—*State v. Wallace*, 140 P. 863.

(B) **Course and Conduct of Trial in General.**

§ 636 (Or.) The trial court can, in defendant's absence, make an order *nunc pro tunc* for entry of record of verdict of conviction; but the practice is not to be commended.—*State v. McDaniel*, 140 P. 993.

§ 655 (Cal.) In a prosecution for statutory rape, where accused's counsel justified his cross-examination on the ground that it concerned matters the prosecutrix had glozed over, it was improper for the court to rebuke him for the remark on the ground that he was guilty of ungentlemanly and unprofessional conduct.—*People v. MacDonald*, 140 P. 256.

### (C) Reception of Evidence.

§ 673 (Or.) In a trial of two defendants, refusal to restrict evidence of declarations by one after the offense in the absence of the other to the declarant is error.—*State v. McDaniel*, 140 P. 993.

(E) **Arguments and Conduct of Counsel.**

§ 706 (N.M.) It was error to permit the district attorney to ask witnesses whether he had not instructed them not to talk to any one about the case, and whether they had not violated such instructions by talking with defendant's attorney.—*State v. Cooley*, 140 P. 1111.

§ 730 (N.M.) Where the court erroneously permitted the district attorney to ask witnesses whether he had not directed them not to talk to any one about the case, and whether they had not talked to defendant's attorney, and such questions were answered, it should, on request, have instructed that the district attorney had no right to give such directions.—*State v. Cooley*, 140 P. 1111.

(F) **Province of Court and Jury in General.**

§ 736 (Idaho) Where the evidence does not show without substantial conflict that a witness was an accomplice, the question whether he was an accomplice is for the jury.—*State v. Grant*, 140 P. 959.

§ 765 (Cal.) Under Const. art. 6, § 19, prohibiting charges upon matters of fact, and Pen. Code, § 1126, giving the jury the exclusive power to determine the facts, it is improper in a prosecution for statutory rape for the court to characterize the prosecutrix as courteous, kind, and modest.—*People v. MacDonald*, 140 P. 256.

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

§ 771 (Okla. Cr. App.) Accused is entitled to instructions defining the law applicable to his theory and covering his defense, when there is competent evidence tending reasonably to substantiate same.—*Courtney v. State*, 140 P. 163.

§ 780 (Idaho) Where the question arises whether the witness is an accomplice under Rev. Codes, § 7871, the court should instruct on the law of accomplices.—*State v. Grant*, 140 P. 959.

§ 782 (N.M.) An instruction that a dying declaration is entitled to no more weight than if the deceased was present and testifying, *held* erroneous as calculated to lead the jury to believe that such declarations are entitled to the same weight as the testimony of living witnesses.—*State v. Valencia*, 140 P. 1119.

§ 785 (Cal.) A charge that a witness false in one part of his testimony is to be distrusted in others, being in accordance with Code Civ. Proc. § 2061, is proper.—*People v. MacDonald*, 140 P. 256.

§ 786 (Cal.) The refusal of an instruction that, if the evidence was otherwise insufficient to justify a conviction, the mere fact that accused when a witness made a false statement in no way connected with the charge against him will not warrant a conviction, was proper, where the false statement was made by accused out of court.—*People v. MacDonald*, 140 P. 256.

§ 814 (Wash.) Where defendants were indicted for conspiracy to prevent any one outside a certain combine from fishing in the waters of Puget Sound, the offense was complete when the conspiracy was formed, and it was not error to refuse to charge that they could not be convicted for having hindered white men from fishing on an Indian reservation.—*State v. Mardeisch*, 140 P. 573.

§ 815 (Okla. Cr. App.) Refusal of an instruction on alibi *held* error, where there was evidence tending to establish such defense, and no other defense or testimony was offered.—*Courtney v. State*, 140 P. 163.

§ 822 (Colo.) In determining the correctness of instructions on alibi, they must be considered as a whole.—*Forste v. People*, 140 P. 789.

§ 822 (Kan.) An instruction on the defense of insanity *held* not so misleading, in view of the entire charge, as to cause the jury to lose sight of the rule that to justify an acquittal they need have only a reasonable doubt as to defendant's sanity.—*State v. Johnson*, 140 P. 839.

§ 823 (Kan.) An instruction that it devolved on accused to first raise the question of his insanity, but merely to create a reasonable doubt as to his sanity, *held* harmless, where other correct instructions were given and defendant introduced much evidence touching his claimed insanity.—*State v. Johnson*, 140 P. 839.

**(J) Custody, Conduct, and Deliberations of Jury.**

§ 855 (Kan.) That one of the jurors pending deliberation asked how they could square themselves with the people in the face of so many witnesses if they did not convict is not misconduct requiring a reversal.—*State v. Wallace*, 140 P. 863.

**XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.**

§ 968 (Cal.) Under Pen. Code, §§ 995 and 1017, the defenses of former acquittal or former jeopardy may not be presented by motion in arrest of judgment.—*People v. Strickler*, 140 P. 270.

§ 970 (Wash.) Under Rem. & Bal. Code, § 2183, providing that a judgment may be arrested on motion of the defendant on the ground that the information does not state a crime, the sufficiency of the information may be ques-

tioned by such motion, although no objection was made thereto before the plea was entered.—*State v. George*, 140 P. 387.

**XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.**

§ 978 (Okla. Cr. App.) Under Const. art. 5, § 54, the repeal or an amendment of a statute prescribing the punishment for an offense, after final judgment and pending an appeal therefrom, does not vacate or modify such judgment or arrest execution, where the judgment is affirmed.—*Alberty v. State*, 140 P. 1025.

§ 980 (Cal.) Where accused withdrew his plea of not guilty, and entered plea of guilty, and applied for release on probation, court *held* to have power to enter judgment on the plea of guilty, though pleas of former acquittal and former jeopardy were not expressly withdrawn.—*People v. Strickler*, 140 P. 270.

§ 995 (Or.) The record in a criminal case should affirmatively show that defendant was present when a verdict of conviction was received.—*State v. McDaniel*, 140 P. 993.

**XV. APPEAL AND ERROR, AND CERTIORARI.****(B) Presentation and Reservation in Lower Court of Grounds of Review.**

§ 1035 (Cal.) In a prosecution for statutory rape, *held*, that accused could not complain on appeal of remarks of the court concerning the prosecutrix made in rebuking counsel, where the objection was not promptly made and did not call the court's attention to the remarks.—*People v. MacDonald*, 140 P. 256.

**(E) Assignment of Errors and Briefs.**

§ 1130 (Okla. Cr. App.) Counsel for accused should brief the assignments of error relied on for reversal.—*Loche v. State*, 140 P. 434.

**(F) Dismissal, Hearing, and Rehearing.**

§ 1132 (Okla. Cr. App.) Where counsel, for any sufficient reason are unable to file briefs, they may appear and orally argue the assignments of error.—*Loche v. State*, 140 P. 434.

**(G) Review.**

§ 1144 (Colo.) Objections that the petition for change of venue was not filed till the morning of the trial, and that the district attorney was not served with notice, will be presumed waived, the record, showing that he appeared and participated in the argument of the petition, not showing the contrary.—*Erbaugh v. People*, 140 P. 188.

§ 1150 (Colo.) The question of prejudice of the inhabitants, on which change of venue is asked, being triable to the court, its denial will not be disturbed, except for abuse of discretion.—*Erbaugh v. People*, 140 P. 188.

§ 1153 (Or.) Under L. O. L. § 732, the decision of the court as to the competency of a witness four years of age will not be disturbed if there is any evidence to sustain it.—*State v. Jensen*, 140 P. 740.

§ 1156 (Idaho) The denial of a new trial for newly discovered evidence will not be disturbed, where the discretion of the trial court was not abused.—*State v. Grant*, 140 P. 959.

§ 1159 (Okla. Cr. App.) A conviction reasonably sustained by evidence will not be disturbed in the absence of errors of law.—*Overton v. State*, 140 P. 1135.

§ 1160 (Okla. Cr. App.) Where a conviction, approved by the trial court, is sustained by evidence, it will not be set aside, in the absence of prejudicial error.—*Tronier v. State*, 140 P. 789.

§ 1166½ (Cal.) An erroneous rebuke to accused's counsel, whereby the court characterized his conduct as ungentlemanly and unprofes-

sional, is not prejudicial to accused.—People v. MacDonald, 140 P. 256.

§ 1176 (Idaho) Refusal to strike from the files counter affidavits submitted by the state on motion for new trial is not ground for reversal, where it does not appear that defendant was prejudiced.—State v. Grant, 140 P. 959.

**(H) Determination and Disposition of Cause.**

§ 1182 (Okl.Cr.App.) Where no briefs are filed or appearance made for oral argument, a motion to affirm for failure to prosecute should be sustained, in the absence of error depriving accused of substantial rights.—Loche v. State, 140 P. 434.

§ 1182 (Okl.Cr.App.) Where accused fails to file briefs or present argument, the appellate court will affirm the conviction, if no prejudicial error appears from an examination of the record proper.—Myrick v. State, 140 P. 788.

§ 1182 (Or.) Const. art. 7, § 3 (L. O. L. P. xxiv), does not authorize affirmance of a conviction where the case was submitted upon a wrong theory of the law.—State v. Davis, 140 P. 448.

§ 1186 (Okl.Cr.App.) The appellate court will not depart from established rules of practice to uphold the judgment of careless or indifferent trial courts in criminal cases.—Courtney v. State, 140 P. 163.

§ 1187 (Utah) Under Comp. Laws 1907, § 4977, where a defendant was convicted and sentenced as for a felony, whereas, the offense was only a misdemeanor, which was the only objection raised, the court could set aside the sentence; but it was necessary to remand for re-sentence.—State v. Carman, 140 P. 670.

**XVII. PUNISHMENT AND PREVENTION OF CRIME.**

§ 1208 (Idaho) Under Laws 1911, c. 200, § 1, amending Intermediate Sentence Act of 1909, § 1, taken together with Rev. Codes, § 7008, held, that a defendant convicted of arson in the first degree was legally sentenced for 50 years' maximum, with a minimum of 25 years.—State v. Grant, 140 P. 959.

**CROPS.**

See Landlord and Tenant, § 262.

**CROSS-EXAMINATION.**

See Witnesses, §§ 268-286.

**CRUELTY.**

See Divorce, §§ 51, 135.

**CUSTOMS AND USAGES.**

See Common Law.

**CUSTOMS DUTIES.**

See Wharves, § 21.

**DAMAGES.**

See Adjoining Landowners, § 3; Appeal and Error, §§ 1004, 1068; Attachment, § 351; Carriers, § 236; Covenants, § 130; Death, §§ 7, 95, 96; Eminent Domain, §§ 101, 106; Fraud, § 59; Landlord and Tenant, § 129; Libel and Slander, § 124; Mines and Minerals, § 78; Replevin, § 103; Sales, §§ 418, 442; Schools and School Districts, § 138; Set-Off and Counterclaim, § 31; Trial, § 260; Trover and Conversion, § 48; Vendor and Purchaser, §§ 322-330.

**III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.**

**(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.**

§ 20 (Mont.) Under Rev. Codes, § 6068, if passenger's disease was aggravated or death accelerated by failure of engineer to stop train, carrier held liable in damages, though it did not know of her illness or the probable serious consequences to follow from her missing the train.—Burles v. Oregon Short Line R. Co., 140 P. 513.

§ 20 (Wash.) A carrier negligently causing or contributing to a passenger's injury is liable for any injury flowing from its negligence.—Atwood v. Washington Water Power Co., 140 P. 343.

§ 34 (Wash.) Where a person receives an injury through the negligence of another, and the injury is subsequently aggravated, and a recovery retarded, through some accident not the result of want of ordinary care of the person injured, he may recover for the entire injury.—Smith v. Northern Pac. Ry. Co., 140 P. 685.

**IV. LIQUIDATED DAMAGES AND PENALTIES.**

§ 80 (Cal.App.) Rule as to treating stipulations for payment of sum for breach of various provisions of contract, which in some instances would be too large as providing for a penalty, held modified by Civ. Code, § 1671.—Los Angeles Olive Growers' Ass'n v. Pacific Surety Co., 140 P. 295.

§ 85 (Cal.App.) Invalidity of stipulation for liquidated damages held not to affect the contractor's obligation to perform, and hence complaint, in action on bond given to secure performance, was sufficient, even though such stipulation was invalid.—Los Angeles Olive Growers' Ass'n v. Pacific Surety Co., 140 P. 295.

**VI. MEASURE OF DAMAGES.**

**(A) Injuries to the Person.**

§ 96 (Cal.App.) In awarding damages for a personal tort, the jury must take into consideration all the elements of damages shown by the proofs, and apply their best and honest judgment in the ascertainment of what, under the evidence, would be just compensatory relief.—Scragg v. Sallee, 140 P. 706.

**(B) Injuries to Property.**

§ 113 (Okl.) The measure of damages for injury to personal property that can be repaired is the cost of repair and the value of its use necessarily lost pending repair.—Weleetka Light & Water Co. v. Northrop, 140 P. 1140.

**VII. INADEQUATE AND EXCESSIVE DAMAGES.**

§ 131 (Cal.App.) Plaintiff while driving a delivery wagon was struck by defendant's automobile, was thrown out, striking on his head and shoulders, rendering him unconscious at the time, and, while not confined to his bed for any time, was incapacitated for his work for two months, for which he received \$70 per month, and for a period of a year afterwards suffered pain in his shoulder. Held, that a verdict for \$750 was not excessive.—Scragg v. Sallee, 140 P. 706.

§ 131 (Wash.) A verdict of \$4,000 for personal injury consisting of a comminuted fracture of the neck of the femur held not to be disturbed as excessive, where the person injured was 27 years old at the time and earned \$10 a week.—Acres v. Frederick & Nelson, 140 P. 370.

§ 132 (Cal.App.) Where a woman 23 years old was injured in a street car collision, her left leg being broken, several ribs fractured, and her back being wrenched so that there was a sensory paralysis of the left arm, an award of \$15,750 damages cannot be held excessive, where

the jury were warranted in finding that the paralysis was permanent, or would grow worse.—*Lynch v. Pacific Electric Ry. Co.*, 140 P. 298.

§ 132 (Wash.) Where one sustaining a fracture of the femur of the left leg was confined in a hospital for several weeks, and the leg was shortened and deformed, but plaintiff's physical health remained otherwise good, a verdict for \$15,000 was excessive, and must be reduced to \$10,000.—*Smith v. Northern Pac. Ry. Co.*, 140 P. 685.

§ 132 (Wash.) A verdict of \$2,500 for a severe fracture of the thigh bone of plaintiff's left leg, confining him in a hospital for 8 months and shortening that leg at least  $1\frac{1}{2}$  inches, was not excessive.—*Toupin v. Kent Lumber Co.*, 140 P. 903.

## VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

### (A) Pleading.

§ 150 (Cal.App.) In action on bond given to secure performance of contract, complaint *held* sufficient to show that the case was within Civ. Code, § 1671, authorizing stipulations for liquidated damages, where it would be impracticable or difficult to fix the actual damage.—*Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 140 P. 295.

§ 158 (Utah) Where plaintiff's injuries were fully described in the complaint and were such as to necessarily interfere with her capacity to earn money, the jury was properly permitted to allow for injury to her earning capacity, though such loss was not pleaded as such.—*Atwood v. Utah Light & Ry. Co.*, 140 P. 137.

### (B) Evidence.

§ 163 (Cal.App.) Civ. Code, § 1670, prohibiting stipulations for liquidated damages, except as provided in the next section, *held* presumed to apply unless the party seeking to recover on the stipulation shows that the case comes within section 1671, authorizing such stipulation in certain cases.—*Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 140 P. 295.

§ 163 (Wash.) One suing for personal injuries need only show that an injury complained of probably resulted from the accident, and he may rely on presumptions and inferences, and the probabilities must be weighed by the jury in determining the extent and character of the injuries.—*Atwood v. Washington Water Power Co.*, 140 P. 343.

### (C) Proceedings for Assessment.

§ 208 (Cal.App.) In a personal injury action by a passenger, the question of the severity and permanence of the injuries *held*, under the evidence, for the jury.—*Lynch v. Pacific Electric Ry. Co.*, 140 P. 298.

§ 208 (Wash.) In an action for personal injuries, the question whether the injury caused plaintiff's miscarriage *held* properly submitted to the jury under the evidence.—*Atwood v. Washington Water Power Co.*, 140 P. 343.

## DEATH.

See Appeal and Error, §§ 1039, 1050; Carriers, §§ 246, 305, 318; Constitutional Law, § 203; Limitation of Actions, § 127; Pleading, § 35; Trial, §§ 187, 194, 199.

## II. ACTIONS FOR CAUSING DEATH.

### (A) Right of Action and Defenses.

§ 7 (Colo.) Rev. St. 1908, § 2056, providing that, if the employes of a railroad negligently cause the death of any person, the company shall forfeit not less than \$3,000 nor more than \$5,000 to the next of kin of the deceased, is penal in its nature, rather than compensatory, like sections 2057, 2058, which permit a recovery for wrongful death based on the damage

sustained.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

The purpose of Rev. St. § 2056, providing that a railroad, whose employes negligently cause a death, shall forfeit \$3,000 to \$5,000 to the next of kin, is to protect human life, and enjoin upon such employes the exercise of the utmost care, and upon the company great care in their selection, and the recovery is a forfeiture, rather than compensation for damages sustained.—*Id.*

That Rev. St. 1908, § 2056, providing that a railroad, negligently causing a death, shall forfeit \$3,000 to \$5,000, directs that such sum shall be paid to the next of kin, does not affect the fact that it is a penalty, especially in view of the fact that the recovery of compensatory damages was fully provided for by prior statutes.—*Id.*

§ 9 (Or.) Statutes creating liability for causing death (L. O. L. §§ 34, 380; Employers' Liability Law), while not strictly construed, are not to be extended by implication, being in derogation of common law.—*McClagherty v. Rogue River Electric Co.*, 140 P. 64.

§ 11 (Colo.) Rev. St. 1908, § 2056, providing that, if the employes of a railroad negligently cause a death, the company shall forfeit \$3,000 to \$5,000 to the next of kin, does not, like sections 2057, 2058, depend upon whether the deceased could have maintained an action, but creates a new and independent cause of action, which is penal in its nature.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

§ 14 (Or.) Defendants, in an action for causing death, are not liable unless they were negligent.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

§ 17 (Or.) Defendants are not liable unless their negligence was the proximate cause of death.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

§ 18 (Or.) The basis of recovery, under Employers' Liability Law, for causing death is not the dependency of plaintiff on decedent, nor the pecuniary loss by plaintiff, but the existence of the relation to decedent required by the act.—*McClagherty v. Rogue River Electric Co.*, 140 P. 64.

§ 25 (Colo.) The cause of action authorized by Rev. St. 1908, § 2056, providing for the forfeiture for a wrongful death of \$3,000 to \$5,000 to the next of kin, being one in which the deceased had no interest, and from which he could not relieve defendant from liability, a free pass, exempting defendant from liability for injury to deceased, was properly excluded.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

§ 33 (Or.) A lime company was not negligent in permitting an injured employe of an independent contractor to be taken for treatment to its office, where a third person administered poison through mistake, causing the employe's death.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

### (D) Pleading and Evidence.

§ 48 (Colo.) A complaint in an action for wrongful death, alleging that the train was so negligently "operated" as to cause a collision, etc., stated a good cause of action under Rev. St. 1908, § 2056, authorizing recovery for a death caused by negligence "whilst running, conducting, or managing any \* \* \* train of cars," notwithstanding the word "operate" may be broader than the words of the statute.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

An allegation of a complaint in an action for wrongful death under Rev. St. 1908, § 2056, authorizing recovery for a death caused by the negligence of "any officer, agent, servant, or employe" of a railroad, of negligence on the part of the company, as well as its "officers, agents, and employes," was surplusage.—*Id.*

§ 49 (Cal.App.) A complaint, in an action for wrongful death, was not bad for failure to allege the existence of an heir, where the action was by the widow as administratrix, as the widow is not only an heir, but Civ. Code, § 1970, authorizes the personal representative to sue for the widow, and under Code Civ. Proc. § 377, such damages are recoverable as may be just.—*Barr v. Southern California Edison Co.*, 140 P. 47.

The complaint was not bad for failure to allege that suit was brought for the benefit of the widow as heir, where the widow brought the suit as administratrix.—*Id.*

§ 52 (Cal.App.) The failure of the complaint to allege that the widow suffered pecuniary damage did not render it subject to general demurrer, as Civ. Code, § 1970, authorizes the personal representative to sue for the widow, Code Civ. Proc. § 377, authorizes the recovery of just damages, and the widow was deprived of that share of deceased's earnings to which she was entitled for support.—*Barr v. Southern California Edison Co.*, 140 P. 47.

§ 64 (Colo.) Since Rev. St. 1908, § 2056, providing that a railroad, negligently causing a death, shall forfeit \$3,000 to \$5,000 to the next of kin, is penal in its nature, it was error to admit evidence of the loss sustained from such death; the culpability of the defendant being the sole guide in fixing the recovery.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

#### (E) Damages, Forfeiture, or Fine.

§ 95 (Colo.) Under Rev. St. 1908, §§ 2057, 2058, authorizing the next of kin to recover such damages for a wrongful death as may be fair and just, reference being had to the injury sustained by the plaintiffs, the amount of recovery is to be determined from the prospective accumulations of the deceased, having reference to his age, occupation, habits, bodily health, and ability to earn money.—*Denver & R. G. R. Co. v. Frederic*, 140 P. 463.

§ 95 (Or.) Under Employers' Liability Law, § 4, the measure of damages for causing death is the value of the life lost, and is not confined to the pecuniary loss to the beneficiary.—*McClagherty v. Rogue River Electric Co.*, 140 P. 64.

Under the Employers' Liability Law, refusal of instruction limiting recovery to pecuniary loss to plaintiff, and giving of instruction to determine damages as if decedent had lived and could sue for himself, *held* proper.—*Id.*

§ 96 (Or.) The rule of damages for wrongful death under L. O. L. § 380, does not apply to actions under Employers' Liability Law; the measure of damages in the latter being the pecuniary loss of the person entitled to damages.—*McDaniel v. Lecanon Lumber Co.*, 140 P. 990.

### DEBTOR AND CREDITOR.

See Fraudulent Conveyances; Garnishment; Sales, § 474; Subrogation.

### DECEDENTS.

See Executors and Administrators.

### DECEIT.

See Fraud.

### DECLARATION.

See Pleading.

### DECLARATIONS.

See Evidence, § 273.

### DEDICATION.

See Adverse Possession, §§ 7, 8; Boundaries, § 20; Municipal Corporations, § 657; Waters and Water Courses, § 201.

### II. OPERATION AND EFFECT.

§ 50 (Or.) Ground on the south side of a street attempted to be included in a boulevard by the widening of the street on both sides is not affected by dedication of property on the north side bounded by the north line of the boulevard.—*Thurman v. Multnomah County*, 140 P. 626.

The vacation of a plat on the north side of a street has no effect on lots south of the street.—*Id.*

§ 53 (Wash.) A dedication to the public of platted streets and alleys gives the public only an easement of use, and does not vest in it the fee, which remains in the dedicators as owners of the lots, so that words in terms reserving the fee to the dedicators are mere surplusage.—*Bradley v. Spokane & I. E. R. Co.*, 140 P. 688.

§ 55 (Wash.) Reservation in a dedication of platted streets of right to lay "water and gas pipes and electric wires, and to erect poles for such purpose, and to construct and operate \* \* \* cable and motor railways," being repugnant to proper control of the streets of the city, is void as against public policy.—*Bradley v. Spokane & I. E. R. Co.*, 140 P. 688.

### DEEDS.

See Boundaries, § 20; Cancellation of Instruments; Contracts, § 128; Estoppel, § 92; Easements, § 1; Evidence, §§ 400-461; Fraudulent Conveyances; Logs and Logging, § 3; Money Paid, § 1; Mortgages; Reformation of Instruments, §§ 25, 36; Taxation, §§ 608, 734-788.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances in General.

§ 3 (Cal.) "Livery of seisin" which was a necessary part of conveyance by feoffment at common law, consisted of a formal delivery of possession of the premises symbolized by the manual delivery of a clod or piece of turf, made in the presence of witnesses from the vicinage.—*Tennant v. John Tennant Memorial Home*, 140 P. 242.

#### (B) Validity.

§ 66 (Or.) If at the execution of a deed the grantor has sufficient mental capacity to comprehend the nature of the business in which he is engaged, the instrument is valid.—*Wade v. Northup*, 140 P. 451.

### III. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

§ 95 (Cal.) Words in a deed must be given their ordinary and popular meaning, unless used in a technical sense, or the context shows that they are used in a different sense.—*Wood v. Mandrilla*, 140 P. 279.

§ 101 (Cal.) The rule of practical construction of a deed applies only when the language on the face thereof is doubtful, uncertain, or ambiguous.—*Wood v. Mandrilla*, 140 P. 279.

#### (B) Property Conveyed.

§ 113 (Cal.) The word "half," in a deed conveying a half of a quarter section of land, must be given its natural meaning, in the absence of a contrary showing, so that the deed conveys a half in acreage.—*Wood v. Mandrilla*, 140 P. 279.

§ 114 (Cal.) The division of a quarter section containing over 160 acres, according to the rules laid down for government surveys, will, where all the opposite sides are parallel, divide the quarter into equal parts, and hence a deed of the east half, no acreage being mentioned, will convey the east half in quantity.—*Wood v. Mandrilla*, 140 P. 279.

**(C) Estates and Interests Created.**

§ 121 (Mont.) One who accepts a quitclaim deed acquires only the title of the grantor, even though full value be paid.—*Gibson v. Morris State Bank*, 140 P. 76.

**(D) Exceptions and Reservations.**

§ 142 (Cal.) At common law, where a transfer was made by feoffment and livery of seisin, a power of revocation of the grant reserved in the feoffment was void as repugnant to the grant.—*Tennant v. John Tennant Memorial Home*, 140 P. 242.

In view of Civ. Code, § 740, providing that a future interest may be defeated by any means which the party creating it provided for or authorized in its creation, construed with sections 741, 1229, 1230, 2280, and 3510, *held*, that a reservation of a right in the grantor to revoke a deed, was valid.—*Id.*

§ 143 (Cal.) Ordinarily if a reservation in a deed is void, as repugnant or contrary to law, the deed becomes absolute.—*Tennant v. John Tennant Memorial Home*, 140 P. 242.

A deed reserving a life estate in grantor only conveys a future interest.—*Id.*

**(E) Conditions and Restrictions.**

§ 151 (Colo.) An agreement made as a part of the consideration to defendant for her execution of a trust deed conveying land in trust to be sold for the benefit of the depositors of an insolvent bank of which her husband was president and the funds of which he misappropriated, being a condition subsequent, would not invalidate the deed as to defendant.—*Godding v. Hall*, 140 P. 165.

Where a condition of a deed is illegal, indefinite, or uncertain, or unreasonable or repugnant to the estate to which it is annexed, it is void, leaving the estate granted absolute.—*Id.*

§ 155 (Colo.) An agreement made as a part of the consideration to defendant for her execution of a trust deed conveying land in trust to be sold for the benefit of the depositors of an insolvent bank of which her husband was president and the funds of which he misappropriated *held* a condition subsequent.—*Godding v. Hall*, 140 P. 165.

If the act or condition required by a deed does not necessarily precede the vesting of the estate, but may as well accompany or follow it, or if, from the nature of the act and the time required for its performance, the parties evidently intended that the estate should vest and the grantee performs the act after taking possession, the condition is a "condition subsequent."—*Id.*

**IV. PLEADING AND EVIDENCE.**

§ 211 (Kan.) Evidence *held* to sustain a finding that the deed was procured by fraudulent representations as to the character and value of the property exchanged therefor.—*Schribar v. Maxwell*, 140 P. 865.

§ 211 (Okl.) Evidence, in an action to cancel a deed, *held* insufficient to show that the deed was procured by fraud and deception.—*Avey v. Van Voorhis*, 140 P. 615.

§ 211 (Or.) In a suit wherein it was sought to cancel a deed, evidence *held* not to show a conspiracy between relatives of the grantor to defraud her.—*Wade v. Northup*, 140 P. 451.

Evidence *held* to show that a grantor had ample mentality to comprehend the nature of the business she was engaged in when she gave power of attorney and when the deeds in question were executed by the attorney.—*Id.*

**DEFAULT.**

See Judgment, §§ 138-160.

**DEFECT OF PARTIES.**

See Parties, §§ 75, 84.

**DEFICIENCY.**

See Mortgages, § 559.

**DELAY.**

See Carriers, §§ 176, 218.

**DELEGATION.**

See Master and Servant, § 108.

**DELIVERY.**

See Bills and Notes, § 64; Landlord and Tenant, § 185.

**DEMURRER.**

See Pleading, §§ 9, 192-214; Trial, §§ 139, 156.

**DE NOVO.**

See Justices of the Peace, § 141.

**DEPOSITS.**

See Banks and Banking, §§ 139, 154.

**DEPOSITS IN COURT.**

See Attachment, § 298.

**DESCENT AND DISTRIBUTION.**

See Executors and Administrators; Homestead, § 142; Indians, § 18; Wills.

**I. NATURE AND COURSE IN GENERAL.**

§ 4 (Kan.) The descent of real property situated in Kansas is governed solely by Gen. St. 1909, §§ 2935-2967, relating thereto.—*McLean v. McLean*, 140 P. 847.

**III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTUTES.****(A) Nature and Establishment of Rights in General.**

§ 68 (Or.) A child, whether of the blood or by adoption, cannot assert or defend any interest which is expected hereafter in the estate of a parent now living.—*Wade v. Northup*, 140 P. 451.

§ 71 (Cal.) A decree determining heirship under Code Civ. Proc. § 1664, in proceedings where the public administrator was a party, is conclusive against him as to the interest of another party who died during the proceeding.—*In re Horman's Estate*, 140 P. 11; *In re Whalen's Estate*, *Id.* 12.

**DESCRIPTION.**

See Boundaries, §§ 13, 20.

**DESERTION.**

See Divorce, §§ 93, 104.

**DILIGENCE.**

See Mines and Minerals, § 78.

**DIRECTING VERDICT.**

See Trial, §§ 168, 178.

**DISCHARGE.**

See Bills and Notes, § 140; Master and Servant, § 36; Principal and Surety, §§ 89-129; Release; Schools and School Districts, § 138.

## DISCRETION OF COURT.

See Appeal and Error, §§ 793, 959-984; Continuance, §§ 7, 46; Criminal Law, §§ 594, 623, 1150, 1153; Dismissal and Nonsuit, § 60; Divorce, § 104; Elections, § 238; Judgment, §§ 139, 143; Jury, § 85; Marriage, § 62; Pleading, § 236; Trial, §§ 115, 349; Vendor and Purchaser, § 104; Venue, § 41; Waters and Water Courses, § 226; Witnesses, §§ 263, 267.

## DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 13, 356, 361, 635, 753, 773, 781, 784, 793, 866, 970, 1231, 1232; Attorney and Client, § 190; Divorce, § 195; Limitation of Actions, § 130; Trial, §§ 159, 165.

### I. VOLUNTARY.

§ 37 (Or.) The right to dismiss an action is not an absolute one, and the court can compel plaintiff to pay costs before dismissal.—Taylor v. Taylor, 140 P. 999.

### II. INVOLUNTARY.

§ 60 (Wash.) There was no abuse of discretion in dismissing an action commenced in 1906, which by stipulations was continued until 1909, when defendants demurred, and nothing more was done until 1911, when defendants moved for dismissal, plaintiffs being without any attorney after 1907, and, when one was secured in 1913, he attempted to call up the demurrer, instead of the motion.—Congdon v. Aumiller, 140 P. 912. The court did not err in first disposing of a pending motion to dismiss the action for want of prosecution without regard to plaintiffs' notice calling up a demurrer filed by defendants about four years previously, during which time nothing had been done.—Id.

A plaintiff who hales a defendant into court assumes and, as long as he has the affirmative of the main issue, retains the duty of diligent prosecution, and plaintiffs could not prevent a dismissal because defendants failed to call up their demurrer to the complaint.—Id.

## DISQUALIFICATION.

See Judges, § 51.

## DISSOLUTION.

See Building and Loan Associations, § 45; Corporations, § 609.

## DISTRIBUTION.

See Executors and Administrators, § 314.

## DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, §§ 628, 706, 730; Malicious Prosecution, § 22.

§ 3 (Colo.) Under Laws 1907, p. 371, §§ 1, 2, relating to payment of the expenses of district attorneys for the maintenance of an office, a deputy district attorney is not entitled to expenses incurred in maintaining an official office.—Trowbridge v. Board of Com'rs of El Paso County, 140 P. 195.

## DIVERSION.

See Waters and Water Courses, §§ 127, 133.

## DIVORCE.

See Appeal and Error, § 984; Homestead, § 117; *Lis Pendens*, § 9; Statutes, § 219.

### III. DEFENSES.

§ 48 (Okl.) Condonoement is forgiveness conditioned on future good conduct.—Kostachek v. Kostachek, 140 P. 1021.

§ 51 (Okl.) Subsequent acts of cruelty will revive condoned adultery, although they would not support an original suit for divorce on that ground.—Kostachek v. Kostachek, 140 P. 1021.

## IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

### (C) Pleading.

§ 93 (Cal.) An allegation of the petition that since defendant's alleged desertion he has left plaintiff destitute without any means of support and during such time has failed to contribute anything toward her support sufficiently alleged willful neglect as a ground for divorce.—Krzepicki v. Krzepicki, 140 P. 13.

§ 93 (Colo.) Where a wife's complaint for divorce alleged that she and her husband were living apart, and that on account of his failure to reasonably provide support she was compelled to work for others, it sufficiently justified the separation.—Rogers v. Rogers, 140 P. 193.

Where a wife seeks a divorce for her husband's failure to make reasonable provision for the support of his family for the space of one year, it is not improper for her to plead that the period of nonsupport has been greater than that specified.—Id.

§ 104 (Colo.) A supplemental cross-complaint in an action for divorce filed *ex parte* may be properly stricken.—Rogers v. Rogers, 140 P. 193.

Denial of leave to defendant in a divorce action to file a supplemental cross-complaint, charging the wife with adultery, supported only by an unverified statement of counsel that, at the time the original answer and cross-complaint charging desertion was filed, the proof of adultery charged had not been secured, *held* not to constitute abuse of discretion.—Id.

### (D) Evidence.

§ 135 (Okl.) Evidence *held* to show subsequent acts of cruelty sufficient to revive condoned adultery.—Kostachek v. Kostachek, 140 P. 1021.

### (F) Judgment or Decree.

§ 171 (Cal.) An adverse judgment in a former action by plaintiff in New York for a limited divorce for willful neglect was *res judicata* of a subsequent action by plaintiff in this state for an absolute divorce on the same ground.—Krzepicki v. Krzepicki, 140 P. 13.

### (H) Fees and Costs.

\* 195 (Wyo.) Where a husband brought error to review a judgment against him in divorce, and was required to pay fees to his wife's attorneys, which he failed to do, her remedy was by motion to dismiss, and not to punish him for contempt.—Brown v. Brown, 140 P. 829.

## V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 202 (Cal.App.) A personal judgment for alimony cannot be rendered in a divorce action against a nonresident defendant served only by publication.—Shillock v. Shillock, 140 P. 954.

## DOCTORS.

See Physicians and Surgeons.

## DOCUMENTS.

See Evidence, §§ 332-383.

## DOMICILE.

See Sales, § 465.

## DRAINS.

See Injunction, § 114.

## DRAMSHOPS.

See Intoxicating Liquors.



**DRUNKARDS.**

See Homicide, §§ 28, 252.

**DRY DOCKS.**

See Wharves, § 21.

**DUE PROCESS OF LAW.**

See Constitutional Law, §§ 287-296.

**DYING DECLARATIONS.**

See Homicide, § 221.

**EASEMENTS.**

See Dedication, § 53; Frauds, Statute of, § 60; Highways; Navigable Waters, § 44.

**I. CREATION, EXISTENCE, AND TERMINATION.**

§ 1 (Cal.App.) A deed to a county, the habendum clause of which is, "To have and to hold said strip of land unto the said party of the second part for the uses and purposes of a public highway or street," does not convey the fee, but merely a right of way.—*Forgeus v. Santa Cruz County*, 140 P. 1092.

**EJECTMENT.**

See Landlord and Tenant, § 129; Pleading, § 8.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 9 (Cal.App.) One can only recover in ejectment upon a legal title.—*Kerr v. Snowden*, 140 P. 704.

§ 11 (Cal.App.) Plaintiff in ejectment could not rely upon a title based upon a final certificate of purchase of government land, which was issued after the commencement of the action in ejectment.—*Kerr v. Snowden*, 140 P. 704.

**III. PLEADING AND EVIDENCE.**

§ 90 (Cal.App.) Evidence that one claiming title to land as unappropriated government land purchased by her obtained a restraining order, directed to defendants, against interfering with her in making improvements required as a condition to the issuance of certificate of purchase, and that she made the improvements under the restraining order, was not admissible in ejectment.—*Kerr v. Snowden*, 140 P. 704.

**EJUSDEM GENERIS.**

See Statutes, § 211.

**ELECTION OF REMEDIES.**

See Appeal and Error, §§ 1027, 1039.

**ELECTIONS.**

See Counties, §§ 13, 28, 29, 151, 174; Statutes, § 120.

**VI. NOMINATIONS AND PRIMARY ELECTIONS.**

§ 120 (Okl.) Act March 13, 1909 (Laws 1909, c. 16, art. 2), regulating primary elections in cities and towns; repealed Comp. Laws 1909, § 841, providing that inspectors at municipal elections shall make a certified statement of the persons elected to fill the several offices in the municipality, and file the same with the county clerk within ten days after such election.—*Shultise v. Town of Taloga*, 140 P. 1180.

**VII. BALLOTS.**

§ 180 (Colo.) Under Rev. St. 1908, § 2238, a ballot, on which, in the blank space at the top, is written "Progressive," in combination with

either "Bull Moose" or "Roosevelt," or both, is to be counted for a candidate on the "Progressive" ticket, when there is no candidate for that office on either the "Bull Moose" or "Roosevelt" tickets.—*Bromley v. Hallock*, 140 P. 186.

§ 180 (Colo.) Under Rev. St. 1908, §§ 2235, 2250, 2266, and Laws 1913, p. 685, § 1, governing the form and marking of ballots, a ballot on which the names of candidates were written in after the printed names, but no cross mark placed thereon, cannot be counted for any candidate.—*Riley v. Trainor*, 140 P. 469.

**X. CONTESTS.**

§ 288 (Colo.) Where an amendment to the complaint in an election contest was not proposed until three weeks after answer was filed, and practically one month after the contest was begun, its denial was not an abuse of discretion.—*Town of Sugar City v. Board of Com'rs of Crowley County*, 140 P. 809.

**ELECTRICITY.**

See Dedication, § 55; Master and Servant, § 119.

§ 1½ (Kan.) Evidence, in an action on the relation of the county attorney to enjoin a city from purchasing a light plant, held to sustain a finding that a part of consideration named for the purchase was paid, by the city without authority to the private owner of the plant for the surrender of an unexpired part of an exclusive franchise previously granted him by the city.—*State v. City of Stafford*, 140 P. 868.

§ 4 (Colo.) The furnishing of a city with electrical power to operate an electric light plant for lighting the streets, etc., held to be for "municipal purposes," within a franchise by which the city authorized the construction of an electrical power plant upon condition that the grantee of the franchise furnished the city electrical power for municipal purposes.—*City of Colorado Springs v. Pike's Peak Hydro-Electric Co.*, 140 P. 921.

An electrical power company, which was bound under its franchise from a city to furnish the city with power for an electric lighting plant for lighting the streets, could not defeat an action by the city to enforce its rights, on the ground that it did not appear that the city had been authorized by vote of the electors to maintain an electric light plant, as required by statute.—*Id.*

§ 4 (Wash.) Rem. & Bal. Code, § 7507, subd. 7, held to authorize a city of the first class in granting a franchise to a corporation to use the streets to furnish electricity for heat and power, to impose the condition that it should not furnish the same for lighting.—*Tacoma Ry. & Power Co. v. City of Tacoma*, 140 P. 565.

Public Service Commission Law held to deal only with questions of safety, efficiency, rates, and equality of public service, and hence did not abrogate a condition in an electric franchise authorizing complainant to furnish electricity for heat and power on condition that it do not furnish same for lighting.—*Id.*

Where an electric franchise granted by a city provided that complainant should not furnish electricity for lighting, and further declared that the franchise should be void and complainant's property subject to forfeiture for failure to desist from a breach after 30 days' notice, complainant's failure to desist from furnishing electricity to a railway company for lighting after such notice was ground for termination of the franchise and forfeiture of its property.—*Id.*

In a suit to restrain a city from forfeiting complainant's electric franchise for breach of a condition binding it not to furnish electricity for lighting, resulting from complainant's furnishing electricity to a railroad company for that purpose, evidence that it would cost the railroad company from \$1,000 to \$1,500 to

readjust its system so as to take power for lights from the city was inadmissible.—Id.

§ 11 (Colo.) Where a municipal franchise for an electrical power plant merely provided that the grantee should furnish to the city such arc lights as "may be required by said city" for lighting the streets, as well as such other power as might be required for municipal purposes, at prices paid by the most favored customer of the grantee, the city would not be bound by implication to take any arc lights from the grantee.—*City of Colorado Springs v. Pike's Peak Hydro-Electric Co.*, 140 P. 921.

The grant by a city of a franchise, for an electrical power plant was sufficient consideration for an option contained in the franchise, giving the city the right to free use of certain electrical power for municipal purposes and the right to purchase any additional amount required.—Id.

Under a municipal franchise for an electrical power plant which provided that grantee should furnish to the city such other power "as may be required for municipal purposes at the same prices that are paid by the most favored customer," the city was not required to take the minimum amount of power contracted for by the most favored customer in order to demand such additional power.—Id.

§ 14 (Or.) Electricity is a dangerous element, and in its use the highest degree of care is required.—*McClagherty v. Rogue River Electric Co.*, 140 P. 64.

§ 19 (Okla.) The placing and maintaining of electric light wires so close to telephone wires that they come in injurious contact presumably constitutes negligence on the part of the owner of the former.—*Weleetka Light & Water Co. v. Northrop*, 140 P. 1140.

In an action by the owner of a telephone wire for damages from defendant's electric wires coming in contact with it, it will be presumed that each party was maintaining its wires in the street in the exercise of a franchise.—Id.

## ELECTROCUTION.

See Constitutional Law, § 203; Homicide, § 351.

## ELEVATORS.

See Carriers, §§ 286, 305, 314, 328.

## EMBEZZLEMENT.

See Indictment and Information, § 110.

§ 30 (N.M.) That an indictment for embezzlement, instead of alleging that title to money contracted to be deposited by a vendee to the credit of one of two tenants in common is jointly in both tenants in common, alleges that the title is in the one will not render it erroneous.—*State v. Probert*, 140 P. 1108.

§ 35 (N.M.) Where a vendee, under his covenant to deposit in a bank to the vendor's credit a certain sum pending investigation of title, drew his check in favor of the bank for the amount, which check and proceeds were embezzled by the bank president and never deposited, held, that an indictment for the embezzlement, which alleged title to the funds to be in the vendor, was fatally defective, because of variance with the fact as proven.—*State v. Probert*, 140 P. 1108.

## EMINENT DOMAIN.

Evidence, §§ 358, 520; Logs and Logging, § 13; Municipal Corporations, §§ 266-575; Railroads, § 113; Trial, § 46.

### I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Okla.) Comp. Laws 1909, § 847, conferring on the trustees of an incorporated town power to improve streets, sidewalks, etc., and keep them in repair, and sections 860-862,

authorizing special assessments for repairing sidewalks after notice, on a frontage basis, are not in violation of Const. art. 2, § 24, as a taking or damaging of private property for public use without just compensation.—*Shultise v. Town of Taloga*, 140 P. 1190.

§ 58 (Cal.App.) In the determination of the size and location of lots for depots, considerable discretion must be accorded to railroad corporations subject to the qualification that their action must not be capricious or arbitrary nor unduly invade the private right of property.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

### II. COMPENSATION.

#### (B) Taking or Injuring Property as Ground for Compensation.

§ 101 (Colo.) A city is not liable in damages to an abutting owner for injuries from reasonable or usual change of the street, made in a careful and skillful manner, for the benefit of the public.—*City of Colorado Springs v. Stark*, 140 P. 794.

§ 106 (Colo.) Authorizing a railroad company to build a subway at the crossing of two streets to avoid congestion of traffic, whereby the grade is changed, and ingress and egress to contiguous lots is impeded, is an extraordinary use of the street for the benefit of the public, for which the city is liable under Const. art. 2, § 15, and this though the railroad company does the work.—*City of Colorado Springs v. Stark*, 140 P. 794.

### III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 167 (Or.) A city in eminent domain proceedings is an inferior tribunal, and must strictly comply with the statute, or its acts are void.—*Thurman v. Multnomah County*, 140 P. 626.

§ 169 (Cal.App.) A railroad corporation could condemn land in a city for a depot, though it had not acquired a franchise over the streets of such city for its proposed railroad.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 180 (Or.) Under a city charter requiring notice to owners of proceedings to condemn land, an owner who is given no notice is not bound.—*Thurman v. Multnomah County*, 140 P. 626.

§ 191 (Cal.App.) Complaint in proceeding to condemn land for railroad depot held to comply with Code Civ. Proc. § 1244.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 195 (Cal.App.) Where, in a proceeding to condemn land, defendants did not state the value of the land and improvements separately, though invited by plaintiff to do so, they could not introduce evidence as to the separate value of the improvements.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 196 (Cal.App.) In a proceeding to condemn property for a railroad depot, evidence held sufficient to show a necessity for taking the land.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 198 (Cal.App.) In proceeding to condemn land for railroad depot, instruction to consider future demands that might fairly be anticipated on account of the future growth of the surrounding community held warranted by the pleadings and evidence.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

Where jury answered in the affirmative questions as to whether taking of property was necessary for a depot and whether it was plaintiff's intention to build the proposed railroad, held, that there was a sufficient finding that the property was necessary for a public use.—Id.

§ 202 (Cal.App.) Under Code Civ. Proc. § 1248, subd. 1, evidence as to the value of improvements separate from realty sought to be condemned held properly excluded.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 262 (Cal.App.) In proceeding to condemn land, striking out testimony relative to condition of building *held* not prejudicial, where the witness thereafter made substantially the same statement, especially where it did not relate to the time of the issuance of the summons.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

An instruction to consider future demands that might fairly be anticipated on account of the future growth of the surrounding community was not prejudicial, if erroneous, where all the evidence showed that the lot was needed.—*Id.*

An instruction cautioning the jury not to base their verdict upon what plaintiff could afford to pay, though probably unnecessary, could not possibly have damaged defendants.—*Id.*

#### IV. REMEDIES OF OWNERS OF PROPERTY.

§ 271 (Cal.App.) An owner of land abutting on a street which is improved may recover, in an action therefor, damages sustained by him by reason of the improvement.—*Hunt v. Manning*, 140 P. 39.

#### EMPLOYERS' LIABILITY ACTS.

See Appeal and Error, § 171; Death, §§ 9, 18, 95, 96; Master and Servant, §§ 119, 204; Trial, § 256.

#### EMPLOYÉS.

See Master and Servant.

#### ENTRY.

See Evidence, § 383; Judgment, § 276; Public Lands, §§ 35, 41.

#### ENTRY, WRIT OF.

See Ejectment.

#### EQUITY.

See Appeal and Error, §§ 1009, 1121; Cancellation of Instruments; Contempt, §§ 20, 50; Corporations, § 259; Courts, § 212; Estoppel; Fraudulent Conveyances, § 241; Injunction; Jury, § 14; Mines and Minerals, § 78; Partition; Quietting Title; Receivers; Reformation of Instruments; Set-Off and Counterclaim; Specific Performance; Subrogation; Trusts.

#### I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 39 (Okl.) Where equity has obtained jurisdiction, it will retain same for administering complete relief as to the subject-matter and to avoid multiplicity of suits.—*Cook v. Warner*, 140 P. 424.

Under Williams' Const. art. 7, §§ 10, 12, 13, relative to the jurisdiction of county and district courts, and in view of Rev. Laws 1910, §§ 4646-4648, classifying and defining actions, where the district court acquires jurisdiction of a suit involving title to realty, cancellation of conveyances, and interest of parties, the fact that a minor has an interest in the land will not divest such court of jurisdiction to decree a sale of same, and a sheriff's deed under an order of sale in such a case will be valid, although the minor's undivided interest be conveyed.—*Id.*

#### IV. PLEADING.

(1) Defects and Objections, and Waiver Thereof.

§ 329 (N.M.) While the filing of a cross-bill founded on matters of equitable cognizance will cure any defects of jurisdiction under the original bill, yet if the cross-bill fails to state grounds for equitable relief, the defect is not

cured.—*La Mesa Community Ditch v. Appelzoeller*, 140 P. 1051.

#### ERROR, WRIT OF.

See Appeal and Error.

#### ESTATES.

See Descent and Distribution; Executors and Administrators; Tenancy in Common; Wills.

#### ESTOPPEL.

See Appeal and Error, § 164; Corporations, §§ 187, 388; Judgment, §§ 584, 743; Landlord and Tenant, § 35; Mortgages, § 280; Municipal Corporations, § 370; Receivers, §§ 57, 58, 218; Schools and School Districts, § 107.

#### III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

§ 72 (Cal.) Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by the act of a third person, he by whose negligence it happened must be the sufferer, does not prevent recovery of money paid or a check given by mistake, even though negligent, where the other party has not changed his position to his detriment.—*National Bank of California v. Miner*, 140 P. 27.

§ 75 (Cal.App.) Facts *held* insufficient to estop defendant to assert his ownership of an automobile which R., who was in possession thereof, had mortgaged to plaintiff.—*Greene v. Carmichael*, 140 P. 45.

§ 92 (Okl.) Under Rev. Laws 1910, § 1150, a son who, with full knowledge of all the facts, accepts his part of the proceeds of the sale made by his father's realty by an attorney in fact, and retains it for 11 years, is estopped to assert the invalidity of the deed executed by the attorney in fact.—*Avey v. Van Voorhis*, 140 P. 615.

§ 93 (Cal.App.) Plaintiff having, in consideration of defendant's agreement to take a lease, built an addition to a building, arranged as requested by defendant, defendant is estopped to thereafter demand a change therein.—*Boyd v. Model Grocery Co.*, 140 P. 309.

#### EVICTION.

See Landlord and Tenant, § 190.

#### EVIDENCE.

See Adjoining Landowners, § 3; Adultery, § 14; Appeal and Error, §§ 204, 209, 232, 263, 635, 671, 731, 889, 907, 928, 931, 933, 971, 1001, 1002, 1005, 1010, 1011, 1033, 1046, 1047, 1060-1058, 1066, 1121, 1170; Assault and Battery, § 60; Attachment, §§ 47, 350; Bankruptcy, § 303; Banks and Banking, §§ 77, 154, 189; Bills and Notes, §§ 491, 519, 520, 523, 527; Boundaries, § 37; Brokers, § 86; Cancellation of Instruments, § 8; Carriers, §§ 236, 248, 316, 318; Colleges and Universities, § 10; Conspiracy, §§ 46, 47; Corporations, § 80; Counties, § 13; Criminal Law, §§ 368-567; Damages, § 163; Death, § 64; Deeds, § 211; Divorce, § 135; Ejectment, § 90; Electricity, §§ 1½, 4; Eminent Domain, §§ 195, 196, 202, 262; Evidence, § 127; Executors and Administrators, § 450; Fraud, §§ 50, 58; Frauds, Statute of, § 60; Fraudulent Conveyances, §§ 298, 301; Gaming, § 98; Gas, § 14½; Guardian and Ward, § 157; Homicide, §§ 145-253; Husband and Wife, § 264; Injunction, § 126; Insurance, §§ 646, 665; Intoxicating Liquors, §§ 226, 236; Judgment, § 340; Jury, § 85; Landlord and Tenant, §§ 169, 222; Larceny, §§ 47, 62; Libel and Slander, §§ 105, 109; Malicious Prosecution, § 24; Marriage, § 50; Master and Servant, §§ 6, 265-278; Mechanics' Liens, § 132;

Mines and Minerals, §§ 24, 73; Mortgages, §§ 36, 38, 459, 464; Municipal Corporations, §§ 122, 657, 671, 705, 706, 993, 1000; Navigable Waters, § 39; Negligence, § 134; New Trial, §§ 72, 79, 97; Parties, § 6; Partnership, §§ 120, 121; Patents, § 203; Payment, § 89; Physicians and Surgeons, § 5; Pleading, §§ 237, 428; Principal and Agent, §§ 20, 22, 101, 190; Property, § 9; Public Lands, 41; Quieting Title, § 44; Rape, § 46; Reformation of Instruments, § 45; Release, § 57; Replevin, § 72; Sales, §§ 416, 418, 441; Schools and School Districts, § 138; Specific Performance, § 121; Statutes, § 283; Street Railroads, § 114; Submission of Controversy, § 18; Taxation, § 708; Tenancy in Common, § 15; Trial, §§ 45-96, 139-156, 253; Trusts, § 371; Vendor and Purchaser, §§ 123, 315, 329; Waters and Water Courses, §§ 152, 179, 201; Wills, §§ 55, 164, 166, 293, 302, 487; Witnesses.

Reception of, see Criminal Law, §§ 667, 673; Trial, §§ 45-96.

### I. JUDICIAL NOTICE.

§ 18 (Wash.) In an action on a note, the court may allow reasonable fees, without evidence as to what constitutes a reasonable fee; the court being as competent to judge of that matter as witnesses.—Carr v. Bonthius, 140 P. 339.

§ 20 (Utah) The court can take judicial notice of the general purpose and method of doing business of building and loan associations.—Union Savings & Investment Co. v. District Court of Salt Lake County, 140 P. 221.

§ 23 (Colo.) The courts will take judicial notice of a law.—Harrison v. People, 140 P. 203.

§ 51 (Colo.) Where the authorized statutes and records of the secretary of state left it in doubt whether amendment of 1878 to Const. art. 6, § 29, was adopted by vote of the people, the Supreme Court may investigate the facts to refresh its judicial recollection, and can judicially notice the validity of the amendment when replies to inquiries to the county clerks show its adoption.—Harrison v. People, 140 P. 203.

While the courts may investigate the facts concerning the adoption of the law, they may accept a certificate of some officer showing its adoption, where it is sufficient to convince the judicial mind.—Id.

§ 52 (Colo.) The courts, taking judicial notice of a law, will not even accept the admission of parties that a supposed law is invalid or their agreement as to facts rendering it so.—Harrison v. People, 140 P. 203.

### II. PRESUMPTIONS.

§ 67 (Cal.App.) Where it appeared that the parties at one time were tenants in common, it will, nothing else being shown, be presumed that that relation has continued.—Klumpke v. Moreno, 140 P. 313.

§ 80 (Cal.) In the absence of a contrary showing, the law of a foreign jurisdiction is presumed to be the same as that of this state.—In re Warner's Estate, 140 P. 583.

§ 82 (Cal.) Where one of the parties to proceedings under Code Civ. Proc. § 1664, for the determination of heirship, died during the pendency of those proceedings, it will be presumed in support of the decree that his administrator was properly substituted as a party.—In re Horman's Estate, 140 P. 11; In re Whalen's Estate, Id. 12.

§ 83 (Cal.App.) Where the power to specifically tax property benefited for the cost of a street improvement is conferred on public officers, the presumption of good faith on their part in levying the tax will be indulged in, and the court will assume that the officers properly considered and determined that all property within an established assessment district will receive benefits.—Hunt v. Manning, 140 P. 39.

§ 83 (Utah) In the absence of an allegation to the contrary, it must be presumed that the officers of a building and loan association and the Secretary of State have performed the duties imposed upon them by Comp. Laws 1907, §§ 392-402, regulating such associations.—Union Savings & Investment Co. v. District Court of Salt Lake County, 140 P. 221.

### III. BURDEN OF PROOF.

§ 90 (Okl.) The burden of proof is determined by the pleadings.—Bass & Harbour Furniture & Carpet Co. v. Harbour, 140 P. 956.

### IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

#### (B) Res Gestæ.

§ 121 (Utah) In an action for trespass by sheep and cattle, statements of a person herding them that they belonged to defendant were inadmissible, not being res gestæ within that exception to the hearsay rule.—Surbaugh v. Butterfield, 140 P. 757.

§ 123 (Utah) A conversation concerning the fire, which one heard after arriving at the place thereof, some time after it started, cannot be testified to, in an action for the setting of it by a locomotive, not being part of the res gestæ.—McCullough v. Oregon Short Line R. Co., 140 P. 767.

§ 127 (Mont.) In an action against a carrier for failure to stop a train on signal for a passenger suffering from an internal hemorrhage, evidence that during the wait for the next train she manifested her suffering by moaning held competent.—Burles v. Oregon Short Line R. Co., 140 P. 513.

#### (E) Competency.

§ 151 (Okl.) On the issue whether an alleged libel was malicious, it was not error to permit defendant to testify that it was made without malice toward plaintiff.—Cobb v. Oklahoma Pub. Co., 140 P. 1079.

### V. BEST AND SECONDARY EVIDENCE.

§ 178 (Kan.) Where written material evidence is admitted to have been in the possession of a party to the action, it is error to admit evidence of its contents until it fairly appears that the writing is lost or destroyed.—Smith, Carey & Co. v. Atchison Live Stock Co., 140 P. 108.

### VII. ADMISSIONS.

#### (A) Nature, Form, and Incidents in General.

§ 200 (Nev.) What a party voluntarily admits to be true may be reasonably taken to be true, notwithstanding that the admission is contrary to his interest.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

#### (B) By Parties or Others Interested in Event.

§ 222 (Cal.App.) In an action for injury to plaintiff caused by defendant's automobile colliding with his wagon on a city street, the court properly permitted a witness to detail conversations had with defendant after the accident, in which he stated that he was going about 15 miles per hour when the accident occurred, and that he failed to blow his horn, etc.—Scragg v. Sallee, 140 P. 706.

§ 222 (Nev.) The voluntary statement of one injured, made after the accident, and relating thereto, is admissible, if relevant, for consideration by the jury in connection with the other evidence.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

Every prior statement of a party inconsistent with his present claim is admissible in evidence as an admission against interest, regardless whether, when the statement was made, it was in his own favor or against his interest.—Id.

**(D) By Agents or Other Representatives.**

§ 242 (Utah) Declarations of a herder of trespassing sheep and cattle that they belonged to defendant, and that he was herding them for him, were inadmissible; it not being shown to be any part of his agency to so talk and gossip about his principal's affairs.—*Surbaugh v. Butterfield*, 140 P. 757.

**(E) Proof and Effect.**

§ 265 (Nev.) The weight to be given to an admission or declaration against interest is for the jury.—*Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519.

**VIII. DECLARATIONS.****(A) Nature, Form, and Incidents in General.**

§ 273 (Utah) The rule that declarations of a person in possession of property are admissible to show the nature of his possession only applies where the nature of his possession is material, and the declarations of a herder of trespassing sheep and cattle that they belonged to defendant were inadmissible to show defendant's ownership.—*Surbaugh v. Butterfield*, 140 P. 757.

Declarations of the herder of trespassing sheep and cattle that they belonged to defendant for whom he was working were not admissible as showing the nature of his possession, as they did not show possession in him but in defendant.—*Id.*

**IX. HEARSAY.**

§ 317 (Utah) In an action for trespass by sheep and cattle, statements of a person herding them that they belonged to defendant were inadmissible, being hearsay.—*Surbaugh v. Butterfield*, 140 P. 757.

§ 317 (Utah) A conversation concerning the fire, which one heard after arriving at the place thereof, some time after it started, cannot be testified to, in an action for the setting of it by a locomotive, being hearsay.—*McCullough v. Oregon Short Line R. Co.*, 140 P. 767.

§ 318 (Or.) In a suit to compel a college to confer a degree, pictures of the graduating class and a statement clipped from a newspaper were incompetent, being hearsay.—*Tate v. North Pacific College*, 140 P. 743.

**X. DOCUMENTARY EVIDENCE.****(A) Public or Official Acts, Proceedings, Records, and Certificates.**

§ 332 (Colo.) In an action to recover an attorney's fee which was contingent upon securing a decision of the Supreme Court sustaining the validity of certain municipal bonds, the published official report of the court's opinion is admissible to show the holding.—*Keeler v. Hoyt*, 140 P. 191.

§ 333 (Or.) In an action against a corporation for injuries by a watchman in making an arrest, the admission of the record of the sheriff's office to show the discharge of the watchman as a deputy sheriff, by a notation in red ink over the entry showing his appointment under L. O. L. §§ 1036, 1037, was not error.—*Scibor v. Oregon Washington R. & Navigation Co.*, 140 P. 629.

**(C) Private Writings and Publications.**

§ 358 (Cal.App.) In a proceeding to condemn land in a city for a railroad depot, the general size and location of the principal streets of the city, if material, could not be proved by the introduction of a map which the city engineer testified that he did not make, but knew to be inaccurate.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

**(D) Production, Authentication, and Effect.**

§ 366 (Colo.App.) A decree unaccompanied by the judgment roll is inadmissible in evidence.—*Miller v. Weldon*, 140 P. 930.

§ 366 (Colo.App.) A decree is not admissible as proof of title without the production of the judgment roll.—*King v. Foster*, 140 P. 930.

§ 383 (Colo.) A constitutional amendment appearing in *Mills' Annotated Statutes* of 1891 and of 1912 and the General Statutes of 1883 and the Revised Statutes of 1908, which were required to contain both the Constitution and the laws, may be accepted as prima facie valid, though not appearing in other authorized statutes.—*Harrison v. People*, 140 P. 203.

Legislative enactments, declaring that *Mills' Annotated Statutes* of 1891 and of 1912 shall be prima facie evidence in all courts of the originals, extends to the state Constitution contained therein.—*Id.*

A note reciting that there was no record of a vote showing its adoption which followed the amendment of 1878 to Const. art. 6, § 29, found in the Revised Statutes of 1908, does not destroy the prima facie presumption of validity because of the presence of the article in the official statutes.—*Id.*

§ 383 (Utah) Entries in books of a party not made by any person who knew the facts evidenced thereby, nor made at the time the transactions occurred, and not so made as to explain themselves, have but little, if any, probative force as evidence.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

**XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.****(A) Contradicting, Varying, or Adding to Terms of Written Instrument.**

§ 400 (Wash.) Order for dredge held a complete contract and not within rule that, where a part only of a contract is in writing, the part not in writing may be proved by parol.—*Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 140 P. 394.

§ 417 (Utah) Under a contract for the construction and lease of a theater, providing that defendant should completely equip it in accordance with the architect's plans, where neither the contract nor the plans specified the equipment, evidence of qualified witnesses that an asbestos curtain, ticket office, decorations, etc., were usual and necessary parts of the equipment held admissible.—*Orpheus Vaudeville Co. v. Clayton Inv. Co.*, 140 P. 653.

§ 424 (Wash.) The rule which prohibits the introduction of parol evidence to contradict or modify a written instrument does not apply as against one not a party to the contract, and so not bound by the terms.—*Watson v. Hecla Mining Co.*, 140 P. 317.

**(C) Separate or Subsequent Oral Agreement.**

§ 441 (Cal.App.) Where plaintiff executed to defendant a bill of sale conveying the tangible property used by him on a milk route, evidence that there was a contemporaneous oral agreement, whereby the defendant was to purchase the good will of the business for an additional sum, is not inadmissible, in a suit therefor, as varying the contract contained in the bill of sale.—*Webber v. Smith*, 140 P. 37.

§ 442 (Kan.) Where a written contract for the employment of an agent to sell silos reads, "On silos: 25 and 5 per cent. on fifty—30 per cent. on 75 or more," and the agent sells 42 silos, the contract being incomplete, oral evidence is admissible to show the agreement.—*Royer v. Western Silo Co.*, 140 P. 872.

§ 444 (Ariz.) One who in writing subscribes to a fund to provide a building and site for a Y. M. C. A. in consideration of subscriptions

of others, provided a specified sum was subscribed, is bound on his subscription on the performance of the specified condition, and he cannot, by parol, show other conditions.—*Hurley v. Young Men's Christian Ass'n of Phoenix*, 140 P. 816; *Lount v. Same*, *Id.* 819.

§ 445 (Mont.) Where a contract of sale was in writing, any modification, unless executed, must also be in writing; and evidence depending upon an executory parol modification was not admissible.—*Curtis & Freeman v. Parham*, 140 P. 511.

#### (D) Construction or Application of Language of Written Instrument.

§ 459 (Wash.) Where a note purports to be the joint, or joint and several obligation of a corporation and certain individuals, evidence is not admissible to show that the individual signers signed in their official capacity only.—*Way v. Lyric Theater Co.*, 140 P. 320.

§ 461 (Kan.) Parol evidence held admissible to show that a loan application containing a notation with respect to the commission was not to take effect as a contract until the ascertainment of a certain fact, where the application was uncertain and ambiguous.—*Little v. Liggett*, 140 P. 838.

§ 461 (Or.) Under L. O. L. §§ 713, 717, in determining whether conveyances for \$10 and \$1 were within the spirit of a power of attorney to sell, parol evidence is admissible.—*Wade v. Northup*, 140 P. 451.

### XII. OPINION EVIDENCE.

#### (A) Conclusions and Opinions of Witnesses in General.

§ 472 (Okla.) In an action for personal injuries, evidence of plaintiff as to the quantum of damages sustained was inadmissible as a conclusion and an invasion of the province of the jury.—*Chicago, R. I. & P. Ry. Co. v. Teese*, 140 P. 1166.

§ 472 (Wash.) In an action for injuries received by a fall upon concrete steps leading to the pool of a natatorium, an opinion by a witness for the plaintiff that a smooth concrete surface would, when wet, constitute dangerous footing, was an opinion on the issue to be tried, and was not competent.—*Anderson v. Seattle Park Co.*, 140 P. 698.

§ 474 (Cal.App.) In proceeding to condemn land, witness familiar with the values of property in the vicinity held properly permitted to testify as to the value of a lot, though he had not inspected the interior of the building on the lot.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 500 (Cal.App.) In an action for an injury to plaintiff by defendant's automobile, the court properly permitted a witness for defendant to state that he had never seen automobiles driven in the streets of the city any faster than defendant was going at the time of the accident, and that "he had seen other automobiles go pretty fast, etc."—*Scragg v. Sallee*, 140 P. 706.

#### (B) Subjects of Expert Testimony.

§ 513 (Okla.) Expert testimony held admissible on the issue of the negligent construction of the framework of a building, where such framework was so complicated that the jury could not understand its construction without expert testimony.—*Henry v. Morris & Co.*, 140 P. 413.

§ 513 (Wyo.) Where a coal miner was injured by the fall of coal which had been cracked from the vein by a blast, opinion evidence by expert miners as to whether experience and knowledge of the sounding test were necessary to determine whether such coal was likely to fall is admissible.—*Carney Coal Co. v. Benedict*, 140 P. 1013.

§ 520 (Cal.App.) In a proceeding to condemn land for a railroad depot, experts were properly permitted to testify as to the amount of land required for depot purposes.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 528 (Or.) Testimony of a physician to show what suffering will accrue from the injuries to plaintiff in the future is admissible.—*Rugenstein v. Ottenheimer*, 140 P. 747.

#### (C) Competency of Experts.

§ 536 (Or.) That a physician is not regularly licensed to practice in the state does not militate against his competency as an expert witness.—*Rugenstein v. Ottenheimer*, 140 P. 747.

§ 539 (Okla.) Architects, carpenters, and builders are competent to testify as experts on the question of the negligent construction of the framework of a building, where their experience and observation are shown to be sufficient.—*Henry v. Morris & Co.*, 140 P. 413.

§ 543 (Kan.) Where plaintiff, who was a farmer, had had considerable litigation, it was not error to permit him to testify as to the value of the services of his attorney in defending an attachment case.—*Murphree v. Anderson*, 140 P. 880.

§ 545 (Or.) That a witness is licensed to practice medicine in another state, and is so engaged, is competent evidence of his competency as an expert witness.—*Rugenstein v. Ottenheimer*, 140 P. 747.

### XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 577½ (Colo.) The testimony of a defendant administratrix in a county court when she was cited and examined under Rev. St. 1908, § 7253, is admissible in evidence in the district court under section 7267 as amended by Laws 1911, p. 678, providing that, when defendant had previously been required to testify under the provisions of section 7253, the testimony, so far as it relates to the estate concerning which a suit is brought and is relevant, may be read in behalf of such defendant.—*Lane v. Lane*, 140 P. 804.

### XIV. WEIGHT AND SUFFICIENCY.

§ 588 (Okla.) A witness may be discredited by his manner of testifying.—*National Union v. Kelley*, 140 P. 1157.

§ 588 (Utah) The testimony of an unimpeached witness, not contrary to the usual course of nature or for some other reason unworthy of belief, must be considered by the court in determining the facts.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

§ 592 (Or.) In determining the sufficiency of evidence to support a verdict for plaintiff, evidence of defendant, tending to make out plaintiff's case, must be considered.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

§ 598 (Mont.) The preponderance of the evidence does not depend alone on the number of witnesses testifying to a fact.—*Burles v. Oregon Short Line R. Co.*, 140 P. 513.

§ 601 (Wash.) Evidence that a hot mineral spring on plaintiffs' land located on a river rose and fell with the rise and fall of the river, and was hotter whenever the flow was greater, cannot be discredited on the assumption that the cold waters of the river would have lessened the heat of the spring, instead of increasing it, where there was no evidence as to its source and the reasons for its heat.—*St. Martin v. Skamania Boom Co.*, 140 P. 355.

### EXAMINATION.

See Witnesses, §§ 246-296.

### EXCEPTIONS.

See Appeal and Error, §§ 263-273; Pleading, §§ 192-214.

### EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 544, 553, 889, 931, 933, 937; Trial, §§ 82-96.

**II. SETTLEMENT, SIGNING, AND FILING.**

§ 39 (Cal.) That appellant's counsel was in court during argument of a motion to set aside a default does not imply actual knowledge by appellant of the entry of the order denying the motion, so as to relieve respondent from giving appellant notice of the order pursuant to Code Civ. Proc. § 650.—Hughes Mfg. & Lumber Co. v. Elliott, 140 P. 17.

**EXCHANGE OF PROPERTY.**

See Action, § 27; Deeds, § 211; Partnership, § 158; Specific Performance, §§ 32, 49.

**EXECUTION.**

See Executors and Administrators, § 256; Homestead.

**XI. EXECUTION AGAINST THE PERSON.**

§ 433 (Colo.) In an action for damages for misrepresentations made in effecting an exchange of land, a verdict *held* sufficient to warrant body execution against defendant under Rev. St. 1908, §§ 3024, 3025.—Mitchell v. Crowl, 140 P. 793.

**EXECUTORS AND ADMINISTRATORS.**

See Descent and Distribution; Evidence, §§ 82, 577½; Husband and Wife, § 264; Wills.

**II. APPOINTMENT, QUALIFICATION, AND TENURE.**

§ 17 (Idaho) The order of priority in right of administration on the estate of a person dying intestate is fixed by Rev. Codes, § 5351.—Wright v. Merrill, 140 P. 1101.

Since, under Rev. Codes, § 5355, a nonresident cannot be appointed administrator, section 5365, providing that administration may be granted to competent persons, though not otherwise entitled to same, does not apply to nonresidents.—Id.

§ 17 (Mont.) The surviving husband or wife is, under Rev. Codes, § 7432, entitled to letters of administration to the exclusion of any other unless a ground of incompetency enumerated in section 7436 is shown, and a refusal to give the preference in the absence of a showing of incompetency is violative of section 7472.—State v. District Court of Lewis and Clark County, 140 P. 732.

§ 20 (Idaho) Under Rev. Codes, § 5363, letters of administration must be granted on proper application, though other persons who fail to appear and claim for themselves within a reasonable time after intestate's death have a better right to the administration.—Wright v. Merrill, 140 P. 1101.

Rev. Codes, § 5363, authorizes the granting of letters of administration to any qualified applicant making application therefor prior to an application by one having a better right, where the latter fails to apply within a reasonable time.—Id.

§ 29 (Kan.) The appointment of an administrator is not open to collateral attack merely because the appointee is not next of kin to the deceased.—Hanson v. Sward, 140 P. 100.

**III. ASSETS, APPRAISAL, AND INVENTORY.**

§ 39 (Ariz.) Where a widow who had made a homestead entry on public land died before she was entitled to a patent, the land did not belong to her estate, and a decree distributing it was void.—Harris v. Lyon, 140 P. 985.

**VI. ALLOWANCE AND PAYMENT OF CLAIMS.****(C) Disputed Claims.**

§ 256 (Colo.) Though the statute prohibits an execution on judgment rendered on a claim against an estate, a judgment will not be reversed because it authorized the issuance of execution, but will be amended on appeal by striking out such provision.—Stratton's Estate v. Finnerty, 140 P. 796.

**VII. DISTRIBUTION OF ESTATE.**

§ 314 (Mont.) Rev. Codes, § 7141, providing that, where a written notice of motion is necessary, it must be given five days before the appointed time for the hearing, is not applicable to the hearing of an issue in probate proceedings formed by a petition for distribution and objections thereto.—In re Peterson's Estate, 140 P. 237.

**X. ACTIONS.**

§ 450 (Colo.) In an action against an administratrix by an heir to compel defendant to turn over to plaintiff one-half in value of certain notes claimed to belong to the estate, the mortgages securing the notes on which were written assignments of the mortgages to testator's widow, the administratrix, were admissible to identify the notes as the notes which were transferred by decedent.—Lane v. Lane, 140 P. 804.

**EXEMPTIONS.**

See Constitutional Law, § 100; Homestead; Statutes, § 121; Taxation, §§ 102, 193-247.

**EXPENSES.**

See District and Prosecuting Attorneys, § 3; Master and Servant, § 41.

**EXPERT TESTIMONY.**

See Evidence, §§ 472-545.

**EXPLOSIVES.**

See Appeal and Error, § 1070; Pleading, § 369; Railroads, § 118.

**EX POST FACTO LAWS.**

See Constitutional Law, § 203.

**FACTORS.**

See Brokers.

§ 2½ [New, vol. 17 Key-No. Series] (Wash.) Laws 1907, c. 139, § 1, making it unlawful for a commission merchant to engage in selling farm products on commission, without first obtaining license, and giving bond executed by a surety company authorized to do business in the state, *held* not unconstitutional.—Ferguson-Hendrix Co. v. Fidelity & Deposit Co. of Maryland, 140 P. 700.

The failure of a produce commission company to procure a license from the commissioner of horticulture as required by Laws 1907, c. 139, §§ 1, 11, and 12, which make it "unlawful" to do such business without a license, and impose penalties for violation of the acts, *held* not to prevent the company from maintaining an action on a bond given by its defaulting employé.—Id.

**FALSE IMPRISONMENT.**

See Judgment, § 590.

**I. CIVIL LIABILITY.**

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 15 (Or.) A railroad yard watchman was within the scope of his authority in following

a thief to his home, and making an arrest, and the company was liable if he did this in an unlawful manner.—*Scibor v. Oregon-Washington R. & Navigation Co.*, 140 P. 629.

(B) Actions.

§ 20 (Kan.) Petition, in an action for damages for false imprisonment, *held* insufficient to state a cause of action.—*Hanson v. Sward*, 140 P. 100.

## FEDERAL EMPLOYERS' LIABILITY ACT.

See Appeal and Error, § 171.

## FEEES.

See Courts, § 56.

## FELLOW SERVANTS.

See Master and Servant, §§ 182-201, 259.

## FENCES.

See Mines and Minerals, § 119.

## FILIBUSTERING.

See Libel and Slander, § 18.

## FINDINGS.

See New Trial, §§ 72, 79; Trial, §§ 388, 404.

## FINES.

See Animals, § 90; Criminal Law, § 258.

## FIRES.

See Evidence, §§ 123, 317; Railroads, § 454.

## FISH.

See Conspiracy; Criminal Law, § 814.

## FORCIBLE DEFILEMENT.

See Rape.

## FORCIBLE ENTRY AND DETAINER.

See Covenants, § 130.

## FORECLOSURE.

See Mortgages, §§ 415-590.

## FOREIGN CORPORATIONS.

See Corporations, §§ 636-670.

## FOREIGN INSURANCE COMPANIES.

See Insurance, § 21.

## FORFEITURES.

See Death, §§ 7, 11, 64; Electricity, § 4; Mines and Minerals, § 78; Public Lands, § 54; Vendor and Purchaser, §§ 39, 104.

## FORMER ADJUDICATION.

See Judgment, §§ 584-743.

## FORMER JEOPARDY.

See Criminal Law, §§ 193½, 195, 290, 968; Indictment and Information, § 137.

## FORNICATION.

See Prostitution.

## FRANCHISES.

See Constitutional Law, § 134; Electricity, §§ 4, 11; Municipal Corporations, § 688; Street Railroads, §§ 24, 37; Waters and Water Courses, §§ 188, 194, 202, 203.

§ 3 (N.M.) Where the meaning of a contract regarding any public franchise is ambiguous, it will be construed favorably to the rights of the public.—*State v. Water Supply Co. of Albuquerque*, 140 P. 1059.

## FRAUD.

See Action, § 27; Banks and Banking, §§ 77, 179; Bills and Notes, §§ 277, 462; Contracts, §§ 97, 266; Corporations, §§ 80, 121, 123; Deeds, § 211; Execution, § 433; Frauds, Statute of; Fraudulent Conveyances; Limitation of Actions, § 100; Mortgages, § 32; Partnership, § 153; Payment, § 89; Pleading, § 248; Principal and Surety, § 89; Reformation of Instruments, § 25; Release, §§ 57, 58; Subscriptions, § 8; Vendor and Purchaser, §§ 6, 334, 343.

### I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 9 (Colo.App.) Actionable fraud is a false representation of a material fact made with knowledge of its falsity, or recklessly without belief in its truth, with intent that it shall be acted on by the party complaining and relied on by and actually inducing him to act on it to his damage.—*Moore v. Carrick*, 140 P. 485.

§ 11 (Colo.App.) A representation by a seller of corporate stock that the stock is good is a mere expression of opinion and not a statement of a material fact within the definition of actionable fraud.—*Moore v. Carrick*, 140 P. 485.

A representation by a seller of stock that the stock was worth above par as far as he knew was only an expression of opinion where he had no peculiar means of knowledge as to the condition of the corporation or the acts of its officers whose criminality destroyed the intrinsic value of the stock.—*Id.*

§ 11 (Kan.) Plaintiff's statement, during the negotiations to exchange an automobile for notes, that the automobile tires were "good for 2,000 miles," *held* a mere puffing statement and not to constitute fraud.—*Woods v. Nicholas*, 140 P. 862.

A seller's mere puffing statement as to quality is ordinarily an expression of opinion not constituting fraud.—*Id.*

§ 11 (Okla.) A purchaser cannot predicate an action for fraud on mere expressions of opinion by the vendor.—*Hazlett v. Wilkin*, 140 P. 410.

A statement of the vendor that the school land department would loan the purchaser a certain amount on the farm *held* to be a mere statement of opinion and not a fraudulent representation.—*Id.*

§ 13 (Okla.) A fraudulent representation by a vendor, assuming to have personal knowledge that the property is unincumbered, will sustain an action for tort by a purchaser who relies on such representation, though such purchaser might have discovered the fraud by searching the public records.—*Gannon, Goulding & Thies v. Hausaman*, 140 P. 407.

§ 30 (Kan.) One who makes false statements to induce another to buy property may be liable for the fraud, though he has no interest in the deal and is not acting in collusion with the seller.—*Hewy v. Fouts*, 140 P. 894.

### II. ACTIONS.

#### (A) Rights of Action and Defenses.

§ 31 (Kan.) An action for false representation of authority to contract is founded on tort.—*Pierson v. Holdridge*, 140 P. 1032.

§ 34 (Okla.) A purchaser's action for damages due to the vendor's false representation that the



property was unincumbered, being an action for deceit within Comp. Laws 1909, §§ 1144, 1145, and predicated on fraud as defined by section 1052, may be maintained, though plaintiff has not suffered a foreclosure or ouster, or paid off the lien.—Gannon, Goulding & Thies v. Hausman, 140 P. 407.

**(C) Evidence.**

§ 50 (Okl.) A plaintiff, relying on fraud, must prove that defendant made a material false representation, known to be false at the time, and made with intent that it should be acted on by plaintiff, and that plaintiff relied on same to his injury.—King v. Howeth & Co. 140 P. 1182.

§ 50 (Wash.) Fraud is never presumed.—Allen v. Kane, 140 P. 534.

§ 58 (Colo.App.) Evidence held not to show that plaintiff relied on the representations of the seller of corporate stock.—Moore v. Carrick, 140 P. 485.

§ 58 (Wash.) Fraud must be proved by clear and convincing evidence.—Allen v. Kane, 140 P. 534.

**(D) Damages.**

§ 59 (Kan.) In an action against an officer of a corporation for damages due to defendant misrepresenting his authority to bind the corporation by a contract to employ plaintiff for life in settlement of a claim for personal injuries, the measure of damages is the loss from failure to secure a valid contract, and not the value of the personal injury claim.—Pierson v. Holdridge, 140 P. 1032.

**(E) Trial, Judgment, and Review.**

§ 64 (Colo.) Where defendant fraudulently exaggerated the value of property which he transferred in exchange for plaintiff's property, the price at which it was agreed defendant's property should be accepted is competent evidence of its value, if it had been as represented, and sufficient to carry the case to the jury upon that question.—Mitchell v. Crowl, 140 P. 793.

## FRAUDS, STATUTE OF.

### III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

§ 23 (Okl.) Conversation between plaintiff and defendant held not to constitute an agreement by defendant to pay for plaintiff's professional services as a physician to defendant's son.—Huls v. Janeway, 140 P. 419.

### V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 53 (Okl.) A parol lease of real property for one year does not come within the statute of frauds (Rev. Laws 1910, § 941), regardless of whether the term of the lease commences in present or in futuro.—Jones v. Bennett, 140 P. 148.

§ 53 (Okl.) A lease or contract of rental, whether in writing or parol, for one year beginning a day in the future, is valid.—Darnell v. Hume, 140 P. 775.

### VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 56 (Wash.) A conveyance of standing timber, with the right of entry upon the land and removal of the timber therefrom within a stated period or a reasonable time, is within Rem. & Bal. Code, §§ 8745, 8746, requiring conveyances of realty or any interest therein to be by deed.—France v. Deep River Logging Co., 140 P. 361.

§ 58 (Okl.) The statute of frauds (Rev. Laws 1910, § 941) does not require that a contract to

make a lease be in writing.—Jones v. Bennett, 140 P. 148.

§ 60 (Idaho) A parol license for a right of way for a ditch, if sought to be declared perpetual, would be an easement or interest in real property, which can only be created by law, or by an instrument in writing, subscribed by the party sought to be charged.—McReynolds v. Harrigfeld, 140 P. 1096.

Where the evidence fails to show that the licensees have expended considerable money or made valuable improvements in reliance on a parol lease for the right of way for an irrigation ditch, or to show that benefits have accrued to the licensors thereunder, the court will not declare that "by operation of law" the parol license is an easement, and hence not within Rev. Codes, § 6007.—Id.

§ 71 (Mont.) A contract for the sale of land must be in writing to satisfy the statute of frauds.—Hicks v. Bupp, 140 P. 97.

### IX. OPERATION AND EFFECT OF STATUTE.

§ 129 (Or.) A part payment does not bind a purchaser of real estate, either a contract in writing or part performance being essential.—Cunningham v. Friendly, 140 P. 989.

§ 129 (Wash.) Even if the making of improvements by the lessee would prevent an unacknowledged, five-year lease, with the privilege of extension for five years upon adjusting rentals, from being invalid as to the first five years, it would not validate it as to the renewal five years, since the renewal involved the making of a new contract.—National Laundry Co. v. Mayer, 140 P. 393.

## FRAUDULENT CONVEYANCES.

See Attachment, §§ 44, 47, 350; Chattel Mortgages, § 227; Common Law, § 7; Lis Pendens, § 26.

### I. TRANSFERS AND TRANSACTIONS INVALID.

**(J) Knowledge and Intent of Grantee.**

§ 156 (Wash.) Though an insolvent debtor may prefer a creditor, though it exhausts the whole of his property, yet there can be no legal preference where the purpose of the debtor was fraudulent and the preferred creditor had knowledge thereof.—Allen v. Kane, 140 P. 534.

§ 160 (Wash.) Where a conveyance was made to an innocent grantee with fraudulent intent on the part of the grantor to defraud creditors, and the full price was not paid, the land must be held subject to the payment of prior debts of the grantor, to the extent of any payments made on the price after notice by the grantee of the grantor's fraudulent purpose.—Allen v. Kane, 140 P. 534.

Where a creditor, without notice of his debtor's insolvency and of his intention to prefer the creditor, purchased all the property of the debtor, and, before full payment of the price, received notice of the debtor's intention to defraud other creditors and of his appropriation of a part of the price to his own use, the conveyance was void as against the creditor to the amount of any payments after notice.—Id.

Though a creditor, to secure a preference, may pay a not unreasonable excess above the debt on the price, for a conveyance made by the debtor, the creditor will not be protected after the knowledge of the grantor's fraudulent design to defraud other creditors, unless he can show that the preference could not be secured without the additional payment.—Id.

### III. REMEDIES OF CREDITORS AND PURCHASERS.

**(A) Persons Entitled to Assert Invalidity.**

§ 206 (Wash.) The term "creditor," within the common-law rule that conveyances with intent

to defraud a creditor shall be void, includes every one having a right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing out of contract or tort.—*Allen v. Kane*, 140 P. 534.

A vendor who breaches his contract to convey to the purchaser, and who thereafter immediately conveys to a third person all his property, thereby preventing the purchaser from obtaining relief for the breach, is guilty of fraud, and the conveyance is fraudulent as against the purchaser.—*Id.*

**(C) Right of Action to Set Aside Transfer, and Defenses.**

§ 241 (Wash.) A creditor cannot proceed in equity to subject property conveyed by the debtor to defraud creditors until his claim has been reduced to judgment and execution issued thereon.—*Allen v. Kane*, 140 P. 534.

**(G) Evidence.**

§ 298 (Cal.App.) Evidence held to sustain a finding that an assignment of an interest in a crop of beans was not made to defraud plaintiff and prevent it from satisfying its judgment against the assignor.—*Sinsheimer Bros. v. Keshaw*, 140 P. 606.

§ 298 (Wash.) The fraudulent intent of a grantor charged with making a conveyance to defraud his creditors may be proved by circumstantial evidence, and the fact that a grantor, on eve of a suit against him, transfers all of his property to another is persuasive evidence of a fraudulent intent.—*Allen v. Kane*, 140 P. 534.

§ 301 (Wash.) Evidence held to show that a grantee obtained knowledge of his grantor's intent to defraud creditors, before he had paid the full consideration.—*Allen v. Kane*, 140 P. 534.

**FRAUDULENT REPRESENTATIONS.**

See Release, § 57.

**GAME.**

See Conspiracy.

**GAMING.**

**I. GAMBLING CONTRACTS AND TRANSACTIONS.**

**(B) Rights and Remedies of Parties.**

§ 29 (Cal.App.) Where a party who has made a wager upon the result of a certain event withdraws therefrom before the event has happened, he is ordinarily, in law, entitled to the money put up by him.—*Matthews v. Lopus*, 140 P. 306.

Since betting on a contest between men is made a crime by Pen. Code, § 337a (added by St. 1911, p. 4), one who places a wager on a wrestling match in the hands of a stakeholder has committed a complete crime and may not thereafter recover the money from the stakeholder even though he withdrew from the wager before the match was finished.—*Id.*

**III. CRIMINAL RESPONSIBILITY.**

**(A) Offenses.**

§ 72½ [New, vol. 8 Key-No. Series] (Cal. App.) The stakeholder who accepts a wager on a wrestling match is an aider and abettor to the making of the wager, which is made a crime by Pen. Code, § 337a (added by St. 1911, p. 4), and is therefore guilty as a principal under Pen. Code, § 31.—*Matthews v. Lopus*, 140 P. 306.

§ 79 (Okla.Cr.App.) Any person conducting a gambling game is guilty of violating Rev. Laws 1910, § 2498 (Comp. Laws 1909, § 2422), though he is acting merely as a matter of accommodation without compensation.—*Johnson v. State*, 140 P. 622.

**(B) Prosecution and Punishment.**

§ 85 (Okla.Cr.App.) An information charging the conducting of a gambling game which was played for money or other representatives of value is sufficient to charge a violation of Rev. Laws 1910, § 2498 (Comp. Laws 1909, § 2422), though it does not state the capacity in which defendant acted, or that he received compensation for his acts.—*Johnson v. State*, 140 P. 622.

An information in a prosecution for conducting a gambling game in violation of Rev. Laws 1910, § 2498 (Comp. Laws 1909, § 2422), held sufficient.—*Id.*

§ 88 (Okla.Cr.App.) An information charging the conducting of a gambling game in violation of Rev. Laws 1910, § 2498 (Comp. Laws 1909, § 2422), need not charge that the game was conducted for money, checks, or other representatives of value.—*Johnson v. State*, 140 P. 622.

§ 98 (Okla.Cr.App.) Evidence held to sustain a conviction of conducting a gambling game in violation of Rev. Laws 1910, § 2498 (Comp. Laws 1909, § 2422).—*Johnson v. State*, 140 P. 622.

**GARNISHMENT.**

See Bankruptcy, § 398; Corporations, §§ 259, 670.

**IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.**

§ 104 (Wash.) A garnishee who appeared and requested permission to defend, without preserving a special appearance, thereby waived objection to the sufficiency of the service of the writ.—*Frieze v. Powell*, 140 P. 690.

**V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.**

§ 114 (Wash.) Rem. & Bal. Code, §§ 683, 685, 688, 692, look to the trial of the issue presented by the garnishee's answer as of the date of the answer, and while an obligation arising before answer, but not due, would be held until trial, debts created, salary earned, or property received subsequent to the answer are not held, otherwise the head of a family might be deprived of his salary exemption under section 703.—*Frieze v. Powell*, 140 P. 690.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

§ 142 (Wash.) The answer of a garnishee, verified by its secretary, who stated that he had read it, was sufficient, when liberally construed, within Rem. & Bal. Code, § 690, providing that it shall be under oath, in writing, and signed by the garnishee, though it was signed by the garnishee's attorney.—*Frieze v. Powell*, 140 P. 690.

§ 158 (Wash.) Under Rem. & Bal. Code, § 285, requiring the liberal construction of pleadings with a view to substantial justice, a garnishee, who pleaded "no funds" and "nulla bona," was entitled to show that the principal defendant had anticipated his salary and that nothing was owing him when it was garnisheed.—*Frieze v. Powell*, 140 P. 690.

§ 187 (Wash.) Where a writ of garnishment against a foreign corporation was served on its local manager, who, through ignorance, failed to protect the garnishee's interests until default was taken, after which prompt steps were taken to have it vacated, there was a sufficient showing of excusable neglect, within Rem. & Bal. Code, § 303, and there was no abuse of discretion in setting aside the judgment.—*Frieze v. Powell*, 140 P. 690.

A petition to vacate a default judgment against a garnishee, which alleged that the garnishee owed nothing to the principal defendant and had none of his goods in its possession, presented a meritorious defense, if proven, and not a mere conclusion that such a defense existed.—*Id.*

### IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

§ 237 (Okla.) An answer to a suit for debt, which pleads in bar a judgment in another state against defendant as garnishee, is demurrable, where it does not show that the demand sued for is identical with that adjudicated in the garnishee proceedings.—*Brown v. Stogsdale*, 140 P. 608.

### GAS.

See Dedication, § 55; Mines and Minerals, § 78.

§ 14½ (Wash.) One suing for injuries by stumbling over a gas pipe projecting through a sidewalk and connected with a pipe leading out to the gas main has the burden of proving that the pipe belonged to the gas company, but, since the question of the company's ownership is peculiarly within its own knowledge, the burden rests somewhat more lightly than if proof of ownership was equally available to both.—*Norton v. Pacific Power & Light Co.*, 140 P. 905.

In an action for injuries to a pedestrian stumbling over a gas pipe projecting through a sidewalk, evidence held to support a finding that the pipe belonged to the gas company.—*Id.*

### GIFTS.

See Charities.

### GOOD FAITH.

See Bills and Notes, § 871; Corporations, § 149.

### GRAMMAR.

See Statutes, § 189.

### GRAND JURY.

See Indictment and Information.

### GRANTS.

See Public Lands.

### GRUB-STAKE CONTRACTS.

See Mines and Minerals, § 99.

### GUARANTY.

See Appeal and Error, § 1010; Frauds, Statute of, § 23; Principal and Surety.

### GUARDIAN AND WARD.

### III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 70 (Okla.) Where a ward, after her majority, voluntarily made final settlement with her guardian, receiving the proceeds of an oil and gas lease made by the guardian known by her to be invalid, held, that such settlement was a ratification of the lease.—*Lasoy's Oil Co. v. Zulkey*, 140 P. 160.

### IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§ 112 (Nev.) Where community property was by agreement and by a divorce decree set aside for support and education of the minor children, it could be thereafter mortgaged by the guardian to pay off a prior mortgage and obtain additional money for the support of the children.—*Schmitt v. Joenson*, 140 P. 518.

### VI. ACCOUNTING AND SETTLEMENT.

§ 157 (Ariz.) In proceedings for the settlement of the account of a guardian, who was the ward's stepfather, evidence held to show that the guardian expected no remuneration

from the child for expenditures made for her support, etc.—*In re Harris*, 140 P. 825.

### HABEAS CORPUS.

#### I. NATURE AND GROUNDS OF REMEDY.

§ 30 (Ariz.) A writ of habeas corpus is not available to correct mere errors or irregularities in procedure in a case where the court has jurisdiction of the person and of the offense.—*Ex parte Silvas*, 140 P. 988.

### HARMLESS ERROR.

See Appeal and Error, §§ 1026-1070; Criminal Law, §§ 823, 1166½.

### HAWKERS AND PEDDLERS.

See Licenses, §§ 7, 33.

### HEARSAY EVIDENCE.

See Evidence, §§ 317, 318.

### HIGHWAYS.

See Counties, § 16; Municipal Corporations, §§ 657-706, 756-821; Navigable Waters, § 1.

#### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§ 19 (N.M.) Laws 1912, c. 54, granting to county road boards general powers over public roads, held not to repeal by implication so much of Laws 1905, c. 124, as authorized county commissioners to acquire land for a public road.—*State v. Romero*, 140 P. 1069.

§ 30 (Or.) Under L. O. L. § 6280, an affidavit as to the posting of road notices not asserting that either of the notices was posted in the vicinity of the proposed road, followed by a finding of the county court that the notices were posted as required by law, is insufficient.—*McMillan v. Mason*, 140 P. 445.

§ 41 (Or.) Under L. O. L. § 6284, as amended by Laws 1911, c. 212, and section 6290, relating to road proceedings, and section 2931, as amended by Laws 1911, c. 37, a report by county road viewers, appointed December 7, 1911, in Tillamook county, filed March 5, 1913, will be set aside.—*McMillan v. Mason*, 140 P. 445.

#### II. HIGHWAY DISTRICTS AND OFFICERS.

§ 90 (Kan.) Under Laws 1911, c. 248, § 15, all cities of the second and third class are separate road districts.—*City of Ellis v. Jacobs*, 140 P. 856.

#### III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 99¼ [New, vol. 14 Key-No. Series] (N.M.) Laws 1912, c. 54, § 7, held to authorize the county road board to draw their warrants upon the county treasurer directly against the county road fund in payment of supplies necessary in the construction of public roads, under the statutory regulations now controlling the county commissioners in disbursing county funds.—*State v. Romero*, 140 P. 1069.

Laws 1912, c. 54, § 7, held not to forbid boards of county commissioners from drawing warrants against the county road fund to pay for land acquired as a public road pursuant to Laws 1905, c. 124.—*Id.*

#### IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§ 130 (Kan.) Under Gen. St. 1909, § 2173, each county treasurer should pay to the treas-

urer of each city of the third class within the county all sums collected on property in such city for township road tax.—City of Ellis v. Jacobs, 140 P. 856.

## HOMESTEAD.

See Indians, § 16; Lis Pendens, § 9; Public Lands, §§ 35, 104; Taxation, § 5; Waters and Water Courses, § 225.

### I. NATURE, ACQUISITION, AND EXTENT.

#### (D) Property Constituting Homestead.

§ 62 (Okl.) Under Const. art. 12, § 1, and Comp. Laws 1909, § 3346, a homestead not in a city, town, or village may consist of 160 acres of land.—Alton Mercantile Co. v. Spindel, 140 P. 1168.

§ 81 (Okl.) Under Const. art. 12, § 1, and Comp. Laws 1909, § 3346, a homestead not in a city, town, or village, may be owned by either husband or wife, or both jointly.—Alton Mercantile Co. v. Spindel, 140 P. 1168.

### II. TRANSFER OR INCUMBRANCE.

§ 117 (Okl.) Where a decree has been denied both parties in a divorce case, but the wife has been enjoined from interfering with the husband's possession of the homestead, she is not thereby divested of her homestead right, and the husband's attempt to sell the homestead without her consent is void.—McWhorter v. Brady, 140 P. 782.

§ 118 (Okl.) Where, in litigation between husband and wife, a decree vested title to the homestead in him in trust for the children, a deed by him without joinder of the wife conveyed no title.—McWhorter v. Brady, 140 P. 782.

Under Rev. Laws 1910, § 1145, a homestead, the title of which is in the husband, cannot be alienated by him without the wife joining, where she has not voluntarily abandoned him or, for any cause, taken up her residence out of the state for one year or more.—Id.

### III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 142 (Ariz.) Under Rev. St. § 2296 (U. S. Comp. St. 1901, p. 1398), providing that no land acquired under the chapter which relates to the entry of public land as a homestead, shall in any event become liable for debts contracted prior to the issuing of the patent, the land cannot be sold for debts of the heir of an entryman contracted before issuance of patent.—In re Harris, 140 P. 825.

### IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 154 (Okl.) An insane wife, though confined in an asylum in another state, is incapable of consenting to an abandonment of their family homestead.—Alton Mercantile Co. v. Spindel, 140 P. 1168.

§ 169 (Okl.) Where land has once been impressed with a homestead character, no act or omission of the husband without the consent of the wife can result in abandonment.—Alton Mercantile Co. v. Spindel, 140 P. 1168.

### V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 187 (Okl.) Under Comp. Laws 1909, § 3346, a homestead is exempt from any form of enforced sale for the payment of debts, whether the title is in the husband or wife.—Alton Mercantile Co. v. Spindel, 140 P. 1168.

## HOMICIDE.

See Criminal Law, §§ 193½, 203, 451.

## II. MURDER.

§ 23 (N.M.) Murder in the second degree, within Laws 1907, c. 36, § 1, is committed where the killing is unlawful and voluntary, and without deliberate premeditation or such provocation as will reduce the crime to voluntary manslaughter.—State v. Cooley, 140 P. 1111.

§ 28 (N.M.) Drunkenness will not serve to reduce murder in the second degree to voluntary manslaughter.—State v. Cooley, 140 P. 1111.

## III. MANSLAUGHTER.

§ 34 (Cal.App.) In the crime of involuntary manslaughter there is wanting the element of malice and preconceived intent essential to murder and the element of intention to take life essential to voluntary manslaughter.—People v. Kelley, 140 P. 302.

## V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 113 (Or.) The aggressor cannot rely on self-defense unless he has so withdrawn from the combat as to show his adversary his intention, in good faith, to desist.—State v. Davis, 140 P. 448.

## VI. INDICTMENT AND INFORMATION.

§ 139 (Kan.) An information held to contain all the essential elements of murder in the first degree.—State v. Johnson, 140 P. 839.

## VII. EVIDENCE.

#### (A) Presumptions and Burden of Proof.

§ 145 (Or.) Neither L. O. L. § 798, subd. 2, section 799, subd. 3, nor section 1894, authorizes an instruction that it is presumed that a person using a deadly weapon intends the consequences which happen from it.—State v. Davis, 140 P. 448.

§ 151 (Okl.Cr.App.) Under Rev. Laws 1910, § 5902, the burden is on accused to overcome the legal presumption of sanity when the homicide was committed by evidence which is sufficient to raise a reasonable doubt.—Alberty v. State, 140 P. 1025.

Under Rev. Laws 1910, § 5902, where accused introduces evidence sufficient to overcome the presumption of sanity, the burden of establishing his sanity is on the state.—Id.

#### (C) Dying Declarations.

§ 221 (N.M.) Dying declarations, being hearsay, are not ordinarily entitled to the same weight as living witnesses.—State v. Valencia, 140 P. 1119.

#### (E) Weight and Sufficiency.

§ 237 (Okl.Cr.App.) Under Rev. Laws 1910, § 5902, where all the evidence in a homicide case, together with the legal presumptions applicable, leave a reasonable doubt in the jurors' minds as to whether defendant was mentally competent to distinguish between right and wrong, or to understand the nature of the act committed, he should be acquitted.—Alberty v. State, 140 P. 1025.

§ 252 (N.M.) Where a defendant charged with first degree murder relies on the defense of intoxication to reduce the offense to murder in the second degree, he need only raise a reasonable doubt relative thereto in the jurors' minds.—State v. Cooley, 140 P. 1111.

§ 253 (Colo.) Evidence held to sustain a conviction of murder in the first degree.—Forte v. People, 140 P. 789.

## VIII. TRIAL.

#### (B) Questions for Jury.

§ 270 (Okl.Cr.App.) The question of defendant's insanity when the homicide was committed, when put in issue by any evidence, is one of

fact for the jury under proper instructions.—*Alberty v. State*, 140 P. 1025.

§ 282 (Cal.App.) Evidence held not to warrant the submission to the jury of the question of involuntary manslaughter as defined by Pen. Code, § 192.—*People v. Kelley*, 140 P. 302.

#### (O) INSTRUCTIONS.

§ 300 (Or.) Under L. O. L. §§ 1500, 1505, 1527, and section 808, subd. 5, it was error to instruct that if the jury found, beyond a reasonable doubt, that defendant was justified they should find him not guilty, and, if they did not find beyond a reasonable doubt that he was justified, they should find him guilty where deceased was killed while defendant was fighting with others.—*State v. Davis*, 140 P. 448.

### X. APPEAL AND ERROR.

§ 340 (Cal.App.) In a prosecution for homicide, error in submitting the question of involuntary manslaughter to the jury, which is not justified by the evidence, was prejudicial, where the jury found the defendant guilty of that offense.—*People v. Kelley*, 140 P. 302.

### XI. SENTENCE AND PUNISHMENT.

§ 351 (Okl.Or.App.) Laws 1913, c. 113, providing for electrocution, and substituting the penitentiary for the county jail as the place of execution, and changing the time limit therefor, held not unconstitutional, though applied to a person convicted of a murder committed before its enactment.—*Alberty v. State*, 140 P. 1025.

### HUSBAND AND WIFE.

See Bills and Notes, § 371; Corporations, § 123; Divorce; Executors and Administrators, §§ 17, 39; Homestead, §§ 81, 117, 118, 142, 154, 160; Lewdness, § 1; Marriage; Mortgages, § 25; Pardon, § 4; Prostitution, § 3; Public Lands, § 35; Rape, § 18; Witnesses, § 58.

### I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 6 (Cal.) At common law the husband, as against every person except his creditor, has a right to dispose of his personality in any manner he thinks proper during his lifetime, and during coverture the wife has no interest therein, except so far as the husband is liable for her support and maintenance.—*In re Warner's Estate*, 140 P. 583.

### V. WIFE'S SEPARATE ESTATE.

#### (C) LIABILITIES AND CHARGES.

§ 152 (Wash.) A rule that a wife's separate property is not ordinarily liable for community debts does not prevent her from binding her separate property by her own contract.—*Northern Bank & Trust Co. v. Graves*, 140 P. 328.

§ 156 (Wash.) Signature of a wife to a note to a third person imports an obligation on her part to bind herself and her separate property for the payment thereof.—*Northern Bank & Trust Co. v. Graves*, 140 P. 328.

### VI. ACTIONS.

§ 205 (Ok.) Under Const. art. 2, § 6, providing that courts of justice shall be open to every person and Rev. Laws 1910, § 3363, conferring the same rights on married women as though sole, a married woman may maintain an action against her husband for injuries to her person.—*Fieder v. Fieder*, 140 P. 1022.

In an action for personal injuries to a wife by her husband, that the injuries were committed during coverture is no defense.—*Id.*

### VII. COMMUNITY PROPERTY.

§ 246 (Cal.) The separate personal property enjoyed under the law of the domicile by one of

the spouses when it was acquired is not lost by its investment in realty in another jurisdiction where the law of community property is in force.—*In re Warner's Estate*, 140 P. 583.

§ 254 (Wash.) A mortgage given to secure a note to the wife personally follows the note as regards its character as separate or community property.—*Nance v. Woods*, 140 P. 323.

§ 264 (Cal.) Upon contested settlement of an executor's final account, evidence held to overcome the presumption of community property attaching to the possession of property by either spouse, and to show by certain and direct proof that realty in this state purchased by decedent with money sent by him from Illinois, where community property is not recognized, was his separate property.—*In re Warner's Estate*, 140 P. 583.

§ 268 (Wash.) Where notes were executed by a theater corporation and certain of its stockholders in payment for an automobile purchased by the corporation for its benefit, the notes were a liability against the community property of the stockholders, in the absence of a showing that the corporate stock was the separate property of the stockholders.—*Way v. Lyric Theater Co.*, 140 P. 320.

The test to determine whether community property is liable for debts incurred in a transaction is whether the transaction was carried on for the benefit of the community, not whether it actually resulted in any profit thereto.—*Id.*

§ 268 (Wash.) The signature of a wife to a note for a community debt is not necessary to bind the community property; the signature of the husband being sufficient for that purpose.—*Northern Bank & Trust Co. v. Graves*, 140 P. 328.

§ 270 (Wash.) A wife to whom a note and mortgage were given personally had a right to maintain an action thereon in her own name even if it was community property.—*Nance v. Woods*, 140 P. 323.

### IMPAIRING OBLIGATION OF CONTRACT.

See Constitutional Law, §§ 134, 149.

### IMPRISONMENT.

See False Imprisonment; Habeas Corpus.

### IMPROVEMENTS.

See Counties, § 132; Municipal Corporations, §§ 266-575.

### IMPUTED NEGLIGENCE.

See Negligence, § 93.

### INCORPORATION.

See Corporations, §§ 28, 30.

### INCUMBRANCES.

See Homestead, §§ 117, 118.

### INDEMNITY.

See Principal and Surety.

### INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 5, 318.

### INDIANS.

See Constitutional Law, § 100.

§ 13 (Ok.) After compliance with the acts of Congress and agreements relative to the distribution of Indian lands, the allottee's title becomes absolute, and the execution and delivery

of patents thereafter are mere ministerial acts.—Wood v. Gleason, 140 P. 418.

§ 15 (Okl.) The one, three, and five year restrictions contained in the Supplemental Treaty with the Choctaw and Chickasaw Nations, section 16, on alienation of surplus lands of allottees, run with the land, and prevent the heirs of a deceased allottee of such land from alienating same before expiration of such periods.—Gannon v. Johnston, 140 P. 430.

The doctrine of rule of property cannot be applied to validate conveyances of Indian allotments in violation of governmental policy.—Id.

§ 15 (Okl.) The restrictions imposed on the right to alienate an Osage Indian allotment, by act of Congress of June 28, 1906 (34 Stat. 539), held to disqualify a white heir of his deceased full-blood wife and his half-blood son, allottees, who had never procured certificates of competency from conveying the allotments.—Levindale Lead & Zinc Mining Co. v. Coleman, 140 P. 607.

§ 16 (Okl.) A one-half blood Creek Indian can make a valid lease of her homestead.—Darnell v. Hume, 140 P. 775.

§ 18 (Okl.) Where, on August 16, 1899, a duly enrolled citizen of the Creek Nation died at the age of two years before receiving allotment, leaving a father, and a sister born of the same mother, all citizens of the Creek Nation, the devolution of the allotment was governed by Original Agreement May 25, 1901 (31 Stat. 869, c. 676, § 28), and the father as the nearest relation inherited to the exclusion of the half-sister.—Scott v. Jacobs, 140 P. 148.

§ 18 (Okl.) Heirs of a Peoria Indian who died in 1906 inherited under the Arkansas law of descent and distribution prescribed in Mansf. Dig. §§ 2522-2545, and made applicable by Act April 28, 1904, c. 1824, 33 Stat. 573, to all persons in the Indian Territory.—Labadie v. Smith, 140 P. 427.

§ 19 (Okl.) Under the Creek Supplemental Agreement, § 18, the inhibition against the trespass of live stock owned by a noncitizen on allotted land and the remedy therefor, runs with the land to an occupying noncitizen tenant of the allottee.—Blasdel v. Finks, 140 P. 1178.

§ 34 (Utah) Laws 1911, c. 106, § 30, making the sale, etc., of liquor to an Indian a misdemeanor, is so repugnant to Comp. Laws 1907, § 4398, making such sale, etc., to an Indian "or person living \* \* \* with an Indian woman," a felony as to repeal it, at least as to an offense not within the words quoted.—State v. Carman, 140 P. 670.

Comp. Laws 1907, § 4488, providing that an act or omission punishable in different ways by different proceedings may be punishable under either provision, does not authorize the enforcement of both Comp. Laws 1907, § 4298, making the sale of liquor to an Indian a felony, and also Laws 1911, c. 106, § 30, making it a misdemeanor.—Id.

## INDICTMENT AND INFORMATION.

See Conspiracy, §§ 43, 46; Criminal Law, § 628; Embezzlement, §§ 30, 35; Gaming, §§ 85, 88; Homicide, § 139; Intoxicating Liquors, §§ 196, 216, 219; Larceny, §§ 34, 40; Prostitution, § 3; Sodomy, § 5.

### I. NECESSITY OF INDICTMENT OR PRESENTMENT.

§ 3 (Cal.App.) Under Pen. Code, §§ 888, 889, and Code Civ. Proc. § 187, a prosecution, in the superior court sitting as a juvenile court, of a misdemeanor within the jurisdiction of the court, under Juvenile Court Act, § 26, must be by indictment or information, notwithstanding Pen. Code, § 682.—People v. Budd, 140 P. 714.

### V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 110 (Cal.App.) A complaint charging accused with soliciting orders for intoxicating liquors within no-license territory, but not showing where the liquors were to be delivered, stated an offense, and a magistrate's court had jurisdiction to pass upon the charge; it being sufficient to charge the offense in the language of the statute.—Golden & Co. v. Justice's Court of Woodland Tp., Yolo County, 140 P. 49.

§ 110 (N.M.) An indictment for embezzlement held sufficiently specific, where it was in the language of Comp. Laws 1897, § 1123.—State v. Probert, 140 P. 1108.

It is only where the terms of a statute are so general as to require specification of detail to identify a given transaction that allegations of an indictment must be extended beyond the statutory terms.—Id.

### VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 137 (Cal.) Under Pen. Code, §§ 995 and 1017, the defenses of former acquittal or former jeopardy may not be presented by motion to set aside the indictment.—People v. Strickler, 140 P. 270.

### IX. ISSUES, PROOF, AND VARIANCE.

§ 173 (Okl.Cr.App.) That the information charged violation of the prohibition law by John Tweedy and the proof showed commission of the crime by J. M. Tweedy held not a material variance, where the proof also showed John Tweedy and J. M. Tweedy to be one and the same person.—Tweedy v. State, 140 P. 787.

## INDORSEMENT.

See Bills and Notes, §§ 209, 277.

## INFANTS.

See Carriers, §§ 239, 316; Equity, § 39; Guardian and Ward; Parent and Child.

### II. CUSTODY AND PROTECTION.

§ 20 (Cal.App.) The Juvenile Court Act confers on the superior court jurisdiction of offenses created by law, and does not create a new court distinct from that of the superior court, and the Legislature may not adopt for the prosecution of such offenses a procedure materially different from that prescribed by the Constitution and statutes for the prosecution of criminal offenses in the superior courts.—People v. Budd, 140 P. 714.

## INFLUENCE.

See Wills, §§ 164, 166.

## INFORMATION.

See Indictment and Information.

## INJUNCTION.

See Appeal and Error, § 877; Building and Loan Associations, § 6; Electricity, §§ 11½, 4; Homestead, § 117; Municipal Corporations, §§ 538, 671, 993, 1000; Schools and School Districts, § 107; Taxation, § 608; Waters and Water Courses, §§ 174, 177, 179, 247.

### II. SUBJECTS OF PROTECTION AND RELIEF.

(E) Public Officers and Boards and Municipalities.

§ 74 (N.M.) The exercise of the discretion vested in subordinate political or municipal tribunals will not, in the absence of fraud, be disturbed by a court of equity.—La Mesa Community Ditch v. Appelzoeller, 140 P. 1051.

**(B) Criminal Acts, Conspiracies, and Prosecutions.**

§ 102 (N.M.) The court will not enjoin the commission of acts merely because they violate a criminal statute.—*La Mesa Community Ditch v. Appelzoeller*, 140 P. 1051.

**III. ACTIONS FOR INJUNCTIONS.**

§ 114 (N.M.) Where, in a suit to enjoin interference with a ditch it appeared that defendant was acting under the authority of B., who owned an interest in the ditch, and that complainant's right to relief depended on an adjudication of his right to use the ditch and water as against B., *held* that B. was a necessary party.—*Miller v. Klsner*, 140 P. 1107.

§ 118 (Cal.) Complaint, in action to enjoin damming of channel of stream, *held* sufficient within rule that the complaint must allege, not merely a possibility of injury, but a reasonable probability thereof.—*Island Reclamation District No. 776 v. Floribel Alfalfa Syndicate*, 140 P. 4.

§ 118 (N.M.) The complaint, in an action for injunction, should show facts from which the court may determine that the threatened damages are irreparable, and not merely state that irreparable damage will result.—*La Mesa Community Ditch v. Appelzoeller*, 140 P. 1051.

§ 126 (Mont.) In an action by a railroad company, which relinquished a section to the United States government, reserving right of way by reference to its main line as then located, for damages and to enjoin interference with a change in its line, *held*, that it had the burden of showing the location of the main line at the date of the relinquishment, and that the land involved was within the strip reserved.—*Northwestern Pac. Ry. Co. v. Hauswirth*, 140 P. 516.

**IN PAIS.**

See *Estoppel*.

**INSANE PERSONS.**

See Criminal Law, §§ 822, 823; Deeds, § 68; Homestead, § 154; Homicide, §§ 151, 237, 270.

**INSOLVENCY.**

See Bankruptcy; Building and Loan Associations, § 42; Corporations, §§ 259, 544.

**INSPECTION.**

See Agriculture, § 3; Master and Servant, § 124; Sales, §§ 168, 179.

**INSTRUCTIONS.**

To jury, see Criminal Law, §§ 765-823; Trial, §§ 187-295.

To servant, see Master and Servant, § 153.

**INSURANCE.**

See Appeal and Error, § 1039; Constitutional Law, § 296; Interest, § 46; Pleading, § 127; Principal and Agent, § 20.

**I. CONTROL AND REGULATION IN GENERAL.**

§ 12 (Or.) Under Laws 1911, pp. 376, 377, §§ 1-4, the insurance commissioner has no power to prescribe additional conditions precedent to the issuance of a license to agents for those providing indemnity among each other from fire loss or other damage to their own property, and agents who comply with the statutory requirements are entitled to the license.—*Guy L. Wallace & Co. v. Ferguson*, 140 P. 742.

§ 20 (Cal.App.) An insurance broker licensed under Pol. Code, § 596, to procure policies from unauthorized companies, may compel the insur-

ance commissioner to credit him with premiums returned, regardless of the calendar year in which they were paid, in determining the amount of the 4 per cent. tax on premiums.—*People v. Merrill*, 140 P. 1075.

§ 21 (Wash.) The plain intent of the Insurance Code (3 Rem. & Bal. Code, §§ 6059-22, 6059-24) is to require foreign insurance companies to keep not less than \$200,000 in securities on deposit as therein provided, and the fact that it is not required to make any deposit by the laws of the state where incorporated does not relieve it from the requirement.—*State v. Fishback*, 140 P. 387.

There is not such conflict between the Insurance Code (3 Rem. & Bal. Code, §§ 6059-24) paragraph 4 and paragraphs 1 and 2 relative to the deposit of securities by foreign companies, as to require an investigation of the history of the act, to determine whether paragraph 4 ought not be disregarded as in conflict with paragraphs 1 and 2.—*Id.*

It cannot be considered that the Legislature in enacting the Insurance Code (3 Rem. & Bal. Code, §§ 6059-24) intended to allow a foreign insurance company to do business in the state without depositing securities, as required of domestic companies, though such deposits be not required by the laws of the state where it was incorporated, as that would directly violate Const. art. 12, § 7.—*Id.*

The Insurance Commissioner's construction of the Insurance Code (3 Rem. & Bal. Code, §§ 6059, 1-24) as permitting foreign insurance companies to do business in the state without depositing securities, will not be adopted by the court in face of the manifest intention of the Legislature to require such deposits.—*Id.*

The construction of the Insurance Code (3 Rem. & Bal. Code, §§ 6059-22, 6059-24) as requiring foreign insurance companies to keep at least \$200,000 in securities on deposit as therein provided, *held* not to render the act invalid.—*Id.*

**II. INSURANCE COMPANIES.****(A) Stock Companies.**

§ 33 (Okl.) A domestic life insurance company may legally accept stock subscriptions after incorporation and before a license to commence business has been granted under Comp. Laws 1909, § 3756; such acceptance being necessary to enable it to show that it has the paid-up capital required by Comp. Laws 1909, § 3765.—*King v. Howeth & Co.*, 140 P. 1182.

**V. THE CONTRACT IN GENERAL.****(A) Nature, Requisites, and Validity.**

§ 143 (Kan.) Where a contract with a fire insurance agent for a policy provided that the policy should include an agreement permitting additional insurance, but the agent wrote the policy without such provision, insured was entitled to have the policy reformed so as to contain the agreement, and to recover on the policy as reformed.—*Palin v. Insurance Co. of North America*, 140 P. 586.

**VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.**

§ 229 (Wash.) The notice of cancellation of an insurance policy, though signed only in the name of the insurance company's agents, in the same manner that the policy was signed, is sufficient, the letter accompanying it advising insured the company was demanding the cancellation.—*Italston v. Royal Ins. Co., Ltd., of Liverpool*, 140 P. 552.

The notice of the insurer to insured, stating that if the premium is not paid by a certain hour, the policy "will stand canceled for non-payment of premium without further notice," is a notice of cancellation, and not a mere ex-

pression of intention to cancel at a future time.—Id.

Though an insurance policy provides that it may be canceled on five days' notice, a notice naming an hour, within five days after receipt of it, when, if premium is not paid, the policy will stand canceled, is not void, but becomes effective five days after its receipt.—Id.

§ 232 (Wash.) Insured being notified that if the premium is not paid by a certain time the policy will stand canceled without further notice, and payment not being made, and the manager of the insurer's agent directing the policy to be canceled on the books of the company, there is a cancellation in fact.—*Ralston v. Royal Ins. Co., Ltd., of Liverpool*, 140 P. 552.

## IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

### (C) Matters Relating to Person Insured.

§ 292 (Okl.) A breach of warranty that insured had not had medical advice during the five years anterior to the application for a life policy was sufficient to avoid the policy conditioned thereon.—*National Union v. Kelley*, 140 P. 1157.

## XV. ADJUSTMENT OF LOSS.

§ 576 (Kan.) Where insured, after loss, was induced to sign an agreement to settle for \$100 and surrender the policy, but the insurer did not pay or offer to pay the money, and the policy was never surrendered, but further negotiations followed inducing plaintiff to believe that defendant had abandoned the agreement, such facts held sufficient to show waiver thereof.—*Palin v. Insurance Co. of North America*, 140 P. 886.

## XVIII. ACTIONS ON POLICIES.

§ 622 (Okl.) A provision of a tornado insurance policy limiting the time to sue to 12 months from date of loss held void under Comp. Laws 1909, § 1128, making void any contract condition restricting a party from enforcing his rights by judicial proceedings.—*Seay v. Commercial Union Assur. Co., Limited, of London, England*, 140 P. 1164.

Act of March 25, 1909 (Laws 1909, c. 21, art. 2), prescribing the standard form of an insurance policy in which a limitation of one year after loss is provided for actions thereon, held not to validate a limitation provision in a tornado insurance policy, where the policy was executed and a claim for loss arose prior to the adoption of such statute.—Id.

§ 646 (Okl.) In an action on a life policy, the burden is on the insurer to show a breach of insured's warranty that he had not had medical advice during the previous five years.—*National Union v. Kelley*, 140 P. 1157.

§ 665 (Okl.) In an action on a life policy, evidence held not to require finding that a warranty that insured had not been treated by a physician for five years prior to the application was untrue, where such finding was based on the testimony of a physician whose memory was deficient, and whose answers were inconsistent.—*National Union v. Kelley*, 140 P. 1157.

§ 668 (Okl.) Whether a statement of insured, in an application for a life policy warranted to be true, is untrue is ordinarily a question for the trier of facts.—*National Union v. Kelley*, 140 P. 1157.

§ 675 (Kan.) In actions against insurance companies, attorneys' fees are allowed, under Gen. St. 1909, § 4263, as part of the costs.—*Manhattan Wholesale Grocery Co. v. Westchester Fire Ins. Co.*, 140 P. 853.

In actions against insurance companies, the court may, even after return of the verdict, hear evidence and allow attorney's fees as costs, pursuant to Gen. St. 1909, § 4263.—Id.

## XX. MUTUAL BENEFIT INSURANCE.

### (B) The Contract in General.

§ 719 (Wash.) Where the application for a fraternal benefit policy, the certificate, and the by-laws of the association provided that the member's rights should be subject to the by-laws then in force or "thereafter enacted," the association could afterwards provide that the provision avoiding the policy if insured commit suicide within two years should be extended to five years.—*Klein v. Knights and Ladies of Security*, 140 P. 72.

## INTENT.

See Attachment, §§ 44, 47; Bankruptcy, § 166; Fraudulent Conveyances, §§ 156, 160, 298; Mines and Minerals, § 24; Mortgages, § 32; Sales, § 250; Statutes, §§ 181, 183, 205; Wills, § 88.

## INTEREST.

See Bills and Notes, § 129; Clerks of Courts, § 35; Courts, §§ 121, 213; Usury.

## I. RIGHTS AND LIABILITIES IN GENERAL.

§ 19 (Cal.App.) An action to enforce a mechanic's lien, based on a contract to surface and wax the floor of a building to make it suitable for dancing for an agreed price, is not in the nature of one upon quantum meruit so as to defeat the lien claimant's right to interest.—*Hardwood Interior Co. v. Bull*, 140 P. 702.

Where an action is based upon quantum meruit, a lien claimant is limited to the reasonable value of the work done or materials furnished, and no interest may be charged until judgment is rendered.—Id.

## III. TIME AND COMPUTATION.

§ 46 (Ariz.) In an action against an insurance company to recover an amount paid on a contract to subscribe for its stock under its agreement to return the payment within 90 days if demanded, plaintiff, upon recovering, should be allowed interest from the date of demand for return of payment.—*Arizona Life Ins. Co. v. Lindell*, 140 P. 60.

## INTERPLEADER.

See Attachment, § 306.

## INTERPRETERS.

See Courts, § 56.

## INTERSTATE COMMERCE.

See Commerce.

## INTOXICATING LIQUORS.

See Criminal Law, §§ 108, 258; Indiana, § 34; Indictment and Information, § 110.

## I. POWER TO CONTROL TRAFFIC.

§ 6 (Cal.App.) While the Legislature can interfere with the individual use or consumption of intoxicating liquors only when it leads to intoxication or alcoholism, it may prohibit every form of soliciting orders within no-license territory for liquor to be delivered therein, though intended for individual use.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.

§ 10 (Cal.App.) Municipal corporation or other subdivision, by ordinance or by invoking the local option law, held to have no power to prevent soliciting of orders or making of agreements for the sale of intoxicating liquors to be delivered outside its limits.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.



**IV. LICENSES AND TAXES.**

§ 108 (Utah) A judgment revoking a liquor license being self-executing, an appeal therefrom does not suspend it, or stay its force, at least where a supersedeas bond is not given under Comp. Laws 1907, § 3314.—*In re Grant*, 140 P. 226.

The power of the district court under Laws 1911, c. 106, § 10, to revoke liquor licenses in cities of the first and second classes, as is its power under section 3 to order their issuance therein, is administrative, so that, in the absence of provision in the statute therefor, appeal does not lie from its revocation of a license.—*Id.*

**VI. OFFENSES.**

§ 146 (Cal.App.) Under the Wyllie Local Option Law, §§ 15, 16, except possibly as to registered pharmacists, no one has a legal right to solicit or take orders for intoxicants from persons within no-license territory.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.

Wyllie Local Option Law, § 15, relative to soliciting orders in no-license territory, *held* violated by sending letter from point outside such territory to person therein soliciting an order.—*Id.*

Under Wyllie Local Option Law, § 15, soliciting orders or making agreements for sale of intoxicating liquors within no-license territory *held* prohibited, though it is contemplated that the sale be consummated outside such territory.—*Id.*

Wyllie Local Option Law, § 15, relative to soliciting orders for intoxicating liquors in local option territory, does not apply to advertisements in newspapers circulating in such territory and addressed to the general public, and not to a particular individual.—*Id.*

§ 146 (Cal.App.) Ordinance of supervisors prohibiting soliciting of orders for alcoholic liquors within the county *held* violated by the sending of a circular letter to a resident of the county soliciting an order.—*Golden & Co. v. Justice's Court of Guinda Tp., Yolo County*, 140 P. 60.

**VIII. CRIMINAL PROSECUTIONS.**

§ 196 (Kan.) Acts 1911, c. 165, § 3, making persistent violations of the prohibitory law a felony, being supplementary legislation, the procedure under the general liquor law governs, and an information need not state the kind of liquor sold or the name of the person purchasing.—*State v. Schmidt*, 140 P. 843.

§ 216 (Kan.) An information under Acts 1911, c. 165, § 3, need not state the kind of liquor sold.—*State v. Schmidt*, 140 P. 843.

§ 219 (Kan.) An information under Acts 1911, c. 165, § 3, need not state the name of the person purchasing.—*State v. Schmidt*, 140 P. 843.

§ 226 (Okla.Cr.App.) In a prosecution for having unlawful possession of intoxicating liquor with intent to sell, evidence of the quantity and kind of liquor, size and number of packages, and circumstances under which it was found, conduct of accused, and all other circumstances calculated to throw light on the purpose for which it was kept, is admissible.—*Overton v. State*, 140 P. 1135.

§ 236 (Okla.Cr.App.) Evidence showing payment of United States special revenue tax and possession of a carload of intoxicating liquor *held* sufficient, in view of Sess. Laws 1911, c. 70, § 6, making railroad companies' records of shipments prima facie evidence, to sustain a conviction of having unlawful possession of intoxicating liquor with intent to sell same.—*Tweedy v. State*, 140 P. 787.

§ 236 (Okla.Cr.App.) Evidence, in a prosecution for having unlawful possession of intoxicating liquor with intent to sell same, *held*

to sustain a conviction.—*Overton v. State*, 140 P. 1135.

**INVENTION.**

See Patents.

**IRRIGATION.**

See Waters and Water Courses, §§ 128, 133, 156, 157, 225-268.

**ISLANDS.**

See Navigable Waters, § 42.

**JOINDER.**

See Parties, §§ 30, 51.

**JOINT TENANCY.**

See Tenancy in Common.

**JUDGES.**

See Criminal Law, § 137; Justices of the Peace; Mandamus, § 172; New Trial, § 159; Trial, §§ 29, 314.

**II. SPECIAL OR SUBSTITUTE JUDGES.**

§ 16 (Kan.) A decree by a judge from another district, who was selected as judge pro tem. by agreement of the parties, *held* valid, though no oath was taken and it did not appear that the regular judge was absent or disqualified.—*Chandler v. Chandler*, 140 P. 858.

Const. art. 3, § 20, requiring that a provision be made by law for the selection by the bar of a pro tem. judge when the regular judge is absent or disqualified, *held* not to invalidate Gen. St. 1909, § 2395, authorizing the parties to select a judge pro tem. by agreement in the following "cases" meaning "occasions" and not actions.—*Id.*

**IV. DISQUALIFICATION TO ACT.**

§ 51 (Wash.) Where defendants moved for a cost bond, and later for a bill of particulars, and, after a motion for default against them had been denied on terms, filed a motion for a change of judge on the ground of prejudice, pending the determination of which answers were filed, there was no error in denying such motion.—*Nance v. Woods*, 140 P. 323.

**JUDGMENT.**

See Adverse Possession, § 91; Appeal and Error; Assignments, §§ 89, 92; Attorney and Client, § 100; Boundaries, §§ 37, 43; Corporations, § 252; Criminal Law, §§ 978, 980; Divorce, §§ 171, 202; Execution; Executors and Administrators, § 256; Intoxicating Liquors, § 108; Judges, § 16; Justices of the Peace, §§ 70, 187; Lis Pendens, § 26; Mortgages, § 559; New Trial, § 116; Parties, § 51; Pleading, § 433; Receivers, § 218; Replevin, § 95; Statutes, § 267; Taxation, § 708; Trial, § 345.

**III. ON CONSENT, OFFER, OR ADMISSION.**

§ 89 (Colo.) Where a decree establishing water rights followed the findings of the referee, it was immaterial that a stipulation for the entry of the decree was not signed by a party to the proceeding with due notice.—*Louden Irrigating Canal & Reservoir Co. v. Town of Berthoud*, 140 P. 802.

**IV. BY DEFAULT.**

(B) Opening or Setting Aside Default.

§ 138 (N.M.) A default judgment will be set aside as irregular, where the real party in interest was not made defendant.—*Miller v. Klasaner*, 140 P. 1107.

§ 139 (Wash.) The vacation of a default judgment rests in the sound discretion of the trial court.—*Frieze v. Powell*, 140 P. 690.

§ 143 (Cal.) The refusal to grant a motion to set aside a default under Code Civ. Proc. § 473, on the ground of excusable neglect, held an abuse of discretion.—*Hughes Mfg. & Lumber Co. v. Elliott*, 140 P. 17.

§ 143 (Wash.) In view of the liberal statutory rule permitting service on foreign corporations through agents unfamiliar with legal proceedings, an equally liberal discretion in vacating defaults founded on such service should be permitted, to the end that justice may be done.—*Frieze v. Powell*, 140 P. 690.

§ 158 (Wash.) The vacation of a default judgment on the ground of insufficient service falls within Rem. & Bal. Code, § 464, subd. 3, permitting the vacation of judgments for irregularity in obtaining them, and a petition therefor was sufficient, though verified by the attorney and not accompanied by an affidavit of merits, as section 467 only requires that an application under section 464, subd. 3, shall be by verified petition.—*Frieze v. Powell*, 140 P. 690.

The vacation of a default judgment because of the failure of the agent served to take proper legal steps falls within Rem. & Bal. Code, § 303, authorizing relief from a judgment taken against a party through his excusable neglect, upon affidavit showing good cause, and a petition therefor was sufficient, though verified by the attorney, no other agent being within the county, and though not accompanied by an affidavit of merits.—*Id.*

§ 160 (Cal.) An affidavit of merits, filed on a motion to vacate a default judgment, that defendant has fairly, fully, and truly "stated all of the facts and grounds of defense," was not objectionable on the ground that it should have averred that it stated "the facts of the case."—*Hughes Mfg. & Lumber Co. v. Elliott*, 140 P. 17.

## VI. ON TRIAL OF ISSUES.

### (A) Rendition, Form, and Requisites in General.

§ 199 (Kan.) Where defendant, in an action on a partnership dissolution agreement, pleaded a mutual mistake, and, upon evidence that plaintiff knew of the mistake, requested leave to amend by alleging a mistake on his part and fraud of plaintiff, which request was refused, it was error to render judgment against defendant notwithstanding a general verdict in his favor.—*Wait v. McKibben*, 140 P. 860.

§ 199 (Or.) The motion for judgment notwithstanding the verdict, authorized by L. O. L. § 202, cannot be used to raise a question which has been included in a motion for nonsuit.—*Seibor v. Oregon-Washington R. & Navigation Co.*, 140 P. 629.

§ 199 (Wash.) Where special verdicts were returned for the plaintiff on three causes of action, and defendant only asked for a new trial, the court could not give judgment notwithstanding the verdict as to two of the causes of action, but was limited to granting a new trial, if the verdict were believed to have been against the weight of evidence.—*Auwarter v. Kroll*, 140 P. 326.

§ 199 (Wash.) If a motion for judgment notwithstanding the verdict was filed after judgment, it was too late, and, if it was filed before, it was overruled by the entry of a final judgment against the mover.—*Okazaki v. Sussman*, 140 P. 904.

### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 256 (Cal.App.) Where the complaint was in the form of a common count for merchandise sold, and the answer alleged a sale with an express warranty of soundness and false representations by plaintiff as to soundness, a finding that the allegations of the complaint were

true, and that there was no warranty as to soundness, supported a judgment for plaintiff.—*Scanlon v. Jacobs*, 140 P. 292.

## VII. ENTRY, RECORD, AND DOCKETING.

§ 276 (Utah) The trial court should not enter judgment without having plaintiff obtaining the judgment produce for cancellation the evidence of the debt merged in the judgment.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

## VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 297 (Cal.App.) The court may, with the consent of both parties, amend its findings and judgment before motion for new trial made or appeal taken.—*Scanlon v. Jacobs*, 140 P. 292.

§ 297 (Wash.) Since the superior courts are always open, their judgments are not subject to change during the term as at common law, and a judgment entered after the time for filing a motion for new trial is as conclusive as a common-law judgment after the term, and can only be changed or modified as provided by statute.—*Okazaki v. Sussman*, 140 P. 904.

§ 331 (Cal.App.) Where the court, with the consent of both parties, made amended findings and judgment, and before motion for new trial made or appeal taken, the amended findings and judgment were the only proper subjects of appeal.—*Scanlon v. Jacobs*, 140 P. 292.

## IX. OPENING OR VACATING.

§ 340 (Wash.) That the judge changed his views as to the effect of the evidence on which the jury founded their verdict was not sufficient cause for setting aside a judgment upon such verdict.—*Okazaki v. Sussman*, 140 P. 904.

§ 384 (Ok.) A petition to vacate a judgment as provided by St. 1893, § 4466 (Rev. Laws 1910, § 5269), is insufficient when not verified by petitioner, as authorized by section 3992 (Rev. Laws 1910, § 4765), or by his agent or attorney.—*Crowley-Southerland Commission Co. v. Husband*, 140 P. 1144.

## XI. COLLATERAL ATTACK.

### (B) Grounds.

§ 489 (Cal.App.) A judgment foreclosing a mortgage can be collaterally attacked only on the ground of want of jurisdiction.—*Klumpke v. Moreno*, 140 P. 313.

§ 501 (Cal.App.) A judgment foreclosing a mortgage cannot be collaterally attacked for mere error or irregularity.—*Klumpke v. Moreno*, 140 P. 313.

## XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

### (B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 584 (Cal.) A final judgment on the merits is a bar to a subsequent action between the same parties on the same cause of action.—*Krzepicki v. Krzepicki*, 140 P. 13.

§ 590 (Kan.) A judgment is not an estoppel as to facts which did not occur until after judgment was rendered, though references were made in the pleadings in that action to matters not involved therein.—*Murphree v. Anderson*, 140 P. 880.

Where, in a former action of false arrest and imprisonment, plaintiff alleged wrongful attachment of his property to show malice, but when the action was tried the attachment had not been vacated and damages for wrongful attachment could not have been awarded, a judgment for plaintiff was not *res judicata* of his damages for wrongful attachment of his property.—*Id.*

**XIV. CONCLUSIVENESS OF ADJUDICATION.****(B) Persons Concluded.**

§ 670 (Wash.) Judgment, in an action to quiet title to land purchased in receivership and tax foreclosure proceedings against an unincorporated association in which its trustees alleged title for the benefit of those who had contributed to its purchase, *held* *res adjudicata* in a subsequent proceeding attacking the purchaser's title on the ground that title and right of possession were in the trustees for the benefit of the membership at large.—*Burgess v. Peth*, 140 P. 851.

**(C) Matters Concluded.**

§ 725 (Colo.) A general adjudication decree, determining the volume and the date of priorities to the use of water of a stream during the irrigation season, was *res judicata* as to all matters and questions that were necessary to constitute a complete appropriation.—*Ironstone Ditch Co. v. Ashenfelter*, 140 P. 177.

§ 731 (Mont.) In action for partnership dissolution and accounting judgment determining that defendant owned the property involved *held* not conclusive as to its value, so as to defeat a recovery on the bond in excess of the value alleged by defendant.—*Lyon v. United States Fidelity & Guaranty Co.*, 140 P. 86.

§ 743 (Cal.App.) Where in an action between plaintiff and defendants' predecessor in title plaintiff was adjudged to have only an interest as tenant in common, that judgment, not having been appealed from, is conclusive on plaintiff's rights up to the time of its rendition.—*Clumpke v. Moreno*, 140 P. 313.

**XV. LIEN.**

§ 785 (Kan.) Where a surety, failing to secure performance of an agreement that the note should be paid from the proceeds of certain land, obtained from the principal, who had exchanged the land, an order on the legal owner to pay to the surety all money received from a sale of land above a certain amount, and intervened in a judgment creditors' suit to subject the land to her judgment against the principal, the real owner, and paid off the note, the surety had a lien on the land for payment of the note, superior to that of the judgment creditor.—*Bisby v. Quinby*, 140 P. 635.

**JUDICIAL NOTICE.**

Evidence, §§ 18-52.

**JUDICIAL SALES.**

See Execution, § 433; Guardian and Ward, § 112; Homestead, § 187; Sheriffs and Constables, § 48; Tenancy in Common, § 19.

**JURISDICTION.**

See Building and Loan Associations, § 45; Colleges and Universities; Contempt, §§ 20, 50; Courts; Equity, § 39; Infants, § 20; Intoxicating Liquors, § 108; Judgment, § 489; Quieting Title, § 7.

**JURY.**

See Appeal and Error, § 1045; Criminal Law, § 855; Trial, §§ 139-350, 370, 374.

**II. RIGHT TO TRIAL BY JURY.**

§ 14 (Okla.) Under Rev. Laws 1910, § 4093, providing that issues of fact arising in actions to recover money shall be tried by a jury unless waived, or a reference is ordered, it was error to refuse a trial by jury of issues in a bastardy proceeding as to whether defendant had settled with the mother of the child and whether the settlement was voluntary or had

been obtained by duress.—*Anderson v. State*, 140 P. 1142.

§ 14 (Wash.) Under Rem. & Bal. Code, §§ 1366, 1370, 1534, a proceeding by a woman to be declared the widow of the decedent and entitled to share in his community estate is an equitable action, triable to the court under section 315, and not an action for the recovery of money or specific property, triable by jury under section 314.—*In re Enos' Estate*, 140 P. 675.

**V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.**

§ 85 (Cal.App.) In an action for injury to plaintiff caused by his wagon colliding with defendant's automobile, *held*, under the evidence, that the trial court did not abuse his discretion in overruling defendant's challenge to a prospective juror on the ground of implied bias.—*Scragg v. Sallee*, 140 P. 706.

The determination of the question whether a person is qualified and competent as a juror is within the discretion of the trial court.—*Id.*

§ 103 (Colo.) Where a juror on his voir dire stated that he had formed and expressed an opinion which would require evidence to remove, but, if accepted, he would disregard his opinion and try the case on the merits and the instructions of the court, he was not disqualified.—*Forte v. People*, 140 P. 789.

**JUSTICES OF THE PEACE.**

See Criminal Law, § 258; Pardon, § 4.

**IV. PROCEDURE IN CIVIL CASES.**

§ 70 (Utah) Though nothing was done in a justice's action from April 25, 1907, when defendant's default was entered until April 22, 1913, when a judgment was entered, the action was pending from the time the complaint was filed upon February 21, 1907.—*Salt Lake Coffee & Spice Co. v. District Court of Salt Lake County*, 140 P. 666.

§ 101 (Utah) The failure to verify a complaint, in a justice's action, as required by Comp. Laws 1907, § 3685, was not a jurisdictional defect, in the absence of statute making it such, so that such defect was waived by failure to interpose a timely objection on that ground.—*Salt Lake Coffee & Spice Co. v. District Court of Salt Lake County*, 140 P. 666.

**V. REVIEW OF PROCEEDINGS.****(A) Appeal and Error.**

§ 141 (Okla.) After adoption of the Constitution, and before Rev. Laws 1910, § 5465, became effective, appeals from justices of the peace were to the county court.—*Boorigie v. Camp*, 140 P. 1148.

§ 141 (Utah) Under Comp. Laws 1907, § 5132, a justice is not deprived of jurisdiction by defendant filing an affidavit of prejudice, though the statute provides in such case the case must be transferred to another, but he only commits error in refusing to transfer, and then proceeding to try; so that, on appeal, the district court has jurisdiction, and, under sections 5165, 5167, should try *de novo*.—*State v. Morgan*, 140 P. 218.

§ 152 (Okla.) Under Willams' Const. §§ 199, 200 (Const. art. 7, §§ 14, 15), and Rev. Laws 1910, § 5466, one of two defendants may appeal from a judgment of a justice of the peace without joining the other.—*Huls v. Janeway*, 140 P. 419.

§ 164 (Okla.) Where, in a case appealed from a justice court under the law in effect after the adoption of the Constitution, and before Rev. Laws 1910, § 5465, became effective, a justice of the peace refuses to transmit a transcript of proceedings after approval of an appeal bond, he may be compelled by manda-

mus from the county court to do so.—Boorigie v. Camp, 140 P. 1148.

§ 187 (Utah) The district judge held not to have disposed of a case on the merits on appeal from a justice's judgment, but solely on the ground of want of jurisdiction because of plaintiff's failure to comply with the statute, making every judgment void which is given on a complaint not legally verified, or which contains an untrue allegation of a jurisdictional fact.—Salt Lake Coffee & Spice Co. v. District Court of Salt Lake County, 140 P. 686.

## JUSTIFIABLE HOMICIDE.

See Homicide, § 113.

## JUVENILE COURTS.

See Indictment and Information, § 3; Infants, § 20.

## KNOWLEDGE.

See Corporations, § 123; Evidence, § 474; Exceptions, Bill of, § 39; Fraudulent Conveyances, §§ 156, 160, 301; Master and Servant, § 217; Subrogation, § 14; Vendor and Purchaser, § 114.

## LACHES.

See Contracts, § 329; Reformation of Instruments, § 32.

## LANDLORD AND TENANT.

See Appeal and Error, § 1056; Attachment, § 306; Covenants, § 130; Frauds, Statute of, §§ 53, 58, 129; Indians, § 16; Limitation of Actions, §§ 28, 187; Mines and Minerals, §§ 73, 78; Parties, §§ 6, 80; Pleading, § 237; Trial, § 404.

## II. LEASES AND AGREEMENTS IN GENERAL.

### (A) Requisites and Validity.

§ 22 (Ariz.) For breach of an agreement for a lease, a party may treat the agreement as rescinded and sue for damages or treat the contract as continuing and sue for specific performance, or repudiate it and sue to recover any advance payments.—Merrill v. Gordon, 140 P. 496.

It is only where a lease has actually been executed that the relation of landlord and tenant is established.—Id.

§ 22 (Cal.App.) The provision of a written contract, whereby, in consideration of defendant agreeing to take a lease, plaintiff agreed to build an addition to a stable, to suit defendant as per verbal agreement, held not to apply to a feedway over the stalls.—Boyd v. Model Grocery Co., 140 P. 309.

Considering the extent of the work, plaintiff substantially complied with his contract in consideration of defendant's agreement to take a lease, to build a two-story brick addition, 35x60 feet, to a stable, things to be arranged to suit defendant, though he refused, after the work was done, to make a change, which would cost only \$25, in the feedway over the stalls.—Id.

§ 25 (Wash.) Under Rem. & Bal. Code, §§ 8745, 8746, 8902, requiring leases for a longer period than one year to be acknowledged, etc., a lease acknowledged only by the lessee is invalid; acknowledgment by both parties being necessary.—National Laundry Co. v. Mayer, 140 P. 393.

§ 35 (Cal.App.) Where a tenant entered into and held possession of land under a lease, invalid under Code Civ. Proc. § 1973, because not subscribed by the tenant, he was estopped in an action for the rent to aver its invalidity, and, being thus estopped, the action could be maintained under the lease for the rent.—Hefernan v. Davis, 140 P. 716.

## IV. TERMS FOR YEARS.

### (C) Extensions, Renewals, and Options to Purchase or Sell.

§ 86 (Kan.) A tenant under a lease for a term of years, with an option to remain for a like period, provided the conditions were satisfactory to both parties, held not entitled to hold under the lease, where the landlord, at the expiration of the term, informed him that the lease would not be renewed, and that he could only remain as tenant from month to month.—Burchfield v. Brinkman, 140 P. 894.

## VII. PREMISES AND ENJOYMENT AND USE THEREOF.

### (B) Possession, Enjoyment, and Use.

§ 129 (Ariz.) When the relation of landlord and tenant exists, the lessee, may maintain ejectment against any person, including the lessor, who wrongfully withholds possession of the demised premises.—Merrill v. Gordon, 140 P. 496.

§ 129 (Cal.) Where a party, acting in bad faith, knowing that he had no title to property, contracted to lease it to another upon conditions which would require such party to expend money in organizing a corporation, the measure of damages were those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances which were known to both parties.—Kline v. Guaranty Oil Co., 140 P. 1.

§ 130 (Or.) Unless otherwise expressly stipulated, a landlord impliedly covenants that the tenant shall not be disturbed in his possession and quiet enjoyment during the term.—Wolf v. Eppenstein, 140 P. 751.

### (E) Injuries from Dangerous or Defective Condition.

§ 166 (Wash.) The provision in the lease of the tenant of the second floor, as well as in that the tenant of the lower floor and basement, of a two-story building, requiring the tenants to make "interior repairs," does not affect the landlord's liability for its negligence, causing the bursting of a water pipe on the second floor resulting in injury to the lower tenant.—Martindale Clothing Co. v. Spokane & Eastern Trust Co., 140 P. 909.

§ 169 (Wash.) Evidence, in an action by the tenant of the lower floor and basement of a two-story building for injury from water through the bursting of a water pipe in a storeroom on the second floor, held to warrant a finding that the negligence of the landlord in failing to inform the tenant of the second floor as to the location of the cut-off for such pipe was the proximate cause of the injury.—Martindale Clothing Co. v. Spokane & Eastern Trust Co., 140 P. 909.

The tenant of the lower floor and basement of a two-story building, injured by the bursting of a water pipe in a storeroom on the second floor, leased to another, was not guilty of contributory negligence, as a matter of law, in not anticipating that proper precaution would not be taken to prevent the freezing, and in not using a shut-off in the basement to all water for the second floor.—Id.

## VIII. RENT AND ADVANCES.

### (A) Rights and Liabilities.

§ 185 (Ariz.) Delivery of possession of the demised premises by the lessor to the lessee is necessary to the lessee's obligation to pay rent, and the rule is the same, whether the lessor refuses or is unable to give possession.—Merrill v. Gordon, 140 P. 496.

§ 190 (Or.) Where a tenant is deprived of the enjoyment of the premises by the immoral act of the landlord, such conduct is an eviction, constituting a valid defense to an action for

rent subsequently accruing.—*Wolf v. Eppenstein*, 140 P. 751.

Where the use of other premises of the landlord has not changed since the commencement of defendant's lease, and the landlord is not shown to have leased the other premises for immoral purposes, or consented to such use, defendant is not relieved from the payment of rent.—*Id.*

#### (B) Actions.

§ 222 (Cal.) A tenant defending an action for rent due under a written lease on the ground that he had rescinded the lease because of the landlord's breach of a covenant omitted from the lease must show facts sufficient to sustain a cause of action to reform the lease so as to include the covenant.—*Bradbury v. Higginson*, 140 P. 254.

#### (C) Lien.

§ 262 (Ok.) Where a petition to enforce a landlord's lien against a tenant's crops under Rev. Laws 1910, §§ 3809, 3810, fails to allege any contract with the tenant, or to show anything due, or that the tenant was obligated to pay the portion of the crop claimed, it does not state facts sufficient to constitute such a lien.—*Lee v. Lowery*, 140 P. 1175.

### LAND OFFICE.

See Public Lands, §§ 104, 106.

### LANDS.

See Public Lands.

### LARCENY.

See Criminal Law, §§ 395, 567; Embezzlement; False Imprisonment, § 15; False Pretenses; Libel and Slander, §§ 19, 71.

### I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3 (Ariz.) One is not guilty of larceny who takes the property under a bona fide claim of ownership.—*Marley v. State*, 140 P. 215.

### II. PROSECUTION AND PUNISHMENT.

#### (A) Indictment and Information.

§ 34 (Ariz.) Under Pen. Code 1901, § 441, defining larceny as a felonious stealing, taking, carrying, or driving away of the personal property of another, the indictment need not expressly allege that the property was taken against the owner's consent.—*Marley v. State*, 140 P. 215.

§ 40 (Utah) In a prosecution for larceny, evidence that the railroad was in possession of the stolen goods as common carrier, and was in the act of transporting them, was sufficient to show title as alleged.—*State v. Reese*, 140 P. 126.

#### (B) Evidence.

§ 47 (Ariz.) In a prosecution for larceny by stealing a steer, in which the state did not prove the recording of the brand found on the animal, defendants could show that they took the steer believing it to bear a certain brand, and that all steers of its age bearing that brand running on the ranch where the particular steer was found were claimed by defendants.—*Marley v. State*, 140 P. 215.

§ 62 (Utah) In a prosecution of a railroad employé for larceny of property from the railroad company, evidence held sufficient to show want of consent of the railroad.—*State v. Reese*, 140 P. 126.

### LAW OF THE CASE.

See Appeal and Error, § 1099.

### LEASE.

See Landlord and Tenant; Mines and Minerals, §§ 73, 78.

### LETTERS.

See Criminal Law, §§ 108, 447.

### LETTERS PATENT.

See Patents.

### LEWDNESS.

See Prostitution.

§ 1 (Ok.) (Cr.App.) To constitute "living together in open and notorious adultery," in violation of Rev. Laws 1910, § 2431, it is not essential that the parties claim to be husband and wife, but is sufficient that they live together as such, and that their cohabitation be open and notorious.—*Kitchens v. State*, 140 P. 619; *Mitchell v. Same*, *Id.* 622.

### LIBEL AND SLANDER.

See Evidence, § 151.

### I. WORDS AND ACTS ACTIONABLE AND LIABILITY THEREFOR.

§ 15 (Cal.) Transportation of arms and ammunition to a foreign country for the use of revolutionists prior to the resolution of Congress, authorizing the President to prohibit the export of arms and ammunition, held not a crime, under Rev. St. U. S. § 5286 (U. S. Comp. St. 1901, p. 8601), or otherwise, and hence an article charging such act was not libelous.—*Mellen v. Times-Mirror Co.*, 140 P. 277.

§ 18 (Cal.) Article under the headline "flibustering," stating that a schooner, which cleared ostensibly for Honduras with a cargo supposed to consist of supplies for plaintiff's company, was carrying arms and ammunition to the Mexican insurgents, held not libelous under Civ. Code, § 45, where no injury to business was shown, unless it charged a crime.—*Mellen v. Times-Mirror Co.*, 140 P. 277.

§ 19 (Cal.) Article relative to claimed secret transportation of arms and ammunition, presumably for the use of the Mexican insurgents, held not reasonably capable of being understood as imputing that plaintiff was guilty of any crime by reason of his alleged connection with the matter.—*Mellen v. Times-Mirror Co.*, 140 P. 277.

§ 19 (Cal.) The language used by defendant to plaintiff, when intercepting and barring his entrance to a hall, "thieves are not allowed in here," carries a charge of plaintiff being a thief.—*Pouchan v. Godeau*, 140 P. 952.

### II. PRIVILEGED COMMUNICATIONS AND MALICE THEREIN.

§ 42 (Ok.) The published report of a judicial proceeding authorized by Comp. Laws 1909, § 2340, subd. 3 (Rev. Laws 1910, § 2381), may be abridged or condensed, provided it is not unfair to the complaining party.—*Cobb v. Oklahoma Pub. Co.*, 140 P. 1079.

### IV. ACTIONS.

#### (A) Right of Action and Defenses.

§ 71 (Cal.) Defendant using to plaintiff, in the presence of others, language carrying the charge of his being a thief, the fact that plaintiff, by a question, drew out a reiteration in more direct language of the charge, in the presence of the same people, does not bring the case within the rule of "volenti non fit injuria."—*Pouchan v. Godeau*, 140 P. 952.

**(B) Parties, Preliminary Proceedings, and Pleading.**

§ 86 (Cal.) Where alleged libelous article could not reasonably be understood as charging a crime, *held*, that an allegation that it was so understood did not render the complaint sufficient.—*Mellen v. Times-Mirror Co.*, 140 P. 277.

§ 100 (Cal.) All circumstances in mitigation, other than such as tend to establish the truth of the charge, may, in slander, be proved without being pleaded.—*Pouchan v. Godeau*, 140 P. 952.

**(C) Evidence.**

§ 105 (Okl.) In an action for publishing a report of criminal proceedings, the indictment and other court records tending to show the truth of the charge against plaintiff were admissible in evidence on the issue whether he had been falsely accused.—*Cobb v. Oklahoma Pub. Co.*, 140 P. 1079.

§ 109 (Okl.) Where an alleged libel contained only excerpts from a brief, the entire brief was admissible on the issue whether the publication was a fair and true report of the proceedings.—*Cobb v. Oklahoma Pub. Co.*, 140 P. 1079.

**(E) Trial, Judgment, and Review.**

§ 123 (Cal.) Whether an article is libelous is to be determined by the court in the light of such extrinsic facts as are alleged, dependent on whether it is fairly susceptible of the defamatory meaning attributed to it.—*Mellen v. Times-Mirror Co.*, 140 P. 277.

Where it is alleged that language was used and understood as conveying a libelous meaning of which it is capable, a cause of action is stated, and it is for the jury to determine whether it was used and understood in that sense.—*Id.*

§ 123 (Okl.) Where there is no dispute as to what the publication was, when or about what it was made, and the language is unambiguous, the question whether the publication was privileged under Comp. Laws 1909, § 2340, subd. 3 (Rev. Laws 1910, § 2381), was for the court.—*Cobb v. Oklahoma Pub. Co.*, 140 P. 1079.

Under conflicting evidence in an action for libel for publishing a report of proceedings, authorized by Comp. Laws 1909, § 2340 (Rev. Laws 1910, § 2381), *held* not error to submit to the jury whether the report was fair or made with malicious intent, and whether plaintiff was falsely charged with crime.—*Id.*

§ 124 (Cal.) Future damages recoverable being, under Civ. Code, § 3283, those "certain to result," an instruction in slander, permitting allowance of damages for future injury which the uttering of the words was calculated to inflict, is erroneous; "calculated" meaning either likely or intended.—*Pouchan v. Godeau*, 140 P. 952.

**LICENSES.**

See Constitutional Law, §§ 280, 287; Factors, § 2½; Insurance, § 12; Intoxicating Liquors, § 108; Waters and Water Courses, § 157.

**I. FOR OCCUPATIONS AND PRIVILEGES.**

§ 7 (Wash.) Const. art. 7, § 5, requiring every law imposing a tax to state distinctly its object, to which only it shall be applied, *held* not applicable to Laws 1909, c. 214 (Rem. & Bal. Code, § 7067), imposing a license fee upon peddlers.—*State v. Sheppard*, 140 P. 332.

§ 7 (Wash.) Laws 1913, c. 134, forbidding the use, in connection with the sale of goods, of trading stamps, unless a license fee be paid, *held* constitutional.—*State v. Pitney*, 140 P. 918.

§ 33 (Wash.) Where revenue, as peddlers' license fees, is directed by law to be paid into the state or county treasury, without specific direction as to its application, it becomes the property of the county or state, applicable to the

payment of the general obligations of such county, etc.—*State v. Sheppard*, 140 P. 332.

§ 39 (Kan.) The disability depriving a person who has failed to pay a city occupation tax of the right to sue for services and material furnished in that connection may be removed by a subsequent ordinance, or by a pardon.—*Draper v. Miller*, 140 P. 890.

**LIENS.**

See Attorney and Client, § 190; Bankruptcy, § 398; Brokers, §§ 49-88; Chattel Mortgages, § 138; Garnishment, § 114; Judgment, § 785; Landlord and Tenant, § 262; Mechanics' Liens; Mortgages, § 151; Mines and Minerals, §§ 112, 114; Pledges; Principal and Surety, § 66; Waters and Water Courses, § 203.

**LIFE ESTATES.**

See Deeds, § 143.

**LIFE INSURANCE.**

See Insurance, §§ 646, 665, 668.

**LIMITATION OF ACTIONS.**

See Adverse Possession; Reformation of Instruments, § 32.

**I. STATUTES OF LIMITATION.**

(A) Nature, Validity, and Construction in General.

§ 5 (Ariz.) While the statute of limitations is as meritorious a defense as any other, the court will not go out of its way to give the benefit of the statute to a debtor seeking to take advantage of his creditor's leniency, in order to defeat the collection of a just debt.—*Wooster v. Scorse*, 140 P. 819.

(B) Limitations Applicable to Particular Actions.

§ 28 (Kan.) An action to recover rents for land wrongfully withheld is founded on an implied contract to which the three-year statute of limitations applies.—*Harlan v. Loomis*, 140 P. 845.

§ 34 (Cal.) Where the incumbent of the consolidated offices of county clerk, auditor, and recorder could under Pol. Code, § 4091 et seq., only issue as auditor warrants for legal demands against the county, a cause of action for the issuance of warrants for illegal demands was within Code Civ. Proc. § 338, subd. 1, limiting actions on liability created by statute.—*Calaveras County v. Poe*, 140 P. 23.

§ 40 (Cal.) The plea of limitations may be interposed in an action at law on a contract to a defense based on an equitable cause of action for the reformation of the contract.—*Bradbury v. Higginson*, 140 P. 254.

§ 41 (Utah) Where money paid in excess of what should have been paid on a debt could not be recovered because of the bar of limitations, a counterclaim for the overpayment did not sustain a judgment therefor.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

**II. COMPUTATION OF PERIOD OF LIMITATION.**

(A) Accrual of Right of Action or Defense.

§ 44 (Cal.) The "right or title," under Code Civ. Proc. § 315, refers to the "right or title" of the state to sue and not to the "right or title" on which a right to sue is based.—*People v. Banning Co.*, 140 P. 587.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 100 (Kan.) The statute of limitations does not commence to run against an action for false representations of authority to contract

until discovery of the fraud.—*Pierson v. Hol-  
dridge*, 140 P. 1032.

**(H) Commencement of Action or Other  
Proceeding.**

§ 125 (Kan.) An amendment of a petition sub-  
stituting one party for another as plaintiff re-  
lates to the institution of the action and sus-  
pends limitations as to the substituted plain-  
tiff from the time the action was begun and  
not from the date of the amendment.—*Harlan v.  
Loomis*, 140 P. 845.

§ 127 (Cal.App.) Where the original com-  
plaint, in an action for wrongful death, was filed  
before the expiration of the period of limitation,  
the sustaining of a demurrer thereto and the  
filing of an amended complaint, showing the  
existence of an heir, after the expiration of the  
period of limitation, did not defeat the action;  
no new cause of action being set up.—*Barr v.  
Southern California Edison Co.*, 140 P. 47.

Where there is no attempt to state a new  
cause of action, but merely the addition of mat-  
ters essential to make the original cause of ac-  
tion complete, the amendment relates back to the  
time of the commencement of the action.—*Id.*

§ 130 (Kan.) Where a person sues to enforce  
a mechanic's lien while under a disability de-  
priving him of his right to sue because of fail-  
ure to pay a city occupation tax, and then dis-  
misses the suit without prejudice, after which  
he obtains a pardon, he may, under Civ. Code  
Proc. § 22 (Gen. St. 1909, § 5615), within a  
year after such dismissal, institute a new suit  
on the same claim.—*Draper v. Miller*, 140 P.  
890.

**III. ACKNOWLEDGMENT, NEW  
PROMISE, AND PART  
PAYMENT.**

§ 148 (Ariz.) The written acknowledgment of  
a debt need not be a formal acknowledgment or  
promise, in order to remove the bar of the sta-  
tute of limitations; it being sufficient if it shows  
that promisor regards the indebtedness as sub-  
sisting.—*Wooster v. Scorse*, 140 P. 819.

**IV. OPERATION AND EFFECT OF  
BAR BY LIMITATION.**

§ 172 (Kan.) The holder of a tax title against  
mortgaged property cannot invoke limitations  
as a defense to a suit to foreclose.—*Gibson v.  
Rea*, 140 P. 893.

**V. PLEADING, EVIDENCE, TRIAL,  
AND REVIEW.**

§ 187 (Cal.) Under Code Civ. Proc. § 338, subd.  
4, a tenant seeking to defeat an action on the  
lease on the ground of the landlord's failure to  
perform a covenant erroneously omitted from  
the lease must allege facts excusing the failure  
to make a discovery of the mistake within three  
years.—*Bradbury v. Higginson*, 140 P. 254.

§ 195 (Ariz.) While the question whether cer-  
tain writings were sufficient, as an acknowledg-  
ment of the debt sued for, to remove the bar  
of the statute of limitations is a question of  
law for the court, evidence showing what the  
writings contained must be given to enable it to  
determine that question.—*Wooster v. Scorse*, 140  
P. 819.

**LIQUIDATED DAMAGES**

See Damages, §§ 85, 163.

**LIQUOR SELLING.**

See Intoxicating Liquors.

**LIS PENDENS.**

§ 1 (Okla.) The doctrine of lis pendens under  
the common law was based on the theory of pub-  
lic policy, but under the statute dealing there-  
with (Rev. Laws 1910, § 4732) it is treated as

an element of the law of notice.—*McWhorter v.  
Brady*, 140 P. 782.

§ 5 (Okla.) It is essential to the existence of a  
valid lis pendens that the property be of a char-  
acter subject to the rule that the court have ju-  
risdiction.—*McWhorter v. Brady*, 140 P. 782.

§ 9 (Okla.) It is essential to the existence of a  
valid lis pendens that the property be suffici-  
ently described in the pleadings.—*McWhorter v.  
Brady*, 140 P. 782.

Description of land in a petition for divorce  
and possession of the homestead held sufficient,  
though vague, to meet the requirements of a  
valid lis pendens, where it apprised the purchas-  
er of the status of the land and enabled him to  
identify same and ascertain the object of the  
suit.—*Id.*

§ 26 (Colo.App.) Where judgment creditor  
filed lis pendens and brought suit to set aside  
fraudulent conveyances, purchaser from the  
fraudulent grantee thereafter, but before the  
bringing of suit, with constructive notice of the  
fraud, held not entitled to reimbursement for im-  
provements.—*Tibbetts v. Terrill*, 140 P. 936.

Purchaser from fraudulent grantee between  
filing of his lis pendens and commencement of  
suit to set conveyances aside, who had construc-  
tive knowledge of the fraud, held not entitled to  
reimbursement for the amount paid on a mort-  
gage given by the fraudulent grantee after the  
judgment was recorded.—*Id.*

**LITTORAL RIGHTS.**

See Navigable Waters, §§ 39-44.

**LIVERY OF SEISIN.**

See Deeds, §§ 3, 142.

**LIVE STOCK.**

See Carriers, § 218.

**LOAN ASSOCIATIONS.**

See Building and Loan Associations.

**LOCAL OPTION.**

See Intoxicating Liquors, §§ 10, 146.

**LOCATION.**

See Mines and Minerals, §§ 9, 19, 24.

**LOGS AND LOGGING.**

See Navigable Waters, § 39; Railroads, § 2;  
Venue, § 36.

§ 3 (Wash.) A deed conveying timber and giv-  
ing grantee the right to enter upon the land and  
remove the timber "at the pleasure of said gran-  
tee, his heirs, personal representatives, and as-  
signs," to have and to hold said granted "prop-  
erty and privileges" to the grantee and his as-  
signs "forever," held to grant a perpetual right  
to enter and remove the timber, so that it did  
not become personalty.—*France v. Deep River  
Logging Co.*, 140 P. 361.

§ 13 (Wash.) In view of Rem. & Bal. Code, §  
7110, providing for the condemnation by boom  
companies of shore rights of lower riparian  
owners, the filing of a plat by a boom company  
does not give it the right, as against lower own-  
er, to impound the waters of a stream.—*St.  
Martin v. Skamania Boom Co.*, 140 P. 355.

**MACHINERY.**

See Electricity; Quieting Title, §§ 2, 35, 44.

**MAINTENANCE.**

See Champerty and Maintenance.

**MALICIOUS PROSECUTION.**

See False Imprisonment.

**II. WANT OF PROBABLE CAUSE.**

§ 22 (Okla.) Where the prosecutor, before instituting the criminal proceedings, obtained the county attorney's advice after stating to him all the facts, and acted on such advice given honestly, and was not actuated by malice, it was error to refuse to direct a verdict for defendant.—*Central Light & Fuel Co. v. Tyron*, 140 P. 1151.

Prior to the taking effect of Act March 19, 1910 (Laws 1910, c. 69) § 24, providing that county attorneys shall not engage in the private practice of law, that the county attorney was a member of the prosecutor's regularly employed firm of attorneys did not preclude the prosecutor from setting up advice of the county attorney as a defense in an action against him for malicious prosecution.—*Id.*

§ 24 (Okla.) Proof of plaintiff's acquittal held not evidence of want of probable cause.—*Central Light & Fuel Co. v. Tyron*, 140 P. 1151.

**MANDAMUS.**

See Pleading, § 403.

**I. NATURE AND GROUNDS IN GENERAL.**

§ 15 (Utah) Under Comp. Laws 1907, §§ 2556, 2560, 2561, and 2563, as amended by Laws 1909, c. 63, where the owner of certain mining property erroneously returned the same for taxation as located in U. county when it was largely located in plaintiff county, plaintiff, after the property had been apportioned to U. county and the tax levies made, could not maintain mandamus against the State Board of Equalization to compel a hearing and reapportionment.—*Juab County v. Bailey*, 140 P. 764.

**II. SUBJECTS AND PURPOSES OF RELIEF.****(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.**

§ 31 (Utah) While the decision of the district court upon the merits, on appeal from a justice's judgment for \$33.50, cannot be reviewed by the Supreme Court, however erroneous, if the district court, without legal reason, refuses to dispose of the appeal to it upon the merits, the Supreme Court will require it to do so and enter judgment.—*Salt Lake Coffee & Spice Co. v. District Court of Salt Lake County*, 140 P. 666.

**(B) Acts and Proceedings of Public Officers and Boards and Municipalities.**

§ 73 (Kan.) Mandamus will lie on the relation of the Attorney General to compel a State Treasurer and State Auditor to perform duties imposed on them by statute as to a fund derived from royalties, pursuant to Seas. Laws 1913, c. 259, on sand removed from navigable streams.—*State v. Akers*, 140 P. 637.

§ 82 (Okla.) Act July 12, 1913 (Laws 1913, c. 246) imposing a tax on mortgages, is not a revenue measure within Const. art. 5, § 33, and hence mandamus was maintainable against the register of deeds for refusing to record a mortgage not subject to the tax unless the tax was paid.—*Cornelius v. State*, 140 P. 1187.

§ 85 (Kan.) Under Laws 1913, c. 295, § 3, providing that one seeking to acquire title to land as an island, belonging to the state should deliver certain papers to the county clerk for filing, after which the rights of claimants should be determined by the court, the clerk cannot refuse to file the papers on the ground that the claim of the person presenting them is without merit.—*Cain v. Kinkad*, 140 P. 1039.

§ 113 (Wash.) Under Laws 1909, c. 135, §§ 63, 64, and Laws 1911, c. 43, §§ 3, 4, creating

horticultural districts, and providing for the expense of inspection by the levy of a tax in the several counties, held, that the state's remedy upon failure of county commissioners to levy a tax was by mandamus to compel such levy.—*State v. Asotin County*, 140 P. 914.

**III. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 152 (Kan.) In mandamus, it is proper to make persons defendants from whom performance of no duty is sought, but who might be affected by the judgment.—*State v. Akers*, 140 P. 637.

§ 154 (Mont.) In the absence of special demurrer, or motion to make more specific, the existence of the office to which plaintiff seeks restoration held sufficiently stated by an allegation of his affidavit for writ of mandamus.—*State v. Duncan*, 140 P. 95.

§ 172 (Idaho) On mandamus to compel a district judge to enter judgment pursuant to mandate of the appellate court, the only question cognizable is the meaning of the mandate and whether the judgment or proposed judgment complies with it.—*Brinton v. Steele*, 140 P. 113.

§ 187 (Colo.) If relator is not entitled to have city warrants paid out of revenue for the fiscal year beginning April, 1913, as he seeks to have done, the question of the validity of the warrants need not be determined on appeal.—*Ostling v. People*, 140 P. 173.

**MANSLAUGHTER.**

See Homicide, § 34.

**MARRIAGE.**

See Adultery, § 14; Divorce; Statutes, § 219.

§ 50 (Wash.) In a proceeding to establish that petitioner was the wife of decedent evidence held insufficient to show that the parties had ever been married.—*In re Enos' Estate*, 140 P. 675.

§ 62 (Or.) The allowance to a wife of money for her living expenses and a surgical operation pending a suit to have the marriage declared void is not authorized by L. O. L. §§ 511-513, 7040, 7041.—*Taylor v. Taylor*, 140 P. 999.

The court cannot order a payment for the support of the wife pending suit to have the marriage declared void, in the absence of statutory provision therefor.—*Id.*

Where the wife, in a suit by the husband to declare the marriage void, has incurred attorneys' fees and other expenses, the court may compel the husband to pay them, and refuse a nonsuit until he has paid them, though the order be made after the services are rendered.—*Id.*

An allowance to the wife of \$2,500 attorneys' fees after a hard contest of an application to set aside a decree declaring a marriage void, the husband being worth a million dollars, is not an abuse of the court's discretion.—*Id.*

**MARSHALS.**

See United States Marshals.

**MASTER AND SERVANT.**

See Adultery, § 14; Appeal and Error, §§ 171, 1050, 1066; Courts, § 8; Death, §§ 7, 11, 18, 25, 33, 95, 96; Larceny, § 62; Mines and Minerals, § 114; Release, § 57; Trial, §§ 199, 242.

**I. THE RELATION.****(A) Creation and Existence.**

§ 5 (Mont.) A miner employed by a coal company, and paid according to a wage scale agreed on by mine operators and representatives of the miners of the district, is an employee of the company and not an independent contractor.—*McInness v. Republic Coal Co.*, 140 P. 235.



§ 6 (Okl.) Every person engaged in the work of another is presumed to be in the other's employment.—Oklahoma City Const. Co. v. Peppard, 140 P. 1084.

#### (C) Termination and Discharge.

§ 36 (Cal.App.) One employed as a traveling salesman *held* entitled to maintain an action for his salary upon his written contract of employment, under the rule permitting an action for salary under such a contract, where there is a reasonable doubt as to whether plaintiff should pursue that remedy or sue for damages for breach of his contract by his wrongful discharge.—Parr v. Baer, 140 P. 712.

§ 39 (Colo.App.) The complaint, in an action by a servant for breach of a contract of employment, need not allege that reasonable effort was made to secure other employment and failed, or that other employment was secured and a certain sum earned.—School Dist. No. 3 in Clear Creek County v. Nash, 140 P. 473.

§ 41 (Colo.App.) A servant suing for breach of a contract of employment may charge the defendant with expenses incurred in obtaining new employment for the unexpired term, and for additional necessary expenditures caused by the change from the old to the new place of employment.—School Dist. No. 3 in Clear Creek County v. Nash, 140 P. 473.

### III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

#### (A) Nature and Extent in General.

§ 92 (Or.) A steel construction company was not negligent in failing to have a physician at a point where it had 12 employes, having arranged for the services of a physician at a town 8 miles distant.—Merrill v. Missouri Bridge & Iron Co., 140 P. 459.

#### (B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Nev.) The master must furnish a reasonably safe place of work.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

§§ 101, 102 (Okl.) Where a lumber company in connection with its business operates a railroad and has its own men in charge, it is bound to exercise ordinary care to provide for the safety of its servants in respect thereto.—Frisco Lumber Co. v. Spivey, 140 P. 157.

§§ 101, 102 (Or.) Electricity is a dangerous element, and in its use the highest degree of care is required to protect employes and the public.—McClagherty v. Rogue River Electric Co., 140 P. 64.

§§ 101, 102 (Wash.) The rule that an employer must use reasonable care to maintain a reasonably safe place for his workmen means that the employer must not expose employes to dangers which may be guarded against by reasonable care and diligence.—Acres v. Frederick & Nelson, 140 P. 370.

§§ 101, 102 (Wash.) An employer must exercise reasonable care to furnish a reasonably safe place of work.—Mattson v. Eureka Cedar Lumber & Shingle Co., 140 P. 377.

§ 103 (Wash.) An employer may not escape liability for injury to an employe who fell into an elevator shaft while being repaired, on the theory that the person making the repairs was an independent contractor.—Acres v. Frederick & Nelson, 140 P. 370.

§ 103 (Wash.) An employer's duty to furnish a safe place of work is nondelegable.—Mattson v. Eureka Cedar Lumber & Shingle Co., 140 P. 377.

§ 106 (Okl.) The responsibility to its servants, of a lumber company operating a railroad, is the same as in respect to cars of other companies which the servants are compelled to handle as

in respect to its own.—Frisco Lumber Co. v. Spivey, 140 P. 157.

§ 119 (Or.) Under Employers' Liability Law, the furnishing of switches by which electrical current may be turned off does not excuse failure to comply with the specific requirements of the statute.—McClagherty v. Rogue River Electric Co., 140 P. 64.

§ 124 (Mont.) The working place of a coal miner, engaged in drilling and blasting and loading coal, within Coal Mining Code, Laws 1911, c. 120, § 83, is, while loading, at the point of loading, and while drilling and blasting, at the face of the entry and a tunnel turned over to the mining company and used as a passageway is not a working place, though used by the miner in his work, but the duty of inspecting it devolves on the company's foreman by section 71.—McInness v. Republic Coal Co., 140 P. 235.

§ 124 (Wash.) An employer must maintain a reasonable inspection of the place of work.—Mattson v. Eureka Cedar Lumber & Shingle Co., 140 P. 377.

§ 127 (Mont.) Where a mining company and its superintendent and assistant foreman and face boss knew of loose rock in a tunnel used by miners in carrying on their work long enough to have made proper examination and repairs, but failed to do so, and a miner was injured by falling rock, the company and superintendent and assistant foreman and face boss were liable under Coal Mining Code (Laws 1911, c. 120, § 73).—McInness v. Republic Coal Co., 140 P. 235.

#### (D) Warning and Instructing Servant.

§ 153 (Wyo.) If a servant employed to work in a dangerous place may, because of inexperience, fail to appreciate the danger, it is the master's duty to instruct him.—Carney Coal Co. v. Benedict, 140 P. 1013.

#### (E) Fellow Servants.

§ 182 (Cal.) Under Civ. Code, § 1970, as amended in 1907, an employer *held* liable for injuries caused by the negligence of a coemployee having control of and directing the work of the plaintiff.—Foutz v. City of Los Angeles, 140 P. 20.

§ 185 (Wash.) The duty of an employer to use reasonable care to maintain a reasonably safe place for his workmen is nondelegable, and the employer is liable for injuries to an employe caused by the negligence of a fellow employe in the performance of such duty.—Acres v. Frederick & Nelson, 140 P. 370.

§ 201 (Okl.) Where a lumber company's employe, engaged in checking lumber in a box car without knowing that other cars are being switched, is injured from the car in which he is at work being struck by other cars, the master is liable, though the accident was caused by the concurring negligence of a fellow servant.—Frisco Lumber Co. v. Spivey, 140 P. 157.

Where a lumber company's foreman, without warning to an employe known to him to be checking lumber in a box car, directs an engineer to make a drop switch, which kicks loaded cars against the box car and injures the checker, the lumber company is liable though the engineer was a fellow servant of the checker.—Id.

#### (F) Risks Assumed by Servant.

§ 204 (Kan.) Assumed risk is not available as a defense in a miner's action for injuries due to the defendant mineowner's failure to exercise the care required by statute to protect miners from falling rock.—Macketta v. Missouri, K. & T. Ry. Co., 140 P. 877.

§ 204 (Or.) The Employers' Liability Act eliminates the defense of assumption of risk in actions under it.—McClagherty v. Rogue River Electric Co., 140 P. 64.

§ 204 (Or.) Employers' Liability Law, §§ 1, 3, eliminates the defense of assumed risk in actions within it.—*McDaniel v. Lebanon Lumber Co.*, 140 P. 990.

§ 206 (Wash.) An employé assumes no risks except those reasonably necessary and incident to his employment.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 217 (Kan.) That an employé had worked for years under same conditions does not prevent his recovering for negligence in the master in failing to provide sufficient light, though there was no complaint on his part, nor promise to repair.—*Tecza v. Sulzberger & Sons Co.*, 140 P. 105.

§ 217 (Mont.) Where a coal company failed to exercise reasonable care to make a tunnel reasonably safe for a coal miner required to use it in carrying on his work, and the only method of detecting danger was by sounding, the mere fact that the miner made a visual examination of the tunnel and found it safe did not show that he assumed the risk of danger.—*McInness v. Republic Coal Co.*, 140 P. 235.

§ 217 (Nev.) A miner would not assume the risk of injury from drilling into an unexploded hole left in that condition by a previous shift of workmen, of which he had no notice.—*Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519.

§ 217 (Okla.) Where an employé engaged in checking lumber in a box car does not know that switching is being done on the same track, he does not assume the risk of injury from cars being bumped against the car in which he is working, though the master has a rule against employés working in cars when switching is being done on the same track.—*Frisco Lumber Co. v. Spivey*, 140 P. 157.

§ 219 (Mont.) The risk arising from the failure of the employer to exercise reasonable care to make a place safe for an employé, and so maintain it, is not assumed by the employé unless the danger is obvious, and with appreciation of the risk he continues at work without assurance from the employer that the defect will be remedied.—*McInness v. Republic Coal Co.*, 140 P. 235.

§ 219 (Wash.) An employé who is put to work in a particular place by the master does not assume the risk of any dangers not so open and apparent as to be discoverable by ordinary observation.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

#### (G) Contributory Negligence of Servant.

§ 228 (Kan.) Contributory negligence is not available as a defense in a miner's action for injuries due to the defendant mineowner's failure to exercise the care required by statute to protect miners from falling rock.—*Macketta v. Missouri, K. & T. Ry. Co.*, 140 P. 877.

§ 228 (Kan.) Contributory negligence is not available as a defense in a miner's action for injuries proximately resulting from the defendant mineowner's failure to furnish sufficient props of suitable length, as required by Gen. St. 1909, § 4987.—*Ricci v. Cherokee & Pittsburg Coal & Mining Co.*, 140 P. 884.

§ 238 (Kan.) Where plaintiff, repairing a roof, walking backwards, struck an 18-inch fire wall and fell over, the danger being open to common observation and as fully known to him as to his employer, the latter was not liable for the resulting injuries.—*Smith v. Beasley*, 140 P. 892.

#### (H) Actions.

§ 250½ [New, vol. 15 Key-No. Series] (Wash.) A common-law action for personal injuries to an employé which occurred in another state and could have been enforced therein may be maintained in this state notwithstanding the Industrial Insurance Law (Laws 1911, c. 74), in view of section 8, since to construe the act as declaring a public policy against such ac-

tions would violate federal Const. art. 4, § 2.—*Reynolds v. Day*, 140 P. 681.

§ 250¾ [New, vol. 16 Key-No. Series] (Wash.) An employer who relies on the Industrial Insurance Law must plead and prove a compliance with the law.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 256 (Wash.) A complaint for injuries to a railroad employé held to sufficiently allege that the accident happened on a branch line engaged in interstate commerce, so as to bring the case within the federal Employers' Liability Act.—*Smith v. Northern Pac. Ry. Co.*, 140 P. 685.

§ 259 (Okla.) Petition in employé's action for injuries held to state a cause of action based on concurring negligence of a fellow servant and of the master.—*Frisco Lumber Co. v. Spivey*, 140 P. 157.

§ 265 (Wash.) The burden is on an employé, suing for a personal injury negligently inflicted, to make it appear more probable that the injury came in whole or in part from the employer's negligence than from any other cause.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 276 (Kan.) Evidence held to justify a finding that negligence of an employer in not providing sufficient light was the proximate cause of an injury to an employé.—*Tecza v. Sulzberger & Sons Co.*, 140 P. 105.

§ 276 (Wash.) In an action for injuries to an employé falling into an elevator shaft, evidence held to show that the proximate cause of the injury was the negligent failure of the employer to maintain the gates in condition to work automatically.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 276 (Wash.) Evidence, in an employé's action for personal injuries by lumber falling upon him, held to sustain a finding that the lumber fell because insecurely piled and braced, and because of the vibration of the shed due to the machinery.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

§ 278 (Idaho) Evidence in a log decker's action for injuries from being knocked off the deck by a "gunning" log, held to sustain a verdict for plaintiff based on a finding that defendant was negligent.—*Swanstrom v. Frost*, 140 P. 1105.

§ 278 (Kan.) Evidence held to sustain a finding that the plaintiff miner's injuries were due to the defendant mineowner's negligent failure to exercise the care required by statute to protect miners from falling rock.—*Macketta v. Missouri, K. & T. Ry. Co.*, 140 P. 877.

§ 278 (Kan.) Evidence, in a miner's action for injuries, held to sustain a finding that the plaintiff's injury was due to the defendant mineowner's negligent failure to furnish props of a suitable length, as required by Gen. St. 1909, § 4987.—*Ricci v. Cherokee & Pittsburg Coal & Mining Co.*, 140 P. 884.

§ 278 (Or.) In an action against a lime company and an independent contractor for death of an employé of the contractor, evidence held not to show negligence of either defendant causing the crushing of decedent's fingers by a steel beam.—*Merrill v. Missouri Bridge & Iron Co.*, 140 P. 439.

In an action against a lime company and an independent contractor for death of the contractor's employé, evidence held not to show that the giving of poison to decedent was the result of the negligence of either defendant.—*Id.*

§ 285 (Wyo.) Whether the negligence of the master in failing to warn an inexperienced coal miner was the proximate cause of the injury held, under the evidence, for the jury.—*Carney Coal Co. v. Benedict*, 140 P. 1013.

§ 286 (Or.) It was a question for the jury whether it was negligence of defendant to permit an electric switch to be out of repair, or to permit old poles to be used without testing or

repair.—*Powell v. Sutherland Land & Water Co.*, 140 P. 998.

§ 286 (Wash.) In an action for injuries to an employé falling into an elevator shaft, evidence of the employer's negligent failure to properly light the floor *held* for the jury.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 286 (Wash.) In an action for injuries to an employé by lumber falling upon him claimed to have been caused by the lumber having been insecurely piled, and by the vibration of the shed, evidence *held* to make it a jury question whether plaintiff was furnished with a reasonably safe place of work.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

§ 286 (Wash.) In an action for injuries to an employé, evidence *held* to justify submission to the jury of the issue of the employer's negligence.—*Smith v. Northern Pac. Ry. Co.*, 140 P. 685.

§ 286 (Wyo.) The question of the master's negligence is for the jury, unless the testimony is without conflict, and is such that reasonable men could not differ thereon.—*Carney Coal Co. v. Benedict*, 140 P. 1013.

The question whether the master was negligent in failing to instruct an inexperienced coal miner *held*, under the evidence, for the jury.—*Id.*

§ 288 (Wash.) An employé does not assume, as a matter of law, the risk of going through a passageway provided by the employer.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 288 (Wyo.) Whether a servant assumed the risk, is generally a question of fact for the jury, and the court cannot declare that, as a matter of law, it was an obvious risk, unless the evidence shows without conflict that an ordinarily prudent man would have noticed it.—*Carney Coal Co. v. Benedict*, 140 P. 1013.

In a personal injury action by an inexperienced coal miner, *held*, that he could not, as a matter of law be declared to have assumed the risk of the fall of a loosened piece of coal, which could not be dislodged when pried upon.—*Id.*

§ 289 (Or.) Evidence *held* to present a question for the jury whether plaintiff knew or ought to have known of the defective condition of the pole which fell, causing his injuries.—*Powell v. Sutherland Land & Water Co.*, 140 P. 998.

A motion for instructed verdict, based on the defense that plaintiff was the foreman, upon which there was a dispute in the evidence, was properly denied.—*Id.*

§ 289 (Wash.) An employé *held* not, as a matter of law, guilty of contributory negligence so as to preclude a recovery for injuries by falling into an unguarded elevator shaft.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 289 (Wash.) In an employé's action for injuries by piled lumber falling upon him, evidence *held* to make it a jury question whether plaintiff exercised due care in working without inspecting the lumber to determine the safety of the place.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

§ 289 (Wyo.) The question of the servant's contributory negligence is for the jury, unless the testimony is without conflict, and is such that reasonable men could not differ thereon.—*Carney Coal Co. v. Benedict*, 140 P. 1013.

§ 291 (Or.) In an action for death of a servant in a sawmill, an instruction as the effect of a factory certificate as evidence, and that it is exclusively for the jury to determine whether plaintiff has made out a case, is not error, though *L. O. L.* § 5046, makes the certificate prima facie evidence of compliance with statute.—*McDaniel v. Lebanon Lumber Co.*, 140 P. 990.

§ 297 (Cal.) In an action for injuries to an employé, a special verdict *held* not inconsistent with the general verdict, within Code Civ. Proc.

§ 625, and judgment was properly rendered on the general verdict.—*Fount v. City of Los Angeles*, 140 P. 20.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (A) Acts or Omissions of Servant.

§ 302 (Cal.) Defendant electric company *held* liable for the negligence of the driver of its truck, while he was bringing the automobile of another of defendant's employes to defendant's repair shop, pursuant to orders of defendant's general storekeeper, to whose orders the driver was subject, as against an objection that the driver was not then engaged in defendant's business.—*Chamberlain v. Southern California Edison Co.*, 140 P. 25.

§ 304 (Okla.) A master is liable for the negligence of his agent resulting in the death of an employé, though he did not know of or authorize the particular acts complained of.—*Oklahoma City Const. Co. v. Peppard*, 140 P. 1084.

##### (B) Work of Independent Contractor.

§ 318 (Okla.) Where a contractor undertakes in general terms to do work, and the employer reserves the power to direct what shall be done, and how, the latter is liable for negligence of the former resulting in the death of one engaged in the work.—*Oklahoma City Const. Co. v. Peppard*, 140 P. 1084.

§ 318 (Wash.) An independent contractor is one who exercises an independent employment and is responsible to his employer only for the results of his work, and not as to the means whereby it is accomplished, and the operation of the rule is not qualified by a reservation which gives the employer the right to supervise the work to ascertain whether it is within the contract.—*Watson v. Hecla Mining Co.*, 140 P. 317.

§ 318 (Wash.) A contractor who was engaged in the construction of a subway for a railroad company, under a contract which required the work to be done under the direction of the railroad engineer, and subject to his control, was not an independent contractor, and the railroad company was liable for his acts.—*B. Schade Brewing Co. v. Chicago, M. & P. S. Ry. Co.*, 140 P. 897.

##### (C) Actions.

§ 332 (Or.) In an action against a railroad for injuries by a watchman in making an arrest, allegations in the answer justifying the acts of the watchman were sufficient to go to the jury on the question whether the company ratified the acts so as to authorize punitive damages.—*Socibor v. Oregon-Washington R. & Navigation Co.*, 140 P. 629.

§ 332 (Wash.) Where a contract for the doing of certain work is certain and definite, the question whether the person operating thereunder is an independent contractor is for the court, but if the terms are doubtful, or are rendered so by the introduction of parol evidence, the question is generally for the jury.—*Watson v. Hecla Mining Co.*, 140 P. 317.

Whether a person engaged in the construction of a mine shaft was an independent contractor or a servant, and whether plaintiff was guilty of contributory negligence, *held* for the jury.—*Id.*

#### MEASURE OF DAMAGES.

See *Damages*, §§ 96, 113.

#### MECHANICS' LIENS.

See *Appeal and Error*, §§ 164, 1122; *Interest*, § 19; *Limitation of Actions*, § 180; *Mines and Minerals*, §§ 112, 114; *Mortgages*, § 151; *Municipal Corporations*, § 373; *Principal and Surety*, § 66.

## I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 13 (Okl.) A laborer's or materialman's lien authorized by St. 1893, § 4527 (Rev. Laws 1910, § 3862), will not attach to real property of a municipality used for public purposes.—Gloyd v. Morris, 140 P. 1149.

## II. RIGHT TO LIEN.

### (A) Nature of Improvement.

§ 23 (Cal.App.) Under Code Civ. Proc. § 1183, it is not a prerequisite to a lien that the owner receive a benefit from the labor done or the materials furnished.—Hardwood Interior Co. v. Bull, 140 P. 702.

§ 26 (Cal.App.) Leveling and waxing a floor so as to render it suitable for dancing is an alteration of the building within Code Civ. Proc. § 1183.—Hardwood Interior Co. v. Bull, 140 P. 702.

### (B) Subcontractors and Contractors' Workmen and Materialmen.

§ 115 (Cal.) Mechanic's lien claimants, who have not served notice on the owner to withhold payment from the contractor, cannot compel the owner to pay them, in addition to the 35-day payment of 25 per cent., amounts of prior payments earned by the contractor on or before completion, but advanced to him by the owner before they were due under the contract.—Pacific Sash & Door Co. v. Elderton, 140 P. 247.

## III. PROCEEDINGS TO PERFECT.

§ 132 (Cal.) Where the undisputed evidence showed that an owner lived in the building from January 1, 1909, and there was no work done on it from that date until some time in April following, a finding that there was no cessation of labor for 30 consecutive days was unsupported and, under Code Civ. Proc. § 1187, as existing in 1909, the cessation of work for 30 days and occupation of the building by the owner set the time running within which to file a claim for lien.—Sunset Lumber Co. v. Bacheider, 140 P. 35.

## IV. OPERATION AND EFFECT.

### (A) Amount and Extent of Lien.

§ 161 (Cal.App.) Under Code Civ. Proc. § 1183, providing for a mechanic's lien "for the value" of the labor or materials furnished, the phrase "for the value" means, in the absence of fraud, the agreed value in cases based upon contract.—Hardwood Interior Co. v. Bull, 140 P. 702.

## VII. ENFORCEMENT.

§ 277 (Cal.App.) The fact that a notice of lien speaks of the work detailed therein as an improvement *held* not to create a substantial variance from proof showing the leveling and waxing a floor so as to make it suitable for dancing.—Hardwood Interior Co. v. Bull, 140 P. 702.

§ 290 (Cal.) Since lien claimants, not serving notice on the owner to withhold payment cannot compel the owner to pay them, in addition to the statutory 25 per cent., amounts of prior payments earned by the contractor but advanced by the owner before such amounts were due under the contract, a finding against defendant owner's allegation that each of the contract payments was made when it was payable under the contract may be disregarded as immaterial.—Pacific Sash & Door Co. v. Elderton, 140 P. 247.

## MILEAGE.

See Witnesses, § 29.

## MINES AND MINERALS.

See Evidence, § 513; Mandamus, § 15; Negligence, § 98; Parties, § 6; Quieting Title, §§ 2, 35, 44.

## I. PUBLIC MINERAL LANDS.

### (B) Location and Acquisition of Claims.

§ 9 (Colo.App.) The location of a mining claim must be made upon some part of the public mineral domain not already located.—Emerson v. Akin, 140 P. 481.

§ 19 (Colo.App.) Under the statute requiring the locators to post at the point of discovery a plain sign or notice, a location notice written on a piece of white paper placed on a stick and partly covered by a rock to prevent it from blowing away cannot, as a matter of law, be held insufficient.—Emerson v. Akin, 140 P. 481.

§ 24 (Colo.App.) The abandonment of a mining location is a matter of intention and may be proven by the acts of the original owner, as well as by his words and statements.—Emerson v. Akin, 140 P. 481.

§ 26 (Colo.App.) Where the owner of a mining claim abandoned part of it, his re-location of another claim, which included part of the abandoned claim, is good; it not appearing that the abandonment was with any fraudulent purpose.—Emerson v. Akin, 140 P. 481.

## II. TITLE, CONVEYANCES, AND CONTRACTS.

### (C) Leases, Licenses, and Contracts.

§ 73 (Cal.) A lease of oil bearing property held not merely an oil lease, but a lease of the land itself.—Kline v. Guaranty Oil Co., 140 P. 1.

In an action for damages growing out of an oil lease, evidence *held* to sustain a finding that the lessee was never placed in possession of the property.—Id.

§ 73 (Okl.) Where the object of an oil lease is to obtain a benefit for both parties, both are bound by what, under the circumstances, would be reasonably expected of an operator of ordinary prudence, having regard to the interest of both.—Indiana Oil, Gas & Development Co. v. McCrory, 140 P. 610.

§ 78 (Okl.) A lease *held* to contain an implied covenant by the lessee that, if oil or gas or both were found in paying quantities, the work of development and construction would be continued with reasonable diligence.—Indiana Oil, Gas & Development Co. v. McCrory, 140 P. 610.

A forfeiture, though ordinarily not enforceable in equity, will be so enforced when this is more consonant with the principles of justice than would be the withholding of equitable relief.—Id.

Equity will decree the forfeiture of an oil and gas lease for breach of an implied covenant to diligently operate and develop the property, where the particular circumstances show that such forfeiture will effectuate justice.—Id.

A lessor seeking cancellation of an oil and gas lease after breach of an implied covenant must come with clean hands and act with reasonable diligence after discovery of his right to the forfeiture.—Id.

Damages for breach of an implied covenant of an oil and gas lease are not recoverable, in a suit to cancel the lease, where the measure of damages is uncertain, vague, and indefinite.—Id.

## III. OPERATION OF MINES, QUARRIES, AND WELLS.

### (B) Mining Partnerships and Companies.

§ 99 (Wash.) Under grubstake contract providing for a division of all the proceeds, that wages earned should be treated as proceeds, and for its continuance while defendant was in Alaska, *held*, the "proceeds" meant net proceeds, and that, where defendant finally returned sick and penniless, plaintiff could not recover.—Troutman v. Polhill, 140 P. 319.

**(C) Rights and Liabilities Incident to Working.**

§ 112 (Nev.) The lien law for securing payment for labor on mining property is not to be construed strictly, as in derogation of common law, but liberally, as remedial.—*Ferro v. Bargo Min. & Mill. Co.*, 140 P. 527.

§ 114 (Nev.) The statute giving right of lien to both contractors and laborers, a lien claim against mining property is not void for joinder of a claim of lien under a contract of employment by the day with one under a contract of employment for a specified amount of work, at an agreed price per foot; the work being continuous and of the same character under both contracts.—*Ferro v. Bargo Min. & Mill. Co.*, 140 P. 527.

Where under a joint contract of two for work on mining property, half the contract price is to be paid each severally, they need not join in a lien claim, but one of them may alone file such a claim for half the amount.—*Id.*

§ 119 (Idaho) An excavation made by a miner in the prosecution of his work is not of itself a nuisance such as would charge him with negligence.—*Strong v. Brown*, 140 P. 773.

Where a miner makes an excavation on mineral lands, and live stock running at large on the public domain are injured by falling into same, he is not liable, though he has not fenced the excavation.—*Id.*

**MINISTERS.**

See Religious Societies, § 27.

**MINORS.**

See Infants.

**MISREPRESENTATION.**

See Execution, § 433; False Pretenses; Fraud; Partnership, § 153; Payment; Pleading, § 248; Principal and Surety, § 89; Subscriptions, § 8.

**MISTAKE.**

See Banks and Banking, § 189; Contracts, § 98; Limitation of Actions, § 187; Reformation of Instruments, §§ 25, 36, 45; Vendor and Purchaser, §§ 31, 308.

**MODEL TRAINING SCHOOLS.**

See Schools and School Districts, § 19.

**MONEY PAID.**

See Payment.

§ 1 (Cal.App.) Where a vendor agreed to pay a sum to a specified fund on the purchaser's paying the price on delivery of the deed and certificate of title, a payment of the agreed sum by the purchaser, without request of the vendor prior to and independently of the closing of the transaction of sale, was a voluntary payment which he could not recover from the vendor on the vendor's failing to show clear title.—*Sessions v. Miller*, 140 P. 44.

**MORTGAGES.**

See Appeal and Error, § 164; Chattel Mortgages; Constitutional Law, § 149; Deeds, §§ 151, 155; Husband and Wife, §§ 254, 270; Judgment, §§ 489, 501; Mandamus, § 82; Pleading, § 236; Quietening Title, § 14; Taxation, § 213.

**I. REQUISITES AND VALIDITY.**

(A) Nature and Essentials of Conveyances as Security.

§ 25 (Wash.) Where W. advanced \$3,000 to enable M. to purchase land from N., under an

agreement that title should be conveyed to W. and wife, until such sum was repaid, and that W. and wife should execute a mortgage to N. to secure the balance of the purchase price, the execution of the deed to W. and wife was a sufficient consideration for their note and mortgage.—*Nance v. Woods*, 140 P. 323.

§ 32 (Mont.) Where a deed, absolute in form, is given by a debtor to his creditor, if the indebtedness remains uncanceled, the conveyance is treated in equity as a mortgage, though the grantee may not regard it as such.—*Gibson v. Morris State Bank*, 140 P. 76.

Where an absolute deed is given by a debtor to his creditor, and it appears that the antecedent debt has been canceled, the retention of the evidence of the debt by the grantee may be explained, but, if the indebtedness is not canceled and proceedings are instituted to enforce it, no explanation can avoid the conclusion that the deed was security only, and not an absolute conveyance.—*Id.*

§ 32 (Wash.) Whether an instrument is a deed or a mortgage is determined at the inception of the transaction; the intention of the parties determining its nature.—*Beverly v. Davis*, 140 P. 696.

An action to have a deed absolute on its face declared a mortgage is founded on fraud, and the fullest inquiry is permissible to ascertain the intention of the parties.—*Id.*

§ 36 (Mont.) The burden is upon him who alleges that an absolute deed is a mortgage to establish that fact by clear and convincing evidence, but the burden is sustained by showing that the debt for which the conveyance was executed remains uncanceled, and is treated as an existing indebtedness.—*Gibson v. Morris State Bank*, 140 P. 76.

§ 36 (Wash.) It is presumed that a deed absolute on its face, with an option to repurchase, is what it purports to be, so that one asserting that it was intended as a mortgage must prove his assertion by clear and convincing evidence.—*Beverly v. Davis*, 140 P. 696.

§ 38 (Mont.) In a suit to quiet title, originally instituted as a suit to foreclose a mortgage, evidence held to clearly preponderate against the finding of the judge that a deed given by the owner of land to a bank to which he was heavily indebted was intended to be absolute, and not as a further security for the debt.—*Gibson v. Morris State Bank*, 140 P. 76.

§ 38 (Wash.) While the existence of a written promise to repay money advanced is strong evidence in determining whether an instrument was a deed or mortgage, it is not conclusive that a personal debt exists, since, if a loan is shown, an implied promise to repay arises therefrom.—*Beverly v. Davis*, 140 P. 696.

Evidence held to sustain a finding that a deed absolute on its face, with an option to repurchase, was intended as a mortgage.—*Id.*

**III. CONSTRUCTION AND OPERATION.**

(C) Property Mortgaged, and Estates of Parties Therein.

§ 144 (Kan.) A person purchasing land incumbered by a mortgage which he does not assume may acquire a tax deed to the land, which will extinguish the mortgagee's rights if the land be not redeemed and no action is brought to set aside the tax deed within five years as required by Gen. St. 1909, § 9183.—*Zuege v. Nebraska Mortgage Co.*, 140 P. 855.

**(D) Lien and Priority.**

§ 151 (Cal.) Where a materialman's lien was not filed within the time prescribed by Code Civ. Proc. § 1187, as existing in 1909, a mortgage, executed by the owner after the materialman had begun to furnish material, was paramount to any lien in favor of the materialman.—*Sunset Lumber Co. v. Bachelder*, 140 P. 35.

## VL TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 280 (Cal.) A deed of mortgaged property, which recites that the property is subject to a mortgage described, does not show that the purchaser assumed the mortgage debt, especially where the deed also recites a nominal consideration.—Hibernia Savings & Loan Society v. Dickinson, 140 P. 265.

The promise of a purchaser of mortgaged property to pay the mortgage need not appear in the deed, but the obligation may be made orally or in a separate instrument, or may be implied from the transaction.—Id.

A contract for the purchase of mortgaged property, which recites the receipt of a specified sum as a deposit on account of the price, which is specified, and which then describes the property as subject to a mortgage, and which allows the purchaser 30 days to examine the title and consummate the purchase, does not show an assumption by the purchaser of the mortgage debt.—Id.

Where there was nothing to justify a vendor of mortgaged property in assuming that an agent of the purchaser had authority to bind the purchaser to assume the mortgage debt except that the purchaser authorized the agent to purchase the property and had furnished him money to pay the difference between the price and the mortgage debt, and the deed carried the implication that there was no personal obligation against the purchaser, the purchaser was not estopped to deny that he assumed the mortgage.—Id.

## X. FORECLOSURE BY ACTION.

### (B) Right to Foreclose and Defenses.

§ 415 (Wash.) That the mortgagee agreed to let the owners sell or execute a second mortgage, and to surrender the mortgage on payment of the proceeds, did not prevent foreclosure; the agreement not having been carried out, and being without consideration.—Nance v. Woods, 140 P. 323.

### (E) Parties and Process.

§ 427 (Wash.) Where N. conveyed land to W. and wife to secure \$3,000 advanced by them to enable M. to purchase it from N., and W. and wife executed a note and mortgage for the balance of the purchase price, they were primarily liable on the note, and were proper parties to a suit thereon and for foreclosure, though they had conveyed the land to others at M.'s request, after the money they advanced had been repaid.—Nance v. Woods, 140 P. 323.

### (F) Pleading and Evidence.

§ 454 (Cal.) In an action to foreclose a mortgage, brought against the mortgagor and his subsequent purchaser, the fact that the subsequent purchaser had assumed the mortgage debt is an affirmative defense in favor of the mortgagor and must be affirmatively alleged.—Hibernia Savings & Loan Society v. Dickinson, 140 P. 265.

§ 459 (Kan.) Where, in a suit to foreclose a real estate mortgage, plaintiff proved record title in the mortgagor and introduced the note and the mortgage with its indorsement in evidence, he proved all that was essential to sustain a judgment of foreclosure.—Gibson v. Rea, 140 P. 893.

In a suit to foreclose a mortgage, the allegation that the mortgagor had left the state prior to a specified date was material only to forestall a demurrer on the ground of limitations.—Id.

In a suit to foreclose a real estate mortgage, plaintiff was not obliged to prove the allegation that the mortgagor had sold his land to another against defendant, who claimed under a tax title adverse to the mortgagor.—Id.

§ 464 (Kan.) Recitals of a real estate mortgage, given to secure a note, are sufficient to prove prima facie the execution of the note

which the mortgage described and secured, so that production of the note and mortgage at the trial proved prima facie title in him.—Gibson v. Rea, 140 P. 893.

### (J) Sale.

§ 538 (Cal.App.) Where foreclosure proceedings are void, the legal title remains subject to the lien of the mortgage; purchaser at foreclosure being considered an assignee.—Klumpke v. Moreno, 140 P. 313.

### (K) Deficiency and Personal Liability.

§ 559 (Cal.) The personal liability of a purchaser of mortgaged land for the payment of the debt and for a deficiency judgment in case of foreclosure is based solely on his assumption of the mortgage debt, and the mortgagee must show, on foreclosure to obtain a personal judgment against the purchaser, that he assumed the debt.—Hibernia Savings & Loan Society v. Dickinson, 140 P. 265.

Where the complaint in a suit to foreclose a mortgage, brought against the mortgagor and a subsequent purchaser, alleged that the purchaser agreed to assume the mortgage debt as a part of the consideration of the conveyance, that the mortgagor did not deny the allegation of assumption of the debt was not an admission of that fact and did not prevent a contrary finding and a deficiency judgment against him.—Id.

Where in a suit to foreclose a mortgage, brought against the mortgagor and a subsequent purchaser, the cause was tried as if the question whether the purchaser had assumed the mortgage debt was in issue, a finding thereon was necessary, and a finding that the purchaser did not assume the mortgage debt was conclusive, unless contrary to the evidence.—Id.

### (N) Fees and Costs.

§ 581 (Idaho) Where, in a suit to foreclose a mortgage of \$10,181.64, defendant went to trial on an answer and cross-complaint, and plaintiff prevailed, an attorney fee of \$1,000 was properly allowed.—Coolin v. Anderson, 140 P. 969.

### (O) Operation and Effect.

§ 586 (Cal.) A mortgage foreclosure sale extinguished all rights of defendants in the foreclosure action acquired after the date of the mortgage, and vested in the purchaser the mortgagor's title at the date of the mortgage, discharged of all such rights; the effect of the sale being terminated only when the judgment debtor redeems by the direct provisions of Code Civ. Proc. § 703.—McNutt v. Nuevo Land Co., 140 P. 6.

§ 590 (Cal.) Separate creditors for whose benefit a trust was declared in mortgaged land held not entitled, after sale of the land on mortgage foreclosure, to have the trust reinstated for their benefit by proportionately reimbursing the purchaser, since, in view of Civ. Code, §§ 871, 2279, and Code Civ. Proc. § 700, the trust necessarily terminated on the foreclosure sale.—McNutt v. Nuevo Land Co., 140 P. 6.

The interests of the beneficiaries under a declaration of trust were determined and foreclosed by a foreclosure sale of the trust property, so that the beneficiaries could not afterwards claim any interest in the property, where the declaration of trust was not recorded until after the lis pendens was filed in the foreclosure action, in view of Civ. Code, §§ 1214, 1415.—Id.

The interests of beneficiaries under a declaration of trust affecting land covered by an existing mortgage were determined and foreclosed by a judgment of foreclosure and sale under the mortgage, where the trustee was a defendant in the foreclosure action.—Id.

## XI. REDEMPTION.

§ 591 (Wash.) The statutory right of redemption cannot be cut off by a strict foreclosure.—Beverly v. Davis, 140 P. 696.

§ 597 (Wash.) The statutory right of redemption inheres in a mortgage, and cannot be waived, whether the mortgage be in the usual form or in the form of an absolute deed; the rule being "once a mortgage, always a mortgage."—*Beverly v. Davis*, 140 P. 696.

§ 599 (Cal.) The right of redemption of the beneficiaries under a declaration of trust covering realty, subject to an existing mortgage, upon the subsequent sale of the property upon foreclosure of the mortgage, was not an equitable right which could be exercised within an indefinite period, but was merely the statutory right of redemption given by Code Civ. Proc. § 702, which must be exercised within 12 months after sale.—*McNutt v. Nuevo Land Co.*, 140 P. 6.

§ 624 (Cal.) The exercise of the right of redemption from a mortgage foreclosure sale by one who is under no legal obligation to do so, as a junior lien claimant or judgment creditor, is not strictly a redemption, but a purchase of the rights acquired under the foreclosure sale.—*McNutt v. Nuevo Land Co.*, 140 P. 6.

### MOTIONS.

See Continuance; Indictment and Information, § 137; Judges, § 51; Judgment, §§ 138-160, 199; New Trial, §§ 114-159; Pleading, §§ 364, 369; Trial, §§ 91, 96, 159, 165, 168, 178.

### MUNICIPAL CORPORATIONS.

See Appeal and Error, § 374; Attorney and Client, § 166; Carriers, §§ 286, 305; Constitutional Law, §§ 134, 289, 290; Counties; Dedication, §§ 50, 53, 55; Elections, § 120; Electricity, §§ 1½-11; Eminent Domain, §§ 2, 101, 106, 167, 169, 180; Evidence, § 83; Highways, § 90; Intoxicating Liquors, § 10; Licenses, § 39; Mandamus, § 187; Mechanics' Liens, § 13; Schools and School Districts; Street Railroads; Trial, §§ 244, 295; Waters and Water Courses, §§ 188, 194, 202.

### II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 53 (Kan.) Every city of less than 2,000 inhabitants is part of the township within which it is located, unless it has the prescribed qualifications as to population and assessed valuation of real and personal property and has elected to become a separate township under Gen. St. 1909, § 1513.—*City of Ellis v. Jacobs*, 140 P. 856.

### IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

#### (B) Ordinances and By-Laws in General.

§ 122 (Kan.) Where the validity of a city ordinance regularly passed and approved by the mayor depends on the existence of one or more of the conditions prescribed by Gen. St. 1909, § 872, the existence of the necessary fact will be presumed.—*State v. City of Atchison*, 140 P. 873.

### V. OFFICERS, AGENTS, AND EMPLOYEES.

#### (B) Municipal Payments and Officers Thereof.

§ 180 (Mont.) The metropolitan police law (Rev. Codes, §§ 3304-3317) contemplates that, in addition to the office of chief of police, which the act itself creates, other offices under the chief shall be established by the council of a city organizing its police department in conformity therewith.—*State v. Duncan*, 140 P. 95.

An ordinance of a city, providing for organization of its police department in conformity with the metropolitan police law, when duly passed, has the force and effect of a statute.—*Id.*

§ 185 (Mont.) The civil service principle being the foundation of the metropolitan police law, retiring to the eligibility list a lieutenant of police, followed immediately by the appointment of another to fill the office, does not operate to deprive him of his office.—*State v. Duncan*, 140 P. 95.

One removed from the office of lieutenant of police of a city does not, under the principle that one office is vacated by the incumbent accepting an incompatible office, waive right to restoration to such office, by accepting temporarily, pending proceedings for restoration, an appointment as deputy county inspector of weights and measures.—*Id.*

### VII. CONTRACTS IN GENERAL.

§ 237 (Wash.) A published notice for bids for the purchase of fire apparatus *held* to require bids on three certain pieces of apparatus including an aerial, so that bids which did not include the truck could be rejected.—*Shields v. City of Seattle*, 140 P. 353.

### IX. PUBLIC IMPROVEMENTS.

#### (A) Power to Make Improvements or Grant Aid Therefor.

§ 266 (Okl.) Comp. Laws 1909, § 847, conferring on the trustees of an incorporated town power to improve street sidewalks, etc., *held* valid.—*Shultise v. Town of Taloga*, 140 P. 1190.

§ 268 (N.M.) Under Comp. Laws 1897, § 2402, subsec. 5, authorizing cities and towns to erect all needful buildings for their use, a municipality may construct a building primarily for a municipal purpose, though it may be incidentally used for theatrical purposes, but cannot erect a building primarily for other than strictly municipal purposes.—*Smith v. City of Raton*, 140 P. 109.

§ 271 (Colo.) The Legislature has power to authorize cities to erect and maintain waterworks, etc., to supply its citizens, to be paid for from taxes.—*City of Colorado Springs v. Pike's Peak Hydro-Electric Co.*, 140 P. 921.

§ 272 (Colo.) While the erection and maintenance of public utilities, such as an electric light plant for lighting streets, etc., is not a function governmental in its nature, it is strictly a municipal purpose, as intended to promote the comfort and convenience of the citizens.—*City of Colorado Springs v. Pike's Peak Hydro-Electric Co.*, 140 P. 921.

The Legislature has power to authorize cities to erect and maintain electric light plants to supply its citizens, to be paid for from taxes.—*Id.*

#### (C) Contracts.

§ 339 (Cal.App.) A provision in a street improvement contract that the contractor shall move waste material to places outside the street, and spread the same in a workmanlike manner, does not render the contract invalid on the ground that it increases the cost of the work because influencing bidders to fix the cost at a higher amount than they otherwise would.—*Hunt v. Manning*, 140 P. 39.

A provision in a street improvement contract that employes of a contractor who fail to perform their work in accordance with the specifications, shall be discharged, does not invalidate the contract on the ground that it injects an element of uncertainty into the work, and thereby prevent bidders from bidding intelligently, or increases the cost.—*Id.*

§ 346 (Wash.) Where a municipal contractor's bond covered payment for supplies for carrying on certain work, it included the rental value of a pump and hoist derrick rented by the contractor and used in the performance of such work.—*Hurley-Mason Co. v. American Bonding Co.*, 140 P. 575.

§ 360 (Wash.) Under a contract for excavation for municipal water system at a certain



price per cubic yard, the requirement of 3,500 cubic yards of excavation, where the estimate had been 450 cubic yards, *held* not such an excess as to take that item out of the contract and to entitle the contractor to payment measured by the reasonable value of the work.—*International Contract Co. v. City of Tacoma*, 140 P. 373.

A municipal corporation making improvement work more expensive than under the terms of the original contract, or requiring work or materials not within such contract, in the absence of contrary stipulation is liable for the increased cost, or for extra work where the claim therefor is not inconsistent with the contract when reasonably construed or outside of the provisions as to charges for extra work.—*Id.*

Under a contract with a city for a public improvement, providing that extra work or materials furnished should be done or furnished at actual cost, plus 10 per cent., *held* that, as to such work, amounting to one-fifth of the whole, the contractor was not entitled to a 6 per cent. overcharge for its office expenditures, officers' salaries, insurance, etc., as a part of the cost of such work.—*Id.*

§ 370 (Wash.) Under a contract for a municipal improvement, providing for monthly payments of 85 per cent. of the work and materials as estimated by the city's engineer, and approved by its commissioner, *held*, that such estimates did not conclude the city so as to estop it from counterclaiming for previous excess payments based on mistakes in such estimates.—*International Contract Co. v. City of Tacoma*, 140 P. 373.

§ 373 (Utah) Comp. Laws 1907, § 1400x, authorizing actions by laborers or materialmen of contractors of public corporations for public work, is remedial and must be liberally construed.—*Mellen v. Vondor-Horst Bros.*, 140 P. 130.

An action authorized by Comp. Laws 1907, § 1400x, authorizing actions to reach a fund due a contractor, is maintainable without first obtaining a judgment against the contractor or without personal service on him.—*Id.*

Where the surety of a contractor agreed to perform the contract on the contractor abandoning the work, and appropriated labor and materials furnished the contractor, the laborers and materialmen could, under Comp. Laws 1907, § 1400x, recover the amount due under the contract to satisfy their claims.—*Id.*

One furnishing labor or materials for the erection of a public building need only, when seeking judgment, under Comp. Laws 1907, § 1400x, allege and prove that a contract was made for the work, that he furnished labor and material for the contractor, that he has not been paid, and that the public corporation has in its hands a part of the contract price, though the contractor abandoned the work which was completed by his surety.—*Id.*

One seeking judgment, under Comp. Laws 1907, § 1400x, for labor and materials furnished in the erection of a public building need not, as against the surety of the contractor, allege that certificates of the architect provided for in the contract were issued, because his claim is based wholly on the statute.—*Id.*

#### (E) Assessments for Benefits, and Special Taxes.

§ 406 (Cal.) The authority conferred under street improvement acts to subject the property of a lot owner to a lien for his proportionate payment of an improvement, and providing further for a sale of the property assessed for delinquency in payment, proceeds from the taxing power of the state.—*Los Angeles Olive Growers' Ass'n v. Pozzi*, 140 P. 581.

§ 407 (Okl.) Comp. Laws 1909, §§ 860-862, authorizing special assessments for repairing sidewalks after notice to abutting owners, *held* valid.—*Shultise v. Town of Taloga*, 140 P. 1190.

§ 498 (Cal.App.) A statute which authorizes street improvements at the cost of property benefited within assessment districts need not, to be valid, specifically provide that in determining the boundaries of an assessment district only property which will be benefited can be included.—*Hunt v. Manning*, 140 P. 39.

§ 466 (Colo.) Rev. St. 1908, § 6592, providing that, in the opening of an alley, the benefits shall be paid by the owners of the property abutting the proposed alley, is not unconstitutional as imposing assessments out of proportion to the possible benefits.—*Phipps v. City and County of Denver*, 140 P. 797.

While under Rev. St. 1908, § 6592, providing that, in the opening of an alley, the benefits shall be paid by the owners of the property abutting such alley and each lot should be assessed, they should not be all assessed equally, but according to the special benefits received.—*Id.*

§ 501 (Colo.) Though the owners of corner lots abutting on a proposed alley filed no objections to the report of the commissioners, yet as the objections filed by the inside owners went to the whole report, the court could consider the assessments as to the corner lots.—*Phipps v. City and County of Denver*, 140 P. 797.

§ 506 (Colo.) Under Rev. St. 1908, §§ 6593-6597, relating to the assessments of benefits by commissioners, their report and review thereof by the court, the court has the duty, there being no demand for a jury, of passing upon such objections, and can modify, alter, or annul such assessment.—*Phipps v. City and County of Denver*, 140 P. 797.

Where commissioners appointed to assess benefits for a proposed alley under Rev. St. 1908, § 6592, did not assess the four corner lots, and hence acted under a misapprehension of the law, the court could revise their report so as to assess such lots.—*Id.*

#### (F) Enforcement of Assessments and Special Taxes.

§ 538 (Okl.) Petition, in an action to enjoin a pretended special assessment wrongfully levied against plaintiff's property, *held* sufficient to state a cause of action.—*Hoehler v. Short*, 140 P. 146.

§ 575 (Cal.) Proceedings to enforce payment of assessments under street improvement acts are proceedings in invitum which must be strictly pursued, and, under an act subjecting only the land assessed to lien and sale, a sale under a description in excess of that in the assessment was void.—*Los Angeles Olive Growers' Ass'n v. Pozzi*, 140 P. 581.

### XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

#### (A) Streets and Other Public Ways.

§ 657 (Wash.) Where a lot owner claims that a strip of land adjoining his lot, which had been dedicated as a public street before it was included within an incorporated town, had been vacated under Laws 1890, p. 603, § 32, vacating any county road remaining unopened for public use for five years, the burden is on him to show that the street had remained physically unopened for public travel for the statutory time.—*Brokaw v. Town of Stanwood*, 140 P. 358.

The fact that there was no public travel upon a street outside the limits of any incorporated town which had been dedicated as a public highway was not sufficient to show that the street was not open for public travel within Laws 1890, p. 603, § 32, vacating a county road which remained unopened for public use for five years.—*Id.*

A street included within the limits of an incorporated town within one year after it was inclosed by an adjoining lot owner *held* no longer subject to vacation under Laws 1890, p.



603, § 32, vacating county roads which remain unopened for public use for five years, since that act did not apply to streets within cities and towns.—Id.

§ 671 (Ok.) When a sidewalk obstruction merely affects an individual's right of passage in common with the public, the individual suffers no injury different in kind from that of the public, and has no private right of action.—Clough v. City of Sulphur, 140 P. 1155.

A private person suing to restrain a public improvement alleged to be an obstruction must show a special injury peculiar to himself, aside from that of the general injury to the public.—Id.

That a sidewalk obstruction would inconvenience plaintiff in going to and from her home to other parts of the city did not constitute such a special injury as would entitle her to maintain a suit for an injunction.—Id.

§ 688 (Cal.App.) A municipality cannot by contract, by granting a franchise to a railroad company to maintain tracks in the streets, divest itself of the power to control the streets for the public benefit.—Town of St. Helena v. San Francisco, N. & C. Ry., 140 P. 600.

A franchise granted by a city to a railroad company to maintain tracks in the streets, subject to laws or regulations in force or that may be subsequently enacted, is not such a contract as invalidates a subsequent statute authorizing special paving by the company and an ordinance enacted pursuant thereto.—Id.

§ 705 (Cal.) A pedestrian, in crossing a busy street in the heart of the business district of a great city must look both ways before starting to cross the street.—Davis v. John Breuner Co., 140 P. 586.

In an action for an injury to a pedestrian by being struck by defendant's automobile at a street crossing, that at the time of the accident defendant was violating a speed ordinance did not preclude a finding that plaintiff's own negligence was the proximate cause of the injury.—Id.

§ 705 (Cal.App.) The violation of a municipal speed ordinance is conclusive evidence of negligence, where such violation is the proximate cause of the injury, and that is so whether such ordinance is specially pleaded or not.—Scragg v. Sallee, 140 P. 706.

§ 706 (Cal.) In an action for an injury to a pedestrian struck by defendant's automobile at a street crossing, evidence held to support a finding that plaintiff was guilty of contributory negligence.—Davis v. John Breuner Co., 140 P. 586.

§ 706 (Cal.App.) In an action for an injury to plaintiff caused by defendant's automobile colliding with his wagon at the intersection of city streets, evidence held to warrant a finding that the proximate cause of the accident was defendant's negligence in driving at an excessive rate of speed.—Scragg v. Sallee, 140 P. 706.

## XII. TORTS.

### (B) Acts or Omissions of Officers or Agents.

§ 747 (Cal.) Where a city was engaged in building an aqueduct to bring water for its inhabitants, and as a part thereof did the work through its officers duly authorized, the city was liable for injury to an employé while at work, caused by the negligence of a coemployé having authority to control the men.—Foutz v. City of Los Angeles, 140 P. 20.

### (C) Defects or Obstructions in Streets and Other Public Ways.

§ 755 (Ok.) Failure to keep streets and sidewalks in a reasonably safe condition for public use renders the city liable to a person injured therefrom while in the exercise of ordinary care.

—Cleveland Trinidad Paving Co. v. Mitchell, 140 P. 416.

§ 788 (Ok.) Notice to a city of a defective street or sidewalk may be either actual or constructive.—Cleveland Trinidad Paving Co. v. Mitchell, 140 P. 416.

§ 809 (Ok.) Where a construction company making street improvements under contract creates a defect in the sidewalk rendering it unsafe, and fails to immediately repair the same, it is liable for resulting injuries to a pedestrian.—Cleveland Trinidad Paving Co. v. Mitchell, 140 P. 416.

§ 812 (Wash.) Under provisions of Spokane charter as to presentation of claims for personal injury from its negligence, and Rem. & Bal. Code, §§ 7996, 7997, relating to such claims and making compliance therewith mandatory, held that where plaintiff was able to go about within 30 days, a claim filed by another deposing that plaintiff was physically unable to sign it, was insufficient to show such fact, and defeated recovery.—Hall v. City of Spokane, 140 P. 348.

§ 816 (Wash.) In an action for personal injuries in a city whose charter required such claims to be presented within 30 days after the injury, an answer, admitting that it was filed on the date alleged, held not an admission that it was legally presented, or that plaintiff was unable to present it.—Hall v. City of Spokane, 140 P. 348.

§ 821 (Ok.) In an action for injuries from a defective sidewalk, held that the question whether the city had notice of the defect was for the jury.—Cleveland Trinidad Paving Co. v. Mitchell, 140 P. 416.

### (E) Condition or Use of Public Buildings and Other Property.

§ 849 (Wash.) A city maintaining a municipal dock need only exercise reasonable care and diligence in keeping the same in repair.—Belles v. City of Tacoma, 140 P. 324.

A city maintaining a municipal dock is not guilty of negligence merely because it permits a plank in the floor thereof to become worn in the center a quarter of an inch below the common level, and it is not liable for injuries to a pedestrian slipping on the plank.—Id.

The officers of a city, maintaining a municipal dock, need not assume that the floor thereof is dangerous merely because the center of a plank therein has worn down a quarter of an inch below the common level.—Id.

## XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

### (B) Administration in General, Appropriation, Warrants and Payment.

§ 904 (Colo.) Under Rev. St. 1908, § 6631, requiring the city council to pass an annual appropriation bill for the succeeding fiscal year, and prohibiting further appropriations without popular vote construed with sections 6632, 6633, 6644, 6645, and 6647, held, that city warrants issued and registered before the fiscal year beginning April, 1913, were not payable from funds realized from the revenue for that fiscal year.—Ostling v. People, 140 P. 173.

Purchasers of city warrants take them subject to the mode of payment provided by statute.—Id.

§ 905 (Colo.) An action cannot be maintained against a city on a warrant until a fund for its payment is collected, and the fact that the revenues for a particular year are inadequate to pay the warrants for that year does not make the city liable thereon until an available fund can be legally raised.—Ostling v. People, 140 P. 173.

**(C) Bonds and Other Securities, and Sinking Funds.**

§ 907 (N.M.) Comp. Laws 1897, § 2402, subsec. 6, par. 1 (enacted as part of Laws 1884, c. 39, § 14), authorizing the issuance of municipal bonds for certain purposes, and providing procedure therefor, *held* not repealed, modified, or amended by Laws 1897, c. 70, § 1.—*Smith v. City of Raton*, 140 P. 109.

Comp. Laws 1897, § 2402, subsec. 6, not being inconsistent with the Constitution, was continued in force by Const. art. 22, § 4.—*Id.*

**(D) Taxes and Other Revenue, and Application Thereof.**

§ 964 (Kan.) Under Laws 1908, c. 78 (Gen. St. 1909, §§ 1380, 1383), cities of the second class may levy a tax to pay judgments not rendered for current expenses, though the limit for general revenue purposes has been levied, provided the 40-mill limit for all general city purposes exclusive of school taxes is not exceeded.—*Atchison, T. & S. F. Ry. Co. v. Kansas City*, 140 P. 1040.

**(E) Rights and Remedies of Taxpayers.**

§ 993 (Wash.) In an action by a taxpayer to enjoin a city from contracting for the purchase of fire apparatus upon the ground that the agreed price is greater than the lowest bid submitted the burden was on plaintiff to show that the bid accepted was illegal as alleged.—*Shields v. City of Seattle*, 140 P. 353.

§ 1000 (Kan.) Where a second class city had levied the limit for general revenue purposes and then levied a one-mill tax to pay judgments, it would be presumed, in an action to enjoin the collection of the tax, in the absence of proof to the contrary, that the judgments were not for debts constituting current expense.—*Atchison, T. & S. F. Ry. Co. v. Kansas City*, 140 P. 1040.

Where, in a suit to enjoin the collection of a tax levied by a city of the second class as illegal, it appeared that the ordinary statutory limit for general purposes had been levied, the burden was on the city to show that it had received permission from the state tax commission, or by a vote of the electors, to levy an increase, as authorized by Laws 1908, c. 78, § 1, if such was the fact.—*Id.*

**MURDER.**

See Homicide, §§ 23, 28.

**MUTUAL BENEFIT INSURANCE.**

See Insurance, § 719.

**NAVIGABLE WATERS.**

See Adverse Possession, § 7; Appeal and Error, § 877; Common Law, § 12; Criminal Law, § 814; Injunction, § 118; Logs and Logging, § 13; Mandamus, § 73; Statutes, § 23; Wharves.

**I. RIGHTS OF PUBLIC.**

§ 1 (Kan.) "Navigability" depends upon use or upon public acts and declarations, and not upon the ebb and flow of the tide.—*State v. Akers*, 140 P. 637.

To say that waters are public is equivalent in a legal sense to saying that they are "navigable waters."—*Id.*

The Mississippi river and its navigable tributaries, which include the Kansas and Arkansas rivers in Kansas, are public highways, and hence are navigable streams.—*Id.*

**II. LANDS UNDER WATER.**

§ 36 (Kan.) On the admission of Kansas into the Union, absolute property in and dominion and sovereignty over the soils under the navigable streams within its limits passed to the state in trust for all the people, subject to the

superior right of the federal government with respect to navigation.—*State v. Akers*, 140 P. 637.

The Legislature has power to impose a royalty on the taking of sand for commercial purposes from a navigable stream, so long as it does nothing violative of its duty to hold title as trustee for the people or to interfere with the superior rights of Congress to control navigation.—*Id.*

Sess. Laws 1913, c. 259, authorizing executive council to impose a royalty on the taking of sand from navigable streams for commercial purposes, *held* valid.—*Id.*

§ 37 (Cal.) The right of a grantee of tidelands from the state is subject to a public easement for navigation and fishing.—*People v. Banning Co.*, 140 P. 587.

The rights of an owner of swamp lands purchased from the state to literal rights over adjacent tidelands and waters as owner of riparian lands are subject to the public easements for navigation.—*Id.*

**III. RIPARIAN AND LITTORAL RIGHTS.**

§ 39 (Wash.) In an action for injuries to land as the result of a log jam in a river, three-quarters of the logs not belonging to defendant, an instruction that if the logs belonged to several owners, including defendant, each of them would be liable for the whole injury was erroneous.—*Johnson v. Irvine Lumber Co.*, 140 P. 577.

Rules promulgated by the Secretary of War, regulating the driving of logs in the Snoqualmie and Snohomish rivers, under Act Cong. May 9, 1900, *held* inadmissible in an action for injuries to the banks of the Snoqualmie river, resulting from a log jam.—*Id.*

§ 42 (Kan.) The title to islands formed in navigable streams since the admission of Kansas into the Union is held by the state for the benefit of all the people.—*Winters v. Myers*, 140 P. 1033.

The Legislature cannot relinquish the title to islands formed in navigable streams since the admission of Kansas into the Union to the owners of shore lands without compensation where no public benefit will result from the gift.—*Id.*

Laws 1913, c. 295, § 9, providing for the gift of islands in navigable streams when certain conditions exist, *held* violative of Bill of Rights, § 2, declaring that free governments are for the equal protection and benefit of the people.—*Id.*

§ 44 (Cal.App.) A conveyance of an easement of a right of way for a highway along the shore of the ocean leaves in the grantor his riparian estate, as regards right to accretion.—*Forgeus v. Santa Cruz County*, 140 P. 1092.

The owner of land on the shore of the ocean granting to the county an easement of right of way for a highway along the shore is entitled to accretion due to the raising by the county of the roadbed along the right of way.—*Id.*

**NEGLIGENCE.**

See Adjoining Landowners, § 3; Carriers, §§ 174-185, 286-323; Corporations, § 491; Damages, § 20; Death; Electricity; Gas; Landlord and Tenant, §§ 166, 169; Master and Servant, §§ 92-332; Mines and Minerals, § 119; Municipal Corporations, §§ 705, 706, 747-849; Railroads, §§ 113, 328, 464; Street Railroads, §§ 99, 114; Trial, §§ 199, 260; Wharves, § 21.

**I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.****(A) Personal Conduct in General.**

§ 4 (Okla.) "Ordinary care," as applied to personal injury cases, means that degree of care and caution which might be reasonably expected from an ordinarily prudent person under

the circumstances.—*Cleveland Trinidad Paving Co. v. Mitchell*, 140 P. 416.

**(C) Condition and Use of Land, Buildings, and Other Structures.**

§ 29 (Wyo.) An owner of uninclosed land is not liable for the death of trespassing cattle which strayed on his property and fell into an open ditch, for, while the owner of the cattle is not liable for their trespass because the land is uninclosed, that does not make the entry of the cattle rightful, nor cast on the landowner the duty of exercising care for their safety.—*Gillespie v. Wheatland Industrial Co.*, 140 P. 832.

§ 44 (Wash.) The proprietor of a natatorium is required to keep the swimming tank and steps leading to it in a reasonably safe condition.—*Anderson v. Seattle Park Co.*, 140 P. 698.

**III. CONTRIBUTORY NEGLIGENCE.**

**(C) Imputed Negligence.**

§ 93 (Utah) Where plaintiff was injured while riding as the guest of L., plaintiff was only responsible for her own negligence, and L.'s negligence, if any, was not imputable to her.—*Atwood v. Utah Light & Ry. Co.*, 140 P. 137.

**(D) Comparative Negligence.**

§ 98 (Nev.) Rev. Laws, § 5651, providing that, in actions against a mineowner for damages for injuries to an employé, the employé's contributory negligence shall not bar a recovery, where it was slight and the employer's negligence was gross in comparison, substitutes for the common-law rule of contributory negligence the rule of relative or comparative negligence.—*Peterson v. Pittsburg Silver Peak Gold Mining Co.*, 140 P. 519.

**IV. ACTIONS.**

**(B) Evidence.**

§ 134 (Wash.) In an action for personal injuries received by a fall on the steps leading into the pool of a natatorium, evidence held to show that the steps and pool were in a reasonably safe condition, and that there was no negligence on the part of the proprietor.—*Anderson v. Seattle Park Co.*, 140 P. 698.

**(C) Trial, Judgment, and Review.**

§ 136 (Cal.) While ordinarily contributory negligence is largely a question of fact for the jury, where the standard of conduct required under given circumstances has been plainly neglected, it is a question of law.—*Kauffman v. Machin Shirt Co.*, 140 P. 15.

§ 136 (Okla.) Whether the plaintiff in a personal injury case has exercised ordinary care to avoid injury is for the jury.—*Cleveland Trinidad Paving Co. v. Mitchell*, 140 P. 416.

**NEGOTIABLE INSTRUMENTS.**

See Bills and Notes.

**NEWLY DISCOVERED EVIDENCE.**

See New Trial, §§ 100, 105.

**NEWSPAPERS.**

See Evidence, § 318; Intoxicating Liquors, § 146; Libel and Slander, § 42.

**NEW TRIAL.**

See Appeal and Error, §§ 272, 301, 305, 362, 502, 528, 544, 783, 933, 977, 1015, 1078, 1172; Criminal Law, §§ 1156, 1176; Judgment, §§ 199, 336-384.

**I. NATURE AND SCOPE OF REMEDY.**

§ 9 (Wash.) Where the jury returns a general verdict on several causes of action, the court cannot separate them for the purpose of granting a new trial or dismissal, but, where special verdicts are returned as to each, the court may deny a new trial as to one and grant a new trial or dismiss the complaint as to the others, without violating Rem. & Bal. Code, § 399.—*Auwarter v. Kroll*, 140 P. 326.

**II. GROUNDS.**

**(F) Verdict or Findings Contrary to Law or Evidence.**

§ 72 (Mont.) The trial court should not set aside the verdict, unless the evidence clearly preponderates against it.—*Gibson v. Morris State Bank*, 140 P. 76.

§ 79 (Mont.) The rule that findings of fact in equity cases should not be set aside unless clearly against the preponderance of the evidence, followed by the Supreme Court since the adoption of Rev. Codes, § 6253, relating to appeals, should govern the determination of a motion for a new trial in an equity suit, which is passed on by a judge other than the one who presided at the trial.—*Gibson v. Morris State Bank*, 140 P. 76.

**(G) Surprise, Accident, Inadvertence, or Mistake.**

§ 97 (Colo.App.) Where no objection to the admission of evidence was based on surprise, the objection is waived and is not a ground for new trial.—*Agnew v. Mathieson*, 140 P. 484.

**(H) Newly Discovered Evidence.**

§ 100 (Kan.) Where, in an action for damages from a flood by the breaking of a dam, witnesses testified that the dam was standing after the injury, a new trial for newly discovered eyewitnesses, who would contradict such testimony, should be granted, where due diligence was shown.—*Davis v. Sim*, 140 P. 851.

§ 105 (Kan.) Refusal of new trial sought on account of newly discovered evidence impeaching in character held not error.—*Schriber v. Maxwell*, 140 P. 865.

**III. PROCEEDINGS TO PROCURE NEW TRIAL.**

§ 114 (Kan.) In cases arising before the taking effect of Laws 1913, c. 243, a motion for a new trial need not be granted by a judge succeeding the trial judge unless such motion involves the weight of evidence and credibility of witnesses.—*Chandler v. Chandler*, 140 P. 858.

§ 116 (Wash.) A motion for new trial could not survive a final judgment against the mover, whatever might be the grounds for relief against the same; the motion being overruled by the judgment.—*Okazaki v. Sussman*, 140 P. 904.

§ 140 (Kan.) Striking of scandalous and impertinent affidavits offered in support of a motion for a new trial held not error.—*Schriber v. Maxwell*, 140 P. 865.

§ 159 (Okla.) Where a new judge takes the place of the trial judge, who retires leaving a motion for new trial pending, the new judge will ordinarily grant a new trial, where the motion involves a review of proceedings and evidence not preserved.—*School District No. 38, Le Flore County, v. School District No. 92, Le Flore County*, 140 P. 1144.

**NONSUIT.**

See Trial, §§ 159, 165.

**NOTES.**

See Bills and Notes.

## NOTICE.

See Appeal and Error, §§ 272, 347, 511, 528, 783; Bills and Notes, § 129; Carriers, § 218; Chattel Mortgages, § 227; Corporations, §§ 93, 123, 298; Eminent Domain, § 180; Exceptions, Bill of, § 39; Fraudulent Conveyances, § 160; Highways, § 30; Insurance, § 229; *Lis Pendens*, §§ 1, 26; Master and Servant, § 217; Mechanics' Liens, §§ 115, 277, 290; Mines and Minerals, § 19; Municipal Corporations, §§ 237, 788, 821; Principal and Surety, §§ 66, 155; Statutes, § 109; Subrogation; Taxation, § 734; Vendor and Purchaser, § 329; Waters and Water Courses, § 266; Wharves, § 21.

## NUISANCE.

See Mines and Minerals, § 119.

## NUNC PRO TUNC.

See Criminal Law, § 636.

## OBJECTIONS.

See Appeal and Error, §§ 187-232.

## OBLIGATION OF CONTRACTS.

See Constitutional Law, §§ 134, 149.

## OFFICERS.

See Bribery; Clerks of Courts; Corporations, §§ 414, 432; District and Prosecuting Attorneys; Embezzlement; Evidence, § 83; Judges; Justices of the Peace; Municipal Corporations, §§ 180, 185; Pleading, § 403; Receivers; Sheriffs and Constables; States, § 69; United States Marshals.

## I. APPOINTMENT, QUALIFICATION, AND TENURE.

### (C) Eligibility and Qualification.

§ 18 (N.M.) The right to hold a public office exists only by virtue of some law which expressly or impliedly confers it.—*State v. De Armijo*, 140 P. 1123.

The right to hold office may be conferred by statute, or may exist by virtue of the common law, where the common law is in force and no statute denies the right.—*Id.*

Sess. Laws 1909, c. 134, § 1, providing that no person prevented by the "Organic Act" of the territory shall be entitled to hold public office, refers to the original act of Congress creating the territory of New Mexico, and the only limitations thereby imposed are that such right shall be exercised only by citizens of the United States.—*Id.*

§ 20 (N.M.) Since the statutory law of the territory neither expressly conferred nor denied the right of women to hold public office, the existence of such right depends on the common law.—*State v. De Armijo*, 140 P. 1123.

Under the common law, a woman was eligible to hold a purely ministerial office, if capable of performing the duties thereof, where such duties did not call for the exercise of judgment and discretion.—*Id.*

## III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 100 (Ariz.) In the absence of constitutional prohibitions, the compensation of any public officer may be increased or diminished at any time during the term for which he was elected.—*Yuma County v. Sturges*, 140 P. 504.

Const. art. 4, § 17, abridges the legislative power to increase the compensation of any public officer during his term, but the compensation prescribed for the office at the beginning of term continues during the term.—*Id.*

Under Civ. Code 1901, pars. 2608 and 2609, as amended by Laws 1905, c. 11, and pars. 2610 and 2611, the treasurer of a county held entitled

to an increase in the salary during his term of office on an increase in the assessed valuation of the property of the county during his term, notwithstanding Const. art. 4, § 17, and Laws 1912, c. 93, adopted during his term of office.—*Id.*

§ 100 (Cal.) Under Const. art. 11, § 9, and County Government Act, the compensation of one elected for the term beginning January 7, 1907, to the consolidated offices of county clerk, auditor, and recorder, while St. 1903, p. 377, fixing the salary of county auditor at \$1,500 annually, was in force, may not be indirectly increased by the appointment of a copyist in the office of the recorder, notwithstanding Pol. Code, § 4267, as amended by St. 1907, p. 507.—*Calaveras County v. Poe*, 140 P. 23.

## OIL.

See Mines and Minerals, §§ 73, 78.

## OPENING.

See Judgment, §§ 138-160, 340-384.

## OPINION EVIDENCE.

See Criminal Law, § 451; Evidence, §§ 472-545.

## OPTIONS.

See Taxation, § 79.

## ORDINANCES.

See Municipal Corporations, §§ 122, 180.

## OWELTY OF PARTITION.

See Partition, § 84.

## PARDON.

See Licenses, § 39.

§ 4 (Wash.) Laws 1913, c. 28, § 2, subd. 2, gives no authority to a justice of the peace to suspend or commute the sentence of one convicted and sentenced to imprisonment for willful nonsupport of wife or children, but merely authorizes, an order for a recognizance for payments to the wife or children; after "conviction" meaning, in view of subdivision 3, after a finding of guilty, and before imposition of sentence.—*State v. Superior Court for King County*, 140 P. 555.

§ 7 (Cal.) Under St. 1913, p. 1048, a first term prisoner is entitled, as a matter of right, upon the expiration of one calendar year, to apply for a parole, but not entitled as a matter of right to a parole; the granting of same being within the discretion of the board of prison directors.—*Roberts v. Duffy*, 140 P. 260.

## PARENT AND CHILD.

See Bastards, §§ 13, 49; Courts, § 97; Descent and Distribution, § 68; Estoppel, § 92; Guardian and Ward; Infants.

§ 3 (Ariz.) A parent is required to care for his child during the time it is unable to care for itself, and is entitled to use the child's estate for that purpose only in exceptional cases.—*In re Harris*, 140 P. 825.

§ 14 (Ariz.) While a stepfather was under no natural or legal obligation to care for a minor stepchild, the assumption of that duty by the stepfather carried with it the resulting legal responsibilities.—*In re Harris*, 140 P. 825.

A parent or one in loco parentis, such as a stepfather, who advances money to support the child, cannot, years thereafter, recover such expenditures as upon an implied contract by the child to repay them.—*Id.*

The intention of one in loco parentis, such as a stepfather, to require repayment of amounts advanced for the maintenance, etc., of a stepchild, must be shown in order to entitle

the stepfather to repayment, as otherwise the maintenance will be deemed gratuitous.—Id.

## PAROLE.

See Pardon, § 7.

## PAROL EVIDENCE.

See Evidence, §§ 400-461.

## PARTIES.

See Appeal and Error, §§ 187, 877; Assignments, § 121; Bills and Notes, § 371; Building and Loan Associations, § 6; Colleges and Universities, § 7; Contempt, § 50; Contracts, § 187; Corporations, § 153; Evidence, § 82; Husband and Wife, § 270; Injunction, § 114; Judgment, §§ 138, 670; Mandamus, § 152; Mortgages, § 427; Pleading, § 248; Subscriptions, § 16; Waters and Water Courses, § 247.

### I. PLAINTIFFS.

#### (A) Persons Who may or must Sue.

§ 6 (Cal.) In an action for damages growing out of a lease of oil lands, evidence held to sustain a finding that plaintiff was the real party in interest, and hence entitled to maintain the action.—Kline v. Guaranty Oil Co., 140 P. 1.

### II. DEFENDANTS.

#### (B) Joinder.

§ 30 (Or.) An action for rent cannot be maintained against one who agrees to pay rent, if the lessees fail to pay, jointly with the lessees, if the sufficiency of the complaint is properly challenged for misjoinder of parties.—Wolf v. Eppenstein, 140 P. 751.

### III. NEW PARTIES AND CHANGE OF PARTIES.

§ 51 (Okl.) Where the grantee of land, which, at the time of the conveyance, was in another's adverse possession, sued in his own name to recover same, it was not error to permit him to amend his petition so as to join his grantor as plaintiff.—Gannon v. Johnston, 140 P. 430.

§ 51 (Wash.) It is permissible to bring in new parties when necessary, and to enter a judgment that will meet the merits of the case.—State v. Asotin County, 140 P. 914.

### V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75 (Or.) "Defect of parties," specified in L. O. L. § 68, subd. 4, as a ground of demurrer, means that other parties are necessary, and a demurrer on that ground must name those who should be brought in.—Wolf v. Eppenstein, 140 P. 751.

Under L. O. L. § 68, subds. 4, 5, and sections 71, 72, unless the objection of misjoinder of parties is taken either by demurrer or answer, the defect is waived.—Id.

§ 84 (N.M.) The rule that a defendant waives his right to take advantage of defect of parties defendant, where he does not present his objection by demurrer or answer, does not apply to an indispensable party.—Miller v. Klasner, 140 P. 1107.

## PARTITION.

### II. ACTIONS FOR PARTITION.

#### (B) Proceedings and Relief.

§ 78 (Or.) Under L. O. L. §§ 443, 444, it is the duty of the referees to apportion the land in value according to the respective interests, without regard to the acreage.—Leonard v. Walker, 140 P. 755.

A decree, giving to the parties acreage, but not value substantially in proportion to the shares of the parties, is reversible error.—Id.

§ 84 (N.M.) Where two town lots owned in common are susceptible of division by giving a lot of equal value to each party, an owelty of partition will not be granted because one lot has a peculiar value to the cotenant to whom it is allotted.—Field v. Hudson, 140 P. 1118.

## PARTNERSHIP.

See Judgment, §§ 199, 731; Receivers, §§ 58, 218.

### I. THE RELATION.

#### (A) Creation and Requisites.

§ 5 (Kan.) Participation in profits is only a circumstance to be considered in determining whether a partnership contract has been made.—Wade v. Hornaday, 140 P. 870.

An arrangement among three persons for a division of net profits from sales of certain stock in lieu of office rent and services furnished by one, advertising and printing furnished by another, and services of a third in the sale of the stock and in the advertising and correspondence, did not create a partnership.—Id.

### III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

#### (B) Individual Transactions.

§ 92 (Wash.) One partner may not profit for himself individually out of the partnership business, or out of private transactions which should have been conducted in the partnership name; but he may buy and sell real estate or other property, if the transaction is disconnected with the partnership business, and is not in competition or rivalry therewith, and if he is under no duty to conduct it for the firm.—Shrader v. Downing, 140 P. 558.

A member of a firm engaged in selling real estate on commission, who bought a tract with his own money, platted it, and placed it with the firm for sale, on the usual commission, the firm having no funds with which to buy, and an effort having been made to get another to do it, was not liable to account to the firm for his profit on the transaction.—Id.

#### (C) Actions Between Partners.

§ 120 (Kan.) Where, in an action on a partnership dissolution agreement, defendant pleaded a mutual mistake in transcribing the agreement, and the evidence showed that plaintiff knew of the mistake, the variance was not material.—Wait v. McKibben, 140 P. 860.

§ 121 (Wash.) Evidence, in an action between partners for an accounting, held to justify the conclusion of the trial court that the transaction conducted by the defendant was not intended or understood to be a firm transaction.—Shrader v. Downing, 140 P. 558.

### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

#### (A) Representation of Firm by Partner.

§ 153 (Okl.) Where one partner, while acting for the firm, procures an exchange of lands by false representations, the other partners are liable for the fraud.—Gannon, Goulding & Thies v. Hausaman, 140 P. 407.

## PASSENGERS.

See Carriers, §§ 236-328.

## PATENTS.

See Abstracts of Title, § 1; Homestead, § 142; Indians, § 13; Public Lands, §§ 104, 114, 144.

## X. TITLE, CONVEYANCES, AND CONTRACTS.

### (B) Assignments and Other Transfers.

§ 196 (Colo.) An instrument providing that, in consideration of the payment of a certain sum by the party of the second part to the party of the first part, the party of the first part "hereby agrees" to deliver to the second party all of his rights to the use of a certain patent, and "does hereby grant and convey" such rights, was a mere option; the second party not agreeing to buy or pay for the patent rights.—*Strauss v. Brier*, 140 P. 183.

§ 199 (Colo.) An agreement to convey rights, etc., held in a patent required a conveyance of the patent rights, which, to be valid, must be made and recorded pursuant to Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387).—*Strauss v. Brier*, 140 P. 183.

§ 203 (Colo.) In an action for the balance due under a written agreement to sell an interest in a patent right, evidence held not to show that plaintiff ever had an assignment of or interest in any patent.—*Strauss v. Brier*, 140 P. 183.

One party to a contract cannot be required to perform, and the other party left to perform at his option, so that one suing for the balance due under an agreement for the sale of patent rights must show a tender of a conveyance of the rights as agreed in order to recover.—*Id.*

## PAYMENT.

See *Frauds, Statute of*, § 129; *Mechanics' Liens*, § 115; *Money Paid*, § 1; *Subrogation*; *Tender*; *Vendor and Purchaser*, §§ 98, 104, 116, 181; *Waters and Water Courses*, §§ 203, 257, 266.

## V. RECOVERY OF PAYMENTS.

§ 82 (Ariz.) Plaintiff, who, under agreement for a lease, but who had no lease or possession, and who was under no obligation to pay rent, and who with full knowledge of such facts, voluntarily and persistently remitted checks for the monthly rental to defendant, who, after he had sold and conveyed the property, cashed the checks, held not entitled to recover such payments.—*Merrill v. Gordon*, 140 P. 496.

§ 89 (Ariz.) Whether a payment was made voluntarily or not is a question of law, where the facts are undisputed.—*Merrill v. Gordon*, 140 P. 496.

§ 89 (Wash.) Evidence, in an action for money paid to defendant upon its representation and warranty as to the balance due upon machinery which it had sold upon the contract of conditional sale assigned to plaintiff, held to show either a false representation or a suppression of the truth entitling plaintiff to recover.—*Scandinavian American Bank of Tacoma v. Puget Sound Machinery Depot*, 140 P. 901.

## PENALTIES.

See *Damages*, § 80; *Death*, §§ 7, 11, 64.

## PERSONAL INJURIES.

See *Carriers*, §§ 286-328; *Corporations*, § 491; *Courts*, §§ 7, 8; *Damages*, §§ 96, 131, 132, 158, 163, 208; *Death*; *Evidence*, §§ 222, 323, 472, 500, 513; *Gas*, § 14½; *Husband and Wife*, § 205; *Master and Servant*, §§ 92-332; *Municipal Corporations*, §§ 705, 706, 747-849; *Negligence*; *Railroads*, § 328; *Release*, § 57; *Street Railroads*, §§ 99, 114; *Trial*, §§ 45, 237, 242, 244, 295; *Wharves*, § 21.

## PERSONAL PROPERTY.

See *Property*.

## PETITION.

See *Appeal and Error*, §§ 361, 362; *Counties*, § 13; *Pleading*; *Waters and Water Courses*, §§ 225, 226, 230.

## PHOTOGRAPHS.

See *Evidence*, § 318.

## PHYSICIANS AND SURGEONS.

See *Evidence*, §§ 528, 536, 545; *Frauds, Statute of*, § 23; *Master and Servant*, § 92; *Statutes*, § 72.

§ 5 (Cal.App.) Whether, within St. 1911, p. 1437, providing for the granting of a certificate to practice a "special branch" of medicine and surgery, "cancers, tumors, malignant growths, and cutaneous diseases" are so correlated that they may be classed as such a branch is a question of fact under competent evidence.—*Bohanon v. State Board of Medical Examiners*, 140 P. 1069.

## PLEADING.

See *Appeal and Error*, §§ 171, 854, 889, 959, 1039-1042, 1170, 1176; *Attachment*, § 306; *Bastards*, §§ 19, 49; *Bills and Notes*, §§ 64, 462; *Brokers*, § 82; *Cancellation of Instruments*, § 37; *Carriers*, § 314; *Contracts*, § 332; *Corporations*, §§ 269, 513, 515, 518; *Costs*, § 184; *Counties*, § 29; *Courts*, § 56; *Damages*, §§ 150, 158; *Death*, §§ 48, 49, 52; *Dismissal and Nonsuit*, § 60; *Divorce*, §§ 83, 104; *Elections*, § 288; *Eminent Domain*, § 191; *Equity*, § 329; *False Imprisonment*, § 20; *Garnishment*, §§ 142, 158, 187, 237; *Indictment and Information*; *Injunction*, § 118; *Judgment*, §§ 158, 199, 256, 384, 590; *Justices of the Peace*, § 101; *Landlord and Tenant*, § 262; *Libel and Slander*, §§ 86, 100; *Limitation of Actions*, §§ 125, 127; *Lis Pendens*, § 9; *Master and Servant*, §§ 39, 256, 259; *Mechanics' Liens*, § 277; *Mortgages*, §§ 454, 459, 559; *Municipal Corporations*, §§ 373, 538; *Parties*, § 51; *Partnership*, § 120; *Principal and Surety*, § 155; *Quieting Title*, §§ 34, 35, 50; *Receivers*, § 218; *Reformation of Instruments*, § 36; *Replevin*, § 69; *Schools and School Districts*, § 138; *Trial*, § 251; *Trusts*, § 371; *Vendor and Purchaser*, § 849.

## I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (Cal.App.) A denial in ejectment that "defendants, or either of them, now unlawfully withhold possession from plaintiff of any of the lands described in plaintiff's said complaint" is evasive and a mere conclusion, and hence not sufficient to raise an issue as to defendants' possession.—*Kerr v. Snowden*, 140 P. 704.

§ 9 (Cal.App.) A complaint in an action for death was not subject to general demurrer for failure to allege the heir's damages, where it alleged facts from which damage to the widow, as heir, must necessarily follow, particularly where the prayer asked for a specific sum.—*Barr v. Southern California Edison Co.*, 140 P. 47.

§ 34 (Ariz.) In construing the language of a complaint, every reasonable intendment should be made to sustain the pleading, if possible.—*Machovich Mercantile Co. v. Hickey*, 140 P. 63.

§ 34 (Okla.) A petition not challenged directly or by objecting to the testimony will be held good on objection made for the first time on appeal where, by a liberal construction, it states a cause of action.—*Hoehler v. Short*, 140 P. 146.

§ 35 (Cal.App.) An allegation in a complaint, in an action for wrongful death, that the plaintiff, who was the widow, suffered damages as administratrix must be regarded as surplusage, as she could not sustain any damages in that capacity upon the facts alleged.—*Barr v. Southern California Edison Co.*, 140 P. 47.

§ 36 (Cal.) A finding contrary to a fact admitted by the pleadings, within Code Civ. Proc. § 462, must be disregarded.—*Hibernia Savings & Loan Society v. Dickinson*, 140 P. 265.

§ 36 (Cal.App.) Where plaintiff suing for goods sold, established a prima facie case, defendant, who admitted in his answer that a certain sum was due, could not complain of a finding that the amount admitted was due.—*Western Implement Co. v. Blodgett*, 140 P. 38.

§ 36 (Mont.) Where, in an action to compel a reconveyance of trust property on the ground that the trust had been fully accomplished, defendant in his answer recognized the original contract by which the trust was created and the property conveyed as valid, but set up title by virtue of a subsequent contract, he could not thereafter contend that the original contract was void because not in writing.—*Willoburn Ranch Co. v. Yegen*, 140 P. 231.

## II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 48 (Mont.) Under the statute, as well as under the general rule of law, if plaintiff is entitled to relief under the facts alleged, considered from any viewpoint, the complaint will be sustained.—*Hicks v. Rupp*, 140 P. 97.

## III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

### (A) Defenses in General.

§ 84 (Cal.) Where a complaint is directed against two defendants, and the liability of one involves facts not material to the liability of the other, and they answer separately, neither need answer those allegations which relate solely to the liability of the other.—*Hibernia Savings & Loan Society v. Dickinson*, 140 P. 265.

§ 87 (Okla.) Under Rev. Laws 1910, § 4736, providing that the pleadings authorized are petition by plaintiff, answer or demurrer by defendant, demurrer or reply by plaintiff, and demurrer by defendant to reply, a plea in bar is unauthorized.—*Anderson v. State*, 140 P. 1142.

### (C) Traverses or Denials and Admissions.

§ 127 (Kan.) A defendant, sued on a contract to accept and pay for a life insurance policy, by defending on the ground that plaintiffs had broken their promise to pay for him a loan commission less in amount than the premium, *held* not to have admitted a liability for the difference.—*Woodell v. Gibson*, 140 P. 107.

§ 127 (Utah) The admission in the answer, in an action for trespass by defendant's sheep and cattle, that defendant was the owner "of certain animals, to wit, sheep and cattle," was not an admission that he was the owner of the alleged trespassing animals, where in connection with the admission, all the allegations of the complaint were denied.—*Surbaugh v. Butterfield*, 140 P. 757.

## V. DEMURRER OR EXCEPTION.

§ 192 (Ariz.) That a complaint alleged legal conclusions instead of facts did not make it bad on general demurrer, where the intention of plaintiff was apparent.—*Machomich Mercantile Co. v. Hickey*, 140 P. 63.

§ 205 (Mont.) In an action by the assignee of the settler of a trust to compel a reconveyance of the trust property on the ground that the purpose of the trust had been fully accomplished, the petition *held* to allege facts from which it was fairly inferable that the trustee had been fully reimbursed for all advancements, and, though vulnerable to a special demurrer because indefinite and ambiguous, was sufficient as against a general demurrer.—*Willoburn Ranch Co. v. Yegen*, 140 P. 231.

§ 214 (Ariz.) In an action to quiet title *held*, that plaintiffs' allegation that the recorded contract of conditional sale under which defendant claimed was invalid would be treated as true

for the purpose of a demurrer.—*Arizona Mine Supply Co. v. Bolman*, 140 P. 490.

§ 214 (Cal.App.) A demurrer admits the verity of the facts pleaded.—*Matthews v. Lopus*, 140 P. 306.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 229 (Kan.) Amendments to correct mistakes or defects in pleadings should be liberally allowed, where they will promote justice and not substantially change the claims or defenses.—*Woods v. Nicholas*, 140 P. 882.

§ 230 (Colo.) The right to amend in special proceedings is purely statutory, and, where the statute does not specifically authorize it amendments of a substantial nature cannot be made.—*Town of Sugar City v. Board of Com'rs of Crowley County*, 140 P. 809.

§ 236 (Cal.) Where the complaint in a suit to foreclose a mortgage, brought against the mortgagor and a subsequent purchaser, alleged an assumption by the purchaser of the mortgage debt, the allowance of an amendment to conform to the proof by omitting that allegation, made after vacating a judgment for the mortgagee on motion authorized by Code Civ. Proc. §§ 663, 663a, was within the court's discretion.—*Hibernia Savings & Loan Society v. Dickinson*, 140 P. 265.

§ 236 (Cal.App.) In an action for legal services rendered by plaintiff's assignors, where the original complaint declared on an account stated, the granting of leave to file an amendment declaring upon the contract itself was not an abuse of discretion, the facts alleged being the same in both cases, and the causes of action arising out of the same transaction.—*Eldridge v. Mowry*, 140 P. 978.

§ 236 (Okla.) Permitting defendant to amend to allege mutual mistake of law, after the evidence was closed, witnesses were discharged, the jury instructed, and counsel for defendant had made his opening argument, plaintiff not being granted a continuance, *held* an abuse of the discretion vested in the court by Comp. Laws 1906, § 5679.—*Northwest Thresher Co. v. McNinch*, 140 P. 1170; *Same v. Pruitt*, Id. 1173; *Same v. Bell*, Id. 1174.

§ 237 (Cal.App.) Where, in an action for rent, the complaint set out a lease and averred that defendant went into possession thereunder, but the facts as brought out on the trial showed that defendant did not hold the land by virtue of the lease, plaintiff should have been permitted to amend her complaint to conform to the facts and recover for use and occupation.—*Hefernan v. Davis*, 140 P. 716.

§ 237 (Okla.) An answer cannot be amended to conform to the proof, where the proof supporting the amendment was immaterial, incompetent, and introduced over plaintiff's objection.—*Northwest Thresher Co. v. McNinch*, 140 P. 1170; *Same v. Pruitt*, Id. 1173; *Same v. Bell*, Id. 1174.

§ 248 (Cal.App.) Where plaintiff, to whom a claim for legal services was assigned, first sued on an account stated, and thereafter amended his complaint and declared on the contract itself, the first assignment of the chose in action was sufficient, and a second, made just before the amendment, was unnecessary, and could not defeat plaintiff's right to amend on the theory that it introduced a new cause of action.—*Eldridge v. Mowry*, 140 P. 978.

§ 248 (Kan.) An amendment of a petition to correct a mistake of the pleader, which merely substitutes one party for another as plaintiff, does not change the cause of action.—*Harlan v. Loomis*, 140 P. 845.

§ 248 (Kan.) Amendment to a petition in an action for defendant's fraudulent representations as to the value of notes exchanged by him for plaintiff's property *held* merely to amplify

the averments of the original petition and state a cause of action for deceit and fraud.—*Woods v. Nicholas*, 140 P. 862.

## VII. SIGNATURE AND VERIFICATION.

§ 291 (Ariz.) In an action on a written contract by the agents of defendant insurance company to return a cash payment made on a stock subscription any time within 90 days, an allegation that such contract was made by defendant's agent was admitted if not denied by a verified answer under Civ. Code 1901, par. 1358.—*Arizona Life Ins. Co. v. Lindell*, 140 P. 60.

## XI. MOTIONS.

§ 364 (Or.) There was no error in striking out of the answer an allegation in detail of matter included in a general statement under which proof of all facts suggested by the stricken matter was admitted, except an item as to which there was no suggestion in the evidence.—*Scibor v. Oregon-Washington R. & Navigation Co.*, 140 P. 629.

§ 369 (Wash.) Where a railroad company was liable to an adjoining property owner for injuries caused by blasting, whether such blasting was negligent or not, the property owner cannot be compelled to elect as to whether he will rely upon allegations in his complaint based upon the inherent danger of the work, or upon the railroad's negligence.—*B. Schade Brewing Co. v. Chicago, M. & P. S. Ry. Co.*, 140 P. 897.

## XII. ISSUES, PROOF, AND VARIANCE.

§ 373 (Wash.) Where, in an action upon an attachment bond, no demurrer was interposed because the complaint did not allege that the damages were unpaid, the only defense pleaded or raised during the trial being that there was probable cause for the attachment, etc., there was a waiver of proof of nonpayment of damages.—*Wild Rose Orchard Co. v. Critzer*, 140 P. 561.

## XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 403 (Mont.) The allegation in the answer that on a certain day relator was a member of the police department of the city of B., holding the position of lieutenant of police, to that extent aids the affidavit for mandamus to be restored to office.—*State v. Duncan*, 140 P. 95.

§ 418 (N.M.) Under Comp. Laws 1897, § 2685, subsec. 39, where the complaint fails to state a cause of action and defendant's demurrer is overruled, he may answer on leave, and go to trial without waiving his right to predicate error on the overruling of the demurrer.—*La Mesa Community Ditch v. Appelzoeller*, 140 P. 1051.

§ 428 (Mont.) Defendant may not object to introduction in evidence by plaintiff of an ordinance the existence of which is pleaded in the answer.—*State v. Duncan*, 140 P. 95.

§ 433 (Ok.) Where defendants do not appear until after judgment, objections that the petition fails to support the judgment will be overruled, unless it fails to allege some matter essential to the relief sought.—*Hoehler v. Short*, 140 P. 146.

## PLEDGES.

See Banks and Banking, § 179; Corporations, § 123.

§ 44 (Utah) Where a note secured by collaterals is paid, the collaterals are not enforceable in the hands of the holder of the note.—*Utah Commercial & Savings Bank v. Fox*, 140 P. 660.

## POISONS.

See Death, § 33.

## POLICE.

See Municipal Corporations, §§ 180, 185.

## POLICE POWER.

See Constitutional Law, §§ 81, 287.

## POLICY.

See Insurance.

## POLITICAL RIGHTS.

See Elections.

## POSSESSION.

See Adverse Possession; Landlord and Tenant, § 185.

## POWERS.

See Deeds, § 142.

## PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

## PREFERENCES.

See Bankruptcy, §§ 159, 166, 303; Fraudulent Conveyances, §§ 156, 160.

## PREMIUMS.

See Insurance, § 20.

## PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

## PRESUMPTIONS.

See Appeal and Error, §§ 901-937; Criminal Law, § 1144; Evidence, §§ 67-83.

## PRIMARY ELECTIONS.

See Elections, § 120.

## PRINCIPAL AND ACCESSORY.

See Rape, § 18.

## PRINCIPAL AND AGENT.

See Adverse Possession, §§ 25, 36; Attorney and Client; Brokers; Corporations, §§ 414, 432, 513; Evidence, §§ 242, 273; Factors; Partnership, § 153.

### I. THE RELATION.

#### (A) Creation and Existence.

§ 20 (Ariz.) In an action against an insurance company to recover a cash payment made on a stock subscription agreement, oral evidence was admissible to show that the person with whom plaintiff contracted for the return of the payment was defendant's agent, so that defendant was bound by the contract, though not an ostensible party thereto.—*Arizona Life Ins. Co. v. Lindell*, 140 P. 60.

§ 22 (Ok.) Where a suit by the principal is based on a contract made by an assumed agent, the agent's declarations in making the contract are competent evidence of agency.—*Iowa Dairy Separator Co. v. Sanders*, 140 P. 406.

§ 22 (Utah) The declarations of a herder of trespassing sheep and cattle that he was working for defendant who owned them, were inadmissible, because agency cannot be proved in that way.—*Surbaugh v. Butterfield*, 140 P. 757.

§ 24 (Ok.) Under conflicting evidence on the question of agency, such question is for the jury.—*Iowa Dairy Separator Co. v. Sanders*, 140 P. 406.



**(B) Termination.**

§ 33 (Okl.) A wholesale merchant employing a traveling salesman could arbitrarily terminate the employment, where the extent of the employment was not specified.—*Glockner v. Jacobs*, 140 P. 142.

§ 33 (Okl.) A contract of agency is revocable at the will of the principal, unless it constitutes "a power coupled with an interest."—*McKellop v. Dewitz*, 140 P. 1161.

§ 34 (Okl.) The phrase "a power coupled with an interest" means a writing creating in, conveying to, or vesting in an agent an interest or estate in the subject of the agency, as distinguished from the proceeds of the exercise of the agency.—*McKellop v. Dewitz*, 140 P. 1161.

§ 41 (Okl.) A principal having a power to revoke an agency is liable in damages, where the revocation causes substantial damages to the agent.—*McKellop v. Dewitz*, 140 P. 1161.

**II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.****(A) Execution of Agency.**

§ 63 (Okl.) Where a traveling salesman, after being discharged, refuses to return his samples until his commissions have been paid, and thereafter sells the samples, and applies the proceeds on what is due him, he is liable, in the absence of bad faith, only for their fair market value when sold.—*Glockner v. Jacobs*, 140 P. 142.

**(B) Compensation and Lien of Agent.**

§ 88 (Kan.) Where a salesman of a manufacturing company employed a local agent to make sales on stated terms, and sales so made were reported and filled, the company is liable for commissions according to the agreement.—*Randolph Lumber Co. v. Western Silo Co.*, 140 P. 867.

**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.****(A) Powers of Agent.**

§ 97 (Wash.) Where a general power of attorney by its terms authorized the agent to act with reference to all manner of business, the fact that it was given with reference to a certain class of transactions did not limit the agent's authority, as persons dealing with him were not bound to look beyond the instrument.—*Anwarter v. Kroll*, 140 P. 326.

§ 101 (Okl.) Where the mutual mistake of law claimed by defendant is based on a collateral oral agreement in the name of an agent, independent of the written agreement on behalf of the principal, evidence that defendant and the agent misapprehended the law as to such oral agreement is insufficient to establish a mutual mistake of law on the part of the principal.—*Northwest Thresher Co. v. McNinch*, 140 P. 1170; *Same v. Pruitt*, Id. 1173; *Same v. Bell*, Id. 1174.

§ 103 (Cal.) A principal directing an agent to purchase for him specified property, provided it can be procured for a specified price, does not thereby authorize the agent to make an agreement binding the principal, as purchaser, to assume a debt secured by a mortgage on the property.—*Hibernia Savings & Loan Society v. Dickinson*, 140 P. 265.

§ 103 (Or.) While a power authorizing an attorney to lease, sell, convey, or mortgage does not technically authorize a gift, conveyances for \$10 and \$1, respectively, are within the letter of the authority.—*Wade v. Northup*, 140 P. 451.

Where a woman spoke of her interest in unproductive land as a burden, conveyances by her attorney in fact for \$10 and \$1, respectively, were within both the spirit and letter of a power to sell.—Id.

§ 105 (Or.) A contract whereby defendant employs agents to plat land and sell the lots and agrees to convey to a purchaser on payment of \$50 does not authorize the agents or their assignee to receive money, nor require a deed till the payment of \$50 per lot to defendant.—*Kern v. Feller*, 140 P. 735.

§ 116 (Wash.) While, under certain circumstances, the power of an agent will be determined with reference to the intent of the parties, and the person dealing with him acts at his peril, yet, where a power of attorney is general and without ambiguity or uncertainty, one dealing with the agent is not bound to look beyond the instrument for secret reservations as to the agent's powers.—*Anwarter v. Kroll*, 140 P. 326.

§ 131 (Or.) Where defendant employed agents to plat land and sell the lots, and agreed to convey on the payment of \$50 by a purchaser, plaintiff, who paid sums to the agents, cannot recover them from defendant, who never received the money.—*Kern v. Feller*, 140 P. 735.

**(B) Undisclosed Agency.**

§ 143 (Cal.App.) An undisclosed principal may sue on a contract entered into by an agent for his benefit.—*Eldridge v. Mowry*, 140 P. 978.

**(F) Actions.**

§ 190 (Cal.App.) In an action by a firm of attorneys for fees for legal services performed under a contract entered into between defendants and a corporation, evidence held to show that the attorneys were the undisclosed principals of the corporation.—*Eldridge v. Mowry*, 140 P. 978.

**PRINCIPAL AND SURETY.**

See Appeal and Error, §§ 1231, 1232; Bills and Notes, § 462; Constitutional Law, § 230; Costs, § 123; Judgment, § 785; Municipal Corporations, § 373; Receivers, §§ 212, 218; Replevin, §§ 120, 123; United States Marshals, § 36.

**II. NATURE AND EXTENT OF LIABILITY OF SURETY.**

§ 66 (Cal.App.) A provision of a bond given to secure performance of a contract, requiring notice in writing of any act on the part of the contractor involving a loss for which the surety was responsible, to be given it within 10 days, was not a "promissory warranty."—*Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 140 P. 295.

§ 66 (Wash.) Under Rem. & Bal. Code, § 1131, property of owners contracting for the improvement of an abutting street is liable to a lien for labor done and materials furnished a subcontractor, within the latter's bond to protect against liens.—*Williams v. Pacific Coast Casualty Co.*, 140 P. 74.

**III. DISCHARGE OF SURETY.**

§ 89 (Colo.App.) Where one acting as secretary of a corporation signed as surety a note of the corporation, she was not released through the fraud of the president or by his representations to her that she was released.—*Agnew v. Mathieson*, 140 P. 484.

§ 104 (Colo.App.) Where one acting as secretary of a corporation signed as surety a note of the corporation, she was not released by the execution of renewal notes by the corporation alone.—*Agnew v. Mathieson*, 140 P. 484.

§ 121 (Cal.App.) It is the duty of a creditor to act in the utmost good faith towards a surety, and so far as he can, consistently with his own rights, protect the interest of the surety, as well as his own.—*Ely v. Liscomb*, 140 P. 1086.

§ 129 (Wash.) Where the surety of a subcontractor knew that the contractor made advances, and thereafter executed a writing consenting that payments might be made on a basis different from that fixed in the contract, and consented to payments after the full contract price had been paid to complete the work, it was not released from liability because of the advancements.—*Williams v. Pacific Coast Casualty Co.*, 140 P. 74.

#### IV. REMEDIES OF CREDITORS.

§ 149 (Wash.) An action on the bond of a surety of a subcontractor, begun within six months after the completion of the contract, held brought within the six months' time fixed by the bond.—*Williams v. Pacific Coast Casualty Co.*, 140 P. 74.

§ 155 (Cal.App.) In action on bond given to secure performance of contract, complaint held to sufficiently allege giving of notice to surety of contractor's breach, within Code Civ. Proc. § 457.—*Los Angeles Olive Growers' Ass'n v. Pacific Surety Co.*, 140 P. 295.

#### PRIORITIES.

See Chattel Mortgages, § 138; Mortgages, § 151; Waters and Water Courses, § 152.

#### PRIVATE ROADS.

See Easements; Specific Performance, § 16.

#### PRIVILEGED COMMUNICATIONS.

See Libel and Slander, § 123; Witnesses, § 199.

#### PROBABLE CAUSE.

See Malicious Prosecution, §§ 22, 24.

#### PROCESS.

See Corporations, §§ 298, 670; Courts, § 8; Divorce, § 202; Execution; Garnishment; Injunction; Judgment, §§ 143, 158; Replevin.

#### PROHIBITION.

See Intoxicating Liquors.

#### PROMISSORY NOTES.

See Bills and Notes.

#### PROPERTY.

See Constitutional Law, §§ 87, 92, 100, 205, 208, 287-296; Counties, § 16; Eminent Domain; Franchises; Shipping; Woods and Forests, § 1.

§ 9 (Cal.App.) Evidence held to warrant a finding that defendant was the owner of an automobile, and that R., who had mortgaged the same to plaintiff, had possession under an executory contract of sale.—*Greene v. Carmichael*, 140 P. 45.

Possession of personal property is only prima facie evidence of ownership and, except as to negotiable instruments and currency, will not prevail against the rights of the true owner.—*Id.*

#### PROSTITUTION.

§ 3 (Kan.) An information merely alleging that accused did unlawfully persuade L., a girl of 15, to commit fornication with D., a male person, by having her hold unlawful, illicit sexual intercourse with him, did not allege a violation of White Slave Act, § 1.—*State v. Thom*, 140 P. 866.

§ 3 (Nev.) An indictment, charging that the defendant permitted his wife to be in a house of prostitution is sufficient to charge an offense under Rev. Laws, § 6445, making it a felony for a person to connive at, consent to, or permit his wife being in any house of prostitution.—*Ex parte Jackson*, 140 P. 718.

#### PROVINCE OF COURT AND JURY.

See Criminal Law, § 763; Trial, §§ 187-199.

#### PROXIMATE CAUSE.

See Death, § 17.

#### PUBLIC BUILDINGS.

See Municipal Corporations, § 268.

#### PUBLIC DEBT.

See Municipal Corporations, §§ 904-1000; Schools and School Districts, § 107.

#### PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 266-575.

#### PUBLIC LANDS.

See Courts, §§ 97, 489; Executors and Administrators, § 39; Mines and Minerals, §§ 9-26; Navigable Waters, §§ 36, 37, 42; Taxation, §§ 5, 177, 607; Waters and Water Courses, §§ 33, 225.

#### II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

##### (A) Surveys.

§ 24 (Cal.) Under Rev. St. §§ 2395-2397 (U. S. Comp. St. 1901, pp. 1471-1473), relating to the survey of public lands, the surveyor general, in making a plat where there was no return in the survey of the line run in the field, dividing a quarter section into halves, must, on dividing a quarter into east and west halves, draw a north and south line from a point equally distant from the southeast and southwest corners of the section, and thus divide the quarter into halves equal in quantity.—*Wood v. Mandrilla*, 140 P. 279.

##### (B) Entries, Sales, and Possessory Rights.

§ 35 (Ariz.) Where a widow who had made a homestead entry on public land died before she was entitled to a patent, the land did not belong to her estate, and a decree distributing it was void; the heirs of the widow having only a preferential right, under Rev. St. U. S. §§ 2291, 2292 (U. S. Comp. St. 1901, pp. 1390, 1394), to perfect the homestead entry.—*Harris v. Lyon*, 140 P. 985.

Where a widow made a homestead entry on public land, remarried, and died before she became entitled to a patent, leaving her second husband and a minor child, the second husband is, under Rev. St. U. S. §§ 2291, 2292 (U. S. Comp. St. 1901, pp. 1390, 1394), and Civ. Code 1913, par. 1092, entitled to a life estate in one-third of the homestead after patent was issued.—*Id.*

§ 35 (Wash.) A homestead entryman has, after making final proof and before the issuance of a patent, an equitable title to the land entered on, which may be transferred by him.—*Kent Lumber Co. v. Clarke*, 140 P. 556.

§ 41 (Cal.App.) A certificate of purchase of unappropriated government land from the United States Department of Agriculture is prima facie evidence of title in the holder, only because made so by Code Civ. Proc. § 1925.—*Kerr v. Snowden*, 140 P. 704.

Code Civ. Proc. § 1925, making the certificate of purchase of unappropriated government lands prima facie evidence that the holder or assignee is the owner of the land described therein, would not make entries from a tract book from the office of the register of United States lands, describing certain land as sold to a certain person, and giving the number of the certificate, etc., competent evidence of the issuance of the certificate of purchase or its assignment.—*Id.*

of a certificate of purchase of school lands, where default was occasioned by misinformation given the certificate holder by the county treasurer as to when payment could be made, and a third person settling on the land before the state accepted delinquent installments could not complain thereof.—*Matkin v. Vickers*, 140 P. 846.

#### (I) Proceedings in Land Office.

§ 104 (Colo.) Pending appeal from an order of the local land office rejecting a desert land entry, the local office's decision was suspended, and the officers thereof were without jurisdiction to deliver a patent to another under a homestead entry.—*Anderson v. Woodward*, 140 P. 198.

§ 106 (Cal.App.) Determination of whether one claiming unoccupied government land had made the improvements prescribed as a condition to the granting of a final certificate of purchase is for the United States Land Department; its ruling thereon being final, in absence of fraud or mistake.—*Kerr v. Snowden*, 140 P. 704.

#### (J) Patents.

§ 114 (Colo.) Though a patent to public land has been erroneously issued, it terminates the authority and control of the land department over the title, which does not again attach until the patent has been set aside by the courts.—*Anderson v. Woodward*, 140 P. 198.

### III. DISPOSAL OF LANDS OF THE STATES.

§ 144 (Cal.) Where tidelands were reserved from sale during designated periods, the approval of an application to purchase and the acceptance of the price and the issuance of a patent during such periods were without authority, and the patent was void.—*People v. Banning Co.*, 140 P. 587.

Where proceedings for the purchase of swamp lands were had during the time the lands were reserved from sale under the Constitution and Pol. Code, § 8488, the patents to the lands were void.—Id.

§ 185 (Wash.) Under Rem. & Bal. Code, §§ 6799-6805, under which the land commissioner may cancel the sale of state tidelands, if used by the purchaser for purposes other than oyster planting purposes, the commissioner had no power to cancel a sale merely because the purchaser failed to use it for oyster planting purposes.—*State v. Savidge*, 140 P. 559.

The rule that all grants from the state shall be strictly construed against the grantee had no application where the only question was as to the power vested in the state land commissioner under Rem. & Bal. Code, § 6804, empowering him to cancel sales of state lands for oyster planting purposes when they were being used for other purposes, and hence did not negative the rule that a strictly statutory power must be strictly construed.—Id.

### PUBLIC SCHOOLS.

See Schools and School Districts.

### PUBLIC SERVICE CORPORATIONS.

See Carriers; Corporations, § 370; Electricity, §§ 17½-11; Municipal Corporations, § 272; Railroads; Street Railroads; Waters and Water Courses, § 188.

### PUBLIC USE.

See Eminent Domain.

### PUBLIC UTILITIES.

See Waters and Water Courses, §§ 188, 201, 202.

See Waters and Water Courses, §§ 188-206.

### PUFFING.

See Fraud, § 11.

### PUNISHMENT.

See Constitutional Law, § 203; Contempt, § 75; Criminal Law, § 1208; Homicide, § 351; Pardon.

### QUALIFICATIONS.

See Jury, §§ 85, 103.

### QUASHING.

See Indictment and Information, § 137.

### QUESTIONS OF LAW AND FACT.

See Trial, §§ 139, 141.

### QUIETING TITLE.

See Adverse Possession, § 98; Constitutional Law, § 149; Judgment, § 670; Mortgages, § 38; Pleading, § 214; Tenancy in Common, §§ 15, 19.

### I. RIGHT OF ACTION AND DEFENSES.

§ 2 (Ariz.) Mining machinery, placed on a mining claim by a purchaser, in possession under an option providing for forfeiture of the machinery, etc., as liquidated damages on default in payment of any installment of the purchase price, *held* real property, within Civ. Code 1901, par. 4104, providing for actions to quiet title to real property.—*Arizona Mine Supply Co. v. Bolman*, 140 P. 480.

§ 7 (Mont.) A suit to cancel an instrument as a cloud upon title is maintainable under the general jurisdiction of courts of equity, based on the principle *quia timet*.—*Hicks v. Rupp*, 140 P. 97.

§ 14 (Ariz.) An unsatisfied mortgage, securing a debt barred by limitations, will not be removed as a cloud on title without the debt being first paid.—*Provident Mut. Building-Loan Ass'n v. Schwertner*, 140 P. 495.

Where a debt secured by mortgage was usurious, but the principal and legal interest were paid, the mortgage would be canceled as a cloud on title.—Id.

§ 14 (Cal.) The rule that a party's title will not be quieted against an outlawed mortgage unless he pays the mortgage debt does not apply to a party claiming title adversely to the original mortgagor.—*Klumpke v. Moreno*, 140 P. 289.

§ 14 (Cal.App.) Where foreclosure proceedings are void, the mortgagor cannot quiet his title against the assignee or mortgagee without paying or offering to pay the mortgage debt, though it be barred by limitations.—*Klumpke v. Moreno*, 140 P. 313.

### II. PROCEEDINGS AND RELIEF.

§ 34 (Ariz.) Under Civ. Code 1901, par. 4105, requiring plaintiff, in a suit to quiet title, to allege defendant's adverse claim, and in view of paragraph 2702, making a contract of conditional sale, not duly recorded, invalid as against third persons, allegations that defendant, the conditional seller of operating machinery placed in plaintiffs' mine claimed a lien thereon by virtue of the apparent validity of his recorded contract *held* to sufficiently allege the cloud or adverse claim.—*Arizona Mine Supply Co. v. Bolman*, 140 P. 480.

§ 34 (Mont.) In an action by railroad company, complaint alleging that defendant, by force and arms, excluded plaintiff's employees engaged in double-tracking and changing its

Rev. Codes, § 6370, as amended. Defendant asserted any adverse claim.—Northern Pac. Ry. Co. v. Hauswirth, 140 P. 516.

§ 35 (Ariz.) Under Civ. Code 1901, par. 4105, requiring the complaint, in an action to quiet title, to set forth the nature and extent of plaintiffs' estate, allegations that plaintiff owned a mine, that the operating machinery in question was placed there by one to whom an option to purchase had been given, and that plaintiff acquired it by forfeiture of the option for default in payment of an installment of the purchase price of the mine held to sufficiently show the nature and extent of plaintiffs' estate.—Arizona Mine Supply Co. v. Bolman, 140 P. 490.

§ 44 (Ariz.) In an action to quiet title to machinery placed on mining land owned by plaintiffs and on which they had given an option to purchase, providing for the forfeiture of any operating machinery placed thereon, on default of payment of any installment of the price, where defendant, the conditional seller of such machinery, claimed a lien thereon for an alleged balance under its recorded contract of conditional sale, evidence held insufficient to sustain a decree for plaintiff.—Arizona Mine Supply Co. v. Bolman, 140 P. 490.

§ 50 (Mont.) A complaint, in an action to cancel contract to convey as a cloud on title, after defendant had repudiated the contract and abandoned the premises, and plaintiff resumed possession, held to sufficiently aver a cause of action at law to recover as damages the value of personalty removed from the property by defendant, and for his use and occupation of the land.—Hicks v. Rupp, 140 P. 97.

## QUITCLAIM.

See Deeds, § 121.

## RAILROADS.

See Appeal and Error, § 1070; Carriers; Constitutional Law, § 134; Death, §§ 7, 11, 48, 64; Eminent Domain, §§ 58, 106, 169, 191, 196, 198, 262; False Imprisonment, § 15; Injunction, § 126; Larceny, § 62; Master and Servant; Municipal Corporations, § 688; Pleading, § 369; Quieting Title, § 34; Specific Performance, §§ 16, 51; Street Railroads; Trial, § 46.

### I. CONTROL AND REGULATION IN GENERAL.

§ 2 (Okl.) The term "railroad" will include a tramroad belonging to a lumber company.—Frisco Lumber Co. v. Spivey, 140 P. 157.

§ 9 (Okl.) An order of the Corporation Commission requiring railroad companies to construct a viaduct over a street held not reviewable.—Midland Valley R. Co. v. State, 140 P. 406.

### VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 113 (Wash.) A settlement between a railroad company and the owner of property abutting on the street under which the railroad desired to construct a subway held not to exempt the railroad company from liability for injuries to buildings on the property caused by blasting without negligence.—B. Schade Brewing Co. v. Chicago, M. & P. S. Ry. Co., 140 P. 897.

Such damages were too speculative to be considered by the parties as damages as upon condemnation.—Id.

Where plaintiff's building was injured by very heavy blasting during the construction of a subway for a railroad under the adjoining street, which blasting was carried on close to the building, and resulted in a serious cracking of both the foundation and the upper walls thereof, the railroad company is liable for such

## X. OPERATION.

### (F) Accidents at Crossings.

§ 328 (Wash.) A traveler, driving on a highway parallel to a railroad track, who turned onto the crossing where the view was obscured without making an attempt to look for trains, and did not stop or listen, is guilty of contributory negligence as a matter of law.—Aldredge v. Oregon-Washington R. & Navigation Co., 140 P. 550.

### (I) Fires.

§ 454 (Utah) An instruction, in an action against a railroad company for fire set by a locomotive, declaring it liable if it failed to avail itself of the best contrivances to prevent escape of sparks, is erroneous, as making it an insurer, whereas its duty is only to use all reasonable care and diligence.—McCullough v. Oregon Short Line R. Co., 140 P. 767.

## RAPE.

See Criminal Law, §§ 369, 655, 765, 1035; Witnesses, §§ 268, 277.

### I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 13 (Cal.) In cases of statutory rape, the willingness of the prosecutrix is immaterial, for she is unable to consent.—People v. MacDonald, 140 P. 256.

§ 18 (Cal.App.) Notwithstanding Pen. Code, §§ 31, 261, 971, abolishing accessories in felony cases, and defining "rape" as intercourse with a female not the wife of the perpetrator, a husband who assists another to ravish his wife is guilty of rape.—Ex parte Kantrowitz, 140 P. 1078.

### II. PROSECUTION AND PUNISHMENT.

#### (B) Evidence.

§ 46 (Cal.) Acts of familiarity of accused towards the prosecutrix prior to the commission of the offense are admissible in a prosecution for statutory rape.—People v. MacDonald, 140 P. 256.

## RATIFICATION.

See Contracts, § 97; Guardian and Ward, § 70.

## REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

## RECEIVERS.

See Banks and Banking, § 77; Building and Loan Associations, § 45.

### II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 57 (Mont.) Failure to appeal from order denying motion on procedural grounds to vacate ex parte appointment of receiver held not to estop moving party to question the propriety of the appointment in an action on the receivership bond.—Lyon v. United States Fidelity & Guaranty Co., 140 P. 86.

§ 58 (Mont.) Order in action for partnership dissolution and accounting, denying motion to vacate receivership, held not conclusive as to the rightfulness of the appointment so as to prevent an action on the receivership bond.—Lyon v. United States Fidelity & Guaranty Co., 140 P. 86.

### IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

#### (D) Sale and Conveyance or Redelivery of Property.

§ 143 (Wash.) Where land was sold by a receiver subject to the taxes, the purchaser, as between the receiver and himself, could not de

duct the amount paid for taxes from the price to be paid.—*Burgess v. Peth*, 140 P. 351.

## VI. ACTIONS.

§ 189 (Wash.) A receiver is not entitled to costs expended on his appeal from a judgment reducing his compensation or to compensation for the conservation of the property pending the appeal.—*Clumpner v. Spokane-Columbia River R. & Navigation Co.*, 140 P. 365.

## IX. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 212 (Mont.) Where receiver failed to return part of the property delivered to him, though its loss was not due to his fault, *held* that its value was recoverable in an action on the receivership bond, given pursuant to Rev. Codes, § 6701.—*Lyon v. United States Fidelity & Guaranty Co.*, 140 P. 86.

§ 218 (Mont.) To authorize action on receivership bond in action for partnership dissolution and accounting conditioned in the language of Rev. Codes, § 6701, final judgment that plaintiff had no interest *held* a sufficient adjudication that the receivership was procured without sufficient cause.—*Lyon v. United States Fidelity & Guaranty Co.*, 140 P. 86.

In action for partnership dissolution and accounting, in which receiver was appointed, judgment in defendant's favor *held* not to recognize the validity of the receivership so as to defeat an action on the bond, though instead of discharging the receiver, it gave him a lien for his fees, and required him to report.—*Id.*

Allegation of answer as to value of property in action, involving only the issue whether plaintiff had an interest therein, *held* not to estop defendant to show a greater value in an action on a receivership bond, but at most to be provable in evidence against him.—*Id.*

## RECEPTION OF EVIDENCE.

See Criminal Law, § 673.

## RECORDS.

See Appeal and Error, §§ 434, 502-694, 773, 901, 907, 937; Criminal Law, §§ 429, 636, 996; Evidence, §§ 332, 333; Lis Pendens, § 26; Mandamus, § 82; Vendor and Purchaser, § 130; Witnesses, § 393.

## REDEMPTION.

See Mortgages, §§ 591-624; Taxation, § 708.

## REFERENCE.

See Appeal and Error, § 198; Partition, § 78.

## REFORMATION OF INSTRUMENTS.

See Appeal and Error, § 1170; Cancellation of Instruments; Contracts, § 175; Insurance, § 143; Landlord and Tenant, § 222; Limitation of Actions, § 40.

## I. RIGHT OF ACTION AND DEFENSES.

§ 25 (Wash.) A deed of real estate may be reformed so as to carry out the actual intention of the parties, where there has been a material and mutual mistake, but no fraud, though the mistake may be due to the negligence of one or both of the parties.—*Carlson v. Druse*, 140 P. 570.

## II. PROCEEDINGS AND RELIEF.

§ 32 (Cal.) The rule that an action for reformation of a contract is not barred so long as an action on the contract may be brought is inapplicable, where the reformation is not merely incidental to the main relief sought, but is

an essential prerequisite to the asking of any relief.—*Bradbury v. Higginson*, 140 P. 254.

§ 32 (Wash.) Where it was discovered in the spring of 1910 that land sold the preceding year did not contain the number of acres represented, the purchaser who entered into lengthy negotiations with the vendor was not guilty of laches because he did not institute his action to reform for nearly three years and allowed his interest payments to lapse.—*Lyle v. Cunningham*, 140 P. 330.

§ 32 (Wash.) A delay of two years in suing to reform a deed does not bar the action, where the delay has not prejudiced defendant.—*Carlson v. Druse*, 140 P. 570.

§ 36 (Wash.) Under Rem. & Bal. Code, § 258, subd. 2, the complaint in a suit to reform a deed, which alleged that the grantor staked off a definite tract containing 2½ acres, exclusive of roads, and conveyed 2½ acres, including the roads, making a difference of about half an acre, *held* to show a material and mutual mistake.—*Carlson v. Druse*, 140 P. 570.

§ 45 (Wash.) To warrant a reformation of an instrument, the evidence must be clear and convincing that it is not what the parties intended it to be.—*Carlson v. Druse*, 140 P. 570.

In a suit to reform a deed, evidence *held* to justify a finding of a material and mutual mistake in the deed.—*Id.*

## REFRESHING MEMORY.

See Witnesses, § 255.

## REGISTERS OF DEEDS.

See Mandamus, § 82.

## REGULATIONS.

See Street Railroads, § 36; Waters and Water Courses, § 202.

## REHEARING.

See New Trial.

## REINCORPORATION.

See Corporations, §§ 577, 579.

## RELEASE.

See Assignments, § 89; Corporations, § 123; Payment.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 57 (Wash.) Evidence *held* to sustain a finding that a release of a claim for damages for personal injuries was signed by an employé through fraudulent representations.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

A contract of settlement for personal injuries can only be impeached for fraud by clear and convincing evidence.—*Id.*

Evidence in an employé's action for injuries *held* to show that the \$250 accepted by plaintiff upon signing a release of his claim was wholly inadequate to compensate him for his injuries.—*Id.*

The fact that the amount received by an injured employé in consideration of the execution of a release is wholly inadequate to compensate him for his injuries is some evidence that the employé did not understand the extent of his injuries or the nature of the instrument when he executed the release.—*Id.*

§ 58 (Wash.) Where the evidence on the question of fraud is conflicting, it is for the jury to determine whether the evidence is sufficiently clear and convincing to impeach a release.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

See Evidence, §§ 121-142.

## RELIGIOUS SOCIETIES.

§ 27 (Wash.) Where plaintiff, when engaged as minister, knew that his salary was contingent upon voluntary contributions, and that the church board merely estimated them, there was no binding contract under which he could subject the church property to payment of his salary, particularly as the rules of that denomination forbade such procedure.—Baldwin v. First Methodist Episcopal Church of Opportunity, 140 P. 673.

## RELOCATION.

See Mines and Minerals, § 26.

## REMOVAL OF CLOUD.

See Quieting Title.

## RENEWAL.

See Landlord and Tenant, § 86.

## RENT.

See Landlord and Tenant, §§ 185, 190.

## REPAIRS.

See Damages, § 113; Landlord and Tenant, § 166; Master and Servant, § 127.

## REPEAL.

See Statutes, §§ 159, 161.

## REPLEVIN.

See Attorney and Client, § 100.

## IV. PLEADING AND EVIDENCE.

§ 69 (Okl.) A general denial entitles defendant to make any defense which would defeat plaintiff's claim of ownership and right to possession.—De Hart Oil Co. v. Smith, 140 P. 1154.

§ 72 (N.M.) Where there was no certain evidence that defendant in replevin suffered damages from plaintiff's taking possession of the horse in controversy, a verdict for defendant for damages cannot be sustained.—Roth v. Yara, 140 P. 1071.

## VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 91 (Okl.) Where plaintiff made out a prima facie case, an instruction that, if the jury found that plaintiffs were the owners, "the property had not been sold either by themselves or through a court having jurisdiction, and that there were no liens against the same in favor of defendant, they should find for plaintiffs," was erroneous as placing an excessive burden on plaintiff.—De Hart Oil Co. v. Smith, 140 P. 1154.

§ 95 (Okl.) A verdict in replevin for a horse, describing it as "one three year old dark gray filly," sufficiently identified the animal in controversy to sustain a judgment.—McConnell v. Watkins, 140 P. 1167.

§ 103 (N.M.) Under Laws 1907, c. 107, § 1, subsecs. 228, 239, defendant in replevin may not only recover the property and damages, but may, if plaintiff fails to prosecute his suit with effect, recover the value of the property and double damages for use of same, with the option of taking back the property.—Roth v. Yara, 140 P. 1071.

§ 120 (Cal.App.) Where sureties on redelivery bond offered to surrender the property, including a barn on leased land, but plaintiff refused to accept it, unless they made good an alleged loss and paid rent for which they were not liable, *held*, that they were not liable for the value of the barn, which, by failure to remove, became the property of the lessor.—Ely v. Liscomb, 140 P. 1086.

§ 123 (Cal.App.) Attorneys for plaintiff in claim and delivery being authorized under Code Civ. Proc. § 283, subd. 2, to receive the property in satisfaction of the judgment, an offer to the attorneys to surrender the property discharged the sureties on defendants' redelivery bond.—Ely v. Liscomb, 140 P. 1086.

## REPORTERS.

See Courts, § 42.

## REPUGNANCY.

See Deeds, §§ 142, 143.

## REQUESTS.

See Trial, §§ 256, 260.

## RESCISSION.

See Cancellation of Instruments; Contracts, §§ 266, 274; Sales, § 124; Vendor and Purchaser, §§ 98, 104, 114-123.

## RESERVATIONS.

See Deeds, §§ 142, 143.

## RES GESTÆ.

See Criminal Law, § 368; Evidence, §§ 121-127.

## RESIDENCE.

See Bastards, § 49.

## RES JUDICATA.

See Divorce, § 171; Judgment, §§ 584, 743.

## RESULTING TRUSTS.

See Trusts, § 72.

## RETROACTIVE LAWS.

See Statutes, §§ 262, 268.

## RETROSPECTIVE LAWS.

See Statutes, § 267.

## REVENUE.

See Taxation.

## REVIEW.

See Appeal and Error; Criminal Law, §§ 1144-1166½.

## REVOCATION.

See Principal and Agent, §§ 33, 41.

## RIGHT OF WAY.

See Easements.

## RIPARIAN RIGHTS.

See Navigable Waters, §§ 39-44.

## RISKS, ASSUMPTION OF.

See Master and Servant, §§ 204-219, 283.

## SALARY.

See Clerks of Courts, §§ 29, 35; Officers, § 100;  
Religious Societies, § 27.

## SALES.

See Brokers; Contracts, § 10; Corporations, §§ 93, 149; Guardian and Ward, § 112; Intoxicating Liquors; Licenses, § 7; Mortgages, §§ 538, 586; Municipal Corporations, § 575; Public Lands, §§ 35, 41, 185; Taxation, § 674; Trial, § 251; Vendor and Purchaser; Waters and Water Courses, § 201.

### I. REQUISITES AND VALIDITY OF CONTRACT.

§ 23 (Utah) Acceptance of orders by plaintiff from defendant, who had contracted with plaintiff to buy and resell safes made by it, to supply them to him for such purpose, and make prompt shipment, *held* unconditional, so that it was liable to him for his loss of profits on sales, through its failure to ship.—Schwab Safe & Lock Co. v. Snow, 140 P. 761.

§ 41 (Kan.) Where an article, sold for any and all purposes for which it is adapted, and not for a particular purpose, is open to inspection by the buyer, the rule of caveat emptor ordinarily applies.—Woods v. Nicholas, 140 P. 862.

### II. CONSTRUCTION OF CONTRACT.

§ 81 (Mont.) Under Rev. Codes, § 5047, declaring that time is not of the essence of a contract, unless by its terms expressly so provided, time is not of the essence of a contract for the sale of sheep which only provided for delivery on a certain day.—Curtis & Freeman v. Parham, 140 P. 511.

Where time was not of the essence of a contract for the sale of sheep, the buyers could not, under Rev. Codes, § 4936, claim a violation because of nondelivery on the day specified without giving the seller an opportunity to tender performance in a reasonable time, with compensation for delay.—Id.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (C) Rescission by Buyer.

§ 124 (Or.) Where a buyer offers to restore goods, and the seller absolutely refuses them, the buyer is relieved from actually returning or tendering them.—Jones v. McGinn, 140 P. 994.

### IV. PERFORMANCE OF CONTRACT.

#### (C) Delivery and Acceptance of Goods.

§ 168 (Wash.) Contractor purchasing cement of a dealer to be delivered "subject to" tests specified by the architect as to fineness, etc., *held* to have the duty of making the tests prior to acceptance and use, and to select his own place to make such tests, and, in the absence of a specified time, to have only a reasonable time after delivery to make such tests.—Hurley-Mason Co. v. Stebbins, Walker & Spinning, 140 P. 381.

A sale of inspected or tested articles, in the absence of stipulation to the contrary, places the duty of inspection or test upon the seller prior to delivery.—Id.

§ 168½ (Kan.) Where a contract for purchase of watermelon seeds provided payment should be made for such as the purchaser should consider sufficiently clean and vital for his use, the acceptance of the seeds was subject to the judg-

§ 179 (Wash.) An executory sale, made subject to inspection, makes inspection a condition precedent to acceptance, and an acceptance by the buyer with or without inspection, and without notice to the seller of any defects or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon ordinary inspection.—Hurley-Mason Co. v. Stebbins, Walker & Spinning, 140 P. 381.

### VI. WARRANTIES.

§ 246 (Wash.) A "warranty" is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it.—Hurley-Mason Co. v. Stebbins, Walker & Spinning, 140 P. 381.

§ 250 (Wash.) In a contract for the sale and delivery of cement, provision that it was sold "subject to" tests as to fineness, soundness, etc., *held* a condition of the contract without which there was no sale, and not a collateral warranty that it would meet such tests.—Hurley-Mason Co. v. Stebbins, Walker & Spinning, 140 P. 381.

In determining whether liabilities or stipulations on one side are conditions essential to the liability of the other party to a sale or are only independent warranties, it is always a question of the intention of the parties.—Id.

§ 261 (Wash.) An executory contract for the sale of an article tested to a given standard is a collateral warranty, placing the consequences of a failure of the article upon the seller, so that the purchaser's remedy survives his acceptance.—Hurley-Mason Co. v. Stebbins, Walker & Spinning, 140 P. 381.

§ 266 (Wash.) There is no implied warranty in the sale of secondhand goods and machinery, though there may be an express warranty.—Fairbanks Steam Shovel Co. v. Holt & Jeffery, 140 P. 394.

Agreement by seller of secondhand dredge to overhaul it and put it in first-class shape *held* a warranty that it was reasonably certain, when properly handled, to do the work intended.—Id.

§ 273 (Wash.) Upon a contract for the sale and delivery to a contractor for a railroad station of cement "subject to" tests as to fineness, soundness, etc., specified by the railroad's architect, where it had no latent defects not discoverable by such tests, there was no implied warranty that the cement furnished would be fit for the purposes for which it was to be used.—Hurley-Mason Co. v. Stebbins, Walker & Spinning, 140 P. 381.

Upon an executory sale by a manufacturer, there is an implied warranty of fitness for the purpose intended and of freedom of defects not discoverable by ordinary inspection and test, while, on a sale by dealer, there is no such implied warranty of fitness but all that is required of him is good faith and fair dealing.—Id.

§ 284 (Wash.) The seller of a secondhand dredge was liable on its warranty that the dredge would do the work intended and was free from structural defects, where the boom was rotten, which could have been discovered by a proper inspection.—Fairbanks Steam Co. v. Holt & Jeffery, 140 P. 394.

### VIII. REMEDIES OF BUYER

#### (C) Actions for Breach of Contract

§ 409 (Cal.App.) Where a buyer executes a note for the purchase price of a business, but later repudiates it, and refuses to execute the note, he is entitled to recover the amount even though there was no evi-



See Appeal and Error, §§ 34, 1047; Colleges and Universities; Public Lands, § 64; Taxation, § 177.

§ 416 (Cal.App.) In an action for a buyer's breach of a contract of sale, the seller having proved a public sale of the property for \$800, without notice to the buyer, evidence that such goods uninstalled at the place of the sale were worth from \$1,700 to \$1,800 was admissible.—*Meyer v. McAllister*, 140 P. 42.

§ 418 (Cal.App.) A resale of chattels by the seller after the buyer's refusal, without actual notice to the buyer, is not conclusive evidence of value, by which to measure the buyer's liability.—*Meyer v. McAllister*, 140 P. 42.

Where title had not passed to the buyer when he refused the goods, and they were resold, as required by Civ. Code, § 3049, but not after actual notice to the buyer, the seller's measure of damages was the excess, if any, of the amount due under the contract over the value of the goods to the seller, under section 3311, subd. 2.—*Id.*

#### (D) Actions and Counterclaims for Breach of Warranty.

§ 441 (Okl.) In an action for breach of warranty on sale of personalty, the purchase price is prima facie the value of property as warranted, in the absence of other evidence.—*Burgess v. Felix*, 140 P. 1180.

§ 441 (Wash.) Evidence held insufficient to show a breach of warranty by the seller of machinery.—*Carr v. Bonthuis*, 140 P. 339.

§ 442 (Cal.App.) Where a buyer of merchandise sold at market price the merchandise to his successor in business, he could not recover any damage, though there was a warranty and a breach thereof.—*Western Implement Co. v. Blodgett*, 140 P. 38.

§ 442 (Okl.) The measure of damages for breach of warranty of personal property is the difference between the actual value of the property at the time of sale and what its value would have been if it had complied with the warranty.—*Burgess v. Felix*, 140 P. 1180.

§ 442 (Wash.) The measure of recovery for breach of warranty of a secondhand dredge was not necessarily the amount paid by the buyer for a new boom stick, where that furnished with the dredge was rotten.—*Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 140 P. 394.

### IX. CONDITIONAL SALES.

§ 465 (Wash.) The residence of a corporation, within Rem. & Bal. Code, § 3670, requiring filing of a contract of conditional sale in the county where the buyer resides, is where it has its principal place of business.—*Malmö v. Shubart*, 140 P. 569.

As between the immediate parties to a conditional sale contract, their rights are not disturbed by failure to file it, as required by Rem. & Bal. Code, § 3670, to protect the seller against purchasers from and creditors of the buyer.—*Id.*

§ 474 (Wash.) "Creditors," within Rem. & Bal. Code, § 3670, making absolute, as to subsequent good faith creditors, a conditional sale contract, where the property is placed in the buyer's possession, unless filed as provided, do not include general unsecured creditors extending credit without knowledge of the delivery or possession of the property.—*Malmö v. Shubart*, 140 P. 569.

§ 479 (Wash.) A seller who retains the right of property until the price is paid, and who on default in installments assumes possession, elects his remedy and cannot recover the balance of the price.—*Edward Thompson Co. v. Murphine*, 140 P. 1073.

### SATISFACTION.

See Attorney and Client, § 100; Payment; Release.

### SAVINGS BANKS.

See Banks and Banking, § 293.

See Appeal and Error, §§ 34, 1047; Colleges and Universities; Public Lands, § 64; Taxation, § 177.

### II. PUBLIC SCHOOLS.

#### (A) Establishment, School Lands and Funds, and Regulation in General.

§ 19 (Wash.) Rem. & Bal. Code, §§ 4562-4574, as amended by Rem. & Bal. Code, §§ 4562, 4567, providing that the apportionment to each county from the current state school funds shall be based on the total number of days attendance, not excepting private and certain other schools, nowhere provide for crediting the attendance of children in a model training school conducted by a state normal school, and such provision cannot be read into the statute.—*State v. Preston*, 140 P. 350.

A model training school conducted by a state normal school, in which children are taught by supervisors with the assistance of students in the normal school, is not a "common school" within Rem. & Bal. Code, §§ 4562-4574, as amended by Rem. & Bal. Code, §§ 4562-4567, providing that the apportionment of current state school funds to the counties shall be based on the total days of attendance.—*Id.*

Rem. & Bal. Code, § 4714 et seq., making attendance upon a public or private school compulsory, does not show that a model training school conducted by a state normal school is a common school or private school within sections 4562-4574, basing the apportionment of the current state school funds on total days of attendance.—*Id.*

#### (B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 33 (Cal.) In view of Pol. Code, § 1580, and St. 1905, p. 243, a school district which, upon the division of a county, lay partly in the new and partly in the old county, is a joint school district, within Pol. Code, § 1583, which recognized the existence of such districts before the enactment of statutes for their creation.—*Las Animas & San Joaquin Land Co. v. Preciado*, 140 P. 239.

#### (E) District Debt, Securities, and Taxation.

§ 107 (Cal.) Plaintiff, whose property was within the boundaries of a joint school district, is not estopped to claim that a tax levied by the second district, organized to take over part of the joint district, is invalid, though he paid one assessment of school taxes by the contested district.—*Las Animas & San Joaquin Land Co. v. Preciado*, 140 P. 239.

Where plaintiff's land was located in a joint school district, a sale of the land for taxes levied by a second school district organized to take over part of the territory of the joint district will be enjoined; for, while the organization of the second district is invalid, a tax deed would constitute a cloud on plaintiff's title.—*Id.*

#### (G) Teachers.

§ 138 (Colo.App.) A school-teacher suing for breach of a contract of employment was not required to allege in her complaint that other employment was secured at additional expense for living, etc., in order to have such expense deducted from the amount realized from the other employment in arriving at the amount of her damage.—*School Dist. No. 3, in Clear Creek County v. Nash*, 140 P. 473.

A school-teacher suing for breach of a contract of employment was entitled to have deducted from the amount received from other employment her expense resulting from the change, for railroad fare, increased living expense, etc., in arriving at her damage.—*Id.*

In a suit by a school-teacher for breach of a contract of employment, evidence of the amount



expended by plaintiff in removing her family to her new place of employment, which was not pleaded, was properly excluded, as such expenses, if allowable at all, must be specially pleaded.—Id.

§ 138 (Colo.App.) A school-teacher wrongfully discharged before the expiration of her contract was entitled to recover the amount she would have received under the contract, less whatever she earned by other employment, with interest thereon at 8 per cent.—School Dist. No. 3, in Clear Creek County v. Olsen, 140 P. 477.

## SEARCHES AND SEIZURES.

See Attachment, § 164.

## SECONDARY EVIDENCE.

See Evidence, § 178.

## SECURITY.

See Costs, § 123.

## SEDUCTION.

See Criminal Law, § 369.

## SELF-DEFENSE.

See Homicide, § 113.

## SEPARATE ESTATE.

See Husband and Wife. §§ 152, 156.

## SERVITUDE.

See Easements.

## SET-OFF AND COUNTERCLAIM.

See Limitation of Actions, § 41; Municipal Corporations, § 370.

## II. SUBJECT-MATTER.

§ 31 (Okla.) Under Harris-Day Code, §§ 4745-4747, damages arising out of an actionable tort in a land trade cannot be set off or counterclaimed in an action on a contract which was distinct from the transaction in which the tort was committed.—Hazlett v. Wilkin, 140 P. 410.

§ 34 (N.M.) Under Comp. Laws 1897, § 2685, subsecs. 1, 41, a counterclaim must be intended to answer the complaint, and must run counter to plaintiff's demand in whole or in part.—La Mesa Community Ditch v. Appelzoeler, 140 P. 1051.

## SETTLEMENT.

See Payment; Release.

## SEX.

See Officers, § 20.

## SHERIFFS AND CONSTABLES.

See Husband and Wife; United States Marshals.

## II. COMPENSATION.

§ 48 (Cal.App.) Under Code Civ. Proc. §§ 681-700, regulating execution sales, and section 695 requiring payment of the price in cash, the sheriff is entitled to receive his commission for a sale to the judgment creditor.—Kelly v. Barnett, 140 P. 605.

## SHIPPING.

See Wharves.

## III. CHARTERS.

§ 39 (Wash.) While the charterer of a vessel is only a bailee, the duties of the charterer may

be fixed by the charter party, which special contract will prevail against the general principles of law applicable to such bailment.—Alaska Coast Co. v. Alaska Barge Co., 140 P. 334.

§ 58 (Wash.) Where a charter party required the charterer to return the vessel in as good condition as when obtained, natural wear and tear and the act of God excepted, the charterer, upon return of the vessel in defective condition, is bound to show that the injury was the result of the act of God.—Alaska Coast Co. v. Alaska Barge Co., 140 P. 334.

Proof by a charterer of a vessel that, when it was proceeding in still water many fathoms deep, the propeller struck something which broke off a blade will not show that the accident was the result of an act of God.—Id.

## SIDEWALKS.

See Municipal Corporations, §§ 266, 671, 809.

## SIGNATURES.

See Appeal and Error, § 385; Counties, § 13; Husband and Wife, §§ 156, 268; Pleading, § 291.

## SLANDER.

See Libel and Slander.

## SODOMY.

§ 1 (Nev.) Rev. Laws, § 6459, punishing the infamous crime against nature, must be construed according to the fair import of its terms, so that its objects may be effective.—Ex parte Benites, 140 P. 436.

§ 5 (Nev.) An indictment charging that accused committed "the infamous crime against nature with and upon \* \* \* held sufficient, under Rev. Laws, § 6459.—Ex parte Benites, 140 P. 436.

§ 5 (Wash.) An information, charging that the defendant did "attempt to carnally know" a living human being by the anus, fails to inform the accused whether the attempt was by solicitation or by assault, and is therefore insufficient.—State v. George, 140 P. 337.

## SPECIAL INTERROGATORIES.

See Trial, §§ 349, 350.

## SPECIAL LAWS.

See Statutes, §§ 76, 84, 87.

## SPECIFIC PERFORMANCE.

See Landlord and Tenant, § 22.

## I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 16 (Idaho) In an action for specific performance of a contract to construct a private crossing over a railroad track, such contract being part of the consideration for the conveyance of a right of way, held no defense that, by a change in the tracks, the expense would be much heavier than was anticipated when the contract was made.—Fox v. Spokane International Ry. Co., 140 P. 1103.

§ 22 (Cal.) The conveyance by the vendor of the land to another, who had notice of the former contract, does not deprive the purchaser, under the contract, of his right to specific performance.—Copple v. Aigeltinger, 140 P. 1073.

## II. CONTRACTS ENFORCEABLE.

§ 32 (Cal.) Under Civ. Code, § 3388, providing for specific performance of a written contract signed by only one party, a vendor, who signed a receipt for a deposit of the purchase price of land, may be compelled to specifically

perform his contract to sell.—*Copple v. Aigeltinger*, 140 P. 1073.

The filing of a suit for specific performance of a contract, which was not signed by the plaintiff, binds the plaintiff to abide by the decree of the court in such suit, and is therefore the equivalent of a written acceptance of the proposition.—*Id.*

§ 32 (Colo.App.) Where a written contract for the exchange of real property provided that the plaintiff should have the right to inspect the property, and he made such inspection and notified the defendant that the property was satisfactory prior to the time for the performance of the contract, it became mutually binding, and may be specifically enforced.—*Gibson v. Riehle*, 140 P. 933.

§ 49 (Colo.App.) In a contract for the exchange of real property, the promise by each party to convey is a valuable consideration for the other party's agreement, and specific performance of such contract may be decreed.—*Gibson v. Riehle*, 140 P. 933.

§ 51 (Idaho) Where a railroad company, with knowledge of the material facts, agreed to maintain a crossing over its track, *held*, that it could not thereafter complain that the contract was unfair, and, by reason of conditions subsequently arising, became more onerous than anticipated.—*Fox v. Spokane International Ry. Co.*, 140 P. 1103.

§ 68 (Kan.) Where there has been part performance, and where the services rendered are of peculiar character which cannot be measured by pecuniary standards, there is no distinction between personal property and real property, and specific performance will be granted where the claim is equitable.—*Phillips v. Bishop*, 140 P. 834.

#### IV. PROCEEDINGS AND RELIEF.

§ 121 (Kan.) In an action for specific performance, evidence *held* to sustain a finding that a written contract was made for benefit of plaintiff by which she was to be received in the family of a man and wife, and to receive at their death all their property; that she performed her part of the contract; that the other parties died, having willed the personality to the defendants, justifying a decree for specific performance.—*Phillips v. Bishop*, 140 P. 834.

§ 132 (Wash.) A decree of specific performance of a contract giving the purchaser the right to collect surface and subterranean waters, though the supply of such waters on the premises of the vendor shall be cut off, is not performed by the execution of a warranty deed in statutory form.—*Wright v. Suydam*, 140 P. 578.

The court decreeing specific performance of a contract to convey real estate, need not appoint a commissioner to convey, as authorized by Rem. & Bal. Code, § 605, but may require the vendor to execute a conveyance within a specified time, or in the alternative commit him to jail until a deed is executed.—*Id.*

### SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

### STATEMENT.

See Appeal and Error, §§ 544-562; Submission of Controversy.

### STATES.

See Adverse Possession, §§ 7, 8; Building and Loan Associations, §§ 2, 45; Constitutional Law, § 328; Contempt, § 50; Intoxicating Liquors, § 6; Municipal Corporations, §§ 271, 272; Navigable Waters, §§ 36, 42; Public Lands, §§ 54, 144, 185; Taxation, §§ 5, 25.

### I. POLITICAL STATUS AND RELATIONS.

§ 9 (N.M.) Where a woman was rightfully in office as State Librarian when the Constitution was adopted, she was continued in office by Const. art. 22, § 9.—*State v. De Armijo*, 140 P. 1123.

### II. GOVERNMENT AND OFFICERS.

§ 69 (N.M.) Under Comp. Laws 1897, §§ 2187-2215, relative to the territorial library, custody, and management thereof, the office of State Librarian is a ministerial office.—*State v. De Armijo*, 140 P. 1123.

### VI. ACTIONS.

§ 192 (Wash.) Under Laws 1909, c. 135, §§ 14, 63, 64, and Laws 1911, c. 43, §§ 3, 4, relating to the expenses of horticultural inspectors requiring counties to remit the amounts assessed therefor, and instructing action therefor by the Attorney General, and Const. art. 3, §§ 1, 21, defining his duties, *held*, that the Attorney General might bring an appropriate action in the name of the state to collect money due under the statute.—*State v. Asotin County*, 140 P. 914.

### STATUTES.

See Evidence, §§ 28-52; Limitation of Actions. For statutes relating to particular subjects, see the various specific topics.

### I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 23 (Kan.) Enactment of Sess. Laws 1913, c. 259, imposing a royalty on the removing of sand for commercial purposes from navigable rivers, *held* valid as against an objection that in the senate the judiciary committee simply reported a substituted bill, where the substitute was germane to the original bill and the same result could have been obtained by recommending the original bill with amendments.—*State v. Akers*, 140 P. 637.

§ 64 (Wash.) Any unconstitutionality in Laws 1913, c. 126, §§ 6, 7, *held* not to affect the constitutionality of sections 1-5 and 8-13.—*State v. Derbyshire*, 140 P. 540.

Any invalidity in Laws 1913, c. 126, § 13, providing that the act, which related to the appointment of official court stenographers and provided their duties and compensation, shall not apply to any county having a population of 200,000 or over, *held* not to invalidate the remaining sections 1-12.—*Id.*

The unconstitutionality of a part of a statute will not invalidate the remainder unless the provisions are so connected and dependent upon each other that it cannot be presumed that the Legislature would have enacted the valid part without enacting the invalid part.—*Id.*

### II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 72 (Cal.App.) St. 1911, p. 1437, providing for granting a certificate to practice a special branch of medicine and surgery, is based on a proper classification: Ability acquired by experience, and shown by an examination, though applying only to those who had violated the law by practicing without a certificate.—*Bobannon v. State Board of Medical Examiners*, 140 P. 1089.

§ 76 (Cal.App.) Penal Code, § 682, subd. 4, if construed as authorizing prosecutions of misdemeanors on complaint filed in the superior court of which jurisdiction is conferred on superior courts sitting as juvenile courts, while section 838 provides for prosecutions on indictment or information, contravenes Const. art. 4, § 25, subd. 33, prohibiting special laws when a general law can be made applicable.—*People v. Budd*, 140 P. 714.

§ 84 (Cal.App.) St. 1909, p. 969, as amended by St. 1911, p. 978, defining personal property brokers, and limiting the interest which they may charge, does not violate Const. art. 1, § 11, prohibiting special laws.—*Eaker v. Bryant*, 140 P. 310.

§ 87 (Cal.App.) Penal Code, § 682, subd. 4, if construed as authorizing prosecutions of misdemeanors on complaint filed in the superior court, of which jurisdiction is conferred on superior courts sitting as juvenile courts, while section 888 provides for prosecutions on indictment or information, contravenes Const. art. 4, § 25, subd. 3, prohibiting special laws regulating the practice of courts.—*People v. Budd*, 140 P. 714.

§ 94 (Wash.) Laws 1913, c. 126, §§ 1-13, held not to violate Const. art. 11, §§ 4, 5, guaranteeing uniform laws for county government and township organization and for the election of county and township officers.—*State v. Derbyshire*, 140 P. 540.

### III. SUBJECTS AND TITLES OF ACTS.

§ 105 (Mont.) In the absence of any constitutional provision on the subject, an act may be enacted without any title.—*State v. District Court of Lewis and Clark County*, 140 P. 732.

The prohibition in Const. art. 5, § 23, is aimed at ordinary legislation only, and the purpose is to prevent fraud and to notify the people of the subjects of legislation that are being considered.—*Id.*

§ 106 (Mont.) A single act which has for its purpose a revision by amendment of all the Code provisions on single subject and simply mentioning in the title the sections intended to be revised by amendment is a "general revision" act within Const. art. 5, § 23.—*State v. District Court of Lewis and Clark County*, 140 P. 732.

Where the Code commissioners presented for adoption by the Legislature four Codes, which, with amendments, were adopted, and, pending the adoption of the Civil Code, a bill to amend enumerated sections thereof was introduced and adopted subsequent to the adoption of the Code, a provision in the body of the bill for the repeal of section 91 of the Code carried into Rev. Codes, § 3657, not mentioned in the title, was within the exception of Const. art. 5, § 23, and was valid.—*Id.*

§ 109 (Wash.) The mention of a particular subject in the title of a statute is notice of all things germane to that subject in the statute.—*State v. Derbyshire*, 140 P. 540.

§ 109 (Wash.) Under Const. art. 2, § 19, it is not necessary that the title of an act should be a complete index to its provisions; but it is sufficient if it indicates to an inquiring mind the scope and purpose of the law.—*State v. Asotin County*, 140 P. 914.

§ 120 (Colo.) Act of 1881 (Laws 1881, p. 103), entitled "An act to regulate elections for the removal of county seats," and providing not only for elections for the removal, but for elections for the location of county seats, is not unconstitutional in that its subject is not sufficiently expressed.—*Town of Sugar City v. Board of Com'rs of Crowley County*, 140 P. 809.

§ 123 (Idaho) Highway Commission Act, § 19, providing for exemption of motor vehicles from taxation, held not violative of Const. art. 3, § 16, providing that every act shall contain one subject, which shall be expressed in the title.—*Achenbach v. Kincaid*, 140 P. 529.

§ 123 (Cal.App.) The title of St. 1907, p. 806, held sufficiently broad, within Const. art. 4, § 24, to sustain provisions conferring authority to pave and oil the surface of streets.—*Hunt v. Manning*, 140 P. 39.

§ 124 (Wash.) The title of Laws 1913, c. 126, entitled "An act providing for the appointment of official court reporters, \* \* \* prescribing their duties, \* \* \* and providing for their

compensation and the manner of their appointment," is sufficient to embrace section 4, requiring the parties to a civil action to pay the sum of one dollar as stenographers' costs.—*State v. Derbyshire*, 140 P. 540.

Laws 1913, c. 126, entitled "An act providing for the appointment of official court reporters, prescribing their duties, oath of office, and qualifications," would embrace as germane sections 6 and 7, relating to the perpetuation of testimony taken by the official reporter.—*Id.*

§ 125 (Wash.) Laws 1911, c. 43, entitled "An act relating to salaries and expenses of horticultural inspectors," etc., by section 4 providing a suit therefor against a county by the Attorney General, held not to violate Const. art. 2, § 19, declaring that no bill shall embrace matter not expressed in its title.—*State v. Asotin County*, 140 P. 914.

### IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 141 (Idaho) Since Rev. Codes, § 1644, as amended by Act March 7, 1911 (Laws 1911, p. 563), had been repealed when the Highway Commission Act was passed, it was not necessary that the later act, though it purports by its title to amend the former, contain the former to comply with Const. art. 3, § 18.—*Achenbach v. Kincaid*, 140 P. 529.

§ 141 (Wash.) Act March 22, 1913 (Laws 1913, c. 165), entitled "An act relating to the organization and government of irrigation districts, and amending section," 6417 and certain other of Rem. & Bal. Code sections held not invalid for want of a sufficient title.—*Board of Directors of Quincy Valley Irr. Dist. v. Scott*, 140 P. 391.

### V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (Idaho) An act containing an emergency clause will repeal another not containing such clause, and passed at the same session, in so far as they conflict.—*Peavy v. McCombs*, 140 P. 965.

§ 159 (Utah) While repeals by implication are not favored, where later provisions are clearly repugnant to existing provisions, the later ones control, and the earlier provisions must be deemed repealed by implication to the extent of the repugnancy.—*State v. Carman*, 140 P. 670.

§ 161 (Idaho) Where two statutes passed at the same session are necessarily inconsistent, one dealing with the common subject-matter in a more minute way will prevail over one of a more general character.—*Peavy v. McCombs*, 140 P. 965.

§ 161 (N.M.) Repeals of statutes by implication, though not favored, will be declared by the courts, where the last statute is so broad, clear, and explicit as to show that it was intended to cover the whole subject.—*State v. Romero*, 140 P. 1069.

Unless absolutely necessary to give effect, a subsequent statute, treating a subject in general terms, will not repeal by implication an earlier statute treating the same subject.—*Id.*

### VI. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

§ 181 (Cal.App.) Where a statute is fairly susceptible of two constructions, one leading to mischief or absurdity, and the other consistent with sound sense and wise policy, the former should be rejected and the latter adopted.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.

§ 181 (Cal.App.) Where a suggested construction of an ambiguous statute necessarily involves a decided departure from what may be fairly said to be the plain purpose of the statute, such construction will not be adopted to the exclu-

sion of a possible, plausible construction which will promote the legislative intent.—*People v. Merrill*, 140 P. 1075.

§ 181 (Colo.) In case of doubt as to the meaning of the statute, the court should consider the results of the construction urged; it being presumed that the Legislature intended a reasonable operation of the statute.—*National Surety Co. v. Schafer*, 140 P. 199.

§ 181 (Wash.) An act should not be given an interpretation which would make it absurd when susceptible of a reasonable interpretation which would carry out the manifest intent of the Legislature.—*State v. Asotin County*, 140 P. 914.

§ 183 (Cal.App.) The court, in construing a statute, must ascertain and give effect to the legislative intent, though it may not be consistent with the strict letter of the statute.—*People v. Merrill*, 140 P. 1075.

The court, in construing a statute containing a patent ambiguity, must reject an interpretation which, if followed, will lead to a conclusion clearly inconsistent in its consequences with the reason and spirit of the statute.—*Id.*

§ 183 (Colo.) A matter apparently within the letter of a statute is not deemed within the statute, unless it appears that the Legislature so intended.—*National Surety Co. v. Schafer*, 140 P. 199.

§ 184 (Cal.App.) Every statute must be construed with reference to the object intended to be accomplished thereby, and should be so construed as is best calculated to advance its object by suppressing the mischief and securing the benefits intended.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.

§ 184 (Cal.App.) The court is not restricted to a construction which will give a literal effect appearing by the letter of the statute but may resort to a consideration of the purpose to be accomplished by the statute.—*People v. Merrill*, 140 P. 1075.

§ 184 (Colo.) The occasion and necessity of a statute and the mischief to be remedied should be considered in determining the legislative intent.—*National Surety Co. v. Schafer*, 140 P. 199.

§ 189 (Cal.App.) Grammatical construction of statute, leading to result contrary to purpose or object, held to be rejected, and one adopted which will effectuate the object designed to be accomplished.—*Golden & Co. v. Justice's Court of Woodland Tp., Yolo County*, 140 P. 49.

§ 205 (Colo.) The Legislature's intention must be deduced from a construction of the whole statute.—*National Surety Co. v. Schafer*, 140 P. 199.

§ 211 (Cal.App.) The rule of *ejusdem generis* is inapplicable in construing the title of an act,

and the general clause in a title will not be restricted by the enumeration therein of specific things.—*Hunt v. Manning*, 140 P. 39.

§ 211 (Colo.) While the title of a legislative act may be considered by the courts as an aid to its interpretation, there is no occasion to resort to the title when the body of the act leaves no doubt as to its purpose.—*Town of Sugar City v. Board of Com'rs of Crowley County*, 140 P. 809.

§ 219 (Mont.) Where successive attorneys general declared that a statute governing the remarriage of divorced persons had been repealed, the court, in case of doubt, would hesitate before adjudging the statute in force.—*State v. District Court of Lewis and Clark County*, 140 P. 732.

§ 219 (Wash.) Where a construction has been placed upon a statute by a department of the government, and property interests have been acquired by long usage, such construction should be adopted by the court, but the rule is not applicable, where the statute is clear and free from doubt as to its meaning.—*State v. Fishback*, 140 P. 387.

§ 225 (Idaho) Statutory provisions in contemporaneous legislation affecting the same subject-matter should be so construed, if possible, that all may stand and the will of the Legislature be effectuated.—*Achenbach v. Kincaid*, 140 P. 529.

§ 225½ (Idaho) Statutes passed at the same session should be so construed, if possible, as to give effect to the provisions of each.—*Peavy v. McCombs*, 140 P. 965.

#### (D) Retroactive Operation.

§ 262 (Idaho) The word "retroactive" need not be used in a statute to give it a retroactive operation, but the legislative intent may be gleaned from any language appropriately expressing such purpose.—*Peavy v. McCombs*, 140 P. 965.

§ 263 (Idaho) No statute will be given a retroactive effect unless such legislative intent is clearly expressed.—*Peavy v. McCombs*, 140 P. 965.

§ 267 (Utah) Comp. Laws 1907, § 3685x, making every judgment void which is made on a complaint containing an untrue allegation of the jurisdictional facts required by the section, would not avoid a judgment rendered on a complaint already filed.—*Salt Lake Coffee & Spice Co. v. District Court of Salt Lake County*, 140 P. 666.

### VII. PLEADING AND EVIDENCE.

§ 283 (Kan.) An enrolled statute imports absolute verity, and it is conclusive evidence of its legal passage, unless the journals of the Legislature clearly and affirmatively show otherwise beyond all reasonable doubt.—*State v. Akers*, 140 P. 637.

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See Carriers; Damages, § 132; Railroads; Trial, §§ 187, 194.

**I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

§ 24 (Cal.App.) A franchise granted by a municipality to a railroad company to maintain tracks in its streets must, in case of doubt as to its interpretation, be construed in favor of the municipality and against the company.—*Town of St. Helena v. San Francisco, N. & C. Ry.*, 140 P. 600.

§ 36 (Cal.App.) A municipality may enact and enforce all reasonable regulations to protect the public or the manner in which its streets shall be used, and may make any reasonable regulation as to the manner in which the tracks of a railroad company shall be constructed and the condition in which they shall be maintained.—*Town of St. Helena v. San Francisco, N. & C. Ry.*, 140 P. 600.

§ 37 (Cal.) A franchise granted to a street railroad company under Civ. Code, § 498, requires the company to either plank, pave, or

macadamize the part of the street designated as the proper city authority may lawfully direct.—*Town of St. Helena v. San Francisco, N. & C. Ry.*, 140 P. 606.

§ 37 (Cal.App.) In the absence of anything to the contrary, the court must presume that a municipal ordinance, requiring a railroad company to pave the streets between its tracks in a particular manner, was adopted to promote the safety of the streets and the security of the public.—*Town of St. Helena v. San Francisco, N. & C. Ry.*, 140 P. 600.

**II. REGULATION AND OPERATION.**

§ 99 (Utah) In an action for injuries to plaintiff by being thrown from a buggy, in which she was riding as a guest of the driver, by its being upset by a collision between one of the horses and defendant's street car, plaintiff, as a matter of law, held not negligent.—*Atwood v. Utah Light & Ry. Co.*, 140 P. 137.

§ 99 (Wash.) An automobile driver who, on approaching an interurban railway crossing, took his last look at the crossing at 175 feet therefrom, and did not afterwards look for an approaching car, was guilty of contributory negligence.—*Bowden v. Walla Walla Valley Ry. Co.*, 140 P. 549.

§ 114 (Wash.) Evidence, in an action for injuries from a collision between an automobile and a street car, held to sustain a finding of contributory negligence by the automobile driver.—*Bowden v. Walla Walla Valley Ry. Co.*, 140 P. 549.

**STREETS.**

See Highways; Municipal Corporations, §§ 657-706, 755-821.

**SUBMISSION OF CONTROVERSY.**

§ 18 (Kan.) Where an agreed statement of facts is ambiguous concerning a specified item, the district court may determine the item on evidence or admissions.—Board of Com'rs of Shawnee County v. Thomas, 140 P. 849.

**SUBROGATION.**

§ 14 (Colo.App.) Purchaser from fraudulent grantee, who, though he had constructive notice, had no actual knowledge of the fraud, and was advised by attorneys that the grantee's title was good, held entitled to be subrogated to the rights of the holder of the purchase-money mortgage given by the fraudulent grantor which he assumed and paid.—Tibbetts v. Terrill, 140 P. 936.

**SUBSCRIPTIONS.**

See Corporations, §§ 80-93; Evidence, § 444.

§ 8 (Ariz.) Where the execution of a subscription contract is induced by a fraudulent representation of fact, the contract is not binding on the subscriber, but the fraud must relate to the subject-matter of the contract.—Hurley v. Young Men's Christian Ass'n of Phoenix, 140 P. 816; Lount v. Same, Id. 819.

§ 10 (Utah) Where after several persons had signed a subscription contract, it was presented to L., and he drew a line under their signatures and signed his name and that of his brother, placing \$25 after each, and the brother repudiated his act, L. was at most liable for \$50.—Bank of American Fork v. Smith, 140 P. 122.

§ 12 (Utah) An instrument signed by certain individuals, binding them to contribute not exceeding \$500 for the construction of a bridge, held a subscription binding the subscribers severally up to the amount specified.—Bank of American Fork v. Smith, 140 P. 122.

§ 15 (Utah) Where a subscription for the construction of a bridge provided that it should be constructed within 30 days, time was not of the essence of the contract, nor a condition precedent to the subscribers' liability, and hence delay was no defense thereto.—Bank of American Fork v. Smith, 140 P. 122.

§ 16 (Utah) Where defendants subscribed to the construction of a bridge and their representative to complete the bridge borrowed money from plaintiff bank on the faith of the subscription, such act constituted an equitable assignment thereof, and the bank was entitled to sue on the subscription as the real party in interest.—Bank of American Fork v. Smith, 140 P. 122.

§ 17 (Utah) Liability on a subscription for construction of a bridge is not defeated because the money to build the bridge was borrowed and subscribers were not called on immediately.—Bank of American Fork v. Smith, 140 P. 122.

**SUPERSEDEAS.**

See Intoxicating Liquors, § 108.

**SUPPORT.**

See Divorce, § 93; Marriage, § 62.

**SURETYSHIP.**

See Principal and Surety.

**SURPRISE.**

See New Trial, § 97.

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See False Pretenses.

**TAXATION.**

See Adverse Possession, §§ 45, 79, 84, 91, 93; Agriculture, § 3; Commerce, § 72; Constitutional Law, § 100; Highways, § 130; Licenses; Limitation of Actions, § 172; Mandamus, §§ 15, 82, 113; Mortgages, § 144; Municipal Corporations, §§ 406-506, 538, 575, 964, 1000; Receivers, § 143; Schools and School Districts, § 107; Statutes, § 121; Tenancy in Common, § 20.

**L NATURE AND EXTENT OF POWER IN GENERAL.**

§ 5 (Wash.) Plaintiff, whose proof upon his application for a patent for a commuted homestead entry, was accepted and his money received by the land office, and a receipt issued, acquired a beneficial interest in the land subject to taxation by the state, and the suspension of proceedings until final favorable determination by the General Land Office did not suspend the state's right to tax it.—Flood v. Virnig, 140 P. 333.

§ 25 (Idaho) In matters of taxation, the Legislature possesses plenary power except as restricted by the Constitution.—Achenbach v. Kincaid, 140 P. 529.

**II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.**

§ 40 (Mont.) The fee imposed by Rev. Codes, § 165, for recording and filing certificates of incorporation, is not a property tax, within Const. art. 12, §§ 1, 7, 11, or within Rev. Codes, §§ 2499, 2502, but is an impost, an excise, or license tax, authorized by Const. art. 12, § 1.—State v. Alderson, 140 P. 82.

§ 40 (Wash.) Laws 1913, c. 126, §§ 1-13, providing for the appointment of official court reporters, prescribing their duties and providing for their compensation, held not a revenue act so that it did not violate Const. art. 7, §§ 1, 2, and 9, requiring a uniform and equal rate of taxation.—State v. Derbyshire, 140 P. 540.

**III. LIABILITY OF PERSONS AND PROPERTY.****(A) Private Persons and Property in General.**

§ 58 (Wash.) Taxing statutes are to be liberally construed, and the action of taxing officers upheld wherever the substance and spirit of the statute are followed, even though there is a departure from its strict letter.—Spaulding v. Adams County, 140 P. 367.

§ 79 (Wyo.) One in possession under an option to purchase, or to complete a purchase, is not liable for taxes under the rule that a purchaser in possession must discharge the taxes, for, if the purchaser is not bound to pay the purchase money, the vendor cannot be treated in equity as the owner of the money and the purchaser the owner of the land.—Olds v. Little Horse Creek Cattle Co., 140 P. 1004.

§ 102 (Wash.) Personal property shipped into this state for sale, and otherwise taxable, is not exempt because it has been taxed for the same year in the state of the seller's domicile, since the state is subjected to the burden of its protection.—Spaulding v. Adams County, 140 P. 367.

**(C) Public Property and Institutions.**

§ 177 (Wyo.) In view of the statutes requiring real property to be listed to the owner and assessed at its true value in money, a general assessment against school lands, which had been sold under a certificate of purchase, but title to which had not yet passed, made in the usual manner of assessing lands, is a tax on the land as such and not a tax on the interest of the



purchaser.—*Olds v. Little Horse Creek Cattle Co.*, 140 P. 1004.

If the state, in selling public land on installments, occupies no better position than an ordinary vendor, yet if it retains the title, that is "property" within Const. art. 15, § 12, exempting state property from taxation, and hence the land cannot be taxed in such a manner as to imperil the state's interest.—Id.

State lands on which the purchaser entered under a contract of purchase, without payment of the entire purchase price, cannot under Const. art. 18, § 1, article 15, § 12, Comp. St. 1910, §§ 634, 637, 638, be assessed for taxes as land, for that might impair the state's interest and indirectly violate the constitutional provision fixing the minimum price at which the state lands may be sold.—Id.

#### (D) Exemptions.

§ 193 (Idaho) The enactment of Highway Commission Act, § 19, exempting motor vehicles from taxation, *held* within the express power granted by Const. art. 7, § 5.—*Achenbach v. Kincaid*, 140 P. 529.

§ 211 (Idaho) Under Highway Commission Act, § 19, exempting motor vehicles from taxation, *held* that the county commissioners and assessor of Ada county properly refused to cause motor vehicles to be assessed for the year 1913.—*Achenbach v. Kincaid*, 140 P. 529.

§ 213 (Okl.) A mortgage to the Commissioners of the Land Office to secure a loan of the permanent school funds is "property of the state," and as such is exempt by Const. art. 10, § 6, from the registration tax imposed by Act July 12, 1913 (Laws 1913, c. 246).—*Cornelius v. State*, 140 P. 1187.

§ 247 (Wyo.) The rule that a vendee in possession under a contract to purchase is liable for taxes cannot be applied so as to permit the taxation of property which is declared exempt by the Constitution.—*Olds v. Little Horse Creek Cattle Co.*, 140 P. 1004.

### IV. PLACE OF TAXATION.

§ 263 (Wash.) Under Rem. & Bal. Code, § 9236, *held*, that a stock of buggies shipped into defendant county, to a temporary warehouse, re-assembled and sold by soliciting agents, and sometimes delivered from the warehouse, by a firm engaging temporarily in such business, was subject to taxation by the county.—*Spaulding v. Adams County*, 140 P. 367.

### V. LEVY AND ASSESSMENT.

(G) Review, Correction, or Setting Aside of Assessment.

§ 495 (Okl.) Where back taxes are sought to be illegally collected under the "Tax Ferret Law" (Laws 1908, c. 81, art. 9, § 1), the taxpayer may appeal from the action of the county treasurer to the county court.—*Weatherford Milling Co. v. Duncan*, 140 P. 1184.

### VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

§ 543 (Wash.) In an action to recover taxes on personal property paid to defendant under protest, a finding that it was "immediately" assessed after arrival in the county *held* just as applicable to an assessment made after it had been unloaded from the cars and stored, as to an assessment before.—*Spaulding v. Adams County*, 140 P. 367.

### VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(C) Remedies for Wrongful Enforcement.

§ 605 (Okl.) Laws 1908, art. 9, c. 81, § 1, allowing an appeal to the county court from the action of the county treasurer in assessing prop-

erty for back taxes, did not repeal, by implication, Wilson's Rev. & Ann. St. 1903, § 4440 (Rev. Laws 1910, § 4881), authorizing injunction to restrain collection of an illegal tax.—*Weatherford Milling Co. v. Duncan*, 140 P. 1184.

§ 607 (Wyo.) A purchaser of state lands under a contract providing for payment in installments and retention of title by the state may object to a tax on the land as land, on the ground that the entire property instead of his interest was illegally assessed against him.—*Olds v. Little Horse Creek Cattle Co.*, 140 P. 1004.

§ 608 (Cal.) Whether a deed for unpaid taxes would constitute a cloud on the owner's property depends upon whether, in ejectment by the holder of the deed, the owner would be required to offer evidence to defeat recovery by showing the invalidity of the assessment.—*Las Animas & San Joaquin Land Co. v. Preciado*, 140 P. 239.

§ 608 (Okl.) Under Laws 1910, c. 64, the county excise board cannot levy during one year for township purposes a tax in excess of the estimate by the township directors, and hence an additional 10 per cent. for delinquent taxes and any tax in excess of such amount may be enjoined.—*St. Louis & S. F. R. Co. v. Lindsey*, 140 P. 1153.

§ 608 (Okl.) Where back taxes are sought to be illegally collected under the "Tax Ferret Law" (Laws 1908, c. 81, art. 9, § 1), the taxpayer may sue out an injunction under Code Civ. Proc. § 4881.—*Weatherford Milling Co. v. Duncan*, 140 P. 1184.

Where a milling corporation disposed of all its capital stock and invested the proceeds in tangible property, an attempt to assess its capital stock as omitted property under the "Tax Ferret" statute (Laws 1908, c. 81, art. 9, § 1) was illegal, and the collection of the tax will be restrained.—Id.

### IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 674 (Wash.) One who is under a moral or legal obligation to pay taxes cannot become a purchaser at a tax sale.—*Burgess v. Peth*, 140 P. 351.

### X. REDEMPTION FROM TAX SALE.

§ 708 (Wash.) A sheriff's return in a tax foreclosure proceeding against a corporation, showing that the corporation could not be found in the county, and an affidavit that it was not a resident and could not be found in the state for service of process, were sufficient to support a judgment of foreclosure and put the burden on the corporation to show, in a collateral proceeding, that it could have been personally served.—*France v. Deep River Logging Co.*, 140 P. 361.

Evidence that a witness was the statutory agent of a corporation during the year a tax foreclosure proceeding was brought against it, and was on the land at intervals of a month or two during the year, was not sufficient to overcome the presumption of jurisdiction arising from the sheriff's return in the foreclosure proceeding, showing that the corporation could not be found in the county, and by the usual affidavit that it could not be found for service in the state.—Id.

### XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 734 (Idaho) Where the assessor's statement to a landowner as to his taxes omitted a tract, and the landowner paid the taxes called for and received his receipt without noticing that it did not cover the omitted tract, and for several years thereafter he paid the taxes on all his land, and the omitted tract was sold for the

unpaid taxes for the one year, and the redemption period expired before he knew of same, upon payment of the taxes with the interest, penalties, and costs, he was entitled to a decree canceling the tax deed.—*Fix v. Gray*, 140 P. 771.

Where the red ink entry of assessments required by Rev. Codes § 1755, was accompanied by an entry stating that the delinquent tax had been canceled by order of the county commissioners, there was nothing in the record to give notice to the property owner that his land had been sold for delinquent taxes; and hence the tax sale was voidable.—*Id.*

#### (B) Tax Deeds.

§ 761 (Colo.) A tax deed is void on its face, where it shows that the land was sold to the county for unpaid taxes on the first day of the treasurer's sale.—*Dussart v. M. Abdo Mercantile Co.*, 140 P. 806.

§ 761 (Colo.App.) A tax deed to a county, failing to show that the property was offered and reoffered by the treasurer before it was stricken off to the county, was void on its face.—*Buckland v. Fiedler*, 140 P. 472.

§ 762 (Colo.App.) A tax deed showing an assignment by the county clerk of the certificate of purchase more than three years after the date of the sale rendered the deed void on its face.—*Miller v. Weldon*, 140 P. 930.

§ 765 (Colo.) A tax deed, issued under Laws 1901, p. 331, § 184, requiring execution by the treasurer in his official capacity and attestation by his official seal, is void upon its face when not attested by the county treasurer's official seal.—*Dussart v. M. Abdo Mercantile Co.*, 140 P. 806.

§ 765 (Wash.) Where a tax foreclosure proceeding was regular, and the treasurer duly acknowledged the execution of the tax deed, and his name appeared as grantor in the granting clause, the fact that his name was not subscribed at the foot of the deed would not render it invalid.—*France v. Deep River Logging Co.*, 140 P. 361.

§ 788 (Kan.) A tax deed less than five years old is open to attack for irregularities in the proceedings on which it was based.—*Gibson v. Rea*, 140 P. 893.

#### TEACHERS.

See Schools and School Districts, § 138.

#### TELEGRAPHS AND TELEPHONES.

See Electricity, § 19.

#### TENANCY IN COMMON.

See Evidence, § 67; Judgment, § 743.

#### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 14 (Cal.App.) A statement by one tenant in common to the agent of another that he claimed the entire property did not amount to an ouster, and furnishes no basis for the assertion of an adverse title, particularly where the agent collected the rents for the benefit of his principal.—*Klumpke v. Moreno*, 140 P. 313.

§ 15 (Cal.App.) In a suit to quiet title, where plaintiff set up an adverse title against his cotenants, evidence held insufficient to show any adverse holding.—*Klumpke v. Moreno*, 140 P. 313.

§ 19 (Cal.) One tenant in common could acquire for his sole benefit the right of the other cotenants at a judicial sale involving such rights.—*McNutt v. Nuevo Land Co.*, 140 P. 6.

§ 19 (Cal.App.) One tenant in common cannot assert the nullity of a judgment foreclosing the mortgage upon the interest of his cotenant and ask that his title to the entire tract be quieted upon payment of the incumbrance.—*Klumpke v. Moreno*, 140 P. 313.

§ 20 (Cal.App.) Where a tenant in common in possession neglected to pay taxes, he cannot allow the property to be forfeited to the state, and then, after redemption, assert his tax title against his cotenants.—*Klumpke v. Moreno*, 140 P. 313.

§ 29 (Mont.) Grantee of fractional interest in canal and water right who agreed to assume a proportionate amount of the cost of maintenance held not liable for repairs or improvements by the grantor without his consent, and without notice and refusal to co-operate therein.—*Manhattan Co. v. White*, 140 P. 90.

§ 36 (Cal.) An offer by a tenant in common to reimburse a cotenant for his proportionate part of the amount required to purchase an outstanding title to the common property must be made promptly, and is not in time, where made years after the acquisition of title by the purchasing cotenant and after the land has greatly increased in value.—*McNutt v. Nuevo Land Co.*, 140 P. 6.

#### TENDER.

See Bills and Notes, § 129; Corporations, § 93; Patents, § 203; Sales, § 124.

§ 19 (Ok.) A party making a tender in the trial, in order to do equity, is bound thereby.—*Lasoya Oil Co. v. Zulkey*, 140 P. 160.

#### TESTAMENTARY CAPACITY.

See Wills, § 55.

#### THEATERS AND SHOWS.

See Evidence, § 417; Negligence, §§ 44, 134.

#### THEFT.

See Larceny.

#### TIDE LANDS.

See Navigable Waters, § 37; Public Lands, §§ 144, 186.

#### TIMBER.

See Logs and Logging, § 3; Woods and Forests, § 1.

#### TIME.

See Appeal and Error, §§ 272, 347, 356, 564, 762, 773, 937, 1231, 1232; Bills and Notes, §§ 129, 140; Criminal Law, § 137; Interest, § 46; Judgment, § 199; Justices of the Peace, § 101; Mechanics' Liens, § 132; Principal and Surety, § 149; Sales, § 81; Subscriptions, § 15; Tenancy in Common, § 36; Vendor and Purchaser, §§ 75, 181, 329; Waters and Water Courses, § 203.

#### TITLE.

See Assignments, § 121; Brokers, § 82; Courts, § 163; Ejectment, §§ 9, 11; Evidence, § 366; Indians; Mortgages, § 538; Navigable Waters, § 42; Public Lands, §§ 35, 41; Quiet-ting Title; Statutes, §§ 105-125, 141, 211; Taxation, §§ 734-788; Tenancy in Common, § 20; Vendor and Purchaser, § 130.

#### TORNADO INSURANCE POLICIES.

See Insurance, § 622.

#### TORTS.

See Action, § 27; Corporations, §§ 491, 492; Death; False Imprisonment; Fraud; Libel and Slander; Malicious Prosecution; Master and Servant, §§ 92-332; Municipal Corporations, §§ 747-849; Negligence; Trover and Conversion.

#### TOWNS.

See Municipal Corporations; Schools and School Districts.

**TRADING STAMPS.**

See Constitutional Law, §§ 230, 287; Licenses, § 7.

**TRAINING SCHOOLS.**

See Schools and School Districts, § 19.

**TRESPASS.**

See Evidence, §§ 121, 242, 273, 317; False Imprisonment; Indians, § 19; Negligence, § 29; Pleading, § 127; Principal and Agent, § 22; Waters and Water Courses, § 247.

**TRESPASS TO TRY TITLE.**

See Ejectment.

**TRIAL.**

See Appeal and Error, §§ 215, 263, 273, 757, 842, 866, 928, 1001-1015, 1046, 1061-1070; Arrest, § 68; Attachment, § 352; Bastards, § 13; Brokers, § 88; Carriers, §§ 218, 320; Continuance; Costs; Criminal Law, §§ 628-855, 1153, 1159, 1160, 1166½, 1171; Damages, § 208; Death, § 95; Eminent Domain, §§ 198, 262; Evidence, § 265; Fraud, § 64; Homicide, §§ 145, 270-300; Insurance, § 668; Judgment, §§ 199-256; Jury; Libel and Slander, §§ 123, 124; Limitation of Actions, § 195; Malicious Prosecution, § 22; Master and Servant, §§ 285-297, 332; Mechanics' Liens, § 290; Mines and Minerals, § 19; Municipal Corporations, § 821; Navigable Waters, § 39; Negligence, § 136; New Trial; Payment, § 89; Physicians and Surgeons, § 5; Principal and Agent, § 24; Railroads, § 454; Release, § 58; Replevin, § 91; Venue; Work and Labor, § 29.

**III. COURSE AND CONDUCT OF TRIAL IN GENERAL.**

§ 25 (Okl.) The party upon whom rests the burden of proof may open and close the argument.—Bass & Harbour Furniture & Carpet Co. v. Harbour, 140 P. 956.

Where defendant, without objection, assumes the burden of proof in the introduction of evidence, his answer will be treated as amended to sustain his right to open and close.—Id.

§ 29 (Nev.) In ruling on the admissibility of evidence, the trial judge should confine his remarks strictly to that question, and not make unnecessary statements.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

Remarks by the trial judge which are calculated to mislead the jury or prejudice the rights of either party are reversible.—Id.

**IV. RECEPTION OF EVIDENCE.****(A) Introduction, Offer, and Admission of Evidence in General.**

§ 45 (Nev.) In an employe's action for injuries, offer of evidence of a conversation between plaintiff and another after the accident to show that plaintiff knew, when the action was brought, that defendant was not responsible for his injury, and to negative defendant's negligence, held sufficient to warrant admission of a declaration against interest.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519.

§ 46 (Cal.App.) In a proceeding to condemn land for a railroad depot, evidence as to the size and character of the depots of other railroad companies was properly excluded, where defendants made no promise to show that the circumstances were similar, though the evidence was objected to on that ground.—Vallejo & N. R. Co. v. Home Savings Bank, 140 P. 974.

§ 53 (Or.) An exhibit admitted in evidence may be considered for what it contains, regardless of who introduced it.—Cunningham v. Friendly, 140 P. 989.

**(C) Objections, Motions to Strike Out, and Exceptions.**

§ 82 (Ariz.) A general objection to evidence not stating any point was wholly unavailable.—Machomich Mercantile Co. v. Hickey, 140 P. 63.

§ 84 (Kan.) Where one in possession of a written contract testifies as to its loss, and there was no objection that a sufficient foundation to admit evidence as to its contents had not been laid, an objection that the same was incompetent was properly overruled.—Phillips v. Bishop, 140 P. 834.

§ 91 (Cal.App.) A motion to strike out the answer of a witness was improperly granted, where no objection had been made to the question.—Vallejo & N. R. Co. v. Home Savings Bank, 140 P. 974.

§ 96 (Or.) A motion to strike out testimony of an expert was properly denied where much of the testimony might properly have been given by a nonexpert.—Rugenstein v. Ottenheimer, 140 P. 747.

**V. ARGUMENTS AND CONDUCT OF COUNSEL.**

§ 115 (Wash.) The trial court may, in its discretion, deny the right of counsel for either party to read extracts from the testimony of a witness when arguing the case to the jury, or deny a request to have the stenographer read extracts from his shorthand notes.—Smith v. Northern Pac. Ry. Co., 140 P. 685.

**VI. TAKING CASE OR QUESTION FROM JURY.****(A) Questions of Law or of Fact in General.**

§ 139 (Okl.) A demurrer to evidence, which reasonably tends to support a petition stating a cause of action, should be overruled.—Wm. Cameron & Co. v. Henderson, 140 P. 404.

§ 139 (Wash.) Where reasonable men may differ as to the sufficiency of the evidence, the jury must determine the issues.—Atwood v. Washington Water Power Co., 140 P. 343.

§ 141 (Cal.) There being no question but that whatever language was used by defendant concerning plaintiff was spoken in the hearing of third persons and was understood by them, an instruction cannot be complained of because withdrawing the question of it having been heard and understood by a third person.—Pouchan v. Godeau, 140 P. 952.

§ 141 (Okl.) Where the uncontradicted evidence showed, as to the only issue involved, that the insurance policy sued on had been issued and was in effect, it was error to deny a directed verdict for plaintiff.—Van Arsdale-Osborne Brokerage Co. v. Wiley, 140 P. 153.

**(B) Demurrer to Evidence.**

§ 156 (Okl.) A demurrer to the evidence admits all facts which the evidence in the slightest degree tends to prove, and all inferences reasonably deducible therefrom.—Wm. Cameron & Co. v. Henderson, 140 P. 404.

**(C) Dismissal or Nonsuit.**

§ 159 (Or.) A nonsuit is properly granted when the plaintiff fails to prove a cause of action sufficient to be submitted to the jury.—Merrill v. Missouri Bridge & Iron Co., 140 P. 439.

§ 165 (Cal.App.) A motion for nonsuit must point out the defects in the proof of plaintiff, and the court must permit plaintiff to supply the missing evidence.—Sferlazzo v. Oliphant, 140 P. 289.

**(D) Direction of Verdict.**

§ 168 (Or.) Where there is no conflict in evidence, the court should direct a verdict in accordance with it.—Merrill v. Missouri Bridge & Iron Co., 140 P. 439.

§ 178 (Wash.) Where the judge and jury viewed the place where plaintiff was injured, the court, in ruling on a motion for directed verdict, may consider the view.—*Aldredge v. Oregon-Washington R. & Navigation Co.*, 140 P. 550.

## VII. INSTRUCTIONS TO JURY.

### (A) Province of Court and Jury in General.

§ 187 (Cal.App.) In an action for the death of a street car passenger in a collision between cars, an instruction *held* not objectionable as interfering with the right of the jury to determine the credibility of the witnesses.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

§ 192 (Idaho) Where, in an action by a bankrupt's trustee to recover certain property as a preference, plaintiff's allegation that the value was \$1,800 was not denied, the court properly charged that the value so alleged was admitted.—*Soule v. First Nat. Bank of Ashton*, 140 P. 1098.

§ 194 (Cal.App.) In an action for the death of a street car passenger in a collision between cars, an instruction *held* not objectionable as interfering with the right of the jury to weigh the evidence.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

§ 199 (Or.) An instruction as to decedent's assumption of risk, if defendant has not violated any statute, without a statement of the obligations put upon an employer by the statute, is properly refused as a submission of a question of law.—*McDaniel v. Lebanon Lumber Co.*, 140 P. 990.

### (C) Form, Requisites, and Sufficiency.

§ 236 (Mont.) Jury *held* properly instructed to consider witnesses' opportunities for knowing the facts, their conduct while testifying, their interest in the suit, and the probability of their testimony.—*Burles v. Oregon Short Line R. Co.*, 140 P. 513.

§ 237 (Or.) Where the court charges that the jury may award what they think will compensate plaintiff, and do what is right between the parties, the refusal of an instruction limiting recovery for permanent injuries to those proved by a preponderance of the evidence is error.—*Rugenstein v. Ottenheimer*, 140 P. 747.

§ 238 (Idaho) An instruction based on a statute which had been repealed is erroneous.—*Soule v. First Nat. Bank of Ashton*, 140 P. 1098.

§ 242 (Okla.) In an employee's action for injuries before statehood a requested instruction that certain chapters of Arkansas laws were applicable to the case *held* misleading and confusing and properly refused.—*Frisco Lumber Co. v. Spivey*, 140 P. 157.

§ 244 (Or.) In an action for injuries on the paved street of a large city, an instruction as to care required of plaintiff, emphasizing the fact that the accident occurred between street intersections, was properly refused.—*Rugenstein v. Ottenheimer*, 140 P. 747.

### (D) Applicability to Pleadings and Evidence.

§ 251 (Okla.) In an action for breach of an express warranty in a sale of personalty, the court should limit plaintiff's right to recovery to breach of the express warranty pleaded, and it was error to charge on an implied warranty not pleaded.—*Burgess v. Felix*, 140 P. 1180.

§ 253 (Idaho) In an action by a bankrupt's trustee for the value of notes and money alleged to have been received by defendant as a preference, instructions as to what circumstances would render the transfer void, omitting the element that plaintiff must prove that defendant had cause to believe that the transfer would effect a preference, were erroneous.—

*Soule v. First Nat. Bank of Ashton*, 140 P. 1098.

### (E) Requests or Prayers.

§ 256 (Or.) Under the Employers' Liability Law, instruction *held* sufficient in the absence of a request for a more specific instruction.—*McClagherty v. Rogue River Electric Co.*, 140 P. 64.

§ 260 (Cal.App.) Instructions which, so far as they were correct and applicable to the facts, were sufficiently covered by the charge given, were properly refused.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 260 (Cal.App.) Where the court stated that sorrow and mental anguish were not elements of damages, and that no damage could be awarded for wounded feelings, and other instructions emphasized the fact that pecuniary loss was the measure of the recovery, refusal to charge that no damage could be given for sorrow or injury to feelings was not prejudicial.—*Bond v. United Railroads of San Francisco*, 140 P. 982.

§ 260 (Okla.) It is not error to refuse an instruction covered by those given, though the requested instruction correctly states the law.—*Alfred v. St. Louis, I. M. & S. Ry. Co.*, 140 P. 415.

§ 260 (Or.) The refusal of instructions as to assumption of risk by plaintiff *held* not error, where the general instructions fairly cover the question so far as the evidence justifies.—*Powell v. Sutherland Land & Water Co.*, 140 P. 998.

§ 260 (Wash.) It is not error to refuse requested instructions, where the law of the case was covered by the court's instructions.—*Atwood v. Washington Water Power Co.*, 140 P. 343.

§ 260 (Wash.) There was no error in refusing requested instructions which, so far as not positively erroneous, were covered by instructions given without objection.—*Mattson v. Eureka Cedar Lumber & Shingle Co.*, 140 P. 377.

§ 260 (Wash.) It is not error to refuse requested instructions sufficiently covered by the instructions given.—*Norton v. Pacific Power & Light Co.*, 140 P. 905.

### (G) Construction and Operation.

§ 295 (Wash.) In an action for injuries from being struck by a taxicab, in which an ordinance fixing the speed limit was excluded, because the accident was not shown to have occurred within the district named, a reference to the ordinance in the instructions *held* not misleading, where the instructions, as a whole, made liability depend upon negligence, independent of the ordinance.—*Gosky v. Seattle Taxicab & Transfer Co.*, 140 P. 342.

## VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 314 (Ariz.) A statement of the trial judge, after the jury had considered a case during one night and until noon of the following day, that the case had been twice tried, and that he hoped they would arrive at a verdict, did not require a reversal.—*Machomich Mercantile Co. v. Hickey*, 140 P. 63.

## IX. VERDICT.

### (A) General Verdict.

§ 344 (Okla.) Alleged irregularities in the verdict could not be shown by a juror's affidavit, stating facts showing it to be a quotient verdict.—*Glockner v. Jacobs*, 140 P. 142.

§ 345 (Kan.) Where the defendant insurance companies, in four actions consolidated by agreement, failed to request separate verdicts, they waived their right to object to a general verdict for the full amount of the loss, which amount the court apportioned among them.—*Manhattan Wholesale Grocery Co. v. Westchester Fire Ins. Co.*, 140 P. 853.

§ 345 (Kan.) Where several actions against different insurance companies are consolidated

by stipulation, without demand for separate findings, and a gross verdict is returned, and the judgment is apportioned among the different defendants, it is too late to object to the judgment because of the gross verdict, and because some of the policies insured property not covered by others.—*Bee-Hive Mercantile Co. v. Insurance Co. of North America*, 140 P. 854.

**(B) Special Interrogatories and Findings.**

§ 349 (Cal.App.) Under Code Civ. Proc. § 625, as amended by St. 1909, p. 193, the submission of special issues is within the discretion of the court.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

§ 349 (Wash.) The submission of interrogatories to the jury rests in the sound discretion of the trial court.—*Acres v. Frederick & Nelson*, 140 P. 370.

§ 350 (Cal.App.) The trial court properly refused to submit special questions which were not within the issues, involved questions of law, or were covered by the questions submitted.—*Vallejo & N. R. Co. v. Home Savings Bank*, 140 P. 974.

**X. TRIAL BY COURT.**

**(A) Hearing and Determination of Cause.**

§ 370 (Okl.) In cases of equitable cognizance, except as otherwise provided by Rev. Laws 1910, §§ 4993, 4994, the judge may call or consent to a jury to advise him on questions of fact.—*Galer v. Berrian*, 140 P. 155.

§ 374 (Okl.) Where a jury is called in a suit for rescission of a contract, the court may either adopt or disregard their conclusions as to the facts established.—*Galer v. Berrian*, 140 P. 155.

§ 374 (Wash.) In an equitable action, where the issues of fact are submitted to the jury, its verdict is merely advisory, and can be disregarded by the court.—*In re Enos' Estate*, 140 P. 675.

**(B) Findings of Fact and Conclusions of Law.**

§ 388 (Wash.) Rem. & Bal. Code, §§ 367, 470, did not require findings of fact upon vacating a judgment for excusable neglect, as that is a discretionary matter reviewable on appeal upon the entire record.—*Frieze v. Powell*, 140 P. 690.

§ 404 (Or.) Where uncontroverted testimony of lessees as to kinds of business of other tenants fully sustains their pleading, a finding that the averments were wholly unproven should be regarded as a conclusion of law that the testimony did not show a constructive eviction.—*Wolf v. Eppenstein*, 140 P. 751.

**TROVER AND CONVERSION.**

**II. ACTIONS.**

**(D) Damages.**

§ 48 (Wash.) In conversion for defendant inadvertently taking away and selling logs belonging to the plaintiff, without any intent to misappropriate them, the measure of damages was the value of the logs at the place of conversion, and not at the place where they were sold.—*Gunstone v. Chicago, M. & P. S. Ry. Co.*, 140 P. 907.

**TRUST DEEDS.**

See Mortgages.

**TRUSTEE PROCESS.**

See Garnishment.

**TRUSTS.**

See Assignments, § 89; Bankruptcy, §§ 159, 166, 303; Charities; Corporations, § 544; Pleading, §§ 86, 205; Trial, §§ 182, 253.

**L. CREATION, EXISTENCE, AND VALIDITY.**

**(B) Resulting Trusts.**

§ 72 (Or.) Where a purchaser of land, in securing a loan, has the title transferred directly to the creditor, the latter becomes the trustee of the title for the purchaser.—*Williamson v. Roberts*, 140 P. 633.

**VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.**

**(O) Actions.**

§ 371 (Mont.) In an action against a trustee to compel a reconveyance of certain trust property where the complaint alleged that plaintiff was the owner of the property, etc., and made the conveyance to the trustee, but the proof showed that the property was in the name of plaintiff's brother, etc., who conveyed to the trustee, the variances were immaterial, there being further proof that plaintiff was the real and beneficial owner.—*Willoburn Ranch Co. v. Yegen*, 140 P. 231.

**UNDERTAKINGS.**

See Appeal and Error, § 385.

**UNDISCLOSED AGENCY.**

See Principal and Agent, §§ 143, 190.

**UNDUE INFLUENCE.**

See Wills, §§ 164, 166.

**UNITED STATES.**

See Husband and Wife; Patents; Public Lands, §§ 24-114; United States Marshals.

**UNITED STATES LAND DEPARTMENT.**

See Public Lands, § 106.

**UNITED STATES MARSHALS.**

§ 32 (Okl.) Under Mansfield's Dig. § 3061, providing that, on a sheriff's failure to return an execution within 60 days from its date, he shall be liable to the execution creditor for the amount of the execution, the liability of a United States marshal in Indian Territory for such a default committed prior to statehood is measured by the amount of the execution, and not by the injuries sustained by the execution creditor.—*A. F. Shapleigh Hardware Co. v. Pritchard*, 190 P. 1136.

§ 36 (Okl.) Under Mansfield's Dig. § 3061, in force in the Indian Territory prior to statehood, a United States marshal having failed within 60 days after its date to return an execution, he and the sureties on his bond were liable to the execution creditor for the amount of the execution, unless the failure was caused by the act or waiver of the creditor.—*A. F. Shapleigh Hardware Co. v. Pritchard*, 140 P. 1136.

**UNIVERSITIES.**

See Colleges and Universities.

**USURY.**

See Quieting Title, § 14.

**I. USURIOUS CONTRACTS AND TRANSACTIONS.**

**(A) Nature and Validity.**

§ 5 (Cal.App.) Whenever there comes into existence a class of business, even though included within a more general class, where it is habitual for those engaged therein to charge excessive interest and take particular kinds of se-

curity therefor, the Legislature can take cognizance of the existence of such business as a distinct occupation subject to regulation peculiar to such business, in order to correct the wrongs connected therewith.—Eaker v. Bryant, 140 P. 310.

§ 6 (Cal.App.) Laws enacted to guard against unreasonable rates of interest should be favorably regarded by the courts as they always have been at common law.—Eaker v. Bryant, 140 P. 310.

#### (B) Rights and Remedies of Parties.

§ 102 (Okl.) An action to recover usury is one arising on an implied contract.—Yates v. First Nat. Bank, 140 P. 1174.

### VACATION.

See Judgment, §§ 138-160, 340-384.

### VALUE.

See Mechanics' Liens, § 161.

### VARIANCE.

See Indictment and Information, § 178.

### VENDOR AND PURCHASER.

See Brokers; Frauds, Statute of, §§ 56-71; Money Paid, § 1; Sales; Specific Performance; Subrogation, § 14; Taxation, §§ 247, 607, 874; Trusts, § 72.

#### I. REQUISITES AND VALIDITY OF CONTRACT.

§ 6 (Cal.) The fact that one who contracts to sell a piece of land is without title thereto at the time of making the contract does not make the contract void, in the absence of deceit, concealment, or false representations, upon which a purchaser was entitled to rely.—Brimmer v. Salisbury, 140 P. 30.

§ 31 (Idaho) Where the government survey of a fractional section abutting on a lake left an unsurveyed tract between the meander and the water line, and a dispute arose as to whether such tract belonged to the fractional section, such dispute involved a question of law, and a mistake in respect thereto between a vendor and purchaser was a mistake of law when not induced by misrepresentations.—Coolin v. Anderson, 140 P. 969.

§ 39 (Or.) L. O. L. § 3264, providing that any person selling a town-site lot before the plat has been recorded shall forfeit \$50 for every lot so sold, does not prevent the vesting of title in the grantee under such a sale.—Kern v. Feller, 140 P. 735.

#### II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 75 (Cal.) A receipt for a deposit on the purchase price of a designated tract of land, which recited that the balance was to be paid upon delivery of the deed, and which was signed by the vendor, was an agreement, binding upon him, to convey the land upon receipt of the balance of the purchase price within a reasonable time.—Coppie v. Aigeltinger, 140 P. 1073.

#### III. MODIFICATION OR RESCISSION OF CONTRACT.

##### (B) Rescission by Vendor.

§ 98 (Cal.) In an action to foreclose the purchaser's rights under a contract for the sale of land for failure to comply with the contract, the purchaser is not entitled to a return of the portion of the purchase price already paid, where the contract provided that all sums paid should be considered as payments for the use of the land in case of failure to comply with the contract.—Cross v. Mayo, 140 P. 283.

§ 104 (Cal.) In an action to forfeit the purchaser's interest under a contract for the sale of land, where the court fixed 10 days within which defendant might comply with the contract or be foreclosed of all rights thereunder, the time given was not unduly short, and the court did not abuse its discretion in refusing an extension.—Cross v. Mayo, 140 P. 283.

Where the purchaser's rights under a contract for the purchase of land were adjudged forfeited for failure to make the payments required by the contract, it was erroneous to also enter judgment for certain payments due under the contract.—Id.

##### (C) Rescission by Purchaser.

§ 114 (Cal.) Under Civ. Code, § 1691, a party to a contract must rescind promptly upon discovery of the facts which entitle him to rescind, and where the purchaser of land for more than 10 months after full knowledge of the facts continued to derive all possible benefits from the contract before attempting to rescind, he waived the right to do so.—Cross v. Mayo, 140 P. 283.

§ 116 (Mont.) Under the substantially direct provisions of Rev. Codes, §§ 5075, 5076, on repudiation of a contract by the purchaser, he was bound, without demand, to restore to the vendor the personality received under the contract, and to compensate vendor for the use and occupation of the land.—Hicks v. Rupp, 140 P. 97.

§ 116 (Utah) Where a contract for the sale of land, which required the payment of one installment upon delivery of the contract, and another June 1, 1908, provided that after June 1, 1909, the purchaser, if dissatisfied, should be entitled to a return of all payments made, the making of the second payment was not a condition precedent to the return of the first, where the seller breached the contract in other matters.—Obrecht v. Neilson Land & Water Co., 140 P. 117.

§ 123 (Cal.) Evidence held sufficient to support a finding that a purchaser, for more than 10 months after he had acquired full knowledge of the facts entitling him to rescind a contract to purchase land, continued acting under the contract, treated the property as his own, and derived all possible benefits therefrom before attempting to rescind.—Cross v. Mayo, 140 P. 283.

#### IV. PERFORMANCE OF CONTRACT.

##### (A) Title and Estate of Vendor.

§ 130 (Cal.) A title not deductible of record is clouded and unmerchantable.—Las Animas & San Joaquin Land Co. v. Preciado, 140 P. 239.

##### (B) Payment of Purchase Money.

§ 181 (Cal.App.) A promise by a vendor to subscribe a specified sum to a fund by check from the amount deposited by the purchaser, to the vendor's account, made in connection with the sale of real estate to the purchaser, who was required to pay the price on delivery of the deed and certificate of title, is only a promise to pay the sum after the purchaser has paid the price, and the purchaser may not pay the sum to the fund prior to the closing of the transaction of the sale.—Sessions v. Miller, 140 P. 44.

#### VI. REMEDIES OF VENDOR.

##### (B) Actions for Purchase Money.

§ 308 (Idaho) A mistake of a purchaser as to the amount of land included within a legal subdivision cannot authorize equitable relief in an action for the price, where he was negligent, and no material misrepresentations were made by the vendor.—Coolin v. Anderson, 140 P. 969.

§ 315 (Idaho) Rulings on evidence, in a vendor's action for the purchase price of land, held not erroneous.—Coolin v. Anderson, 140 P. 969.

**(C) Actions for Damages.**

§ 322 (Kan.) Where the purchaser refuses to comply with his contract, one remedy available to the vendor is to sue for the loss sustained by the purchaser's nonperformance.—First M. E. Church of Strong City v. North, 140 P. 888.

§ 329 (Kan.) Where the purchaser refuses to accept the property, and it is resold within a reasonable time, after notice to him, for the highest price reasonably obtainable, the price on resale is prima facie evidence of its market value.—First M. E. Church of Strong City v. North, 140 P. 888.

§ 330 (Kan.) The measure of damages for a purchaser's refusal to perform is ordinarily the difference between the contract price and the market value, where title remains in the vendor, and the money in the purchaser.—First M. E. Church of Strong City v. North, 140 P. 888.

**VII. REMEDIES OF PURCHASER.****(A) Recovery of Purchase Money Paid.**

§ 334 (Wash.) Where the owner of property undertakes to point out to a prospective purchaser its boundaries, the failure to do so accurately will constitute a fraudulent representation, entitling the purchaser to recover for any deficiency.—Lyle v. Cunningham, 140 P. 880.

**(B) Actions for Breach of Contract.**

§ 343 (Cal.) A vendor does not breach a contract for the sale of land by a sale thereof to another, subject to the rights of the purchaser under the contract; but, where the purchaser's rights are not protected, the sale amounts to a breach of the contract and a fraud upon the purchaser.—Brimmer v. Salisbury, 140 P. 30.

§ 349 (Cal.) In an action by the purchaser for the breach of an executory contract for the sale of land, an averment merely that the vendor had, since the contract was entered into, sold the land to another, is not sufficient, since it does not negative the possibility that the rights of the purchaser were reserved in such sale.—Brimmer v. Salisbury, 140 P. 30.

**VENUE.**

See Criminal Law, §§ 108-137, 1144, 1150.

**III. CHANGE OF VENUE OR PLACE OF TRIAL.**

§ 36 (Wash.) An action for an accounting of a logging business and to enforce an agreement to convey timber lands held a transitory action, so that the venue was properly changed from S. county, where it was brought, to K. county, where defendant resided.—English v. Gibbons, 140 P. 322.

§ 41 (Wash.) The county, where an action for wrongful attachment was pending, being that where the levy was made, and where the defendant corporation had an office, and a more convenient place of trial, there was, under Rem. & Bal. Code, §§ 206, 207, 209, no abuse of discretion in refusing change of venue to another county, asked because individual defendants were residents of it and the corporation had an office there.—Culbertson v. Gilbert Hunt Co., 140 P. 548.

**VERDICT.**

See New Trial, §§ 72, 79; Trial, §§ 168, 178, 344-350.

**VERIFICATION.**

See Judgment, § 384; Pleading, § 291.

**VESTED RIGHTS.**

See Constitutional Law, §§ 92, 100.

**VOTERS.**

See Elections.

**WAGERS.**

See Gaming, § 29.

**WAIVER.**

See Appeal and Error, §§ 511, 842, 1078; Attachment, § 852; Bills and Notes, § 129; Criminal Law, §§ 137, 1144; Estoppel; Garnishment, § 104; Insurance, § 576; Jury, § 14; Justices of the Peace, § 101; Mortgages, § 697; Municipal Corporations, § 185; New Trial, § 97; Parties, §§ 76, 84; Pleading, §§ 373, 418; Public Lands, § 54; Sales, § 179; Trial, § 345; Vendor and Purchaser, § 114.

**WARDS.**

See Guardian and Ward.

**WARRANT.**

See Municipal Corporations, §§ 904, 905.

**WARRANTY.**

See Insurance, §§ 292, 646, 665; Sales, §§ 246-284, 441, 442.

**WATERS AND WATER COURSES.**

See Appeal and Error, §§ 178, 223; Boundaries, § 13; Dedication, § 55; Evidence, § 601; Injunction, § 118; Judgment, § 89; Landlord and Tenant, §§ 166, 169; Municipal Corporations, § 271; Navigable Waters; New Trial, § 100; Public Lands, § 144; Tenancy in Common, § 29.

**I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.**

§ 33 (Wyo.) Under Const. art. 8, § 2, providing that there shall be constituted a board of control which shall have supervision of the appropriation, etc., of waters of the state, the board had jurisdiction; and it was its duty, upon application, to adjudicate and determine whether the applicant had a water right, since, until such was done, there was nothing from which the applicant could appeal.—State v. Parshall, 140 P. 830.

**VI. APPROPRIATION AND PRESCRIPTION.**

§ 127 (Nev.) There is no absolute property in the waters of a natural stream, and the only right one may acquire thereto is by diverting the waters for a usufructuary purpose, and a water right, to be available, must be attached to the land.—Prosole v. Steamboat Canal Co., 140 P. 720.

§ 127 (N.M.) The "Colorado Doctrine" of prior appropriation prevails in New Mexico.—Snow v. Abalos, 140 P. 1044.

§ 128 (Nev.) Laws 1913, c. 140, does not affect the rights acquired by one obtaining water for irrigation from a water company for several years prior to the act.—Prosole v. Steamboat Canal Co., 140 P. 720.

§ 133 (Nev.) One who obtains water for irrigation from a water company, diverting water from a stream into an artificial waterway for sale, is an appropriator of water, and the right of user is contingent only on paying a reasonable compensation for water obtained.—Prosole v. Steamboat Canal Co., 140 P. 720.

§ 133 (N.M.) The "appropriation of water" consists in the taking or diversion of it from some natural stream or other source of water supply, pursuant to law, with intent to apply it to some beneficial use, which intent is consummated within a reasonable time by the

actual application of all of the water to the use designed, or to some other useful purpose.—*Snow v. Abalos*, 140 P. 1044.

§ 135 (N.M.) It is the application of water to a beneficial use, or the intent to apply, followed with due diligence toward appropriation and ultimate application, which gives the appropriator the continued and continuous right to take the water.—*Snow v. Abalos*, 140 P. 1044.

§ 138 (Wash.) So long as defendant's impounding of the waters of a stream on which plaintiffs' land abutted did not injure plaintiffs' riparian rights, defendant could acquire no prescriptive rights to impound the waters.—*St. Martin v. Skamania Boom Co.*, 140 P. 355.

§ 142 (Nev.) A company owning and operating an artificial waterway and diverting water from a natural stream for gain by the sale of the water to others, who actually apply it for irrigation, acquires no right to the water except the right to dispose of it for a reasonable compensation.—*Prosser v. Steamboat Canal Co.*, 140 P. 720.

The right of an actual appropriator of water for beneficial use, whether he obtains the water by diverting it from a natural water course or by purchase from a water company, is a part of the freehold.—*Id.*

§ 143 (N.M.) An appropriator of water does not acquire a right to specific water flowing in a stream, but only the right to take therefrom a given quantity of water for a specified purpose.—*Snow v. Abalos*, 140 P. 1044.

§ 145 (Colo.) A right to the use of water of a natural stream does not depend upon the place of its application, and is not confined to the land upon which the right came into existence, but the point of diversion, the place of application, and the character of use may each be changed; the only limitation being the prohibition of any injurious effect upon the vested rights of others to the use of the water.—*Ironstone Ditch Co. v. Ashenfelter*, 140 P. 177.

§ 152 (Ariz.) Whether an appropriator of water has abandoned the water, ditch, canal, or other works depends on the facts, and is for the jury.—*Landers v. Joerger*, 140 P. 209.

Whether a squatter who appropriated water for irrigation abandoned his water right and the water itself, on judgment of ouster against him, *held* one of fact, and the findings of the trial court would not be disturbed.—*Id.*

§ 152 (Colo.) In a proceeding by owners of water rights for permissions to change points of diversion under Rev. St. 1908, §§ 3226, 3227, evidence *held* to show that accretions into the river above petitioners' headgates and below protestants' headgates did not supply petitioners' priorities.—*Ironstone Ditch Co. v. Ashenfelter*, 140 P. 177.

Where the owner of a priority to the use of a volume of water of a stream as settled by a decree diverted extraneous and seepage water into the stream above his headgate, which otherwise would not have reached the stream, such water belonged to such owner individually, and was not an accretion belonging to the river and included within the adjudication decree.—*Id.*

In a proceeding by an owner of a priority of right to the use of a volume of water from a stream for permission to change the point of diversion to a point 25 miles up the river, under Rev. St. 1908, §§ 3226, 3227, evidence *held* to sustain a finding that such change was a benefit, and not an injury, to vested rights of owners whose headgates intervened between the old and new points of diversion.—*Id.*

§ 152 (Colo.) Where the owner of a priority to the use of a volume of water of a stream, as settled by an adjudication decree, diverted extraneous and seepage water into the stream above his headgate, which otherwise would not have reached the stream, such water belonged to such owner individually, and was not an accretion belonging to the river and controlled by

the decree.—*Moore v. Ironstone Ditch Co.*, 140 P. 183.

## VII. CONVEYANCES AND CON-TRACTS.

§ 156 (Colo.) The sale by riparian landowners of water rights did not preclude them from irrigating the land from which the rights were thus severed, by other water, or with rights other than the ones transferred; the sale not being a surrender of their junior rights, or of the right to appropriate any unappropriated water, or of developing or procuring water from an independent source which otherwise would not reach the stream.—*Ironstone Ditch Co. v. Ashenfelter*, 140 P. 177.

§ 157 (Idaho) Mere naked possession by a licensee of an irrigation ditch right of way created by parol license does not render such license irrevocable.—*McReynolds v. Harrigfeld*, 140 P. 1096.

## VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 160 (Wash.) So long as defendant's impounding of the waters of a stream on which plaintiffs' land abutted did not injure plaintiffs' riparian rights, defendant could acquire no prescriptive rights to impound the waters.—*St. Martin v. Skamania Boom Co.*, 140 P. 355.

§ 171 (Cal.) Riparian owner, though entitled to protect his land by levees, *held* not entitled to dam a natural channel of a stream, thereby causing the other channel to overflow, to the detriment of owners who, in the usual way, had guarded against floods.—*Island Reclamation District No. 776 v. Floribel Alfalfa Syndicate*, 140 P. 4.

Where some water passed through a slough or channel of a stream and eventually joined the other part of the stream, it could not be dammed, thus causing the other channel to overflow in times of flood.—*Id.*

§ 174 (Cal.) A prohibitory injunction will issue against the threatened damming of the natural flow of a stream, to the detriment of another, by causing overflows and a mandatory injunction to remove the cause when some injury has been done.—*Island Reclamation District No. 776 v. Floribel Alfalfa Syndicate*, 140 P. 4.

§ 177 (Cal.) Preliminary injunction against construction of dam will be granted, though it had already been constructed, where it had also been removed by plaintiffs before the hearing.—*Island Reclamation District No. 776 v. Floribel Alfalfa Syndicate*, 140 P. 4.

§ 179 (Wash.) In an action to prevent defendant from impounding the waters of a stream and thus interfering with the flow of a spring on plaintiffs' land, located on the river bank, evidence that, after objections, the waters were not impounded at any time for over a year is admissible on the question whether defendant had acquired a prescriptive right.—*St. Martin v. Skamania Boom Co.*, 140 P. 355.

Where defendant claimed a prescriptive right to impound the waters of a stream which interfered with the flow of a spring on the land of a lower riparian owner, evidence of negotiations between defendant and the owner after defendant's erection of its dam is admissible to show that defendant acquired no prescriptive right.—*Id.*

One claiming a prescriptive right to impound the waters of a nonnavigable stream has the burden of proving an adverse, hostile, continuous, and uninterrupted use for the period of limitations under a claim of right.—*Id.*

In an action to enjoin defendant from impounding the waters of a stream, thus lessening the flow of a spring on the land of a lower riparian owner, evidence *held* insufficient to show that defendant's use was hostile or ad-



verse, or had continued during the period of limitations.—*Id.*

### IX. PUBLIC WATER SUPPLY.

#### (A) Domestic and Municipal Purposes.

§ 188 (Cal.) Under Public Utilities Act, § 67, findings of Railroad Commission that water company was public utility, and that it was operating a water system for compensation, held conclusive, unless the evidence was without conflict, and the question therefore one of law.—*Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 591.

§ 188 (N.M.) Where the people of a city are entitled to certain rights and privileges under a water company's franchise, a construction of ambiguous provisions of the franchise by one consumer or beneficiary is not binding on others not shown to have acquiesced therein.—*State v. Water Supply Co. of Albuquerque*, 140 P. 1059.

§ 194 (N.M.) Where a water company's franchise authorizes the company to make regulations to be approved by the city, mere inaction by the city would not amount to an approval of a regulation requiring a consumer to pay the cost of making connection with its mains.—*State v. Water Supply Co. of Albuquerque*, 140 P. 1059.

Where a water company's franchise requires it to furnish water to private consumers, it must provide the necessary service pipe from the main line in an abutting street to the consumer's property line, at its own expense, unless the franchise imposes this burden on the consumer.—*Id.*

Where a water company, under its franchise, is required to lay service pipes from the curb to the company's main, a regulation compelling the consumer to do so is unreasonable.—*Id.*

Where a municipality operates its own water supply system, a rule requiring a consumer to lay service pipes from the curb to the main is reasonable.—*Id.*

§ 201 (Cal.) Public Utilities Act, §§ 35, 36, held not to authorize Railroad Commission to order water company, which had not held out that its water was for sale to persons outside a town site and the subdivided lands of its organizer, to lay pipes and furnish water to a person outside such territory.—*Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 591.

Sales of water by a water company to persons who come and take it away in barrels is not evidence of a dedication of the water owned by it to public use, nor the dedication of any of it to the supply of any particular territory.—*Id.*

The owner of a water supply is not compelled to dedicate all of it to public use, but may dedicate a part only, reserving the remainder for private purposes, or for private sale or disposition, or may make a limited dedication, confining the use to such territory as he sees fit.—*Id.*

§ 202 (Kan.) A waterworks company engaged in supplying water for the city of Leavenworth and the United States military prison, and other public and private institutions outside the city, is within the provisions of Laws 1911, c. 238, § 3, and subject to the control of the public utilities commission.—*State v. Leavenworth City & Ft. Leavenworth Water Co.*, 140 P. 103.

§ 202 (N.M.) A water company, whether a private corporation or a municipality, may enforce reasonable regulations and may refuse to furnish water to any person who declines to comply with same.—*State v. Water Supply Co. of Albuquerque*, 140 P. 1058.

The right of a municipality operating waterworks to enforce reasonable regulations is the same as that of a private corporation.—*Id.*

§ 202 (N.M.) Where a water company's franchise imposes a burden on the company, any regulation by which it attempts to shift the burden on the consumer is unenforceable.—*State*

*v. Water Supply Co. of Albuquerque*, 140 P. 1059.

§ 203 (N.M.) A rule providing for shutting off water from a consumer on default in payment is enforceable, where there is no dispute as to the amount and the water was not furnished for some other place, or for a transaction distinct from that for which a consumer is demanding water.—*State v. Water Supply Co. of Albuquerque*, 140 P. 1058.

In the absence of statutory authority for making a charge for water a lien on the premises, a regulation authorizing a water company to shut off water for nonpayment of water rates is void, in so far as it permits water to be shut off from a new owner or occupant because of failure of a former owner or occupant to pay his water bill.—*Id.*

Where the statute gives a water company a lien on premises for unpaid dues, a regulation of the company providing for discontinuance of services until delinquent charges are paid may be enforced against a subsequent tenant, owner, or occupant.—*Id.*

Laws 1912, c. 68, § 1, gives a water company supplying water to inhabitants of the city a lien on the premises where the water is used for unpaid water charges.—*Id.*

§ 203 (N.M.) A water company's franchise held not to authorize the company to charge a consumer using more than 200 gallons daily, 35 cents per 1,000 gallons for the first 200 gallons each day, but to authorize a charge of only 80 cents per 1,000 gallons on the total amount used.—*McRae v. Water Supply Co. of Albuquerque*, 140 P. 1065.

§ 203 (N.M.) A rule of a water company operating under a franchise that all bills must be paid monthly, within a reasonable time after due, or the water will be turned off and a charge of \$1 made for turning off and turning on the same, being reasonable, is enforceable.—*Sei v. Water Supply Co. of Albuquerque*, 140 P. 1067.

#### (B) Irrigation and Other Agricultural Purposes.

§ 225 (Mont.) The power of the district court to establish an irrigation district under Laws 1909, c. 146, providing for the organization of irrigation districts, can only be exercised when the court acquires jurisdiction of the subject-matter by the filing of a petition signed by statutory number of holders of title or evidence of title.—*In re Gallatin Irrigation Dist.*, 140 P. 92.

Where a petition to create an irrigation district under Laws 1909, c. 146, gives the names of individuals and corporations as owners, and also "Garnett Bros." the court, in determining the number of owners, must give the ordinary meaning to the quoted words, so that they at least include two persons, in determining the number of owners within the district.—*Id.*

A homestead entryman or a desert entryman, prior to the making of final proof, has no title or evidence of title, within Laws 1909, c. 146, providing for the organization of irrigation districts on petition signed by a requisite number of the holders of title or evidence of title.—*Id.*

Where the petition for the establishment of an irrigation district under Laws 1909, c. 146, showed on its face that the court did not acquire jurisdiction, because the petition was not sufficiently signed, the refusal to allow an amendment by the addition of names of other qualified petitioners was not erroneous, especially where the petition as amended would not show the requisite number of qualified signers.—*Id.*

The procedure for the creation of an irrigation district under Laws 1909, c. 146, is wholly statutory, and the statutory requirements must be complied with.—*Id.*

Objectors to the creation of an irrigation district under Laws 1909, c. 146, held entitled,

on the dismissal of the petition for want of a requisite number of qualified signers, to recover as costs fees of witnesses to testify to facts on the merits, though they were not subpoenaed, sworn, or examined.—Id.

§ 226 (Colo.App.) Land, the title to which was evidenced by a United States receiver's receipt, was properly included in an irrigation district; Rev. St. 1908, §§ 3440, 3441, not excluding the holders of such receipts, though they speak of "freeholders owing land."—Carson v. Cudworth, 140 P. 935.

§ 226 (Mont.) The court, in proceedings for the establishment of an irrigation district under Laws 1909, c. 146, may, in its discretion, exclude proposed lands from the district by permitting an amendment to the petition; but, in the absence of any abuse of discretion in refusing to exclude lands by an amendment, its decision will not be disturbed.—In re Gallatin Irrigation Dist., 140 P. 92.

§ 230 (Wash.) Petition by directors of an irrigation district under Rem. & Bal. Code, §§ 6489-6494, for judicial confirmation of its organization and the issuance of its bonds, containing a direct reference to the order of the board of county commissioners in which the description of the district was found, held sufficient in respect to description.—Board of Directors of Quincy Valley Irr. Dist. v. Scott, 140 P. 391.

Petition under Rem. & Bal. Code, §§ 6489-6494, for the judicial confirmation of the organization of an irrigation district and the issuance of its bonds, held to allege the establishment of election precincts sufficiently to permit thereof.—Id.

§ 231 (Wash.) Under the statute not forbidding the directors of an irrigation district from taking the advice of a competent engineer in making their estimate of the amount to be raised, but merely requiring that they make the estimate, their estimate, made in good faith and approved by the qualified electors of the district, held sufficient.—Board of Directors of Quincy Valley Irr. Dist. v. Scott, 140 P. 391.

§ 238 (N.M.) Laws 1895, c. 1, entitled "An act in regard to community ditches and acequias," did not confer upon the corporations created by it the power to acquire or hold title to water rights.—Snow v. Abalos, 140 P. 1044.

Corporations created by Laws 1895, c. 1, entitled "An act in regard to community ditches and acequias," have no powers not expressly or impliedly granted them by such act.—Id.

Acts 1895, c. 1, entitled "An act in regard to community ditches and acequias," did not change the status of individual consumers, and the right acquired under a community ditch by each water user is several, and owned by him though the ditch has been constructed by him in conjunction with others.—Id.

The water rights acquired by parties to whom water is carried through a ditch owned by the constructors as tenants in common are not attached to the ditch, but are appurtenant to the lands irrigated, and hence are owned in severalty by parties owning such lands in severalty.—Id.

Laws 1895, c. 1, § 1, though making all community acequias corporations, held not to divest the individual water user of any rights of property.—Id.

§ 247 (N.M.) Since the right to utilize water acquired by the individual water user under a community acequia is a several right, each user is a necessary party in an action for adjudication of water rights so utilized.—Snow v. Abalos, 140 P. 1044.

That a water user may have contracted to convey his water right to another at some future time, does not deprive him of his right to sue for an adjudication of his right to use the water.—Id.

§ 247 (N.M.) Since an ample remedy is afforded by C. L. 1897, § 13, as amended by Laws 1903, c. 44, § 2, the unlawful diversion of water

from a community acequia, or the naked trespass, unaccompanied by great and irreparable damage, will not warrant relief by injunction.—La Mesa Community Ditch v. Appelzoeller, 140 P. 1051.

§ 254 (Nev.) Where a consumer of water obtained for several years a specified quantity of water from a water company for irrigation for a reasonable compensation, there was an implied contract that the company would continue to deliver water.—Prosole v. Steamboat Canal Co., 140 P. 720.

§ 257 (N.M.) Since no remedy is provided for the collection of assessments by acequia commissioners pursuant to Comp. Laws 1897, § 11, as amended by Laws 1903, c. 44, § 1, except by depriving the delinquent party of the right to use water until payment is made, the community officers are confined to such remedy.—La Mesa Community Ditch v. Appelzoeller, 140 P. 1051.

§ 266 (N.M.) Where a party in default, in payment of an assessment levied by acequia commissioners, violates a notice not to take and use water until such assessment is paid, he is guilty of a misdemeanor though the assessment is excessive.—La Mesa Community Ditch v. Appelzoeller, 140 P. 1051.

## WAYS.

See Easements; Highways; Municipal Corporations, §§ 657-706, 755-821.

## WEAPONS.

See Homicide, § 145.

## WHARVES.

§ 21 (Cal.) Proprietor of dry dock held to owe to persons lawfully and properly on vessels docking there the duty of exercising ordinary care to furnish a safe gangplank and necessary props.—Wilson v. Union Iron Works Dry Dock Co., 140 P. 250.

Proprietor of dry dock held liable for injuries to United States customs inspector who had boarded a vessel in the performance of his duties, caused by the breaking of the gangplank.—Id.

Proprietor of dry dock held liable for breaking of gangplank, though fastened at the ship end by the officers and men on the steamer; the breaking not being due to any defect in such fastenings.—Id.

Notice on the part of the servants of a dry dock proprietor of the weak condition of a gangplank might be inferred from the fact that on previous occasions it had been shored up when in use.—Id.

## WHITE SLAVES.

See Prostitution, § 3.

## WILLS.

See Descent and Distribution; Executors and Administrators; Witnesses.

### II. TESTAMENTARY CAPACITY.

§ 55 (Wash.) In a will contest, evidence held to show that testator, at the time of the execution of a will, possessed testamentary capacity.—In re Enos' Estate, 140 P. 677.

### IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 88 (Cal.) An instrument purporting to convey realty, but "reserving" in "grantor" the right to use the rents and profits for life, and "further reserving to the said grantor the right to revoke this deed" and the right to sell any of the property conveyed, held a present conveyance and not testamentary in character.—Ten-

*nant v. John Tennant Memorial Home*, 140 P. 242.

An instrument is testamentary if it appears from its terms that the maker's intention was that it should not be operative as a disposition of the property until his death, but operates as a present conveyance if at the time of its execution it passes a present interest or title.—*Id.*

**(F) Mistake, Undue Influence, and Fraud.**

§ 164 (Wash.) In a will contest on the ground of undue influence upon testatrix by contestees, her sons and the principal beneficiaries, evidence that the attorney who drew the will was requested to do so by them, and obtained all his information as to it from them, *held* admissible.—*In re Beck's Estate*, 140 P. 340.

§ 166 (Wash.) In a will contest, evidence *held* not to show that the wife of testator procured the will to be executed by undue influence.—*In re Enos' Estate*, 140 P. 677.

**V. PROBATE, ESTABLISHMENT, AND ANNULMENT.**

**(H) Evidence.**

§ 293 (Wash.) In a will contest on the ground that it was not the will of testatrix because she did not understand the English language, or what was being said when it was read to her in English by the attorney who drew it, evidence that he was requested to draw it, and obtained all his information as to it from the contestees, sons of testatrix and the principal beneficiaries, *held* material.—*In re Beck's Estate*, 140 P. 340.

§ 302 (Wash.) A showing that testatrix did not understand the English language, in which her will was written, and that it was read to her in English and not explained to her so that she could understand its terms, *held* sufficient to make a prima facie case that it was not her will.—*In re Beck's Estate*, 140 P. 340.

**(L) Fees and Costs.**

§ 405 (Wash.) Under Rem. & Bal. Code, § 1313, relating to the taxation of costs in probate proceedings, etc., the costs and expenses of an unsuccessful will contest should not be paid out of the estate.—*In re Enos' Estate*, 140 P. 677.

**VI. CONSTRUCTION.**

**(A) General Rules.**

§ 487 (Mont.) Under Rev. Codes, § 4755, providing that, where any testator omits to provide in his will for any of his children, unless it appears that such omission was intentional, such child must have the same share in the estate as if testator had died intestate, etc., evidence de hors the will may be received to ascertain whether the omission was intentional.—*In re Peterson's Estate*, 140 P. 237.

**WITNESSES.**

See Appeal and Error, §§ 971, 1048; Costs, § 184; Criminal Law, §§ 603, 655, 730; Evidence; Waters and Water Courses, § 225.

**I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.**

§ 21 (Kan.) Where a witness persists in a refusal to answer a question, he may be punished for contempt, as the pertinency of the question asked was for the determination of the court, and not the witness.—*Hanson v. Sward*, 140 P. 100.

Imprisonment may be imposed, not only to punish a witness for contumacy, but to compel him to obey a lawful order, and produce testimony which the court deems necessary.—*Id.*

§ 29 (Wash.) Witnesses from another state are entitled to mileage from the state line to the

point of trial.—*Aldredge v. Oregon-Washington R. & Navigation Co.*, 140 P. 550.

**II. COMPETENCY.**

**(A) Capacity and Qualifications in General.**

§ 53 (Cal.App.) Under Pen. Code, § 1322, a wife is competent to testify as to a crime of violence committed upon her after marriage.—*Ex parte Kantrowitz*, 140 P. 1078.

§ 58 (Okla.Cr.App.) In a prosecution for adultery in violation of Rev. Laws 1910, § 2481, the injured spouse is a competent witness.—*Kitchens v. State*, 140 P. 619; *Mitchell v. Same*, *Id.* 622.

**(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§ 139 (Colo.) In an action by the executrix of an attorney to recover a fee, the defendant could not, under the statute, testify as to facts which he claimed established the failure of the attorney to perform the conditions upon which the fee depended.—*Keeler v. Hoyt*, 140 P. 191.

**(D) Confidential Relations and Privileged Communications.**

§ 199 (Wash.) In a will contest on the ground that testatrix did not understand the will, and that it was obtained by undue influence, communications by her sons and the principal beneficiaries to the attorney whom they requested to draw the will, and communications by such attorney to them, *held* not privileged, since in drafting the will the attorney acted for the testatrix.—*In re Beck's Estate*, 140 P. 340.

**III. EXAMINATION.**

**(A) Taking Testimony in General.**

§ 246 (Utah) A party may not have testimony stricken merely because neither party called the witness, but the court of its own motion called him and had him testify.—*Merchants' Bank v. Goodfellow*, 140 P. 759.

§ 255 (Okla.) A witness who stepped land and made memoranda of its dimensions in steps at the time may refresh his memory as to the number of steps by reference to such memoranda.—*Elwell v. Purcell*, 140 P. 412.

§ 255 (Wash.) A party furnishing a bill of particulars, in which each item of damage demanded is set forth, may, on the trial, use the bill to refresh his memory.—*Frair v. Caswell*, 140 P. 564.

§ 263 (Or.) It was within the discretion of the court to permit plaintiff to be recalled and explain her testimony of the previous day as to distances on a map.—*Rugenstein v. Ottenheimer*, 140 P. 747.

**(B) Cross-Examination and Re-examination.**

§ 267 (Okla.) The limit to which a witness may be cross-examined is within the discretion of the court.—*Cobb v. Oklahoma Pub. Co.*, 140 P. 1079.

§ 268 (Cal.) The refusal to permit cross-examination of prosecutrix in a statutory rape case as to whether she willingly entered the bedroom wherein she and accused had intercourse, was not error, where there was sufficient cross-examination to test her credibility and the reason for the desired examination was not stated.—*People v. MacDonald*, 140 P. 256.

§ 277 (Or.) Under L. O. L. § 1534, it is error, in a prosecution for assault with intent to rape, to permit cross-examination of defendant as to trouble with another girl, to which he made no reference in his direct testimony.—*State v. Jensen*, 140 P. 740.

§ 286 (Wyo.) In an action by a miner hurt by the fall of coal which was cracked from the vein by a shot he had fired, where defendant cross-examined plaintiff's witnesses as to whether experience was necessary to determine whether such coal was likely to fall, plaintiff may, on direct examination, show that a knowledge of the sounding test was necessary to determine that question.—*Carney Coal Co. v. Benedict*, 140 P. 1013.

#### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

##### (D) Inconsistent Statements by Witness.

§ 393 (Or.) Though, under L. O. L. § 864, a coroner or stenographer may testify that a witness made statements at an inquest inconsistent with his testimony, the exclusion of the coroner's record of his testimony at the inquest is not error.—*State v. Davis*, 140 P. 448.

### WOMEN.

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### WOODS AND FORESTS.

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